

STATE OF MAINE  
PENOBSCOT, SS.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO.: CV-09-201

JOHN DOE and JANE DOE, as parents \*  
And next friend of Susan Doe, \*

And \*

MAINE HUMAN RIGHTS \*  
COMMISSION \*

Plaintiffs \*

v. \*

KELLY CLENCHY, individually and in \*  
His capacity as the Superintendent of the \*  
Orono School Department, \*

ORONO SCHOOL DEPARTMENT, \*

SCHOOL UNION 87, and \*

REGIONAL SCHOOL UNIT 26, a/k/a \*  
RIVERSIDE REGIONAL SCHOOL UNIT \*

Defendants \*

MEMORANDUM IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

### **INTRODUCTION**

The Maine Human Rights Act (“MHRA”) prohibits discrimination in schools on the basis of “sexual orientation,” which includes a person’s gender identity and, specifically, a transgender identity. 5 M.R.S.A. § 4553-9; 94-348 C.M.R. Ch. 3, § 3.02(C). (2). This case involves a fifth-grade transgender girl, Susan Doe,<sup>1</sup> who was ascribed the sex of male at birth, but has always had a female gender identity. There is no dispute that by fifth grade Susan looked and acted like a typical fifth grade girl and was, according to the school counselor, “living full-time as a female in our school community.” In fact, prior to Susan’s fifth grade year, the school understood that it

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<sup>1</sup> This case has been proceeding with pseudonyms. Susan Doe’s parents are referred to as John and Jane Doe.

was important for a transgender girl's psychological health and educational success to live consistent with her female gender identity. Prior to fifth grade, the school worked with Susan and her parents to integrate her female identity into her daily life -- referring to her by female pronouns, placing her in the girls' section of the chorus, and agreeing to her use of the girls' restroom in third and fourth grade. The school determined that for Susan's fifth-grade year it was the "best practice" for her to use the shared girls' restroom and that it was not possible for her as a transgender girl to use the boys' restroom. This went smoothly until a male student violated the school's anti-harassment policy by twice disrupting Susan's use of the girls' restroom. The school abruptly terminated Susan's use of the girls' restroom and required that she use a separate staff-only restroom.

Susan now moves for summary judgment on Counts I and II of the Amended Complaint which assert claims for discrimination in education (Count I) and public accommodations (Count II) based on her exclusion from the girls' restroom. This Court should grant summary judgment for Susan because the plain meaning of the MHRA's sexual orientation provisions require that a transgender girl who has lived as and been accepted as a girl be afforded the same access to the school's accommodations and facilities as other girls.

### **STATEMENT OF FACTS**

#### **I. Susan Doe is a Transgender Girl.**

Plaintiff Susan Doe<sup>2</sup> is a transgender girl. Facts 1.<sup>3</sup> This means that although assigned the sex of male at birth, she has always had a female gender identity. Facts 2. Most people have an internal gender identity that matches their assigned sex at birth, but for a transgender person this

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<sup>2</sup> Susan Doe was given a male name at birth which she has not used since fourth grade. In this memorandum, she is referred to using female pronouns which reflect her life experience.

<sup>3</sup> References to "Facts" are to Plaintiffs' Statement of Undisputed Material Facts, followed by the corresponding paragraph numbers in that document.

is not the case. Facts 36, 38. In order to harmonize the inconsistency between a transgender girls' birth sex and gender identity, the course of care is to live consistent with her gender identity -- that is, to live fully as a female. Facts 35, 45, 48.

Susan Doe's female identity was manifest from a very young age. Facts 3-7. Her parents recount that she frequently wore a shirt or towel on her head to create the feeling of long hair, wore tutus, played with Barbie dolls, and by age four referred to herself as a "girl-boy" or a "boy-girl." Facts 4-6. She expressed disgust for her penis and asked when she would be rid of it. Facts 7.

When Susan entered Asa Adams Elementary School in first grade, she carried a Kim Possible lunchbox and wore pink shoes and a pink backpack. Facts 9-12. In first and second grades, she wore gender-neutral clothes, with the occasional "sparkling shirt," but would come home and immediately put on a dress and heels. Facts 12-13. The School Counselor, Lisa Erhardt, indicated that in third grade "[Susan] pretty much live[d] completely as a female," wearing female clothes and growing her hair long. Facts 14-15. At that time, Susan's friends began referring to her as "she." Facts 16. Teachers and other students easily accepted the use of the female pronoun and began using it as well. Facts 16. The school principal understood, by third grade, that Susan was transgender. Fact 17.

The school acknowledged that by fourth grade Susan was developing socially as a female. Facts 24. She could typically be found with "a bunch of girls that became kind of her cadre of friends." Facts 26. Ms. Erhardt worked cooperatively with Susan's parents to help her live consistent with her female identity. Facts 19. Susan, for example, was placed in the girls' section of the school choir. Facts 20. With the agreement and support of school staff, Susan used the girls' restroom at Asa Adams in third and fourth grades. Facts 21. Other students were

comfortable with Susan's use of the girls' restrooms. Facts 22. In fact, they were protective of her. Facts 27.

In fourth and fifth grades, Susan began wearing skirts, dresses, female-style bracelets, barrettes in her hair and nail polish. Facts 23. She had shoulder-length hair. Facts 23. Photographs of Susan in third, fourth and fifth grades show that Susan was indistinguishable from her female peers. Affidavit of Jane Doe, Exhibits A, B and C.

## **II. Living Consistent with Her Female Gender Identity at School was Critical to Susan's Educational Success.**

In Spring 2007, towards the end of Susan's fourth-grade year, the school implemented an educational plan to address Susan's diagnosis of gender dysphoria, a term that refers to the chronic suffering that results from having a gender identity that is different from one's assigned sex at birth. Facts 34, 40, 53-55, 57-72.<sup>4</sup> School personnel agreed that living consistent with one's gender identity is important to psychological health and social and educational development. Facts 35. As such, the school acknowledged that adequately addressing Susan's gender dysphoria was important to her ability to succeed in school. Facts 56.

The standard course of care to alleviate the distress associated with gender dysphoria in children is called social role transition. Facts 45. The therapeutic goal of social role transition is to support a person living as fully female in her environment. Facts 48. It requires the child's full integration into society as a female. Facts 48. Access to the restroom consistent with one's gender identity is central to social role transition "because accessing the girls' room is what girls

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<sup>4</sup> Related to gender dysphoria, Gender Identity Disorder (GID) is the diagnostic term for such condition listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) published by the American Psychiatric Association and the International Classification of Diseases. Facts 39. Although the school used the term "gender dysphoria," it is undisputed that by January 2007, Susan met the diagnostic criteria for both GID and gender dysphoria. Facts 43. If untreated, GID and gender dysphoria can cause debilitating psychological harm. Facts 42.

do.” Facts 51; Affidavit of Randi Ettner, Ph.D., ¶ 16. Moreover, because restrooms are such visible gender identifiers in our society, denying a transgender girl admission to the restroom labeled “girls” communicates publicly that she is not female. This denial interferes with social role transition and the psychological integration of one’s gender identity. Facts 52. Social role transition cannot succeed if a transgender girl is told that she can be female in one situation but not another. Facts 49-50.

A team consisting of teachers, Director of Special Services Sharon Brady, School Counselor Lisa Erhardt, and Susan’s mother, Jane Doe, met in March 2007 to develop Susan’s educational plan, called a “504 Plan.” Susan had completed social role transition prior to her fifth-grade year after a long progression over years of her childhood in which she integrated her female gender identity into her daily life, including at school. Facts 47. As such, being viewed and accepted by her peers as a girl and treated by school personnel as a girl were essential to her psychological health. Facts 61. The 504 team determined that it was important for Susan to be referred to by her female name and using female pronouns. Facts 57-58. In fact, the team agreed that using a male name would have harmed Susan. Facts 60. The team also reached a consensus that Susan’s use of the shared girls’ restroom was the “best practice” for a transgender girl like Susan and important to her educational success. Facts 65-67. Everybody at the 504 meeting agreed that the boys’ restroom would not be appropriate for Susan. Facts 71.<sup>5</sup>

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<sup>5</sup> The 504 Plan, Exhibit M to the Exhibits to Plaintiffs’ Statement of Undisputed Material Facts, states: “Accommodations for [Susan] to use female restrooms/staff bathrooms.” This reference meant that Susan would use the girls’ restroom unless it became evident that Susan was uncomfortable doing so, or other female students expressed concerns. In such a circumstance, the 504 team would reconvene to revisit the issue. Facts 72. For the reasons stated in the Argument section, *infra*, discussions and any alleged agreement about Susan’s use of the staff restroom are immaterial because the sexual orientation provisions of the MHRA prohibit both the exclusion of a transgender girl from the girls restroom as well as the segregation of that student into a staff-only restroom that no other students used.

### **III. The School Rescinded Susan's Access to the Girls' Restroom and Required That She Use a Separate Staff-only Restroom.**

Susan began her fifth-grade year in September, 2007. Facts 73. Her use of the girls' restroom went smoothly until a male student followed her into the restroom on September 28 and called her a fag and again disrupted her use of the girls' restroom on October 3. Facts 74. The male student entered the restroom at the instigation of his grandfather, his guardian, who told him that Susan was really a boy and shouldn't be allowed to use the female restroom. Facts 75. The male student's grandfather urged him to enter the girls' restroom because he disagreed with the sexual orientation anti-discrimination law and told his grandson that if Susan could use the restroom as a boy, then the male student could use that restroom as well. Facts 75. The grandfather had a political or religious objection to the sexual orientation nondiscrimination law. Facts 75. The male student's conduct was a violation of serious school policies. Facts 116-118. No other students expressed discomfort with or objected to Susan's use of the girls' restroom. Facts 76-77.

After the two incidents in which the male student followed Susan into the girls' restroom, the school terminated her use of the girls' restroom over Susan's and her parents' objections. Facts 79. The school required that Susan use a separate staff restroom in the fifth grade wing. Facts 79.<sup>6</sup> No student other than Susan Doe used the staff restroom in Susan's fifth-grade year;

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<sup>6</sup> Notably, there has never been a situation at Asa Adams in which a case of bullying or harassment was resolved by restricting the victim's access to any particular location. Facts 114. Nor has there ever been a situation at Asa Adams in which a student who was not misbehaving in a restroom was prohibited from using that restroom. Facts 113. The school, in fact, responded to the disruption of Susan Doe's use of the restroom differently than it acknowledges it would have responded to other similar disruptions. Facts 120-141. Asa Adams Acting Principal Robert Lucy did not increase the consequence for the male student's harassment of Susan Doe after the second occurrence, as Orono School Department Superintendent Kelly Clenchy testified he should have. Facts 120-128. Moreover, Superintendent Clenchy testified at his deposition that student harassment should not be resolved by placing the victim in another setting or otherwise

all other fifth-grade students used either the shared girls' restroom or the shared boys' restroom. Facts 81-82. The school continued to exclude Susan from the girls' restroom and forced her to use a separate restroom during her sixth grade year at Orono Middle School. Facts 142-148.<sup>7</sup> A photograph of Susan in sixth grade is attached as Exhibit D to the Affidavit of Jane Doe.

At the time that the school terminated Susan's use of the girls' restroom, Susan "was living full-time as a female in [the] school environment." Facts 29. The School Counselor, Director of Special Services, Principal, Acting Principal, and Susan's fifth grade teacher all testified that Susan looked and acted like a typical fifth grade girl. Facts 28-32. In fact, transgender children who undergo social role transition prior to puberty appear indistinguishable from their peers with the same gender identity who are not transgender. Facts 46.

It is therefore unsurprising that everyone involved agreed that Susan could not use the boys' restroom in fifth or sixth grades. Facts 107-112. School counselor Erhardt states that "it wasn't feasible for [Susan] to use the boys' [room] -- we would never -- that was never a consideration ... in the entire time she was there." Facts 108. Asa Adams Principal Sue O'Roak did not think it was safe for Susan to use the boys' restroom. Facts 109. Sharon Brady, the Director of Special Services, testified that any consideration of Susan using the boys' restroom

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taking away a privilege or right from the student who was harassed. Facts 129-141. Superintendent Clenchy reasoned that in such cases, the victim of the harassment did not do anything wrong and the school is obligated to stop the harassing behavior and teach tolerance and respect for other students. Facts 130-133, 134-138, 139-140.

<sup>7</sup> The defendants responsible for the schools' decisions are: 1) the Orono School Department, which operated the Asa Adams Elementary School and Orono Middle School (the "schools") until June 2009. Facts 144; 2) School Union 87, which administered the schools through June 2009. Facts 145; 3) Regional School Unit 26/Riverside Regional School Unit, which succeeded the Orono School Department and School Union 87, and conducted business for the schools after July 1, 2009. Facts 146; and 4) Kelly Clenchy, who was Superintendent and had oversight for all schools in Orono from October 2004 through June 2010. Facts 147. Defendant Clenchy specifically denied John and Jane Doe's request that Susan be permitted to use the girls' restrooms. Facts 80.

“was just a moot point, not even something that anyone wanted to consider.” Facts 110, 111 (repeating the identical conclusion for Susan’s sixth grade year).

The school’s exclusion of Susan Doe from the girls’ restroom and her segregation in a staff-only restroom was detrimental to her social role transition, psychological health and educational development. Facts 81-106. It caused Susan to feel isolated and abnormal. Facts 84-86. Her mother wrote to the school days after Susan’s exclusion from the restroom describing Susan’s feelings of “depression, lack of self-worth, and as she put it, freak-ness.” Facts 87. The school acknowledged that important social development occurs in the shared girls’ restroom and that Susan’s educational experience was changed because she was no longer part of it. Facts 88-89. During early adolescence, a sense of belonging and conforming with the peer group is critical to psychological development, including through group socialization and bonding in the girls’ restroom. Facts 90-94. The school’s abrupt exclusion of Susan from the girls’ restroom deprived her of that critical early adolescent experience and additionally was detrimental to the psychological integration of her female gender identity, especially because she had already been accepted as a female in the school community. Facts 95-101. For these reasons, a separate restroom is never appropriate for an individual with Susan’s gender history as of September 2007. Facts 105.

## **ARGUMENT**

### **I. THIS COURT SHOULD GRANT SUMMARY JUDGMENT FOR SUSAN DOE ON COUNTS I AND II OF THE AMENDED COMPLAINT FOR SEXUAL ORIENTATION DISCRIMINATION.**

#### **A. Standard of Review**

This Court must grant summary judgment for Susan Doe if (1) there is no genuine issue as to any material fact, and (2) she is entitled to judgment as a matter of law. M.R.Civ.P.56(c);

see also Dyer v. Me. Drilling and Blasting, Inc., 2009 ME 126, ¶14, 984 A.2d 210, 214. The court must also “examine the facts in the light most favorable to the nonmoving part.” Lightfoot v. School Administration Dist. No. 35, 2003 ME 24, ¶6, 816 A.2d 63, 65 (internal citation omitted). Taking the facts in the light most favorable to the defendants, it is undisputed that Susan Doe was “living full-time as a female in [the] school environment,” Facts 29, but was excluded from the girls’ restroom that every other girl at Asa Adams Elementary School used and forced to use a separate staff-only restroom because she is transgender. Facts 79, 81-82. Because this exclusion violates the clear meaning and intent of the MHRA, Susan Doe is entitled to judgment as a matter of law.

**B. The MHRA Protects the Rights of Transgender Individuals to Live Consistent with Their Gender Identity in All Aspects of Their Lives.**

The MHRA prohibits discrimination on the basis of sexual orientation in educational institutions and public accommodations. See 5 M.R.S.A. §§ 4601 & 4602, and 5 M.R.S.A. §§ 4591 & 4592. Specifically, it is unlawful education discrimination on the basis of sexual orientation to:

[e]xclude a person from participation in, deny a person the benefits of, or subject a person to, discrimination in any academic, extracurricular, research, occupational training or other program or activity.

5 M.R.S.A. § 4602(4)(a).<sup>8</sup>

Similarly, it is unlawful for:

any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse,

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<sup>8</sup> Under 5 M.R.S.A. § 4601, “[t]he opportunity for an individual at an educational institution to participate in all educational, counseling and vocational guidance programs and all apprenticeship and on-the-job training programs without discrimination because of...sexual orientation...is recognized and declared to be a civil right.”

discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of...sexual orientation...any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services or privileges may depend.

5 M.R.S.A. § 4592.<sup>9</sup> This broad language plainly requires the full integration of individuals in protected classes into the mainstream life of a school.<sup>10</sup> The term “discriminate” includes “without limitation, segregate or separate.” 5 M.R.S.A. § 4553(2). The statute prohibits segregation or separation or the denial of “the full and equal enjoyment” of a school’s “accommodations,” “facilities,” or “privileges” either “directly or indirectly” and “in any manner.” 5 M.R.S.A. § 4592.

A person’s sexual orientation includes a person’s “gender identity or expression.” 5 M.R.S.A. § 4553(9-C). By its plain meaning and the reasonable interpretation of the Maine Human Rights Commission (“MHRC”), “gender identity” means “an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with that individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.” 94-348 C.M.R. Ch. 3, § 3.02(C)(2).<sup>11</sup> Accordingly, the MHRA prohibits discrimination because a person’s gender identity does not match his or her assigned

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<sup>9</sup> Under 5 M.R.S.A. § 4591 “[t]he opportunity for every individual to have equal access to places of public accommodation without discrimination because of...sexual orientation...is recognized as and declared to be a civil right.”

<sup>10</sup> A place of public accommodation includes an “elementary” or “secondary” school. 5 M.R.S.A. § 4553(8)(J).

<sup>11</sup> The Commission’s reasonable interpretation is entitled to “great deference.” See S.D. Warren Co. v. Bd. of Environmental Protection, 2005 ME 27 ¶7, 868 A.2d 210, 214; Maritime Energy v. Fund Ins. Review Bd., 2001 ME 45, ¶7, 767 A.2d 812, 814; Freeman v. Realty Resources Hospitality, LLC, Decision at 2 n.1 (May 27, 2010 Androscoggin Sup. Ct.) (finding the MHRC’s interpretation of the term “sexual orientation” “helpful in determining who is protected under the MHRA”), attached as Exhibit A.

sex at birth. The fact that the MHRC's regulations specifically include a "transgender" gender identity within the phrase "gender identity" further supports the understanding that the MHRA prohibits separation or segregation in school of individuals whose gender identity does not match their assigned sex at birth. As such, the MHRA also prohibits discrimination because a person's gender identity does not match his or her anatomy, which is the basis on which sex is assigned at birth.

Susan Doe is the quintessential person whom the legislature intended to integrate seamlessly into school life without regard to the fact that her gender identity is not consistent with her assigned sex at birth. The evidence demonstrates that she was assigned the sex of male at birth, but has a female gender identity which was manifest from a very young age. Facts 1-2. Teachers, counselors and administrators without exception agree that Susan lived as and was treated by both school personnel and her peers as a typical female student. Facts 14-32. Prior to the events giving rise to this case, Susan "pretty much live[d] completely as a female at the school" (Facts 15) -- being referred to by female pronouns, wearing skirts, dresses, hair barrettes and nail polish, using the girls' restroom starting in third grade, and singing in the girls' section of the choir. Facts 16-28. Teachers and students alike accepted Susan as a girl. Facts 16, 19-22, 26-27. By fifth grade Susan was "living full-time as a female in the school environment." Facts 29. Susan was indistinguishable from other fifth grade girls. *See* photographs attached as Exhibits A-C to the Affidavit of Jane Doe and Facts 46. The school understood that the integration of Susan's female gender identity into the life of the school was critical to her educational development and success. Facts 35 and 56. For that reason, the school not only affirmed Susan's female identity and social role, but also implemented an educational plan for fifth grade that mandated the use of female pronouns and a female name and provided for her to

use the shared girls' restroom because it was important to her educational success and "the best practice" for someone with her gender history. Facts 53-67.

In fifth grade, after years of Susan's successful integration into the school environment as a female, the school suddenly reversed Susan's course after one male student twice followed Susan into the girls' restroom. Facts 74. The school barred her from the girls' restroom and forced her to use a staff-only restroom. Facts 79. Susan was separated, plucked from her peer group, stigmatized, and deprived of the normal socialization that takes place in the girls' restroom that both the school and plaintiffs' expert agree is an important component of a student's psychological and educational development. Facts 84-104. The school's actions communicated to Susan and the entire community that Susan was not a normal fifth grade girl.

If the "gender identity" provisions of the MHRA for educational settings are to have any meaning, they must at the very least mean that somebody who has lived as and been accepted at school as a girl must be afforded the opportunity to participate in school as every other girl does. And to accomplish that goal, the public accommodation and education provisions of the MHRA include one of most basic yet essential requirements for every person -- and every student -- to function in daily life: equal access to restroom facilities, meaning access to the restroom that matches a person's gender identity. Abruptly terminating Susan's access to the girls' restroom and forcing her to use an alternative staff restroom in response to another student's misconduct (a boy walking into the girls' restroom) violates the MHRA in the most basic and direct way.

**C. The MHRA's Guarantees of Equal Opportunity and Freedom from Discrimination for Transgender Students Include Access to Restrooms Consistent with One's Gender Identity.**

There is no basis to exempt access to restrooms from the education or public accommodation provisions of the MHRA. There is no language in the statutes supporting such

an exemption and the legislature has repeatedly rejected efforts by those who oppose equal access to create one.

**1. The Maine Legislature Has Three Times Rejected Attempts to Amend the MHRA’s Sexual Orientation Protections in a Way That Would Have Permitted the Restriction of Restrooms to Members of a Biological Sex.**

The legislative history of the sexual orientation law compels the conclusion that it includes access to a restroom consistent with one’s gender identity. The legislature has three times rejected the argument that the defendants will make to this Court.

Most recently, in 2011, LD 1046 ("An Act To Amend the Application of the Maine Human Rights Act Regarding Public Accommodations"), which was introduced after the Court’s ruling on the motion to dismiss in this case, would have exempted public and private entities which restricted restroom or shower facilities to members of a biological sex regardless of sexual orientation from the provisions of the MHRA pertaining to public accommodations discrimination. The bill language provided:

It is not unlawful public accommodations discrimination, in violation of this Act, for a public or private entity to restrict rest room or shower facilities that are part of a public accommodation to the use of single-sex facilities to members of a biological sex regardless of sexual orientation. Unless otherwise indicated, a rest room or shower facility designated for one biological sex is presumed to be restricted to that biological sex.<sup>12</sup>

The Judiciary Committee voted the bill “ought not to pass” by a margin of 8-5.<sup>13</sup> The bill left the committee with an attached Minority Report which amended the language of the bill.<sup>14</sup> The

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<sup>12</sup> LD 1046, 125th Leg., 1st Reg. Sess., (Me. 2011). The bill and relevant parts of the legislative history have been attached as Exhibit B for the convenience of the Court.

<sup>13</sup> LD 1046 Judiciary Committee Voting Sheet, Exhibit B.

<sup>14</sup> The amendment provided: “It is not unlawful public accommodations discrimination, in violation of this Act, for a public or private entity to restrict access to a rest room, locker room, shower facility or bathroom in a way that takes into account the legitimate privacy concerns of

House voted down the Minority Report, rejecting the amended version of the bill, 81-61, and the Senate voted it down 23-11.<sup>15</sup>

In 2007, a similar amendment was introduced and was also rejected. LD 1589 (“An Act to Prohibit the Use of Opposite-gender Bathrooms, Changing Rooms and Locker Rooms”) stated:

[A] person may not use a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth. If a person completely undergoes a medical procedure in which that person’s gender is changed, that person must use a public locker room, changing room or bathroom facility designated for use by the person’s new gender. A violation of this subsection is a Class E crime.”<sup>16</sup>

The Joint Standing Committee on Criminal Justice & Public Safety unanimously recommended that the bill “ought not to pass.”<sup>17</sup>

In 2005, legislators considered a proposed amendment to the bill that ultimately added sexual orientation to Maine’s non-discrimination laws. The amendment, House Amendment “E” (H-86), would have provided that the Maine Human Rights Act “may not be construed to permit a person to use a locker room or bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth [unless] the person has [undergone] a medical

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all members of a biological sex regardless of sexual orientation.” H-452, 125th Leg., 1st Reg. Sess., (Me. 2011), Exhibit B.

<sup>15</sup> Roll-calls for LD 1046, 125th Leg., 1st Reg. Sess. (Me 2011), Exhibit B.

<sup>16</sup> LD 1589, 123rd Leg., 1st Reg Sess., (Me. 2007). Relevant parts of the legislative history have been attached as Exhibit C for the convenience of the Court.

<sup>17</sup> LD 1589 Voting Tally Sheet, Exhibit C.

procedure in which that person's gender is changed..."<sup>18</sup> The full House of Representatives soundly rejected the proposed amendment by a vote of 83-67.<sup>19</sup>

This Court should not create an exemption that the Legislature has rejected three times. See Harding v. Wal-Mart Stores, Inc., 2001 ME 13, ¶¶ 14-16, 765 A.2d 73, 76 (declining to supply exemption "not expressly contained in the language of the statute"; "[i]t is not our role to second guess the legislature").

**2. A Regulation Permitting Separate Girls' and Boys' Restrooms in Schools Does Not Address the Issue in This Case nor Obviate the Legislature's More Recent Mandate for Restroom Access Consistent with One's Gender Identity.**

Defendants will likely assert that the exclusion of Susan Doe from the girls' restroom in fifth and sixth grades, and her isolation in a staff restroom, is justified by a regulation of the Maine Human Rights Commission and the Department of Education promulgated in 1994 that exempts a school from sex discrimination liability if it "provide[s] separate toilet, locker room, and shower facilities on the basis of sex." 94-348 C.M.R. Ch. 4, § 4.13. Nobody in this case challenges that a school may have separate restrooms for boys and girls. This regulation, however, simply does not address the question before this Court: Given that a school has separate boys' and girls' restrooms, when a student has a female gender identity and lives completely as a female in the school environment, which of those restrooms is the student entitled to use? The answer to that question is found not in the regulation, but in a statute -- the sexual orientation provisions of Maine's antidiscrimination law -- which requires equal access to

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<sup>18</sup> H-86, 122nd Leg., 1st Reg. Sess. (Me. 2005). Relevant parts of the legislative history have been attached as Exhibit D for the convenience of the Court.

<sup>19</sup> Roll-calls and Actions for LD 1196, 122nd Leg., 1st Reg. Sess. (Me. 2005), Exhibit D.

a school's facilities for individuals whose gender identity is different from their ascribed sex at birth.

The restroom regulation provides no safe harbor for the school in this case. While the regulation permits separate restrooms based on sex, there is nothing in the regulation that contemplates or permits the exclusion of a student from *both* the boys' restroom and the girls' restroom.<sup>20</sup> In this case, there is no dispute that Susan Doe was not afforded the use of either the girls' or the boys' restroom. Facts 107-112.<sup>21</sup> In Susan Doe's fifth and sixth-grade years, there were multiple meetings among teachers, guidance and special education staff, and Susan Doe's parents, addressing which restroom Susan could use. School personnel described the option of using the boys' restroom as not "feasible," "never a consideration," unsafe, and "just a moot point, not even something that anyone wanted to consider." Facts 108-112.<sup>22</sup> This testimony is hardly surprising: nobody would permit a student who was "living completely as a female in [the] school environment," Facts 29, and presented and acted like typical fifth grade girl to use the boys' restroom.

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<sup>20</sup> The regulation no more permits such a total exclusion from the restrooms that all other students use than it permits a school to ban a student from both the boys' and girls' chorus under the section permitting "choruses of one sex." 94-348 C.M.R. Ch. 4, § 4.10. In fact, the school placed Susan in the girls' section of the chorus and never contemplated that she be barred from the chorus that all students participate in at Asa Adams. Facts 20.

<sup>21</sup> See Argument § D, *infra*, for plaintiffs' argument that the exclusion of Susan Doe from both the boys' and girls' restroom and her relegation to a staff-only restroom is illegal segregation and separation.

<sup>22</sup> As this Court noted in its Decision on Defendants' Motion to Dismiss, "[t]here is no record evidence to suggest—beyond that which possibly exists outside the parameters of the Complaint—that Superintendent Clenchy, or any other school administrative official acting on behalf of Asa Adams Elementary, permitted Susan to use the boys' bathroom facilities while attending school." Decision on Defendants' Motion to Dismiss at 5 fn.2, John and Jane Doe, et al. v. Kelly Clenchy, et al. (April 1, 2011 Penobscot Sup. Ct.). Discovery has borne out that use of the boys' restroom by Susan Doe was not an option.

The education regulation was clearly promulgated to address concerns that sex discrimination laws might be interpreted to invalidate any separate settings for boys and girls. But the regulation cannot be read to negate a later-enacted statute which requires that transgender girls be treated like girls. And it certainly does not excuse treating a transgender girl as neither a girl nor a boy.

**D. Defendants' Exclusion of Susan From the Girls' Restroom and the Requirement That She Use a Separate Staff Restroom is Sexual Orientation Discrimination.**

The undisputed facts demonstrate that the exclusion of Susan Doe from the girls' restroom directly violated the MHRA.<sup>23</sup> Under the public accommodation and education nondiscrimination statutes, Susan Doe must show that she was separated or segregated with respect to her restroom use, or denied the full and equal use of the school's restroom facilities, on account of being transgender. Viewing the evidence in the light most favorable to the non-movant, Lightfoot, 816 A.2d at 65, there is no dispute that after the male student twice disrupted Susan Doe's use of the restroom, the defendants barred Susan from the using the girls' restroom and required that she use a separate staff restroom that no other students used. It is also undisputed that Susan was excluded from the girls' restroom and forced to use a separate staff restroom because she has a gender identity that is different than her ascribed sex at birth (i.e., she is transgender).<sup>24</sup>

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<sup>23</sup> In order to succeed on a claim of disparate treatment discrimination, a plaintiff must show that she was discriminated against because of a protected characteristic. See Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 153 (1st Cir. 1990); Maine Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1263 (Me. 1979).

<sup>24</sup> The school may assert that Susan Doe's educational plan contained a provision for moving Susan Doe from the girls' restroom to a staff restroom under certain circumstances. Because the law's provision for equal treatment requires that Susan Doe be granted access to the girls' restroom, and not segregated as the sole student using the staff restroom, such an assertion is immaterial for purposes of this motion. Further, the 504 team agreed that the girls' restroom was

The undisputed facts here are particularly striking in light of the express prohibition of separation and segregation. 5 M.R.S.A. § 4553(2). The legislative determination that separation and segregation are per se illegal codifies one of our nation’s most fundamental legal principles: separation and segregation are inherently harmful. See Brown v. Board of Education, 347 U.S. 483, 493-494 (1954). As one court articulated, Brown recognized “that the circumstances under which a child is educated can and do impart to children social messages of their claims to equality and self-respect.” State v. Newstrom, 371 N.W.2d 525, 532 (Minn. 1985).<sup>25</sup>

Although Susan Doe does not have the burden to establish harm resulting from her exclusion from the female restroom,<sup>26</sup> the facts amply demonstrate it in this case. Susan was quite literally painted as neither a girl nor a boy, but “other.” Susan felt isolated and abnormal as a result of the school’s abrupt termination of her access to the girls’ restroom, and, as her mother described, expressed feeling like she was a freak. Facts 84-87. The school’s exclusion of her from the girls’ restroom undermined one of the most critical factors in healthy preadolescent social and emotional development: the feeling of conforming and belonging to the group. Facts 90-94. The school acknowledged that “[d]evelopmentally fifth graders, there’s a lot of socializing that happens in the shared restroom facilities,” and that denying Susan access to the girls’ restroom “changed her experience in school...[b]ecause she wasn’t part of the socializing

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the “best practice” for Susan’s educational success; as such, any deviation from that practice would subject Susan to discrimination and unequal treatment in her academic setting.

<sup>25</sup> That equal opportunity is interrupted by separation is deeply ingrained in our law. See, e.g., Maine Human Rights Commission v. City of South Portland, 508 A.2d 948, 956 (Me. 1986) (the creation of a separate paratransit system does not relieve the city of its obligation to avoid discriminatory exclusion from the fixed route bus system); Evening Sentinel v. National Organization For Women, 168 Conn. 26, 29-35, 357 A.2d 498, 501-504 (Conn. 1975) (striking down system of sex-segregated classified employment listings and declaring that “there can be no such thing as separate but equal”).

<sup>26</sup> See 5 M.R.S.A. § 4553(2) (defining discrimination as including segregation or separation).

stuff in the bathroom.” Facts 88-89.<sup>27</sup> Most importantly, the school’s exclusion of Susan from the girls’ restroom and her relegation to the staff restroom were detrimental to Susan’s social role transition to female. Facts 50, 52, 99-100. The MHRA’s prohibitions on unequal treatment and segregation in schools were intended to eliminate these harmful consequences of discrimination.

### **CONCLUSION**

In the end, this case calls for the court to enforce the legislature’s determination that transgender students be treated like every other student in school. The plain language of the statute and the legislature’s rejection three times of the position asserted by the defendants compel this Court to conclude that Defendants should not have terminated Susan Doe’s access to the girls’ restroom. For the foregoing reasons, the plaintiffs respectfully request that the Court enter summary judgment for them and against Defendants Kelly Clenchy, individually and in his capacity as the Superintendent of the Orono School Department; the Orono School Department; School Union 87; and Regional School Unit 26 a/k/a Riverside Regional School Unit, on Counts I and II of the Amended Complaint.

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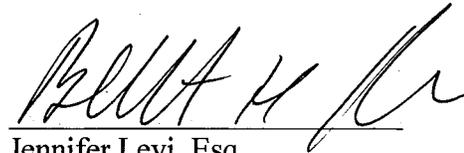
<sup>27</sup> Courts have also recognized the critical role of social development in education. See, e.g., Board of Education of City of Plainfield v. Cooperman, 209 N.J. Super. 174, 214-215, 507 A.2d 253, 275-276 (N.J. Super. 1986) (in case involving exclusion of child with AIDS from classroom, court noted that the “socialization process” and opportunity to “interact in a social way with one’s peers” is a major goal of the educational process; child must be placed “in as normal [an] environment as possible...to learn to interact in a social way with [his] peers”); Plyler v. Doe, 457 U.S. 202, 222 (1982) (noting education’s impact on the “social...intellectual and psychological well being” of the child).

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Respectfully Submitted,

  
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