

# 21-1365

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother; ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,

*Plaintiffs-Appellants,*

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

*Defendants-Appellees,*

and

ANDRAYA YEARWOOD; THANIA EDWARDS on behalf of her daughter, T.M.; COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,

*Intervenors-Appellees.*

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On Appeal from the United States District Court for the District of Connecticut, Case No. 3:20-cv-00201 (RNC)

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**APPELLANTS' APPENDIX  
VOLUME 2 (PAGES 181-291)**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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SELINA SOULE, A MINOR, BY	:
BIANCA STANESCU, HER MOTHER,	:
CHELSEA MITCHELL, A MINOR, BY	:
CHRISTINA MITCHELL, HER MOTHER,	:
ALANNA SMITH, A MINOR, BY	:
CHERYL RADACHOWSKY, HER MOTHER,	:
	:
Plaintiffs,	:
	:
vs	:
	:
CONNECTICUT ASSOCIATION	:
OF SCHOOLS, INC., D/B/A	:
CONNECTICUT INTERSCHOLASTIC	:
ATHLETIC CONFERENCE, ET AL.	:
	:
Defendants.	:
	:
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No. 3:20CV201 (RNC)

HARTFORD, CONNECTICUT  
FEBRUARY 26, 2021

ORAL ARGUMENT

VIA ZOOM

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

DARLENE A. WARNER, RDR  
OFFICIAL COURT REPORTER

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10:00 A.M.

THE COURT: Good morning. Thank you for being available this morning. This is a hearing in the Soule case.

We scheduled this hearing to give you an opportunity to address the pending motions to dismiss. Your briefs are admirably thorough, and I appreciate the efforts you have made to help me with the case. Today you will have an opportunity to make whatever additional presentations you wish.

Let me begin by asking counsel to please enter their appearances starting plaintiffs' counsel.

MR. BROOKS: Roger Brooks, Your Honor, with the Alliance Defending Freedom on behalf of all plaintiffs.

THE COURT: Good morning.

MR. HOWARD: James Howard with Fiorentino, Howard, Petrone also on behalf of the plaintiffs.

THE COURT: Good morning.

MR. HOWARD: Good morning, Your Honor.

THE COURT: Turning then to defendants' counsel.

MS. YODER: Attorney Linda Yoder of the law firm of Shipman & Goodwin representing the defendant CIAC and the Danbury Board of Education.

THE COURT: Good morning.

1 MS. ZELMAN: Your Honor, Johanna Zelman from  
2 Ford Harrison representing Bloomfield and Cromwell.

3 THE COURT: Good morning.

4 MS. ZELMAN: Good morning, Your Honor.

5 MR. MONASTERSKY: Your Honor, David Monastersky  
6 Glastonbury and Canton boards of education.

7 THE COURT: Good morning.

8 MR. MONASTERSKY: Good morning, Your Honor.

9 MR. BLOCK: Good morning, Your Honor, Joshua  
10 Block and Chase Strangio on behalf of the individual  
11 intervenors.

12 MR. BARRETT: Good morning, Your Honor, Dan  
13 Barrett on behalf of the individual intervenor defendants.

14 THE COURT: Good morning.

15 MR. ROBERTS: Good morning, Your Honor, Michael  
16 Roberts for the intervenor defendant Commission On Human  
17 Rights and Opportunities.

18 THE COURT: Good morning, thank you.

19 MR. MURPHY: Good morning, Judge, Peter Murphy  
20 for CIAC and Danbury as well.

21 THE COURT: Thank you.

22 MR. BISCHOFF: And good morning, Your Honor,  
23 also on behalf of CIAC and the Danbury Board of Education,  
24 Tyler Bischoff.

25 THE COURT: Good morning.



1                   Is that everyone who wants to enter an  
2 appearance?

3                                   (Pause)

4                   Very good.

5                   I see that our court reporter, Darlene Warner,  
6 is with us this morning. Darlene, are you able to hear  
7 everyone?

8                   THE COURT REPORTER: Good morning, Your Honor, I  
9 am able to hear everyone, thank you.

10                   THE COURT: Thank you.

11                   It may be helpful if you mute your phone or  
12 other device when you aren't actively participating as a  
13 speaker. We find that it tends to help with the  
14 technology in providing everybody with the best  
15 opportunity to hear what is being said, so I would  
16 appreciate your consideration in that regard.

17                   Let me ask counsel for the moving parties  
18 whether you have discussed how you would like to proceed  
19 this morning with regard to which counsel will be  
20 addressing which issues.

21                   MS. YODER: We have, Your Honor, and others can  
22 jump in if I am incorrect in this, but Attorney Joshua  
23 Block is going to be addressing the -- whether there is a  
24 cognizable claim under Title IX and the related issues.

25                   I am then going to address if there's any

1 questions or concerns about the standing issues that are  
2 in pages 14 to 17 of the brief as well as the claims of  
3 effective accommodation, Attorney Monastersky is going to  
4 address the Pennhurst argument, and Attorney Zelman is  
5 going to address claims against individual defendants and  
6 any other areas relevant to -- that I may have missed.  
7 But we are all prepared to address questions from the  
8 Court on any of the issues as they relate to our  
9 particular clients.

10 THE COURT: All right, thank you.

11 Am I right in understanding that you would like  
12 me to entertain argument in the order in which you just  
13 listed the issues starting with Attorney Block?

14 MS. YODER: Yes, Your Honor. Although, again,  
15 we're prepared to answer any questions you have in any  
16 order you would like us to present.

17 THE COURT: Okay, thank you.

18 Before we turn to your presentations, let me ask  
19 whether there is anything that anybody wants to bring to  
20 my attention prior to those presentations.

21 MR. BROOKS: Nothing today from the plaintiffs,  
22 Your Honor.

23 THE COURT: All right, thank you.

24 Finally, let me ask whether any of the parties  
25 are present and participating. I'd like to know if that's

1 the case.

2 MR. BROOKS: Your Honor, of course it's  
3 difficult in this context, I believe that at least one of  
4 my clients, Chelsea Mitchell, is listening but not  
5 participating actively and I frankly cannot vouch for the  
6 whole set.

7 THE COURT: All right.

8 Do we have representatives from any of the other  
9 parties or --

10 MS. YODER: Your Honor -- I'm sorry -- Mr. Glen  
11 Lungarini is here listening representing the CIAC. He  
12 will not be participating actively in any way in the  
13 argument.

14 THE COURT: All right. Do we have the  
15 intervenor defendants present today?

16 MR. BLOCK: I don't believe so, Your Honor.

17 THE COURT: All right, very well, thank you.

18 Attorney Block, you're welcome to proceed.

19 MR. BLOCK: Thank you, Your Honor, and we  
20 decided to put this argument first because I think it cuts  
21 to the chase the most.

22 As an initial matter, we've laid out in the  
23 brief all the ways that excluding Andrea and Terry and  
24 other girls who are transgender, from competing on the  
25 same teams of other girls would violate their rights under

1 Title IX and the Equal Protection Clause.

2 But the central issue in this case is even  
3 easier than that. The central issue isn't whether Title  
4 IX or the Equal Protection Clause requires that schools  
5 treat transgender girls equally as other girls, the  
6 question is whether Title IX prohibits schools from doing  
7 so.

8 And the plaintiffs here have advanced an  
9 argument that is completely lacking in any source of  
10 judicial authority or even in any agent interpretation  
11 before this past year. And of course the only agency  
12 interpretation that they have cited to support them has  
13 now been withdrawn and rescinded.

14 So this is truly an unprecedented claim and it's  
15 unprecedented for two independent reasons:

16 First, nothing in the text of Title IX or any  
17 Department of Education regulation or guidance or in each  
18 additional decision has ever purported to define the sex  
19 of students who are transgender, much less define whether  
20 or not they can participate in separated sports or  
21 facilities on the same terms as other students.

22 And the second is that even if the Court were to  
23 indulge the argument that Title IX somehow defines girls  
24 who are transgender and who are recognized in their school  
25 records as girls to be, in the plaintiff's words,

1 biological males, that still wouldn't state a claim under  
2 Title IX for either effective accommodation or equal  
3 treatment. So I'll address the first of those issues  
4 first.

5 This exact same question has been litigated in  
6 the context of students using sex-separated restrooms, and  
7 every single circuit, six circuits in total, have rejected  
8 the arguments that Title IX or its regulations somehow  
9 requires that girls who are transgender have to use the  
10 boys room or boys who are transgender have to use the  
11 girls room.

12 As the Ninth Circuit said, Title IX doesn't  
13 require sex-separated restrooms at all, much less prohibit  
14 schools from taking gender identity into account.

15 The Eleventh Circuit recently said the same  
16 thing, that Title IX doesn't define a transgender  
17 student's sex or dictate how they use separated  
18 facilities, and exactly the same reasoning applies here in  
19 the context of sports that, you know, whatever the  
20 plaintiffs' policy arguments might be, those policy  
21 arguments are just simply not reflected in the text of  
22 Title IX or its regulations, those regulations do not  
23 require sex-separated teams in the first place much less  
24 dictate the manner in which they are sex separated.

25 The plaintiffs' only response to that argument

1 is that they say that sports are different from restrooms  
2 because sports are, according to plaintiffs, separated to  
3 account for physiological characteristics between men and  
4 women. And, you know, regardless of whether their policy  
5 argument for that is true or not, their complaint ties all  
6 those physiological characteristics to changes that occur  
7 in puberty. According to their own complaint, it's not  
8 tied to chromosomes, it's not tied to what your sex organs  
9 are at birth, it's tied to changes that occur in puberty.

10 And I think whether or not you think those  
11 allegations are true -- we have to accept them as true for  
12 the purposes of the motion to dismiss -- there's no way  
13 that those fit into the plain meaning of the word "sex" in  
14 Title IX, that sex isn't defined as physical changes that  
15 occur in puberty.

16 So they are shoehorning their argument into the  
17 text of the word "sex" in a 1972 statute.

18 So I'm happy to move on to the second part of  
19 the argument if the Court doesn't have any questions on  
20 the first question about how Title IX purports to define  
21 the sex of the students who are transgender.

22 THE COURT: You're welcome to proceed, thank  
23 you.

24 MR. BLOCK: Thank you, Your Honor.

25 The second is that even if the Court were to

1       indulge in the assumption that Title IX does require the  
2       schools classify girls who are transgender and who are  
3       recognized in their school records as girls to be males  
4       for the purposes of sex-separated sports, plaintiffs still  
5       wouldn't state a claim under Title IX. Title IX just  
6       doesn't support the type of claim plaintiffs are making.

7               I'll start with the effective accommodation  
8       claim.

9               There is a three-part test for effective  
10       accommodation claims, and plaintiffs do not even bother  
11       trying to fit their claims into that three-part test,  
12       because it plainly doesn't apply.

13              The first prong in the three-part test is  
14       whether or not the schools provide substantially  
15       equivalent -- excuse me -- provides equal participation  
16       opportunities for boys and girls that are substantially  
17       proportional to their enrollment. That is a question that  
18       is defined at the macro level considering all sports  
19       teams, all participation opportunities. It is not defined  
20       at a micro level for how many people in how many contexts.  
21       It's a holistic inquiry.

22              Plaintiffs don't allege that CIAC or any of the  
23       schools fails that holistic inquiry, and of course they  
24       can't do so. In addition to, you know, the fact of there  
25       being opportunities on the track team, there's

1 opportunities throughout the athletic program, and  
2 Connecticut provides even more opportunities in some other  
3 jurisdictions because it allows girls to play on even  
4 contact sport teams with boys.

5 So in Connecticut, girls play ice hockey and are  
6 active participants on that team. If you were to do an  
7 aggregate total, and this is in one of the footnotes in  
8 the brief, there's just no support for the idea that  
9 Connecticut fails, you know, part one of that prong. And  
10 of course satisfying any one of those three prongs is the  
11 defense to advance the claim of effective accommodation.

12 So instead of applying the actual test that's  
13 been developed and applied in every other case for  
14 adjudicating effective accommodation claims, plaintiffs  
15 are creating their own tests cobbled together from  
16 snippets of statements of cases taken from out of context.

17 They say that participation opportunities can't  
18 be illusory, and we agree that participation opportunities  
19 can't be illusory, but the way that term is defined in the  
20 case law is having situations where girls are allowed to  
21 try out for a team but never make it, or cases in which  
22 girls are forced to sign up, basketball players are also  
23 forced to sign up for the swimming team in order to pump  
24 up the numbers of statistics for girls competing even  
25 though the girls have no intention of actually swimming or



1 competing on that team. No court, no agency has ever  
2 defined a participation opportunity as winning an equal  
3 number of trophies.

4 The only reference in all of the statutes, all  
5 of the regulations, all of the guidance on when a school  
6 is required to provide sex-separated teams exclusively for  
7 one sex or the other is in a snippet of the 1979 policy  
8 statements. And that says that when a school provides a  
9 sport for members of one sex, it has to either allow the  
10 other sex to compete in the sport or create a separate  
11 team if the evidence shows that they cannot actively  
12 participate in the same team as boys, try out or actively  
13 compete in the same team as boys. And so that test on its  
14 own isn't a test about winning an equal number of  
15 trophies, it's the ability to actively compete.

16 And what's sort of striking here is in this  
17 track and field -- in the setting of track and field, what  
18 you have is you have several different events at each of  
19 the meets, any one student can only choose to compete in  
20 three different events, and you have the plaintiffs in  
21 this case not only winning their own, you know, first  
22 place medals, their own national championships in a  
23 variety of events, but you have them on occasion  
24 out-racing the intervenors in this case.

25 So they are competing actively, they are winning

1 some races, no one's guaranteed to win every race, but  
2 that is not what Title IX requires.

3 The plaintiffs in this case are accomplished  
4 athletes who have gained a great deal from the athletic  
5 opportunities offered to them and they've won national  
6 acclaim from that. But there's room enough on the podium  
7 for everyone in that accommodating the interests of these  
8 particular athletes doesn't require schools to shove aside  
9 the girls who are transgender and deny them participation  
10 opportunities too.

11 So that's the effective accommodation claim.

12 But the one other point I would make is that  
13 plaintiffs' case is based on this theoretical idea that  
14 somehow if you allow girls who are transgender to be on  
15 sports teams, then cisgender girls will be categorically  
16 and systemically squeezed out.

17 And, yes, that is a sort of a very aggressive  
18 prediction of what might happen in the future, that  
19 there's no -- but it has no actual basis in fact,  
20 including today, cisgender girls are not being squeezed  
21 out. This policy has been in place for seven years now  
22 and there is a grand total of two girls who are  
23 transgender that have been identified as winning anything.

24 Similar policies are in place throughout the  
25 country, and as the judge in Hecox noted, maybe there's

1 four instances total of girls who are transgender that  
2 have won stuff in active competition here.

3 So the fact is that no one's being pushed off  
4 any podiums, no one's being squeezed out of anything. If  
5 this were an alternative universe in which schools were  
6 filled with girls that were transgender that were winning  
7 every single competition and picking up every single slot  
8 of participation, then maybe plaintiffs' theory of the  
9 case would have more traction. But that's just an  
10 empirical assertion about what will happen to cisgender  
11 girls if there's participation of transgender girls, and  
12 there's no factual basis for that empirical assertion  
13 right now.

14 THE COURT: If I understand your argument  
15 correctly, even in that alternative universe, you would  
16 say that it's a policy question that has not been  
17 determined by the legislature.

18 MR. BLOCK: Exactly, Your Honor, so this is  
19 arguing in the alternative.

20 I think first of all, you know, whatever  
21 someone's policy position on how transgender girls should  
22 be competing in sports and what requirements should or  
23 should not be put in place, Title IX doesn't answer that  
24 question.

25 You know, I think that the plaintiffs are

1     testifying in legislatures, in state legislatures, to try  
2     to pass laws matching their view of what should happen.  
3     Title IX, you know, doesn't already embody that vision.

4             But, so I guess I'm saying that once you get  
5     past whether or not girls who are transgender are even,  
6     you know, whether it's even legitimate to consider them as  
7     being anything different than cisgender girls in the first  
8     place, you have to get to whether or not the claims the  
9     plaintiffs are bringing even fit into the equal effective  
10    accommodation framework.

11            If the Court doesn't have other questions on  
12    effective accommodation, I'll turn to the equal treatment  
13    claims.

14            So for equal treatment, this is even simpler,  
15    that equal treatment claims are based on equal treatment  
16    of the girls teams and the boys teams. That's what it's  
17    about. Do they get the same facilities? Do they get the  
18    same funding? Do they get the same, you know,  
19    programmatic publicity in terms of putting up posters  
20    about their games? It's not about whether, you know,  
21    individual people on those teams get their articles -- or  
22    have articles written up about them. It's about the  
23    treatment of the two separate teams.

24            And there's no allegations here that the girls  
25    track team and the boys track team are treated differently

1 in any way for purposes of any of the factors for an equal  
2 treatment claim.

3 So again, I think plaintiffs' claims simply  
4 don't fit into the doctrine for how you make out these  
5 claims. So I feel like that point is probably one of the  
6 most straightforward ones in the case, that it's assessed  
7 at a team-by-team level, not assessed by, you know, who  
8 gets to participate on a particular team or not or who  
9 gets to win a trophy on a particular team or not.

10 Unless the Court has any further questions, I  
11 don't want to take up more time than necessary.

12 THE COURT: Thank you, Attorney Block, I  
13 appreciate your input.

14 I think we can turn now to Attorney Yoder.

15 MS. YODER: Thank you, Your Honor. I believe  
16 that many of the claims in this case and what you'll hear  
17 today are issues that are overlapping.

18 When the CIAC in 2013 adopted its current  
19 policy, it was looking to make athletic opportunities --  
20 and this is one area where I believe both the plaintiffs  
21 and the defendants agree, and there's probably not too  
22 many areas where we agree -- but it's one area where we  
23 agree, which is really at the high school level, the  
24 significant, significant benefits that can be given to  
25 young people in being allowed to participate in sports.

1           And CIAC in 2013 adopted a policy that was  
2           inclusionary to ensure that those benefits were extended  
3           to all girls, not just a subcategory of girls or basically  
4           so that a subcategory of girls, transgender girls, were  
5           not excluded from sports participation, and this is what  
6           this Court is being asked to consider in this case:  
7           Should there be -- does Title IX require or prohibit  
8           public schools and the state athletic association that  
9           sanctions events from permitting a category of girls,  
10          young people in high school, from benefiting from these  
11          sports opportunities by participating. And the argument  
12          is that these students should in fact be excluded from the  
13          ability to participate in high school sports because that  
14          is somehow unfair or discriminatory against other  
15          cisgender young girls who will be competing.

16          And when you look at Title IX and you look at  
17          some of the other cases that interpret Title IX, they look  
18          at the facts that our population between male and female  
19          in this country is roughly equal and for at the time that  
20          Title IX was enacted, they said because of discriminatory  
21          views of the abilities of women, women were not being  
22          given opportunities.

23          And again, to follow up on Attorney Block's  
24          point, they wanted to make sure that substantially equal  
25          opportunities were provided to young women to be able to

1 participate in those activities.

2 By allowing transgender girls to participate in  
3 sports since 2013 -- and they undoubtedly were  
4 participating before but this is the current rule that's  
5 being challenged -- there has been no showing that the  
6 sort of parade of horrors that is predicted by the  
7 plaintiffs has occurred or is likely to occur.

8 And when we're looking at standing of two of the  
9 plaintiffs who are still in high school and compete in the  
10 track area, for them to say we need to enjoin in the track  
11 and field area, even beyond the activities that we  
12 participate in, the ability of transgender girls to  
13 participate in high school sports because we might not win  
14 a certain competition, we might come in second or third or  
15 fourth, is not at all what Title IX was about.

16 And it is also the case that given this  
17 seven-year history, they've identified two individuals who  
18 have graduated, but they've identified no really  
19 likelihood of the future harm that they are predicting,  
20 that they are going to be excluded from meaningful  
21 participation in sports.

22 And despite the statistics, which we again talk  
23 about in our brief, they can look at a single competition  
24 and identify the various plaintiffs and say in this single  
25 competition, my pace in a track event -- which gets

1 recorded, and when we're looking at colleges and  
2 universities and other people looking at them, their pace  
3 is recorded, it's public -- my pace was somewhat less than  
4 one of the intervenor defendants in this particular one  
5 race that I've identified -- except for one of the  
6 plaintiffs has identified more situations -- and as a  
7 result, I had been discriminated against.

8           And that is not what, again, Title IX requires  
9 or Title IX is about. It is not this eradication across  
10 the board of opportunities for cisgender girls to compete  
11 in sports, and an injunction eliminating the opportunity  
12 for transgender girls to compete at all is not what Title  
13 IX requires or the goals underlying Title IX that are  
14 cited by both sides look to accomplish.

15           We've already talked a little bit about equal  
16 treatment when it goes to the equal treatment of the  
17 individual public schools, and this is addressed on  
18 pages 38 to 40 of the brief. Again it talks about on a  
19 school level, do we offer equal opportunities? Do we  
20 offer track and field that is meaningful? Yes.

21           And in fact to say to a school, you cannot  
22 participate in CIAC events, means you're not going to be  
23 able to offer meaningful opportunities to compete in track  
24 and field and other sports events.

25           When we look at the injunction for the looking



1 forward to saying these individuals should be able to take  
2 some discovery and move forward on this idea that they are  
3 going to be systematically excluded, there's absolutely  
4 nothing in the complaint that would indicate that  
5 discovery is going to lead to any different conclusion in  
6 this area when you look at it from a legal basis.

7 In terms of the other request for injunctive  
8 relief, which is to expunge the existence and  
9 participation of these two transgender girls so that the  
10 scores and races would show that in the past they did not  
11 compete, again that's addressed in our brief. We do not  
12 think there is anything in Title IX that justifies or  
13 would permit that kind of relief, and therefore are  
14 looking to say that there is no standing or cause of  
15 action under that area.

16 With regard to the other area that I would like  
17 to address, the cause of action against the home schools,  
18 and each plaintiff has identified that their claim is only  
19 against the school that they attend or currently attend,  
20 again this is tied into the fact that they're saying to  
21 those schools: You have not provided to me a meaningful  
22 opportunity. And given the allegations in the brief  
23 showing the number of occasions in which they have  
24 competed at sports activities, the success they've had in  
25 the sports activity that they've chosen to compete in,

1 there is no basis to conclude that they have been denied  
2 either effective accommodations or equal treatment.

3           Again, they're looking at one specific event out  
4 of the multiple events that were made available to me. I  
5 came in with a pace or -- a pace that put me in a lower  
6 placement than a transgender girl, and again I'm looking  
7 to enjoin that person from having an opportunity to  
8 participate in sports even though I still have had a  
9 meaningful opportunity to participate in that sport  
10 myself, I am a certainly looking to deny that to another.  
11 And both the CIAC and the individual defendants feel that  
12 there is no basis on that allegation which underlies the  
13 complaint, the entire complaint, to move forward with this  
14 action.

15           With that, if there's any question from the  
16 Court, I'm happy to answer those questions, otherwise I'll  
17 turn it over to our next attorney.

18           THE COURT: All right.

19           With regard to the standing of Ms. Smith and  
20 Ms. Nicoletti to seek prospective relief, is there any  
21 evidence in the record to lend support to a finding that  
22 transgender girls will be competing in track later this  
23 year or next year?

24           MS. YODER: Your Honor, there is no evidence in  
25 the record that that is the case.

1           It is the policy that should such transgender  
2 girls choose to try out for or compete in those areas,  
3 they are permitted under the current policy. And we want  
4 to be candid about that. That is the purpose of the  
5 policy is to allow all girls to have the benefit of  
6 participating in high school sports in an inclusionary  
7 way, but there has been no identification anywhere in the  
8 complaint other than the two individuals who have  
9 graduated that any transgender youth would be competing in  
10 any of the events that these plaintiffs might wish to  
11 compete in.

12           THE COURT: On that point, based on my review of  
13 the record, the only references I could find that bear on  
14 the question of standing to seek perspective relief can be  
15 found in the revised enforcement letters that your clients  
16 received from the Office of Civil Rights last summer,  
17 which refers to interviews with athletic directors, I  
18 believe, possibly principals, possibly coaches, in which  
19 the person interviewed stated that to his or her knowledge  
20 there were no other transgender girls seeking to compete  
21 besides the intervenors referred to there as Students A  
22 and B.

23           So on this record, it appears that there is no  
24 basis for a finding that Ms. Smith or Ms. Nicoletti need  
25 an order from the Court to protect them against the

1 complaint of unfair competition.

2 MS. YODER: That is correct, Your Honor.

3 THE COURT: All right.

4 With regard to the claim for expungement or  
5 alteration of records, it gets to be a bit intricate  
6 looking at all of the information presented in the briefs;  
7 but at the bottom line, Attorney Yoder, what is your  
8 understanding of what Ms. Soule and Ms. Mitchell would ask  
9 the Court to do by way of altering or amending their own  
10 records, the records of their own athletic performance,  
11 not erasing what might have been achieved by other people,  
12 but with respect to their personal interests.

13 MS. YODER: Your Honor, track -- and in this  
14 case the sprints that we're looking at -- every person's  
15 pace is recorded. So whether you came in first, second or  
16 third by one second, your accomplishment is recorded, how  
17 you compare to people who were there on that particular  
18 day, how you compare to people nationally, what you  
19 accomplished on that day is recorded in your personal  
20 time, that is out there.

21 So my understanding, and certainly plaintiffs'  
22 counsel can correct me if I'm wrong, is that they would  
23 like the times of other individuals expunged so that their  
24 time showing how they ran on that day compared to other  
25 people who ran in that race on that day might put them at

1 a higher number in terms of the ranking.

2 So if you had 30 people, and I came in, my pace  
3 put me at 25th, if you eliminated person who was 24th and  
4 you renumber the register, on that particular day, I came  
5 in 24th and not 25th.

6 We have two problems with that, Your Honor.

7 One is that we think that erasing the  
8 accomplishments of other individuals is inappropriate.

9 But, two, any race and your pace on that day  
10 depended on a whole variety of factors, and this idea that  
11 I would have therefore -- I have some kind of specific  
12 injury in not placing higher among the runners who ran  
13 that day, and if a transgender athlete had not been  
14 allowed to compete, I somehow would have in fact ran the  
15 same race, come in at the same pace, but gotten more  
16 recognition for that because someone was eliminated from  
17 the list, that is my understanding of the injury that's  
18 being claimed.

19 And again, their pace, their score, how they did  
20 that day in that race is out there for anybody to see who  
21 wants to see it. There is no relief that's going to  
22 change that. It is -- the injury is, I would like to show  
23 -- or the alleged injury is, I would like to show on that  
24 day that another runner -- I'd like to not show that that  
25 other runner was there, and therefore, my pace would put

1 me -- if you renumber the outcome, would put me at a  
2 higher number in that particular event.

3 And for the reasons expressed in the brief, we  
4 believe that is not appropriate relief for them to be  
5 seeking under Title IX.

6 THE COURT: Thank you.

7 Let me turn then to Attorney Monastersky,  
8 please.

9 MR. MONASTERSKY: Good morning, Your Honor.

10 So the issue about whether the plaintiffs can  
11 take retrospective relief is pretty well briefed by the  
12 parties. I'm not going to belabor the general standard.

13 But one important part of the general standard  
14 under the Pennhurst doctrine is that the recipient of the  
15 federal funds has to be put on notice that if they engage  
16 in intentional conduct that clearly violates the terms of  
17 the statute, then they can be held liable for  
18 retrospective relief.

19 What the plaintiffs argue is that once they  
20 allege intentional discrimination, the debate's over, they  
21 can seek retrospective relief in damages. But they  
22 absolutely failed to recognize the modification on that  
23 issue is that the violation has to violate the clear terms  
24 of the statute.

25 Now there's no doubt that it is not clear

1 whether the participation of transgender athletes on girls  
2 teams violates Title IX, and the brief sets forth that the  
3 history of actions by the Department of Education  
4 essentially flip-flopping back and forth on this issue --  
5 and just this week we saw another reversal by the  
6 Department of Education and the Department of Justice.  
7 Just on Tuesday or Wednesday the Department of Justice  
8 withdrew its statement of interest in this case, as well  
9 as the Department of Education withdrawing its notice of  
10 impending enforcement actions and saying, listen, that's  
11 not our position anymore, it's clear that the recipients  
12 of the fundings, that is the defendants in this case, were  
13 not put on notice by Congress as well as the Department of  
14 Education with its enforcement regulations that the  
15 participation of transgender girls in the manner in which  
16 it's alleged in this case would violate the clear terms of  
17 Title IX.

18 It's -- and in fact, we've seen multiple  
19 decisions from the courts throughout the country that sex  
20 includes transgender individuals under the definition  
21 within the statute.

22 So I don't -- it's the defense position that the  
23 plaintiffs cannot establish that their allegations in the  
24 complaint would put the defendants on notice that they  
25 violated the clear terms of Title IX. It's just simply

1 not there.

2 And the actions of the Department of Education,  
3 the Department of Justice in the decisions throughout the  
4 nation clearly demonstrate that at best it's ambiguous in  
5 terms of, at best, in terms of the plaintiffs' argument.  
6 But we take the position that it's not even -- that if  
7 there's a violation -- but there has been no violation in  
8 terms of allegations of the complaint and broader about  
9 the protections under Title IX.

10 So in terms of the relief which the plaintiffs  
11 can seek if this case goes forward involving a motion to  
12 dismiss, it would be limited to the injunctive relief and  
13 that the plaintiffs cannot recover any retrospective  
14 relief.

15 Now, one of the issues that the plaintiffs also  
16 raise in their opposition is that this isn't the proper  
17 time to raise this issue in terms of what is the proper  
18 relief, and that's for another day, but they don't set  
19 forth any case law to support that position and it is  
20 indeed proper on a motion to dismiss for failure to state  
21 a claim that they haven't stated a claim for which they  
22 can recover the retrospective relief.

23 One other issue is that it is not relevant to  
24 the analysis whether the defendants are agents of the  
25 state in terms of whether the damages in retrospective



1 relief can be recovered.

2 The Pennhurst doctrine applies to all recipients  
3 of federal funding, and the issue about whether there's  
4 sovereign immunity or not is not going to have a bearing  
5 on this analysis because it's absolutely clear that the  
6 defendants were not put on notice by the clear terms of  
7 the statute that what's alleged in the complaint would  
8 hold them for violation of Title IX.

9 If the Court has any other questions on this  
10 issue, I'd be happy to address them, but otherwise I'll  
11 yield to others so we can get through today's proceeding.

12 THE COURT: Thank you.

13 Attorney Zelman?

14 MS. ZELMAN: Good morning, Your Honor. I want  
15 to briefly address the issue of liability against my two  
16 clients, Bloomfield Board of Education and the Cromwell  
17 Board of Education. I think before we talk about it, I  
18 think it's important to understand who attended or attends  
19 what school.

20 Ms. Soule attended Glastonbury, Ms. Mitchell  
21 attended Canton, Ms. Smith attends Danbury and  
22 Ms. Nicoletti attends Immaculate.

23 Immaculate is not a defendant to this action  
24 presumably because it's a private school but it is part of  
25 the CIAC.

1 Terry attends Bloomfield and Andrea -- or  
2 attended Bloomfield, I should say, and Andrea attended  
3 Cromwell.

4 So what we have here is four plaintiffs who are  
5 bringing a Title IX suit against school districts where  
6 they did not attend school. And the plaintiffs, although  
7 they oppose our motion for dismissal on these grounds that  
8 these plaintiffs did not attend either Bloomfield or  
9 Cromwell schools, they have not cited to a single case  
10 that would give this Court the ability to hear these  
11 claims.

12 You know, I think we would have to concede that  
13 there is no case that is directly on point here, so we  
14 have to look outside of this specific factual  
15 circumstances to what is most closely related. And what  
16 is most closely related under Title IX is a series of  
17 cases that talk about statutory standing under Title IX in  
18 the context of sexual assault.

19 There are a number of cases throughout the  
20 districts that deal with this issue where a student who  
21 attends one school brings a claim against a different  
22 school. Most of these cases are in the higher ed context,  
23 and all almost unanimously have found that a student  
24 attending School A cannot sue School B because that  
25 basically the student of School A is not meant as the

1 beneficiary of the funds received by School B. And that's  
2 precisely what we have here.

3 I think the case that's most instructive is Doe  
4 v. Brown University it's a First Circuit case. In that  
5 case the plaintiff, Ms. Doe, attended Providence College.  
6 She alleged sexual assault by a student at Brown  
7 University while she was at Brown University. She then  
8 brought a Title IX claim against Brown University and it  
9 was clearly held that because she did not afford herself  
10 of any of the educational opportunities at Brown, she  
11 could not maintain a claim under Title IX against Brown.

12 So I think that's the case that's the most on  
13 point.

14 There was one case in -- and I'm trying to look  
15 at the circuit because it's a Kentucky case -- where there  
16 was a reversal of the court and I believe the plaintiffs  
17 cite it in their brief -- Doe v. University of Kentucky  
18 out of the Sixth Circuit.

19 This case is completely distinguishable from the  
20 situation we have here. The Second Circuit did reverse  
21 the lower court decision on that case. But it was  
22 specifically because the student in question attended a  
23 community college, which was essentially part and parcel  
24 to the University of Kentucky, and so they were unable to  
25 basically say that the two districts weren't so

1 intertwined.

2 I mean the woman in that case lived on the  
3 university campus, she used the student services, she paid  
4 dues to the student government at the university. That's  
5 not what we have here. What we have here is four students  
6 who attend schools who are bringing suit against two  
7 districts where they have no contact with at all.

8 And so if Your Honor has any questions, I'm  
9 happy to answer them.

10 THE COURT: Thank you.

11 Let me turn now to Mr. Brooks.

12 MR. BROOKS: Thank you, Your Honor, and let me  
13 just ask, can you hear me clearly?

14 THE COURT: Yes.

15 MR. BROOKS: In speaking of equal athletic  
16 opportunities, I feel a little bit like I'm playing tennis  
17 with four people on the other side. I will see what I can  
18 do.

19 Your Honor, we've heard actually quite a number  
20 of statements about no factual basis and no showing and a  
21 number of statements of things outside the complaint.

22 Let me start by beginning to taking us back to  
23 the core facts in the complaint. That is, as far as we  
24 know, the first biologically male athlete to take  
25 advantage of the CIAC policy to run in girls track, that

1 first occurred in the spring of 2017, and within three  
2 years or really two and a half years of seasons,  
3 biological males had taken 15 state championships in track  
4 events, in girls track events, set a number of state  
5 records which may never be broken by biological girls and,  
6 as alleged in the complaint, had taken more than 85  
7 opportunities for girls to participate in advanced  
8 competitions, championships state and regional  
9 championships.

10 One example that's detailed in the complaint,  
11 Terry Miller who is now 18 -- and I heard counsel mention  
12 Terry's name so I think we don't have to worry about  
13 that -- Terry Miller competed in boys track in 2017 and  
14 through the winter of 2018 seasons and never qualified for  
15 any state championship meet, didn't qualify, never mind  
16 win.

17 In 2018, Terry chose to run in the girls track  
18 identifying as gender identity as a girl, and immediately  
19 involved not just to qualification, but to taking girls  
20 state championship in the 100-meter and not simply just  
21 pushing Terry Miller down from 24 to 25, to use an example  
22 that was given, but pushing her off the top three victory  
23 podium. No, there isn't room for everybody on the victory  
24 podium.

25 So our core contention in this case is that

1 Title IX promises equal opportunities and equal athletic  
2 experiences to our daughters but the CIAC policy is in  
3 fact giving girls extra lessons in losing.

4 What the defendants ask this Court to hold by  
5 their motion as a matter of law -- and of course that's  
6 where we're at procedurally -- is that a policy that  
7 permits individuals who have every biological, genetic,  
8 physiological hormonal attribute of maleness, which  
9 includes -- and there's details in the complaint and of  
10 course there will be extra factual development -- but that  
11 includes height and muscle mass and muscle strength and  
12 endurance and oxygen transport and lung size and heart  
13 size, individuals who have all those advantages of male  
14 physiology, to then allow them to take team spots and  
15 victory spots and advancements to elite competitions based  
16 on gender identity, simply cannot violate Title IX no  
17 matter how severe the resulting impact on the  
18 opportunities and experiences of that half of the student  
19 body who were born with xx chromosomes and all that  
20 follows from the physiologically as they grow and mature;  
21 that's the position the defendants ask you to adopt as a  
22 matter of law.

23 I'm glad to hear that we have not spent time in  
24 this argument on the issues of testosterone suppression  
25 and hormones, the policy doesn't require any of that and

1 it has not been contended by the defendants that either of  
2 the intervenors have suppressed testosterone to female  
3 levels for any or all of the period for these events that  
4 the plaintiffs describes going forward.

5 Now, we did hear the argument this morning, the  
6 kind of it's no big deal argument this morning, it's just  
7 two. Simultaneously we heard that, yes, CIAC thinks it's  
8 important and intends to allow other individuals to  
9 compete based on female gender identity, but I would  
10 emphasize, Your Honor, that what's going on here isn't  
11 just about two, and that's why we are all here and there's  
12 so many here.

13 A 2018 paper -- this report of course is outside  
14 the complaint, but I just flag things that will come in in  
15 due course in expert evidence -- a 2018 paper published in  
16 the prestigious Journal of Pediatrics reported an  
17 extremely extensive survey, almost all ninth to eleventh  
18 graders in Minnesota, just I believe three years ago,  
19 which reported that 2.7 percent of those students, ninth  
20 to eleventh graders, claimed a transgender or a gender  
21 non-conforming identity. And that's an order of  
22 magnitude, perhaps two orders of magnitude, higher than  
23 historic figures that often get bandied around.

24 What that means is that there are in Minnesota  
25 thousands of students claiming a transgender identity as

1 high school students. We don't have a similar survey for  
2 Connecticut, but there's no reason to doubt that it isn't  
3 similar -- we're all part of one big culture these days --  
4 and that's thousands of students in Connecticut, and that  
5 many in the upcoming season and upcoming seasons will be  
6 seeking to compete to participate in athletics. And the  
7 problem for the law is, what does that mean for equity,  
8 for fairness, for equal experiences and indeed for safety  
9 for girls?

10 And because we see that coming, because we see  
11 the actual impact of just two, and we see what's coming,  
12 this is raising concerns across the political spectrum.

13 Professor Coleman and openly lesbian tennis  
14 athlete Martina Navratilova wrote in the Washington Post,  
15 2019 I believe, that in sports, quote, the relevance of  
16 sex is undeniable. And they went on to say that  
17 pretending that it's irrelevant will cause the very harm  
18 that Title IX was enacted to address.

19 Just earlier this month a headline working group  
20 of elite women athletes, including former Olympic and  
21 national champions, two transgender athletes, Dr. Renee  
22 Richards, former tennis star, and Joanna Harper, this  
23 women's sports policy working group has put out a major  
24 legislative initiative in a briefing book in which they  
25 point to the very facts that are in front of this Court



1       which they say we are thus increasingly likely to face  
2       situations like that in Connecticut where trans athletes  
3       seek to compete in girls sports. And they emphasize there  
4       is strong scientific evidence that trans girls and women  
5       have an unfair advantage over biological females even  
6       after a year of estrogen suppressing treatment.

7               So as these statements suggest the science is  
8       becoming, if anything, crystalized. And indeed, just  
9       since we filed the second amended complaint, international  
10      sporting bodies are taking action to address this real  
11      problem.

12             Just since we filed our amended complaint in  
13      early August, in October the world rugby federation was in  
14      the news for deciding after an extensive study that safety  
15      for biological females meant that male bodied athletes,  
16      even of the transgender female identity, simply could not  
17      be permitted to compete in that women's contact sport.

18             And the Swiss Supreme Court in August, but  
19      perhaps two weeks after we filed our amended complaint,  
20      upheld an international arbitration decision that  
21      sustained track rules that excluded Caster Semanya from  
22      female international track competition because Caster  
23      Semanya was born with xx, born with testicles, not  
24      ovaries, even as a result of a developmental defect, those  
25      testicles were internal producing testosterone. But

1 Caster had been raised with a female gender identity all  
2 her life.

3 This is the situation that comes in front of  
4 this Court. Now, obviously it is not your role today to  
5 solve a difficult policy question nor indeed to adjudicate  
6 the facts we've talked about, but to answer the question  
7 of law because we're here on a motion to dismiss. And  
8 Your Honor has been on the bench a long time. I'm not  
9 going to take your time emphasizing motion to dismiss  
10 standards, you know them well.

11 I want to agree with Attorney Block that really  
12 the legal question boils down to the meaning of sex in the  
13 athletic regulations of Title IX. And just to be clear,  
14 we heard some reference to the bathroom cases, there are a  
15 set of distinct regulations implemented in '75 and then  
16 official commentary afterwards that focus specifically and  
17 exclusively on athletics. And it is those regulations,  
18 the 1975 regulations, the 1979 policy interpretation, the  
19 1996 clarification -- obviously some more clarification  
20 will be coming down one of these days -- these are  
21 particular to athletics.

22 So my point is this, the case turns on the  
23 meaning of sex, or I should say the legal sufficiency of  
24 the claim turns on the meaning of sex in the athletic  
25 regulations based on Title IX, because athletics are not

1 mentioned explicitly in the text of the Title IX statute  
2 itself, which as Your Honor knows is a very high level  
3 text with a great deal delegated to regulation.

4           So let me go as far as to say that if sex in the  
5 Title IX athletic regulations must now be construed as a  
6 matter of law to mean gender identity rather than  
7 biological sex, necessarily and for all purposes, then  
8 this Court should dismiss this case.

9           And I say that because it's obviously not the  
10 business of Title IX to worry about one set of girls  
11 depriving a different set of biological females of  
12 opportunities. And if you conclude, therefore, that the  
13 law now prohibits us from distinguishing between  
14 biological females on the one hand and biological males of  
15 the transgender female identity on the other, then there's  
16 nothing left to talk about if we're not permitted to make  
17 that distinction.

18           On the other hand, if sex in the Title IX  
19 athletic regulations refers to the dimorphic reproductive  
20 biology of our species like all higher species, then the  
21 case we contend -- obviously I have many counsel to  
22 respond to -- but then we contend the case cannot be  
23 dismissed.

24           And we contend that it's not possible to read  
25 sex in the Title IX athletic regulations to mean or to

1 include gender identity for three primary reasons.

2 First, the text of those regulations won't allow  
3 it;

4 Second, the substitution would destroy the very  
5 logical basis of separate sports in the first place; and

6 Third, in the recent Bostock case, the Supreme  
7 Court rejects rather than supporting confusion between  
8 gender identity and sex.

9 Because I say this is the heart of the case, let  
10 me walk through those three if I may, Your Honor.

11 The -- we have -- we deal with this in our brief  
12 beginning at page 18, that the accepted meaning of sex in  
13 1972 when Title IX was enacted, 1975 when the key  
14 regulations were enacted, was clearly unambiguously  
15 referring to the division by reproductive function of the  
16 species. What the Supreme Court referred to in the very  
17 next year in *Frontiero v. Richardson* as the, quote, an  
18 immutable characteristic of each one of us.

19 And Your Honor for the kind of parsing of the  
20 meaning and citation of historical resources as to what  
21 sex meant in that time period in addition to *Frontiero v.*  
22 *Richardson*, let me just call the Court's attention to  
23 *Ulane v. Eastern Airlines* 742 F.2d 1081. It's a Seventh  
24 Circuit case. I cite it not as a binding precedent in any  
25 way, but simply for the careful review of the meaning of

1 sex as of 1972, a topic that I did not at an earlier stage  
2 in my life that I would ever be debating.

3           There's also a structural reason that sex in the  
4 regulations can't be construed to mean gender identity.  
5 No one will dispute that every respected LGBTQ voice  
6 agrees that gender identity can be male, female, both,  
7 neither, somewhere on the spectrum. But the regulations  
8 repeatedly refer to one sex and the other sex or sometimes  
9 to both sexes. You cannot retrofit a concept that can be  
10 neither or something other or somewhere on the spectrum  
11 into the whole binary structure of the athletic  
12 regulations of Title IX. Your Honor, I've also said that  
13 the attempt to rework sex to include gender identity  
14 destroys the very logical basis for sex-separated sports.

15           Now, in general, Title IX has been understood to  
16 prohibit what we would think of as separate but equal  
17 treatment of the sexes. The reason for the special  
18 permission for sex-separated athletics that is contained  
19 in the 1975 regulation, as we cite in page 9 of our  
20 opposition and again on the 1979 policy interpretation, is  
21 what the Ninth Circuit in its court case in 1982, referred  
22 to as the average physiological differences, closed quote,  
23 between the two sexes after puberty in particular.

24           We don't separate our athletics for social  
25 reasons. We don't do it to affirm cooperative feminine

1 behavior over here and aggressive masculine behavior over  
2 there. On the contrary, if anything, we do it for the  
3 reason that was articulated by -- and this is in the  
4 complaint at paragraph 44 -- a woman who prior to this has  
5 been called more than once the Godmother of Title IX,  
6 Dr. Bernice Sandler.

7 She testified in '75 in front of Congress  
8 endorsing, supporting, the regulations that had been  
9 adopted and that provided for separated sports. She said  
10 that failure to separate by sex would, quote, effectively  
11 eliminate opportunities for women and, quote, would not  
12 appear to be in line with the principle of equal  
13 opportunity. So since the reason for the separation is  
14 biological, then the only logically justifiable basis for  
15 separation, Your Honor, is the biology.

16 Performance capabilities, physiological  
17 capabilities, depends on biology not on identity. And the  
18 principles contended for by the defendants is that sports  
19 should be separated, yes, but based on gender identity,  
20 not biology. But there's no underlying justification for  
21 separation by gender identity. That's not what athletic  
22 ability depends on.

23 Now, Your Honor, a few minutes ago I claimed  
24 Bostock as supporting our reading of Title IX. Your Honor  
25 I'm sure is very familiar with the case, and I won't

1 detail the facts a lot. There is certainly a lay or press  
2 reading of Bostock out there that concludes that any line  
3 drawn or action taken that could be described as  
4 discriminating against transgender individuals in any way  
5 violates Title VII and therefore likely also Title IX or  
6 some law. Obviously justice Gorsuch was far more precise  
7 than that.

8 Aimee Stephens, the transgender plaintiff in the  
9 consolidated case was born male and came to identify as  
10 female and according to the court Stephens was fired,  
11 quote, simply for being transgender.

12 And then Justice Gorsuch went on to note that  
13 you can't identify somebody as transgender, you can't  
14 define that status without knowing and referring to that  
15 individual's biological sex. So he concluded that the  
16 firing was, based at least, in part on Stephens'  
17 biological sex.

18 In that analysis, he doesn't at all conflate sex  
19 identity. Indeed, the problem is that they're different.  
20 And the majority emphasized, they said on page 1746, we  
21 agree that homosexuality and transgender status are  
22 distinct concepts from sex. Your Honor they are, they  
23 were, they are in the Title IX regulations pertaining to  
24 athletics.

25 And we contend that if you can't read sex in the

1 Title IX athletic regulations to mean gender identity,  
2 then the displacement of girls by biological males based  
3 on gender identity can state a Title IX claim. And if  
4 that's the case that these plaintiffs have adequately  
5 alleged that claim, and they have adequately alleged it  
6 because they allege that they have -- the policy has  
7 resulted in actual denial of equal treatment, treatment  
8 and opportunities for female athletes in Connecticut, that  
9 it's affected them personally, that their harm has been  
10 caused by these defendants.

11 And Your Honor, we heard some reference to what  
12 was fairly referred to as bathroom cases. Let me comment  
13 on those.

14 I believe that counsel for the defendants said  
15 that courts in bathroom cases have held that sex -- I'll  
16 actually quote their reply brief. I think it parallels  
17 what perhaps Mr. Block said.

18 "The courts in bathroom cases have held that sex  
19 in Title IX should be read to mean or include gender  
20 identity."

21 Respectfully, I'll say to the Court that with  
22 regard to most of the cases cited by the defendants,  
23 that's just mistaken, and in particular I would point the  
24 Court to the Ninth Circuit's holding in Parents for  
25 Privacy v. Barr, the Third Circuit's holding in Doe v.



1 Boyertown and the Seventh Circuit's holding in Whitaker v.  
2 Kenosha.

3           What those courts did, they did not confuse sex  
4 and gender identity. What they said is that Title IX  
5 doesn't require separate bathroom facilities and that the  
6 plaintiffs had failed do show that a policy that allowed  
7 individuals to use the bathroom of their gender identity,  
8 that allowed individuals of the opposite biological sex  
9 into the restroom, had failed to show that that created a  
10 pervasively hostile environment therefore denying  
11 plaintiffs equal educational experiences.

12           Well, that was the conclusion of those courts  
13 and that was an interesting analysis, but it's unrelated  
14 to the analysis that apply in the athletic context under  
15 these distinct athletic regulations.

16           Now, it's true that two appeals courts have  
17 misunderstood Bostock and as a result have reached the  
18 conclusion that sex now means gender identity. Those two  
19 courts are wrong, and let me call them out. One is the  
20 Eleventh Circuit decision in the Adams v. School Board  
21 case, and the other is the Fourth Circuit in the Grimm v.  
22 Gloucester case.

23           And just looking at the Grimm decision, for  
24 example, they recognize that the plaintiff was excluded  
25 from the boys restroom not based on identity but by

1 reference to the student's, quote, biological gender. A  
2 true summary of what happened.

3 But the Court went on to express huge  
4 uncertainty as to the meaning of sex in the 40 year old  
5 regulation relating to locker rooms and privacy spaces  
6 which was enacted in 1980. And they denounced what they  
7 referred to as the board's own, quote, inventive  
8 classification biological gender, and they accused the  
9 board of relying on, quote, discriminatory notions of what  
10 sex means.

11 And, Your Honor, as to that case, as with the  
12 Adams v. School Board case, we would simply say that the  
13 circuits that haven't lost their grip on the plain meaning  
14 of sex -- the Ninth, the Seventh and the Third -- have it  
15 right, and that the Fourth Circuit in Grimm and the  
16 Eleventh Circuit in Adams have it wrong, and that our view  
17 in that regard is strongly reinforced by Bostock's  
18 unambiguous statement that transgender status is a  
19 different concept from sex.

20 Well, I have said that if a claim based on the  
21 taking of opportunities from biological females biological  
22 males based on gender identity can state a claim, then  
23 these plaintiffs have done so. Let me move on and address  
24 that if I may, Your Honor.

25 Counsel said in essence that this is an

1       unprecedented claim, and that we certainly concede. It's  
2       an unprecedented claim because this is fundamentally a new  
3       type of policy in recent years and a new type of problem  
4       for those who are born female.

5                 The defendants say, and I'll speak first to  
6       the -- our Count Two, which is the right to equal  
7       treatment and opportunities in athletics.

8                 The defendants have argued, they state in their  
9       brief at page 23, their opening brief, that we have no  
10       claim because we haven't alleged that girls received  
11       lesser participation opportunities. And Attorney Yoder  
12       referred more than once to the proposition that the CIAC  
13       and the schools have provided, quote, meaningful  
14       opportunities to girls.

15                Now, in fact, we have specifically alleged that  
16       girls are denied equal opportunities to participate in  
17       advanced meets in particular by this policy. And we've  
18       alleged that not only with regard to girls generally, we  
19       have a large amount of statistical information, or I  
20       should say by detail, in paragraphs 108 through 109, and  
21       Table 16, we've alleged that specifically with regard to  
22       Chelsea Mitchell that she was denied opportunities to  
23       participate in advanced meets as a result of the policy,  
24       paragraph 87; Ashley Nicoletti, the same, paragraph 100;  
25       Selina Soule the same, paragraph 91.

1           Now, it's also -- the participation question is  
2 also irrelevant as a matter of law. It is not true that  
3 Title IX is satisfied by the mere right to get on the  
4 track or field or even by having some meaningful athletic  
5 experience.

6           We have cited long-respected Department of  
7 Education and HEW, its predecessor, regulatory sources and  
8 case law that insist that Title IX guarantees our  
9 students, are daughters who are born female, a lot more  
10 than that. We summarize these on pages 16 to 17 of our  
11 complaint. But in brief, the McCormick Court, in looking  
12 over all the regulatory authority and precedent, said that  
13 the Title IX guarantees girls to equal opportunities to,  
14 quote, engage in post-season competition.

15           The 1996, OCR policy clarification says that  
16 Title IX guarantees girls equal quality of competition.  
17 Well, we've alleged that that's been denied, that having  
18 to step to the finish line and be advised to race against  
19 individuals with inherent and large physiological  
20 advantages out of the starting gate is not an equal  
21 competition.

22           And we allege in the complaint how Alanna Smith  
23 says that she and her friends, when they step up to the  
24 finish line and they see this transgender competitor, they  
25 know they're just racing for second or third place because

1 that's how it is. You step there saying, well, I can't  
2 win because -- because why? Because I was born female.

3 And the McCormick court again emphasized,  
4 participation isn't enough. Meaningful experience isn't  
5 enough. Title IX guarantees our daughters equal chances  
6 to be champions.

7 So, Your Honor, I'll leave the sufficiency of  
8 allegations of Count Two to those points and to the  
9 briefing. I believe that is clear.

10 I think the effective accommodation count  
11 deserves a little more comment.

12 The defendants said in their brief that a  
13 typical effective accommodation claim -- and they use the  
14 word "typical" -- involves failure to provide certain  
15 sports desired by girls. And I think counsel may have  
16 referred to funding and publicity.

17 It is certainly true that those are what typical  
18 effective accommodation cases look like up to the present.  
19 But that's irrelevant as a matter of law because the most  
20 frequent setting or problem that arises doesn't limit the  
21 law.

22 We have spent quite a bit of effort in our  
23 briefing and in our complaint parsing an effective  
24 accommodation regulatory requirement which manifests  
25 itself again in the '75 regulations, the '79 policy

1 interpretation, the 1996 clarification, and out of that, I  
2 find three sometimes repeated articulations of what  
3 effective accommodation requires schools to provide to  
4 girls in athletics. Those are these:

5 They are obliged to provide, quote, competitive  
6 opportunities which equally reflect girls' abilities.  
7 That's from the 1979 policy interpretation. Competitive  
8 opportunities which equally affect abilities.

9 The 1975 regulation itself refers to, quote,  
10 levels of competition that effectively accommodate each  
11 sex distinct abilities.

12 And the 1996 clarification requires that schools  
13 provide quality of competition which accommodates those  
14 distinctive abilities.

15 And, Your Honor, a situation where you step to  
16 the starting line knowing that you can't win or that it's  
17 extremely improbable not because you haven't tried hard or  
18 not because you're not as gifted but because you're up  
19 against a male-bodied athlete is, we submit, not an equal  
20 quality of competition as to what these girls' brothers  
21 experience when they step to the starting line.

22 And beyond that, let me leave that issue also to  
23 the briefing, which I think is detailed on that point.

24 I will say that we have -- on the question of  
25 are the athletic abilities different, we have alleged

1 quite in the complaint -- and that of course is a subject  
2 for expert submissions, we did put in an expert submission  
3 with our preliminary injunction motion way back when,  
4 which includes many scientific facts that are not in the  
5 complaint. But in the complaint, for instance, we have --  
6 well, let me see, this one is perhaps not in the  
7 complaint.

8 A study that was done recently, went through all  
9 the public records -- and you're beginning to learn from  
10 this, or perhaps you knew already -- all these records are  
11 publicly posted. And one scholar went through and  
12 identified that in a given year, 2017, male bodied  
13 athletes beat the all-time record of world record female  
14 sprinter, Allyson Felix, 15,000 times. Beat that in  
15 15,000 recorded times.

16 In other words, the world record woman's sprint  
17 time isn't even a significant weigh mark in competition by  
18 male-bodied athletes.

19 These are not close questions, these are not  
20 large overlaps. These are radically different  
21 physiologies and radically different capabilities. These  
22 are issues which are significantly alleged in the  
23 complaint and of course will be developed more fully in  
24 expert discovery.

25 Let me talk about the individual defendants, if

1 I may, and whether they are appropriate defendants.

2 I think there's really no contention -- I don't  
3 believe I've missed anything -- there's no contention that  
4 if a Title IX claim exists, and the CIAC is the sponsor of  
5 the policy, is an appropriate defendant.

6 And what about the schools that were or are  
7 attended by the plaintiffs? I'll call it their home  
8 schools, if I may: Glastonbury for Selina Soule, Canton  
9 for Chelsea Mitchell, Danbury for Alanna Smith -- and I  
10 failed to make a note about Ashley's school, pardon me.

11 Attorney Yoder essentially offered the "good  
12 enough" defense on behalf of those schools, that they've  
13 provided meaningful experiences. We've talked about the  
14 inadequacy of a meaningful experience.

15 In their briefs in opposition, they essentially  
16 raised what I'll call the outsourcing defense. It's not  
17 our rule, we couldn't help it. It's the CIAC. But that  
18 doesn't work because we have alleged both direct violation  
19 by the schools and control violations based on fact that  
20 they and their fellow member schools are the sole  
21 governing authority of the CIAC.

22 Now, as to direct violation.

23 It's undisputed that the home schools provide  
24 interscholastic athletics as an important part of their  
25 educational program, and that they do it only through CIAC



1 sponsored sanctioned events. That's paragraphs 17 to 19  
2 of the complaint.

3 Let me ask the Court to undertake a thought  
4 experiment.

5 If we suppose that a school provided competitive  
6 athletic opportunities, only through a league that in the  
7 interest of supposed equity, limited the number of  
8 minority players in certain sports who could appear on the  
9 court at any given time, well, in my view that would be  
10 radically illegal, and the idea that the school could walk  
11 away from liability based on the it's-not-my-rule defense,  
12 I didn't do it, would have no legal legs at all nor should  
13 it here. Each school has an affirmative obligation to  
14 provide equal athletic opportunities for girls who attend  
15 those schools. And we have alleged that they have fallen  
16 short in that obligation.

17 Your Honor, I think I will leave the issue of  
18 control liability, which is I suppose more intricate to  
19 the briefing. I think it hasn't been raised by opposing  
20 counsel.

21 We have cited a case in this very district that  
22 approves the control theory of liability for Title IX  
23 violations, the Mennone v. Gordon case. And I would just  
24 leave this emphasizing that each -- there is no other  
25 authority that sets CIAC policy except the member schools,

1 the principals who sit in the voting body as described in  
2 the complaint, and it cannot be that a large number of  
3 schools can join together, adopt a discriminatory policy  
4 and then each one of them say, well, you can't hold me  
5 liable, it's not my fault. That is what control liability  
6 is for, Your Honor.

7 Let me talk about the intervenors' schools,  
8 Cromwell and Bloomfield.

9 Now, Ms. Zelman has argued that what the law  
10 says is that only students who are enrolled at a Title IX  
11 school can have a claim against that school. She conceded  
12 that there is no on-case point, and I will concede that  
13 there is no directly on-case point. But then she then  
14 took the Court to several sexual assault cases in which  
15 the assault had nothing to do with the educational program  
16 of the school. An example would be the Arocho v. Ohio  
17 University case. It was cited at page 51.

18 But the contrast here, Your Honor, is dramatic,  
19 because what we're talking about here is these schools'  
20 interscholastic athletic programs in which the  
21 participation by girls from other schools is intended, is  
22 invited, is essential, and is indeed the heart of the  
23 matter in an interscholastic athletic program.

24 Let's go to the Doe v. Brown University case  
25 that Ms. Zelman called the Court's attention to, and that

1 they indeed spent time in their brief on at pages 28 to  
2 30.

3 Let me just say, I think we have perhaps  
4 adequately highlighted in our brief that the district  
5 court decision in that case is fundamentally erroneous and  
6 the First Circuit itself was at pains to emphasize they  
7 were affirming on different grounds after a de novo a  
8 review. So let's go to the what the First Circuit said.  
9 Ms. Zelman said it was most instructive, and I agree.

10 The defendants are arguing a reading of that  
11 case that it -- that the First Circuit itself was  
12 precisely at pains to contradict, to make impossible,  
13 because that court focused not on enrollment, but on  
14 nexus.

15 And the focus that they said that discrimination  
16 has to be encountered, quote, while participating or  
17 athlete attempting to participate in the funding  
18 recipient's program or activity. But then they emphasized  
19 in a footnote that participating is a very different thing  
20 from enrollment.

21 They said in that Footnote 6 on page 132, "We  
22 clarify that a victim need not be an enrolled student,"  
23 and they went on to give examples.

24 The victim who had a Title IX claim against  
25 Brown University could include, quote, members of the

1 public who are taking part or trying to take part in  
2 activities made available to the public which, they said,  
3 could include members of the public who are making use of  
4 libraries, public lectures, attending sporting events and  
5 other activities.

6 Well, if we take the First Circuit at its word,  
7 then the reading of this case as advocated by Ms. Zelman,  
8 is that a member of the public who is sexually harassed in  
9 the stands, if the universities is deliberately  
10 indifferent, could have a Title IX claim against the  
11 university. But a young woman who is participating in  
12 interscholastic competition on the track at the  
13 invitational university, a competition that is part of  
14 Brown's athletic program could have no recourse under  
15 Title IX.

16 Well, we called that out in our opposition and  
17 you'll see in the defendants' reply brief, they simply  
18 say, oops, pay no attention to that aspect of the case.  
19 They say on page 15, quote, a footnote can never clearly  
20 hold anything.

21 And, Your Honor, I would just submit that that  
22 is not true as a matter of law; that a court is free to do  
23 what the First Circuit said they were doing, which is to  
24 elaborate and clarify its holding in a footnote.

25 So Doe v. Brown, of course is not this circuit

1 and not binding on this Court, but we agree with the  
2 defendants that it is most informative on the question of  
3 liability of an educational institution to a student who  
4 is not actually enrolled in that institution.

5 THE COURT: Attorney Brooks, excuse me. We've  
6 been going for an hour and a half, and if we were in the  
7 courtroom, I would be inclined to take a break for the  
8 benefit of the court reporter. So let me ask you to  
9 please be patient for ten minutes and we can take a short  
10 break. Why don't we say 15 minutes.

11 Darlene will that be adequate?

12 THE COURT REPORTER: That's perfect, Judge,  
13 thank you.

14 THE COURT: All right.

15 Why don't we say we'll resume in 15 minutes, and  
16 at that time we'll pick up where we left off.

17 MR. BROOKS: Very good, Your Honor, thank you.

18 THE COURT: Thank you.

19 (Whereupon, a recess followed).

20 THE COURT: Attorney Brooks, are you ready to  
21 proceed?

22 MR. BROOKS: I am, Your Honor.

23 THE COURT: Thank you.

24 MR. BROOKS: Your Honor, I think we've come to  
25 issues of standing and mootness. And I would start by

1 urging the Court, as you parse through that, to keep those  
2 separate. I think they need to be kept separate because  
3 they're different issues with different burdens.

4 The burden is on the plaintiff to plead facts at  
5 the time of the established standing as of the time of the  
6 complaint. The burden is on the defendants to establish  
7 mootness and how exactly one would establish that on a  
8 motion to dismiss is an open question I don't find much  
9 guidance in the case law on. Also mix into this the scope  
10 of appropriate relief, which one of them accurately quoted  
11 me as saying that's a question for another day, I'll  
12 address that.

13 As to standing, I mean we've parsed through in  
14 our papers how each plaintiff at the time that she first  
15 filed her claim, alleged facts identifying how -- the  
16 reasonable expectation that she would be directly impacted  
17 by the policy in what was the then upcoming season, and of  
18 course that season didn't upcome due to COVID, but that's  
19 neither here nor there.

20 And I believe we've cited authority to Your  
21 Honor that the standing question is one that is addressed  
22 that is asked in this circuit only as of the time of  
23 filing.

24 And I am not certain whether we cited this case  
25 in the briefs, so let me mention it: The Building and

1       Constructions Trades Council of Buffalo v. Downtown  
2       Development Corporation, Second Circuit 2006, 448 F.3d  
3       138.

4                 And there the Second Circuit held that it was  
5       reversible error where a district court held that standing  
6       had been destroyed by events after the time of the  
7       complaint.

8                 I am aware that other circuits view -- or  
9       perhaps they use the words differently -- but they talk  
10      about standing as something that has to exist throughout  
11      the time of the litigation. The Second Circuit is very  
12      clear how it has to be applied here.

13                There's been discussion about -- well, there's  
14      standing for what? Well, I think primarily there is  
15      standing to assert claims, but I believe it's the case  
16      that the standing of these plaintiffs to pursue correction  
17      of records -- and there's debates about whether that's an  
18      appropriate remedy -- but they're pleading that they have  
19      been affected, that they're ranking in publicly posted  
20      records, their ranking in their credit for championship  
21      victories has been denied to them.

22                So there's standing to pursue correction of  
23      records, nominal compensatory damages and attorneys' fees,  
24      which are explicitly allowed for Title IX claims, I think  
25      are difficult to dispute.

1           Standing to pursue injunctive relief, the  
2 defendants say in their reply, that Selina Soule and  
3 Chelsea Mitchell who now concede that they do not have  
4 standing to seek prospect of relief. Again, just to  
5 untangle things, that's not accurate. What we conceded by  
6 the Second Amended Complaint is that prospective relief  
7 would be moot as to those individuals, and therefore they  
8 didn't seek it in the Second Amended Complaint. We've  
9 parsed that out carefully.

10           Now, as to Alanna Smith and Ashley Nicoletti,  
11 they've argued that the future harms are too speculative  
12 because who knows who they will run against. Your Honor,  
13 I would just encourage the Court to look at the example of  
14 the Second Circuit's McCormick case.

15           Yes, we have to and did allege as regards to  
16 standing at the time a reasonable realistic danger of  
17 future harm. We identified specific events in which they  
18 were likely to come up against these competitors. And  
19 then the McCormick case kind of helps us calibrate what  
20 realistic danger of harm means.

21           The scenario there was, the issue was, one of  
22 the schedulings that would or would not allow  
23 hypothetically the Mamaroneck girls soccer team to  
24 participate in state finals. The plaintiffs themselves  
25 never participated in the Mamaroneck team, they never



1 demonstrated that they had the skills to make that team,  
2 and the Second Circuit noted without dispute that it was a  
3 long shot for Mamaroneck to play in the state finals even  
4 should the schedule be changed because Mamaroneck had not  
5 even won at the more local district level in the previous  
6 year, page 294 of that opinion.

7           So, Your Honor, I would just call the Court's  
8 attention to that case, which I think demonstrates that  
9 the realistic danger threshold for standing is a low, not  
10 a high bar.

11           Your Honor, this also I think confusion in the  
12 briefing on the argument that standing somehow precludes  
13 the plaintiffs from seeking a general injunction against  
14 the application of the policy. They want to try to  
15 confine standing to all we can talk about is me, so to  
16 speak, and they emphasize, they lead with the Lewis v.  
17 Casey case from the Supreme Court, which I'm very happy to  
18 call the Court's attention to and agree that it's  
19 important. It's a suit -- but let me explain why.

20           It's a suit by an illiterate prisoner alleging  
21 that prison policies deny meaningful access to legal  
22 resources. And while the Supreme Court -- well, what was  
23 held by the Supreme Court there is that an illiterate  
24 prisoner has no standing to challenge legal aid and access  
25 to materials and policies that are relevant to non-English

1 speakers or to those prisoners in lockdown because the  
2 plaintiffs were not non-English speaking and they weren't  
3 under lockdown.

4 And that's the origin of the language that gets  
5 quoted in defendants' brief where Justice Scalia I believe  
6 says standing is not dispensed in gross.

7 The point was having ground on one policy  
8 doesn't give you the right to challenge other policies.  
9 But there was nothing in that decision that the illiterate  
10 plaintiff wasn't entitled to challenge and have enjoined  
11 the policy as it applied to illiterate prisoners.

12 So standing is the question the Court will ask  
13 only as the time of the first filing of each claim for a  
14 plaintiff, and I think you'll find that it is alleged  
15 perhaps the more concrete question is, are the asserted  
16 claims moot. And particularly is the request for  
17 prospective relief mooted by the graduation of  
18 intervenors. And this we've discussed in our opposition  
19 at pages 36 through 38. And the point is, the defendants  
20 emphasize the graduation of the intervenors in page 15 of  
21 their opening brief and again in their reply. Let me  
22 start at the kind of commonsense level.

23 The intervenors remain in this case. The only  
24 possible interest they have in it is to prevent the  
25 correction of records, to preserve what they view as their

1 appropriate and proper records. Obviously they aren't and  
2 never will be affected by this policy again. But the very  
3 fact that they're still in and they still care signifies  
4 that these records about who won championships matter to  
5 athletes. This is so much of what athletes strive for.  
6 Yes, you want personal best and personal satisfaction, but  
7 you want recognition as the fastest girl in Connecticut,  
8 the fastest girl in your league. These records matter,  
9 that's why the intervenors are still in.

10 And so the claims -- I believe in general that  
11 mootness is a concept that applies to claims not  
12 individual requests for relief.

13 And I would call the Court's attention to the  
14 case of *Suffolk County v. Sebelius*, 605 F.3d 135, Second  
15 Circuit 2010, and there the Second Circuit emphasized that  
16 under the general rule of mootness, court's subject matter  
17 jurisdiction ceases only when an event occurs during the  
18 course of proceedings or an appeal that makes it  
19 impossible for the Court to grant any effectual relief  
20 whatsoever to a prevailing party.

21 Your Honor, with the claims for damages,  
22 attorneys' fees, correction of records, in addition to  
23 prospective injunctive relief, I do not think it is  
24 possible to conclude for either one of these claims at  
25 this stage in the proceeding before factual development in

1 discovery that no effective relief of any type can be  
2 provided under either one of these claims.

3 I'm trying to cut to the chase here, Your Honor.

4 As I've said -- oh, I do now also mention, and  
5 Attorney Yoder conceded, that she didn't know who was  
6 coming down the pipe for the next season, who would seek  
7 to compete, how many transgender athletes might be seeking  
8 to compete in CIAC, and she conceded that should any wish  
9 to do so, the very purpose of the policy was to ensure  
10 that they are permitted to do so.

11 And, Your Honor, I think this case has taught us  
12 very clearly that this is a classic situation of capable  
13 of repetition, as Attorney Yoder conceded, but evading  
14 review; that is a sports season moves very quickly and  
15 litigation, as those of us who have been lawyers for  
16 awhile know, moves slowly. Here we are a year after the  
17 filing of this complaint.

18 Your Honor, let me also break out for mootness  
19 the question of remedies. Page 39 and 40 we have -- well,  
20 in argument it was said that we have not put forward  
21 relevant case law. I would refer the Court to the case  
22 law we do cite, 39 to 40 of our opposition, where I think  
23 I've quoted before, I won't say it again, the Norwalk CORE  
24 decision from the Second Circuit saying that if you  
25 dismiss on the basis that the wrong relief or ineffective

1 relief has been requested, quote, the Court has moved too  
2 quickly.

3 And we've cited the Supreme Court saying in the  
4 Holt Civic Club case that a federal court may not dismiss  
5 a potentially meritorious claim because the requested  
6 relief was, quote, not the correct one.

7 Whether respective relief is necessary or  
8 appropriate, these are all questions for another day after  
9 discovery and development of the facts when it will  
10 perhaps no longer be true that none of us know what's  
11 coming down the pike. These are issues where the school  
12 has information, the schools have information, and of  
13 course the plaintiffs have none having had no substantial  
14 discovery on that sort of issue.

15 I'll say in passing, Your Honor, that I agree  
16 with the defendants that state actor status is not an  
17 issue here when it comes to remedies, that's not the basis  
18 of liability under Title IX.

19 But let me go to Pennhurst, because in the  
20 briefs and now again in the argument we've heard a lot  
21 about Pennhurst. And the gist of that argument is that  
22 even if the Court were to conclude the permitting male  
23 bodied individuals to take opportunities from females  
24 could constitute a Title IX violation, there could be no  
25 damages claim because that's a novel theory.

1           Now, Your Honor, that's just not how Pennhurst  
2 works. Pennhurst State says that a court cannot imply a  
3 private right with action for damages based on spending  
4 power statute absent a clear voice from Congress  
5 expressing that intent.

6           And the relevant question, the correct question,  
7 here is: Is a private right of action for damages for  
8 intentional discrimination, does a damage action exist  
9 under Title IX? And that the Supreme Court has  
10 definitively answered in the Franklin v. Gwinnett County  
11 case in 1992.

12           And I guess I have to digress to a kind of  
13 strange quirk of Title IX law, which is that the necessary  
14 intent for an intentional violation comes not from proving  
15 that the parties are sitting there saying, gosh, I want to  
16 discriminate against girls, but rather from the intent to  
17 offer sex-separated sports; and once one forms the intent,  
18 once one acts with intent to separate sports for boys and  
19 for girls, then one has satisfied the intent element and  
20 has all of the obligations of effective accommodation and  
21 equal opportunities that the Title IX regulations require.

22           Well, the defendants say, okay, okay, but your  
23 theory of intentional violation, your theory of violation  
24 is novel and, Your Honor, I can think we can see from the  
25 Supreme Court's case law that that is just not the right

1 question under Pennhurst. Why do I say that?

2 What we think you'll find in the law is that  
3 once an action for intentional violation is -- for  
4 intentional discrimination -- is recognized, Pennhurst  
5 doesn't act to block damages simply because a particular  
6 theory of what constitutes intentional violation is new.

7 If you look at the Franklin case, which I just  
8 mentioned, it was the first case to say that there even  
9 was a private right of action for damages for  
10 discrimination under Title IX. But the Supreme Court let  
11 the damages claim in that case go forward even though in a  
12 case of first impression they invoked at page 74 of that  
13 decision what they referred to as the normal presumption  
14 in favor of all appropriate remedies.

15 And a few years later in the Davis v. Monroe  
16 County, they recognize for the first time a cause of  
17 action for damages under Title IX based on deliberate  
18 indifference to discrimination and harassment by others,  
19 by students or teachers; and even though it was a -- even  
20 though that was a question of first impression, the  
21 damages claim in that case was permitted to go forward.

22 Similarly, 2005, in Jackson v. Birmingham Board  
23 of Education, the first time the Supreme Court decided  
24 retaliation against somebody who makes a sex  
25 discrimination complaint could constitute sex

1 discrimination itself, it was the first time a case of  
2 first impression the damages claim in that action was  
3 permitted to go forward.

4 Your Honor, the remedy of correction of records,  
5 there was -- we heard the, well, how can you know what  
6 would have happened argument. We heard the general  
7 argument that it's all speculative.

8 I would just point out to that, Your Honor, two  
9 things:

10 If somebody is subsequently determined to be  
11 ineligible for any reason in athletics, the routine  
12 solution, not a eccentric solution that we've sought out,  
13 the routine solution is the removal of the ineligible  
14 person from the records and the increasing of ranking and  
15 the awards of prizes of recognition as championship to  
16 those who are next in line.

17 So are there perhaps more complicated  
18 alternative universes? Perhaps there are. But what we're  
19 asking for is routine.

20 In the last several decades, 149 Olympic  
21 athletes who have won medals have been, after the fact,  
22 held to be ineligible, and those have been revoked and  
23 those awards have simply trickled down to the next  
24 eligible individual.

25 Similarly and perhaps even more to the point,



1 the CIAC bylaws, Article 8(c) addressing a different  
2 circumstance of after determining ineligibility state that  
3 what should be done is to, quote, require that individual,  
4 that individual or team records and performances achieved  
5 by such ineligible student, shall be vacated or stricken.

6 So what we're asking for in this situation, if  
7 we're correct, and Title IX says no, you can't do this  
8 thing, you can't permit male bodied athletes to take spots  
9 from female bodied athletes is simply what the CIAC itself  
10 provides for in a similar circumstance. Of course because  
11 that argument hadn't come up, that provision of the bylaws  
12 isn't, I believe, in the record. That's a matter for more  
13 discovery and development.

14 And with that, Your Honor, I will rest.

15 THE COURT: Thank you.

16 Let me inquire whether anybody on the  
17 plaintiffs' side wants to reply to anything in particular  
18 that Attorney Brooks had to say during his presentation?

19 MR. BLOCK: Yes, Your Honor, briefly, if Your  
20 Honor has the time.

21 THE COURT: Yes.

22 MR. BLOCK: So I think that -- I mean, a lot of  
23 ground was covered, so I think we'll have to pick our  
24 battles about which things to highlight orally and which  
25 things are addressed in the papers.

1           But with respect to, you know, whether or not  
2 this is a cognizable cause of action under Title IX, I  
3 heard Mr. Brooks to be arguing a case that is not the case  
4 presented here. Most of his argument was directed to  
5 rebutting a claim that Title IX somehow -- that Title IX  
6 requires that schools treat girls who are transgender the  
7 same as other girls and, I mean, I certainly think it  
8 does, but that's not what this case requires the Court to  
9 resolve.

10           This case is not about whether Title IX  
11 prohibits schools from distinguishing between girls who  
12 are transgender and girls who are not; this case is about  
13 whether or not Title IX prohibits schools from treating  
14 them equally.

15           So I think that much of Mr. Brooks' argument was  
16 about how, you know, sex can mean gender identity and how,  
17 you know, in order to -- how the Fourth Circuit and the  
18 Eleventh Circuit have held that Title IX requires that  
19 transgender students be treated equally for purposes of  
20 sex-separated facilities, and that's just not this case.

21           This case is about whether Connecticut, pursuant  
22 to Connecticut law and its longstanding athletic policy,  
23 is allowed to recognize girls who are transgender who are  
24 recognized in their school records and daily lives as  
25 girls -- some of them have birth certificates recognizing

1       them as girls -- whether Title IX prohibits Connecticut  
2       from following state law and providing those girls equal  
3       participation in athletics as state law requires.

4               So Mr. Brooks doesn't have to agree with the  
5       Fourth Circuit and the Eleventh Circuit. The issue is  
6       whether Connecticut is allowed to make its own choice  
7       under Title IX.

8               I also heard a lot of discussion about  
9       Switzerland and about regulations and, you know, athletic  
10      rugby competitions in the UK, and I think this sort of  
11      just highlights that, you know, this case has been brought  
12      to serve as a shot across the bow in a larger issue.

13              And the purpose of Article III courts is to  
14      address specific claims by specific individuals who are  
15      harmed and whose harm can be redressed by the court. And  
16      each of these plaintiffs -- most of them have identified a  
17      single instance in which my clients have allegedly taken a  
18      slot away from them by outranking them.

19              The only one is Chelsea. Chelsea is the only  
20      one who has raced against my clients more than one or two  
21      times. She has outraced them some of those times. She is  
22      a national ranked figure in the, I think it's either the  
23      high jump or the long jump, an incredibly accomplished  
24      athlete. The idea that the participation opportunities  
25      have been taken away from her -- well, first of all,

1 that's not in the complaint at all. There's no allegation  
2 that she's ever been unable to compete in a race as a  
3 result of our client's participation; but there's just no  
4 predicate for the claim that these particular plaintiffs  
5 have been harmed by my particular client.

6 So whatever's going on with the issue of the  
7 Switzerland Court of Human Rights doesn't really have  
8 relevance here for the United States District Court for  
9 Connecticut.

10 I also just, you know, a couple of things just  
11 sort of jumped out at me.

12 Mr. Brooks talked about Ulane, a Seventh Circuit  
13 decision, which is a notorious Seventh Circuit decision  
14 for saying that Title VII didn't protect transgender  
15 people who were fired for being transgender. That is  
16 precisely the Seventh Circuit decision that was abrogated  
17 by Bostock.

18 Bostock specifically said that this result of  
19 the Seventh Circuit in those earlier cases defining the  
20 purpose of what Congress was thinking when it passed the  
21 statute is an entirely inappropriate inquiry. What  
22 matters is the text that Congress wrote.

23 The statute says nothing about sex-separated  
24 sports, zero. The regulations say schools shall not  
25 separate teams on the basis of sex unless in contact

1 sports or when skill is involved, schools may do so.

2 The text of Title IX in its regulations is not a  
3 text that requires sex separation of sports in the first  
4 place, much less prohibits transgender people from  
5 competing in them.

6 And another example is we heard about safety  
7 concerns about playing in contact sports. Connecticut  
8 allows girls to play in contact sports with boys. In  
9 Connecticut, if you want to do ice hockey and you're a  
10 girl, you have to compete on the coed team against boys.  
11 It's a contact sport. There's checking. But Title IX  
12 allows different states in different athletic communities  
13 to make their own determinations about the best way to  
14 provide equal accommodation to everyone.

15 It's not a straight jacket that imposes, you  
16 know, one requirement of the one and only way to provide  
17 equal and effective athletics accommodations, and in fact  
18 Connecticut provides many more opportunities to girls  
19 because unlike other states, it doesn't exclude girls from  
20 competing in contact sports with boys.

21 And then just two other small things.

22 To say that Bostock definitively rejected a  
23 definition of facts that had anything to do with gender  
24 identity is just simply a false reading of Bostock.

25 The decision is crystal clear that the parties

1 in that case both provided competing definitions of what  
2 sex could mean at the time that Title VII was adopted, and  
3 the Court said it didn't have to resolve that dispute,  
4 because even under a definition of sex that was confined  
5 solely to so-called biological sex, the plaintiffs still  
6 won. Bostock, you know, intentionally did not resolve  
7 that dispute.

8 And then just say one thing about this idea of  
9 Ms. Smith walking up to the starting line and knowing that  
10 she can't win. She's won. She's outraced them on the  
11 starting line. The idea she's coming there saying, I  
12 can't win, it's just not true. She's won. Maybe she  
13 doesn't win every time. But it's just like -- it's a  
14 false premise. The scores of my clients are not outside  
15 the range of scores of cisgender girls.

16 So this isn't even a situation where you have a  
17 Venn diagram where the cisgender girls are competing  
18 against transgender girls whose scores fall outside the  
19 range of what a cisgender girl is capable of doing; they  
20 don't.

21 So I just -- the case here is being brought on a  
22 set of hypotheticals, and that in a hypothetical situation  
23 might strike someone as being unfair. But the  
24 hypothetical situation, is just not an accurate  
25 description of what's going on in Connecticut, what's

1 going on the race track with my clients or with the  
2 plaintiffs.

3 I'm happy to -- oh, and another small thing  
4 about the intervenors remain in the case even though we've  
5 graduated.

6 Intervening defendants don't need to have  
7 standing. The person that needs to have standing is the  
8 person asking the Court to take action to do something.

9 It's the plaintiffs that are asking the Court to  
10 take action and do something, and in order to do that,  
11 they need to show that they were injured. So no one's  
12 contesting an injury in fact. And traceability, no one's  
13 contesting that here for past injury, but they also need  
14 to show redressability and for injunctive relief.

15 Part of Article III, whether it's mootness or  
16 standing, you need to show you still have a redressable  
17 claim.

18 Their redressable claim is for damages which may  
19 be precluded from Pennhurst entirely, but the redressable  
20 claim for damages, they do not have a redressable claim  
21 for their injunctive relief.

22 And I'll end it at that unless the Court has  
23 further questions. I don't want to take up anymore time  
24 than necessary.

25 THE COURT: Thank you. I appreciate all of the

1 work you have done.

2 It is likely to be a couple or three weeks  
3 before I have a decision for you, but I will endeavor to  
4 provide you with a decision as soon as possible.

5 With that, thank you all. The clerk will  
6 adjourn the proceeding.

7 (Proceedings adjourned at 12:14 p.m.)

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C E R T I F I C A T E

In Re: SOULE vs. CIAC

I, Darlene A. Warner, RDR-CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/ \_\_\_\_\_

DARLENE A. WARNER, RDR-CRR  
Official Court Reporter  
450 Main Street, Room #223  
Hartford, Connecticut 06103  
darlene\_warner@ctd.uscourts.gov

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

SELINA SOULE, a minor, by :  
Bianca Stanescu, her mother; :  
CHELSEA MITCHELL, a minor, by :  
Christina Mitchell, her mother; :  
ALANNA SMITH, a minor, by :  
Cheryl Radachowsky, her mother; :  
ASHLEY NICOLETTI, a minor, by :  
Jennifer Nicoletti, her mother,

Plaintiffs, :

v. :

Case No. 3:20-cv-00201 (RNC)

CONNECTICUT ASSOCIATION OF :  
SCHOOLS, INC. d/b/a CONNECTICUT :  
INTERSCHOLASTIC ATHLETIC :  
CONFERENCE; BLOOMFIELD PUBLIC :  
SCHOOLS BOARD OF EDUCATION; :  
CROMWELL PUBLIC SCHOOLS BOARD :  
OF EDUCATION; GLASTONBURY :  
PUBLIC SCHOOLS BOARD OF :  
EDUCATION; CANTON PUBLIC :  
SCHOOLS BOARD OF EDUCATION; :  
DANBURY PUBLIC SCHOOLS BOARD OF :  
EDUCATION, :

Defendants, :

and :

ANDRAYA YEARWOOD; THANIA :  
EDWARDS on behalf of her :  
daughter, T.M.; CONNECTICUT :  
COMMISSION ON HUMAN RIGHTS, :

Intervenors. :

RULING AND ORDER

This case involves a challenge to the transgender participation policy of the Connecticut Interscholastic Athletic

Conference ("CIAC"), the governing body for interscholastic athletics in Connecticut, which permits high school students to participate in sex-segregated sports consistent with their gender identity.<sup>1</sup> Plaintiffs claim that the CIAC policy puts non-transgender girls at a competitive disadvantage in girls' track and, as a result, denies them rights guaranteed by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and implementing regulations, which require that if a school provides athletic programs or opportunities segregated by sex, it must do so in a manner that "[p]rovides equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(c). Defendants have jointly moved to dismiss the action on numerous grounds. For reasons discussed below, I conclude that the plaintiffs' challenge to the CIAC policy is not justiciable at this time and their claims for monetary relief are barred and dismiss the action on this basis without addressing the other grounds raised in the joint motion.

#### I.

In February 2020, plaintiffs Selina Soule and Chelsea Mitchell, then high school seniors, and Alanna Smith, then a high school sophomore, brought this action seeking a preliminary

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<sup>1</sup> The CIAC policy requires member schools to determine eligibility to participate in sex-segregated athletics based on "the gender identification of [the] student in current school records and daily life activities in the school . . . ." ECF No. 141 ¶ 74.

injunction to prevent transgender girls from competing in events scheduled to take place during the 2020 Spring Outdoor Track season. Plaintiffs alleged that without a preliminary injunction, they would continue to face unfair competition by two transgender students, Andraya Yearwood and Terry Miller, then high school seniors. Plaintiffs claimed that by permitting "male-bodied athletes" -- defined as "individuals with an XY genotype" -- to compete in girls' track, the defendants were denying them an opportunity to compete for places on the victory podium in violation of Title IX and 34 C.F.R. § 106.41(c). The issue raised by the plaintiffs is one of first impression.<sup>2</sup>

Prior to bringing this action, the plaintiffs had filed a complaint with the U.S. Department of Education's Office of Civil Rights ("OCR"). OCR initiated an investigation in response to the complaint but took no action to prevent Yearwood and Miller from competing in the 2020 Spring Track Season, so the plaintiffs filed this suit. Explaining the need for immediate relief, the motion stated:

Plaintiffs Soule and Mitchell are seniors in high school, and the brief remainder of this academic year contains the final track and field competitions of their high school athletic careers. The Spring track season begins in March, with the first interscholastic meet subject to the CIAC

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<sup>2</sup> The issue implicates opposing interests that are not easily reconciled. See Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, Re-affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule, 27 Duke J. Gender L. & Pol'y 69, 99 (2020).

Policy scheduled to occur as soon as April 4, 2020. Absent immediate injunctive relief from this Court, the irreparable harm they will suffer under the continuing operation of the Defendants' policy and its enforcement will leave their concluding interscholastic athletics season marred and their personal experience substantially injured. Though Plaintiff Alanna Smith is a sophomore, her interests are no less immediately impacted or properly honored with immediate equitable relief, as the profound interests in and experience of high school athletics are concurrently fleeting and formative, and each season of eminent value and importance.

In addition to CIAC, the complaint named as defendants the school boards for the three high schools attended by the plaintiffs (Glastonbury, Canton, and Danbury) and the two high schools attended by the transgender students (Bloomfield and Cromwell). All five schools are members of CIAC and, as such, must abide by its transgender participation policy.

Soon after the complaint was filed, Yearwood, Miller, and the Connecticut Commission on Human Rights and Opportunities ("CHRO") filed motions to intervene, which the plaintiffs opposed. Before the plaintiffs' motion for a preliminary injunction could be heard, Connecticut declared a public health emergency in response to the Covid-19 pandemic. Schools and nonessential businesses were closed across the state, and interscholastic athletic competition was suspended indefinitely. Plaintiffs subsequently filed an amended complaint adding Ashley Nicoletti, then a sophomore, as a plaintiff. They also renewed their motion for an expedited hearing, which was opposed by the

defendants and proposed intervenors on the ground that the 2020 Spring Track season was likely to be cancelled in its entirety.

Following oral argument, the motions to intervene were granted, either as a matter of right or permissively, thereby enabling Yearwood, Miller, and the CHRO to participate in this litigation as additional defendants along with the CIAC and the five school boards. The plaintiffs' motion for expedited treatment was denied because of Covid-19, which would prevent resumption of interscholastic athletic competition for the rest of the academic year. Further proceedings in this case were then stayed by agreement while the plaintiffs sought appellate review of a ruling denying a recusal motion.<sup>3</sup> After the stay was lifted, defendants filed the pending motion to dismiss, which has been fully briefed and argued.

## II.

Plaintiffs' second amended complaint alleges that CIAC's transgender participation policy

is now regularly resulting in boys displacing girls in competitive track events in Connecticut -- excluding specific and identifiable girls including Plaintiffs from honors, opportunities to compete at higher levels, and public recognition critical to college recruiting and

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<sup>3</sup> Plaintiffs moved for my recusal on the ground that I had demonstrated bias by calling on plaintiffs' counsel to refrain from continuing to refer to Yearwood and Miller as "males," which I regarded as needlessly provocative. Plaintiffs' counsel argued that this usage was necessary because the present action concerns the effects of biological differences between persons born male and persons born female.

scholarship opportunities that should go to these outstanding female athletes.

As a result, in scholastic track competition in Connecticut, more boys than girls are experiencing victory and gaining the advantages that follow, even though postseason competition is nominally designed to ensure that equal numbers of boys and girls advance to higher levels of competition. In the state of Connecticut, students who are born female now have materially fewer opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records, than students who are born make.

Plaintiffs claim that

This reality is discrimination against girls that directly violates the requirements of Title IX: "Treating girls differently regarding a matter so fundamental to the experience of sports - the chance to be champions - is inconsistent with Title IX's mandate of equal opportunity for both sexes." McCormick ex rel. McCormick v. Sch. Dist. Of Mamaroneck, 370 F.3d 275, 295 (2d Cir. 2004).

Plaintiffs request:

A declaration that Defendants have violated Title IX by failing to provide competitive opportunities that effectively accommodate the abilities of girls;

A declaration that Defendants have violated Title IX by failing to provide equal treatment, benefits, and opportunities for girls in athletic competition;

An injunction prohibiting all Defendants, in interscholastic competitions sponsored, organized, or participated in by the Defendants or any of them, from permitting males -- individuals with an XY genotype -- from participating in events that are designated for girls, women, or females;

An injunction requiring all Defendants to correct any and all records, public and non-public, to remove male athletes from any record or recognition purporting to record times, victories, or qualifications for elite competitions

designated for girls or women, and conversely to correctly give credit and/or titles to female athletes who would have received such credit and/or titles but for the participation of males in such competition;

An injunction requiring all Defendants to correct any and all records, public or non-public, to remove times achieved by male athletes from any records purporting to record times achieved by girls or women;

An award of nominal and compensatory damages and other monetary relief as permitted by law; [and]

An award of Plaintiffs' reasonable attorneys' fees and expenses, as authorized by 42 U.S.C. § 1988.

### III.

#### A.

In the joint motion to dismiss, the defendants first contend that the plaintiffs lack standing to seek an injunction enjoining enforcement of the CIAC policy. Standing refers to the personal stake a plaintiff must have in a disputed issue in order to be able to obtain a judicial determination of the issue in federal court. See Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of a particular issue."). Under Article III of the United States Constitution, the judicial power of the federal courts is limited to adjudicating "cases" and "controversies." The law of standing implements this limitation by requiring a plaintiff to demonstrate that she requires judicial relief in order to redress a legally cognizable injury to her. See Allen v.



Wright, 468 U.S. 737, 751 (1984) (noting that, to have standing under Article III, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief”); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (discussing three elements of standing: injury in fact, causal connection to defendant’s conduct, and redressability).<sup>4</sup> Unless a plaintiff’s personal stake in a disputed issue satisfies the standing requirement, the court lacks jurisdiction to adjudicate the issue at the plaintiff’s request. See Warth, 422 U.S. at 498 (explaining that standing doctrine is “founded in concern about the proper -- and properly limited -- role of the courts in a democratic society”).<sup>5</sup>

The defendants contend that the plaintiffs lack standing with regard to the principal form of relief at issue -- an injunction preventing enforcement of the CIAC policy. Soule and Mitchell have graduated and thus are no longer eligible to compete in CIAC-sponsored events. But Smith and Nicoletti, now

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<sup>4</sup> “Injury” in this context signifies harm to the plaintiff, either actual or imminent, due to unlawful conduct attributable to the defendant. To provide standing to sue, the injury to the plaintiff must be “distinct” and “palpable,” and not “abstract,” “hypothetical,” or “conjectural.” See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

<sup>5</sup> The standing requirement must be satisfied with regard to each claim and form of relief. Town of Chester, N.Y. v. Laroe Ests., Inc., 137 S. Ct. 1645, 1650 (2017). Therefore, in applying the requirement, each claim and form of relief must be analyzed separately.

juniors, have another year of eligibility. Whether their interest in obtaining the requested injunction is still sufficient to support adjudication of their claim on the merits is the main issue presented by the joint motion to dismiss.

Defendants argue that Smith and Nicoletti lack standing because they have not identified a transgender student who is likely to compete against them next season. Defendants further argue that, “[e]ven if Smith and Nicoletti could allege with any certainty that girls who are transgender will imminently compete in track and field, and that they will personally compete against those transgender girls, Smith and Nicoletti cannot credibly allege that they will finish in particular spots in particular races next year if girls who are transgender are barred from competing.” ECF No. 145-1 at 16.

Plaintiffs correctly argue that the issue is one of mootness rather than standing. ECF No. 154 at 45. The standing inquiry concerns a plaintiff’s personal stake in the outcome of an action at the time the action is filed; mootness, on the other hand, ensures that a plaintiff maintains a sufficient personal stake in the outcome of an action for the duration of the litigation. See Klein on behalf of Qlik Techs., Inc. v. Qlik Techs., Inc., 906 F.3d 215, 220–21 (2d Cir. 2018) (“The consequences of losing a stake in ongoing litigation are determined not by asking whether the party losing its stake in

the litigation has lost its standing but by asking whether the action has become moot." (emphasis in original)). However, standing and mootness are closely related doctrines of justiciability rooted in Article III. The Supreme Court has described mootness as "the doctrine of standing set in a time frame." Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (referring to "this Court's repeated statements that the doctrine of mootness can be described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)'" (quoting Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 68 n.22 (1997))). And the underlying concern of the two doctrines is the same -- a plaintiff seeking relief in federal court must maintain a "legally cognizable interest" in the outcome of the action. Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013). In other words, a plaintiff must retain a "personal stake" that "subsists through all stages of federal judicial proceedings." Spencer v. Kemna, 523 U.S. 1, 7 (1998). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" Id.; see also Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) ("At all stages of litigation,

a plaintiff must maintain a personal interest in the dispute. The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings.”).

Defendants have the burden of establishing mootness, as plaintiffs point out. Mhany Mgmt., Inc. v. Cty. of Nassau, 819 F.3d 581, 603 (2d Cir. 2016). But the burden is not the one plaintiffs describe in their brief. Elaborating on the defendants’ burden, plaintiffs argue that “[i]f standing exists at the time injunctive relief is requested, then that request will not be deemed moot unless defendants meet ‘the heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again.’” ECF No. 154 at 45 (quoting Laidlaw, 528 U.S. at 189). To satisfy this standard of mootness, plaintiffs continue, “[s]ubsequent events must make it ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’” Id. (quoting United States v. Concentrated Phosphate Export Ass’n, 393 U.S. 199, 203 (1968)).

The burden plaintiffs describe does not apply here. Plaintiffs are relying on an “extremely strict standard” of mootness applied by courts when a defendant argues that its voluntary cessation of the challenged conduct has served to moot the case. See Wright & Miller, 33 Fed. Prac. & Proc. Judicial

Review § 8347 (2d ed.); see also Concentrated Phosphate, 393 U.S. at 203 (distinguishing the voluntary cessation exception from the general mootness standard and explaining that the voluntary cessation standard erects a higher bar to mootness because if a defendant could moot a case by voluntarily ceasing the challenged conduct, “the courts would be compelled to leave ‘[t]he defendant . . . free to return to his old ways’” (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953))). This stringent standard does not apply when mootness is based on a change in circumstances other than voluntary cessation of the challenged conduct. See Laidlaw, 528 U.S. at 214 (Scalia, J., dissenting) (“The required showing that it is ‘absolutely clear’ that the conduct ‘could not reasonably be expected to recur’ is not the threshold showing required for mootness, but the heightened showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of ‘standing set in a time frame.’” (emphasis in original)). Thus, the correct inquiry for our purposes is the typical mootness question: whether “the issues presented are no longer ‘live’ or the parties lack a legally

cognizable interest in the outcome.” DiMartile v. Cuomo, 834 F. App’x 677, 678 (2d Cir. 2021) (quoting Already, 568 U.S. at 91).

Applying this standard, I conclude that the request to enjoin enforcement of the CIAC policy has become moot due to the graduation of Yearwood and Miller, whose participation in girls’ track provided the impetus for this action. There is no indication that Smith and Nicoletti will encounter competition by a transgender student in a CIAC-sponsored event next season. Defendants’ counsel have represented that they know of no transgender student who will be participating in girls’ track at that time.<sup>6</sup> It is still theoretically possible that a transgender student could attempt to do so. Even then, however, a legally cognizable injury to these plaintiffs would depend on a transgender student running in the same events and achieving substantially similar times. Such “speculative contingencies” are insufficient to satisfy the case or controversy requirement of Article III. Hall v. Beals, 396 U.S. 45, 49 (1969); see also Knaust v. City of Kingston, 157 F.3d 86, 88 (2d Cir. 1998) (noting that it will not “suffice to hypothesize the possibility that at some future time, under circumstances that could only be guessed at now, the parties could theoretically become embroiled in a like controversy once again”). As a result, Smith and

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<sup>6</sup> This representation was made during a colloquy with counsel regarding the present motion. See ECF No. 174 at 24-25.

Nicoletti currently lack a legally cognizable interest in seeking to enjoin enforcement of the CIAC policy. See Already, 568 U.S. at 100 (finding moot plaintiff's request for injunctive relief because plaintiff's "only legally cognizable injury . . . is now gone and . . . cannot reasonably be expected to recur"); Cheeseman v. Carey, 623 F.2d 1387, 1392 (2d Cir. 1980) (holding that request for injunction was moot after plaintiffs "received all the relief due them" and that the "issue thus now lacks one of the requisites of a live controversy, namely, a 'real and immediate' threat of injury").

Smith and Nicoletti contend that their challenge to the CIAC policy falls within the exception to the mootness doctrine for a controversy that is capable of repetition while evading judicial review. See United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540 (2018). "A dispute qualifies for [this] exception only 'if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" Id. (quoting Turner v. Rogers, 564 U.S. 431, 439-440 (2011)). To qualify for this "severely circumscribed" exception, Knaust, 157 F.3d at 88, which is available only in "exceptional situations," Spencer, 523 U.S. at 17, a plaintiff must do more than make a "speculative and theoretical assertion" that an injury might

recur. Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ., 397 F.3d 77, 86 (2d Cir. 2005). Rather, a plaintiff must allege that it is “‘reasonable to expect’ and ‘probable’ -- not simply possible -- that the complaining party would again be subjected to the ‘action for which he initially sought relief.’” Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 82 (2d Cir. 1991) (quoting Honig v. Doe, 484 U.S. 305, 318-22 (1988)); see New Jersey Carpenters Health Fund v. Novastar Mortg., Inc., 753 F. App'x 16, 20 (2d Cir. 2018) (explaining that, to fit within this exception to mootness, plaintiffs “must show that these same parties are reasonably likely to find themselves in dispute of the issues raised” (quoting Video Tutorial Servs., Inc. v. MCI Telecomms. Corp., 79 F.3d 3, 6 (2d Cir. 1996) (per curiam))).

Plaintiffs argue that this exception to mootness applies because “[f]irst one, then another, male-bodied athlete has participated in girls’ track competitions under CIAC auspices for each of the last three years,” and “CIAC and the Defendant Schools insist on continuing the Policy that enables this.” ECF No. 154 at 46. As just discussed, however, there is no indication that Smith and Nicoletti will face competition by a transgender student next season. The Second Circuit has repeatedly declined to apply the “capable of repetition” exception when an injury’s recurrence “is not reasonably likely



but, at best, only a theoretical and speculative possibility.” Lillbask, 397 F.3d at 86 (emphasis in original); see Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 121 (2d Cir. 2001) (declining to apply the capable of repetition exception because, although plaintiff’s age and status as a student “mean[t] recurrence [wa]s theoretically possible, that is insufficient to support the requisite ‘reasonable expectation’ of recurrence”); Knaust, 157 F.3d at 88 (holding that exception did not apply because “nothing ha[d] been shown to suggest any ‘reasonable expectation’ that [plaintiff] [would] confront any like situation in the future”); Courshon v. Berkett, 16 F. App’x 57, 63 (2d Cir. 2001) (rejecting exception for claims based on “mere speculation” of recurrence); Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 82–83 (2d Cir. 1991) (holding that, though injury could happen “in the next few years,” it was “not imminent” and “not sufficiently likely to recur”); Armstrong v. Ward, 529 F.2d 1132, 1136 (2d Cir. 1976) (rejecting application of the exception because, although there was “a possibility” the dispute would recur, “such speculative contingencies afford no basis for our passing on the substantive issues [appellees] would have us decide” (quoting Hall, 396 U.S. at 49)).<sup>7</sup>

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<sup>7</sup> Plaintiffs submit that they “have no ability to know what male-bodied athletes may register to compete in girls’ track events in the next season.”

Plaintiffs also fail to show that the injury they complain about, if it did recur, would “evade review.” If it turns out that a transgender student does register to compete in girls’ track next season, Smith and Nicoletti will be able to file a new action under Title IX along with a motion for a preliminary injunction. Plaintiffs have expressed doubt that such a motion could be heard and decided in a timely manner. However, it is reasonable to expect that if Smith and Nicoletti were to allege facts satisfying the traditional requirements for a preliminary injunction, a request for an expedited hearing would be granted.<sup>8</sup> Plaintiffs’ request for an expedited hearing in this case was denied only because of Covid-19 and the ensuing suspension and cancellation of CIAC-sponsored events. Accordingly, I conclude that the request for an injunction enjoining enforcement of the CIAC policy is now moot.<sup>9</sup>

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ECF No. 154 at 38. That may be true. Even so, no case has been cited or found in which mootness was avoided under the “capable of repetition” exception on the seemingly paradoxical ground that the plaintiff had no way of knowing whether the injury would recur.

<sup>8</sup> At the hearing, the plaintiffs would have to show that without a preliminary injunction, they would sustain immediate, irreparable harm -- the showing traditionally required to obtain injunctive relief. See Levin v. Harleston, 966 F.2d 85, 90 (2d Cir. 1992).

<sup>9</sup> Plaintiffs’ request for a declaratory judgment is moot for the same reasons. Declaratory relief is a form of prospective relief that requires a plaintiff to show “a sufficient likelihood that he will again be wronged in a similar way.” Marcavage v. City of New York, 689 F.3d 98, 103 (2d Cir. 2012) (quoting Lyons, 461 U.S. at 111). Because plaintiffs have failed to make such a showing, their claims for declaratory relief must be dismissed. See Preiser v. Newkirk, 422 U.S. 395, 402 (1975) (explaining that, to determine whether a request for declaratory relief has become moot, the question is “whether the facts alleged, under all the circumstances, show that there is a

B.

Defendants next argue that plaintiffs lack standing to seek an injunction requiring changes in the defendants' records. Plaintiffs seek an order requiring the defendants to revise records of races in which Yearwood or Miller competed by eliminating them from the order of finish and moving everyone else up one position. Defendants contend that with regard to this requested relief, plaintiffs fail to satisfy the redressability element of standing, which requires a plaintiff to show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560.<sup>10</sup> Plaintiffs respond that the requested revisions are relevant to their ability to get scholarships and jobs -- scholarships in the case of Smith and Nicoletti, jobs in the case of all the plaintiffs.

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substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (emphasis in original) (quoting Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)); Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) ("A plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future."); Golden v. Zwickler, 394 U.S. 103, 110 (1969) (holding that plaintiff was not entitled to declaratory relief because it was "most unlikely" that his alleged injury would recur and there was thus not a "specific live grievance" or "sufficient immediacy and reality" to warrant the requested relief).

<sup>10</sup> Defendants also dispute the underlying assumption that the races would have resulted in the same order of finish if Yearwood and Miller did not compete. However, as plaintiffs correctly point out, the order of finish is regularly adjusted in this manner when a runner has been disqualified after the completion of a race.

After careful consideration, I conclude that the plaintiffs' theory of redressability is not sufficiently supported to provide any of the plaintiffs with standing. Based on the plaintiffs' detailed submissions, which are accepted as true and construed most favorably to them, it appears that but for the CIAC policy: (1) Chelsea Mitchell would have finished first in four elite events in 2019,<sup>11</sup> and qualified for the 2017 New England Regional Championship in the Women's 100m; (2) Selina Soule would have advanced to the next level of competition in the 2019 CIAC State Open Championship in the Women's Indoor 55m; (3) Ashley Nicoletti would have qualified to run in the 2019 CIAC Class S Women's Outdoor 100m; and (4) Alanna Smith would have finished second in the Women's 200m at the 2019 State Outdoor Open.

Plaintiff's theory of redressability has some cogency in the case of Chelsea Mitchell. Changing the defendants' records could provide her with a basis to list four additional wins on her resume, and those wins might well be of interest to a prospective employer. But it seems inevitable that before making an offer to Mitchell, a prospective employer impressed by her record would learn that she did not actually finish first in

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<sup>11</sup> Specifically, Mitchell would have won the CIAC Outdoor Track, Class S, Women's 100m and 200m; the CIAC Indoor Track, Class S, Women's 55m; and the CIAC Indoor Track, Open, Women's 55m.

the four races. In other words, even with the requested changes, Mitchell's position with regard to her employment prospects would remain essentially the same.<sup>12</sup>

The two cases plaintiffs cite in support of their theory of redressability are readily distinguishable because both involve expungement of erroneous disciplinary action from a student's school record. See Flint v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007); Hatter v. Los Angeles City High Sch. Dist., 452 F.2d 673, 674 (9th Cir. 1971). A student's disciplinary record is always relevant to college recruiters and prospective employers. Here, in contrast, the requested revisions might well have no bearing on Mitchell's employment prospects. At a minimum, gauging the effect of the requested revisions on prospective employers requires guesswork. The Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013); see also ASARCO Inc. v. Kadish, 490 U.S. 605, 614-15 (1989); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 42-43 (1976).

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<sup>12</sup> Plaintiffs' submissions provide no basis to conclude that changing the defendants' records would be relevant to the educational or employment prospects of the other plaintiffs.

C.

The remaining issue is whether plaintiffs' claims for money damages are barred. The Supreme Court has held that monetary relief is available in private suits under Title IX only if the defendant received adequate notice that it could be liable for the conduct at issue. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999). Defendants submit that they did not receive the requisite notice. I agree.<sup>13</sup>

The notice requirement derives from Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), where the Court considered whether a state entity, in accepting federal funds under the Developmentally Disabled Assistance and Bill of Rights Act, agreed to assume the costs of providing disabled persons with appropriate treatment in the least restrictive environment. The "crucial inquiry," the Court stated, was whether Congress had provided "clear notice to the States that they, by accepting funds under the Act, would indeed be obligated" to underwrite the high costs of such treatment. Pennhurst, 451 U.S. at 25.

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<sup>13</sup> Plaintiffs argue that the question of notice should be deferred until a later stage of the case. However, if the plaintiffs' claims for money damages are barred due to lack of adequate notice, the action is subject to dismissal in its entirety because the only remaining form of relief sought in this case -- attorney's fees and expenses -- is "insufficient, standing alone, to sustain jurisdiction." Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993); see also Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990); Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) ("A request for attorney's fees or costs cannot establish standing because those awards are merely a 'byproduct' of a suit that already succeeded . . . .").

Because Congress had failed to provide clear notice, the relief requested by the plaintiff class was unavailable. “Though Congress’ power to legislate under the spending power is broad,” the Court explained, “it does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.” Id.

There can be no doubt that the clear notice required by Pennhurst is lacking here. Title IX broadly prohibits discrimination in educational programs and activities on the basis of sex. See 20 U.S.C. § 1681(a); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) (noting that Title IX is a “broadly written general prohibition on discrimination”). Congress left it to the Department of Education (“ED”) to promulgate specific rules. See 20 U.S.C. § 1682; see also Biediger v. Quinnipiac Univ., 691 F.3d 85, 96 (2d Cir. 2012) (“Congress explicitly delegated to the administering agency ‘the task of prescribing standards for athletic programs under Title IX.’” (quoting McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004))); Catherine Jean Archibald, Transgender Bathroom Rights, 24 Duke J. Gender L. & Pol’y 1, 27–28 (2016) (“States that accept federal funding for education programs [under Title IX] have agreed to prohibit sex discrimination and to allow the Federal Government to make interpretations about what prohibiting sex discrimination

requires.”). Whether the defendants received the requisite notice thus depends primarily on the guidance provided to them by ED. See Davis, 526 U.S. at 647 (guidance issued by ED providing that certain discrimination violates Title IX would have “contribute[d] to [the School] Board’s notice of proscribed misconduct” had it been issued earlier).

Beginning in 2014, ED’s Office of Civil Rights (“OCR”) notified schools that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.” Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014). In 2015, OCR gave notice that “[t]he Department’s Title IX regulations permit schools to provide sex-segregated . . . athletic teams . . . [and] [w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.” Letter from James A. Ferg-Cadima, Acting Deputy Assistant for Policy, U.S. Dep’t of Educ. Office for Civil Rights, to Emily Prince (Jan. 7, 2015). In 2016, OCR went further, stating unequivocally that “transgender students must be allowed to participate in such activities . . . consistent with their gender identity.” Letter from Catherine E. Lhamon, Ass’t Sec.



for Civil Rights, U.S. Dep't of Educ. and Vanita Gupta, Principal Dep. Ass't Attorney for Civil Rights, U.S. Dep't of Justice (May 13, 2016) [hereinafter "2016 Guidance"].<sup>14</sup>

Plaintiffs argue that OCR reversed course when it issued a Dear Colleague letter in 2017. See Letter from Sandra Battle, Acting Ass't Sec. for Civil Rights, U.S. Dep't of Educ. and T.E. Wheeler, II, Acting Ass't Attorney General for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017). The 2017 letter did not provide any new or different guidance, however. Instead, it stated that OCR was rescinding the 2016 Guidance "in order to further and more completely consider the legal issues involved." The letter expressed OCR's belief that it was required to give "due regard for the primary role of the States and local school districts in establishing educational policy." Id. This assurance could reasonably be interpreted by the defendants to mean that OCR would be inclined to defer to local authorities. At a minimum, the letter did not provide clear notice that allowing transgender students to compete in girls' track would violate Title IX.

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<sup>14</sup> These guidance documents are subject to judicial notice because they are public records whose accuracy cannot be questioned. See Porazzo v. Bumble Bee Foods, LLC, 822 F. Supp. 2d 406, 411-12 (S.D.N.Y. 2011) (taking notice of agency guidance documents and other documents); Controlled Air, Inc. v. Barr, No. 3:19-CV-1420 (JBA), 2020 WL 979874, at \*3 n.2 (D. Conn. Feb. 28, 2020), aff'd, 826 F. App'x 121 (2d Cir. 2020) (same).

No further guidance was provided to the defendants until May 2020, several months after this action was brought, when OCR sent them a Letter of Impending Enforcement Action based on a complaint it had received about Yearwood and Miller competing in girls' track. See ECF No. 117-1. In August 2020, a Revised Letter of Impending Enforcement Action was issued to the defendants, informing them for the first time that OCR interpreted Title IX and its implementing regulations to require that sex-specific sports teams be separated based on biological sex. ECF No. 154-2. This letter and the previous letter were withdrawn in February 2021. ECF No. 172-1. In withdrawing the Revised Enforcement Letter, OCR stated that the letter had been "issued without the review required for agency guidance documents" and should therefore "not be relied upon in this or any other matter." Id. at 2.

In light of this history, it is apparent that OCR did not provide the defendants with clear notice that they would be liable for money damages if they permitted Yearwood and Miller to compete in girls' track. See Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 607 (S.D. Ohio 2016) (no liability could be imposed under Title IX in part because "federal regulations and Title IX guidance indicate[d] that [school] was required" to take the actions at issue and "actions taken by [school] to comply with guidance to implement Title IX cannot have been in

violation of Title IX"); Doe v. Columbia Coll. Chicago, 299 F. Supp. 3d 939, 956-57 (N.D. Ill. 2017), aff'd, 933 F.3d 849 (7th Cir. 2019) (same because a 2011 Dear Colleague letter required school's actions); Doe v. Coll. of Wooster, 243 F. Supp. 3d 875, 887 (N.D. Ohio 2017) ("[I]t stands to reason that evidence that a university has endeavored to comply with federal guidance on Title IX cannot support a violation of Title IX."); Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ., 584 F.3d 253, 277 (6th Cir. 2009) (Pennhurst's clear-statement rule was not satisfied in part because "the former Secretary of Education found that [the provision] means the opposite of what the current Secretary claims"); New York v. United States Dep't of Health & Human Servs., 414 F. Supp. 3d 475, 565-71 (S.D.N.Y. 2019) (holding that states were "denied notice" under Pennhurst because they would not have "clearly underst[oo]d" that the term "discrimination" as used in the statute "would be given the meaning" later ascribed to it); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 658 (5th Cir. 1997) (refusing, pursuant to Pennhurst, to "retroactively" bind defendants to ED's later interpretation of Title IX because the government "cannot modify past agreements with recipients by unilaterally issuing guidelines through the Department of Education").<sup>15</sup>

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<sup>15</sup> Plaintiffs cite no case under Title IX, or any other Spending Clause statute, permitting liability to be imposed for conduct that was approved by

In support of their position that the defendants did receive the requisite notice, plaintiffs state that "repeated Supreme Court decisions have put educational institutions 'on notice that they could be subjected to private suits for intentional sex discrimination,' and that this liability 'encompass[es] diverse forms of intentional sex discrimination.'" ECF No. 154 at 45 (quoting Jackson, 544 U.S. at 182-83). Plaintiffs rely on cases involving claims of sexual harassment in violation of Title IX, which are readily distinguishable from the plaintiffs' claims of denial of equal treatment and effective accommodation. See, e.g., Davis, 526 U.S. at 650 (sexual harassment in violation of Title IX requires discrimination "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"); Gebser, 524 U.S. at 290 (under Title IX, a school is liable for sexual harassment only if it had actual knowledge of harassment

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the agency responsible for providing guidance to funding recipients. Such a holding would be at odds with Pennhurst itself. In that case, the Court pointedly observed that the very "governmental agency responsible for the administration of the Act and the agency with which the participating States have the most contact, has never understood [the provision] to impose conditions on participating States." Pennhurst, 451 U.S. at 25. To hold that the states received adequate notice, the Court stated, would therefore "strai[n] credulity." Id. The same is true here. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (noting that the "central concern" for Pennhurst purposes is whether defendants had fair notice); see also Peter J. Smith, Pennhurst, Chevron and the Spending Power, 110 Yale L.J. 1187, 1191 (2001) (noting the "potential unfairness to state recipients" of binding them to an agency's interpretation of terms in a statute "in cases in which the agency reverses its prior view").

and failed adequately to respond); see also Horner v. Kentucky High Sch. Athletic Ass'n, 206 F.3d 685, 693 (6th Cir. 2000) (noting that Franklin, Gebser, and Davis “all address deliberate indifference to sexual harassment and are not readily analogous” to cases alleging discrimination in athletics).

More pertinent to the notice issue presented here is what courts have said about the obligations of states and local school districts to transgender students under Title IX. See, e.g., Jackson, 544 U.S. at 183–84 (holding that defendants were on notice in part because, “importantly, the Courts of Appeals that had considered the question at the time of the conduct at issue in this case all had already interpreted Title IX to cover retaliation”). In its 2016 Guidance, OCR stated that requiring schools to permit transgender students to participate in sex-segregated activities consistent with their gender identity comported with judicial decisions under Title IX. That statement remains accurate. Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. See A.H. v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 552 (M.D. Pa. 2019) (collecting and discussing cases). Every Court of Appeals to consider the issue has so held. See Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020), cert. denied, No. 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020); Doe by & through

Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018); Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); Dodds v. United States Dep't of Educ., 845 F.3d 217 (6th Cir. 2016); G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017).

This unbroken line of authority reinforces the conclusion that the plaintiffs' claims for money damages are barred.<sup>16</sup>

IV.

Accordingly, the motion to dismiss is hereby granted. The Clerk may enter judgment in favor of the defendants dismissing the action.

So ordered this 25th day of April 2021.

/s/ Robert N. Chatigny  
Robert N. Chatigny  
United States District Judge

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<sup>16</sup> In a recent case under Title VII, the Supreme Court observed that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1741 (2020). The parties dispute the significance of Bostock for cases arising under Title IX's prohibition of sex discrimination. But there is no need to get into that dispute now.

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

SELINA SOULE, a minor, by Bianca  
Stanescu, her mother; CHELSEA  
MITCHELL, a minor, by Christina  
Mitchell, her mother; ALANNA SMITH,  
a minor, by Cheryl Radachowsky,  
her mother; ASHLEY NICOLETTI, a  
minor, by Jennifer Nicoletti, her mother,

Plaintiffs

v.

CASE NO. 3:20-cv-00201 (RNC)

CONNECTICUT ASSOCIATION OF  
SCHOOLS d/b/a CONNECTICUT  
INTERSCHOLASTIC ATHLETIC  
CONFERENCE; BLOOMFIELD PUBLIC  
SCHOOLS BOARD OF EDUCATION;  
CROMWELL PUBLIC SCHOOLS  
BOARD OF EDUCATION;  
GLASTONBURY PUBLIC SCHOOLS  
BOARD OF EDUCATION; CANTON  
PUBLIC SCHOOLS BOARD OF  
EDUCATION; DANBURY PUBLIC  
SCHOOLS BOARD OF EDUCATION,

Defendants

and

ANDRAYA YEARWOOD; THANIA  
EDWARDS on behalf of her daughter,  
T.M.; COMMISSION ON HUMAN  
RIGHTS and OPPORTUNITIES,

Intervenor-Defendants.

**JUDGMENT**

This action having come before the Court for consideration of the defendants’  
and intervenor-defendants’ motion to dismiss, before the Honorable Robert N. Chatigny,  
United States District Judge. On February 21, 2020, Andraya Yearwood and Thania

Edwards on behalf of her daughter, T.M., filed a motion to intervene as defendants and on April 22, 2020, the Court granted the motion and Andraya Yearwood and Thania Edwards on behalf of her daughter, T.M., were added as intervenor-defendants in the case. On February 26, 2020, the Commission on Human Rights and Opportunities filed a motion to intervene and on April 22, 2020, the Court granted the motion and the Commission on Human Rights and Opportunities was added as an intervenor-defendant in this case.

The Court having considered the full record of the case including applicable principles of law, and having granted the defendants' and intervenor-defendants' motion to dismiss on April 25, 2021, it is hereby,

ORDERED, ADJUDGED, and DECREED that judgment be and is hereby entered in favor of the defendants dismissing the action.

Dated at Hartford, Connecticut, this 26<sup>th</sup> day of April, 2021.

ROBIN D. TABORA, Clerk

By: /s/ Michael Bozek  
Michael Bozek  
Deputy Clerk

Entered on Docket: 4/26/2021



**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother; ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants,

and

ANDRAYA YEARWOOD; THANIA EDWARDS on behalf of her daughter, T.M.; CONNECTICUT COMMISSION ON HUMAN RIGHTS,

Intervenors.

Case No. 3:20-cv-00201 (RNC)

**NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiffs Selina Soule, Chelsea Mitchell, Alanna Smith, and Ashley Nicoletti, hereby appeal to the United States Court of Appeals for the Second Circuit from the Ruling and Order (Doc. 178) and Judgment

(Doc. 179) granting Defendants' and Intervenors' Motion to Dismiss, entered in this action on April 26, 2021.

Respectfully submitted.

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May 26, 2021