MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. PEN-12-582

JOHN DOE and JANE DOE, as parents and next friend of SUSAN DOE, *and*

MAINE HUMAN RIGHTS COMMISSION

Appellants,

v.

KELLY CLENCHY, *et al.*

Appellees.

ON APPEAL FROM THE PENOBSCOT COUNTY SUPERIOR COURT

BRIEF OF APPELLANTS JOHN AND JANE DOE AS PARENTS AND NEXT FRIEND OF SUSAN DOE

Jennifer Levi
Bennett H. Klein
Admitted *pro hac vice*
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108
(617) 426-1350

Jodi L. Nofsinger
Bar No. 8373
Berman & Simmons, P. A.
P.O. Box 961
Lewiston, ME 04243-0961
(207) 784-3576

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

STATEMENT OF THE ISSUES FOR REVIEW 12

SUMMARY OF THE ARGUMENT 13

ARGUMENT 16

I. STANDARD OF REVIEW. 16

II. THE EXCLUSION OF SUSAN DOE FROM THE GIRLS' RESTROOM BECAUSE SHE IS A TRANSGENDER GIRL VIOLATES THE MHRA AS A MATTER OF LAW. 17

A. The Plain Language of the MHRA Requires the Integration of Transgender Students into Every Sphere of School Life—Including Restrooms—Consistent With Their Gender Identity. 17

B. 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. 22

C. The Clear Application of the MHRA's Gender Identity Nondiscrimination Provisions Is Not Diminished by a Regulation Regarding the Maintenance of Sex-Designated Restrooms in Schools. 24

1. The Purposes of Both the MHRA and § 4.13 Are Fulfilled by Permitting Transgender Girls to Use the Restroom Designated for Girls. 26

2. The Proper Harmonization of the MHRA and § 4.13 is Consistent With the Sex Discrimination Jurisprudence of This Court and the Federal Courts That the Term "Sex" Does Not Mean Narrowly "Biological Sex." 28

3. The Superior Court's Interpretation Should Be Rejected

Because it Creates Absurd and Illogical Results. 35

D. *Goins v. West Group* Is Distinguishable and Out of Step With the Views of More Recent Jurisdictions Passing Gender Identity Nondiscrimination Laws. 36

III. THE UNDISPUTED FACTS ESTABLISH THAT THE SCHOOL UNLAWFULLY SEPARATED AND SEGREGATED SUSAN IN VIOLATION OF THE MHRA BECAUSE HER EXCLUSION FROM THE GIRLS' RESTROOM INEVITABLY PREVENTED HER FROM USING ANY COMMUNAL USE BATHROOM. 40

A. The MHRA Prohibits Segregation or Separation of Students on the Basis of Gender Identity "Directly or Indirectly" or "in any Manner." 41

B. The Undisputed Facts Demonstrate That the School Knew That It Was Impossible for Susan to Use the Boys' Restroom. 42

CONCLUSION 44

CERTIFICATE OF CERVICE 46

TABLE OF AUTHORITIES

CASES

Abbott v. LaCourse,

2005 ME 103, 882 A.2d 253 16

Adoption of Tobias D.,

2012 ME 45, 40 A.3d 990 .....25, 35

Ashe v. Enterprise Rent-A-Car,

2003 ME 147, 838 A.2d 1157 16

Barnes v. City of Cincinnati,

401 F.3d 729 (6th Cir. 2005).....32

Barr v. Dyke,

2012 ME 108, 49 A.3d 1280 16

Beal v. Beal,

388 A.2d 72 (Me. 1978).....32

Bibby v. Phila. Coca Cola Bottling Co.,

260 F.3d 257 (3d Cir. 2001) 32

Dyer v. Dep't of Transp.,

2008 ME 106, 951 A.2d 821 43

Enriquez v. West Jersey Health Sys.,

777 A.2d 365 (N.J. Super. 2001) 32

Estate of Cummings v. Davie,

2012 ME 43, 40 A.3d 971 16

Flaherty v. Muther,

2011 ME 32, 17 A.3d 640 43

Fuhrmann v. Staples the Office Superstore East, Inc.,
2012 ME 135, 58 A.3d 1083 .....17, 25
Goins v. West Group,
619 N.W.2d 424 (Minn. Ct. App. 2000).....37
Goins v. West Group,
635 N.W.2d 717 (Minn. 2001) 15, 36-39
Hamm v. Weyauwega Milk Prods., Inc.,
332 F.3d 1058 (7th Cir. 2003).....32
Helvering v. Stockholms Enskilda Bank,
293 U.S. 84 (1934).....33
Higgins v. New Balance Athletic Shoe, Inc.,
194 F.3d 252 (1st Cir. 1999). 32
Hispanic AIDS Forum v. Estate of Bruno,
792 N.Y.S.2d 43 (N.Y. App. Div. 2005).....37
Holloway v. Arthur Andersen & Co.,
566 F.2d 659 (9th Cir. 1977)..... 30-31
Hutz v. Alden,
2011 ME 27, 12 A.3d 1174 16
L.A. Dep't of Water & Power v. Manhart,
435 U.S. 702 (1978).....30
Maine Human Rights Comm'n v. Auburn,
408 A.2d 1253 (Me. 1979)..... 32-33
Maine Human Rights Comm'n v. Local 1361,
383 A.2d 369 (Me. 1978) 29

Medina v. Income Support Div.,
413 F.3d 1131 (10th Cir. 2005) 32
Miles v. New York Univ.,
979 F. Supp. 248 (S.D.N.Y. 1997) 32
Miller v. City of New York,
177 Fed.Appx. 195 (2d Cir. 2006) 32
Montgomery v. Local Sch. Dist. No. 709,
109 F. Supp. 2d 1081 (D. Minn. 2000) 32
Morgan v. Marquis,
2012 ME 106, 50 A.3d 1 ..... 16, 35
Nichols v. Azteca Rest. Enter.,
256 F.3d 864 (9th Cir. 2001) 32
Parrish v. Wright,
2003 ME 90, 828 A.2d 778 16
Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 29-30, 32-33
Ratzlaf v. U.S.,
510 U.S. 135 (1994) 33
Redgrave v. Bos. Symph. Orch.,
502 N.E.2d 1375 (Mass. 1986). 21
Rene v. MGM Grand Hotel, Inc.,
305 F.3d 1061 (9th Cir. 2002) 32
Roy v. Bath Iron Works,
2008 ME 94, 952 A.2d 965 22

Schwenk v. Hartford,
204 F.3d 1187 (9th Cir. 2000) 31
Smith v. City of Salem,
378 F.3d 566 (6th Cir. 2004) 31
Smith v. Liberty Mutual Insurance Co.,
569 F.2d 325 (5th Cir. 1978) 29
Snelling v. Fall Mountain Regional Sch. Dist.,
2001 WL 276975 (D.N.H. Mar. 21, 2001) 32
Sommers v. Budget Mktg., Inc.,
667 F.2d 748 (8th Cir. 1982) 30
Sorenson v. Sec'y of Treasury,
475 U.S. 851 (1986) 33
Spickler v. Greenberg,
586 A.2d 1232 (Me. 1991) 43
Theno v. Tonganoxie Unified Sch. Dist. No. 464,
377 F. Supp. 2d 952 (D. Kan. 2005 32
Town of Eagle Lake v. Comm'r, Dep't of Educ.,
2003 ME 37, 818 A.2d 1034 ..... 17, 26, 35
Ulane v. E. Airlines, Inc.,
742 F.2d 1081 (7th Cir. 1984) 30
Watt v. UniFirst Corp.,
2009 ME 47, 969 A.2d 897 29
Wood v. Superintendent of Ins.,
638 A.2d 67 (Me. 1994) 17, 35

STATUTES

5 M.R.S.A. § 4553 .....18, 41

5 M.R.S.A. § 4591 17-18

5 M.R.S.A. § 4592 .....17-19, 22, 24, 41

5 M.R.S.A. § 4601 17-18

5 M.R.S.A. § 4602 .....17-18, 22, 24, 41

20-A M.R.S.A. § 6501 24-25

1993 Minn. Laws ch. 22 37

2001 R.I. Pub. Laws ch. 340.....37

RULES

3 Colo. Code Regs. § 708-1, Rule 81.11 (2013) 38

D.C. Mun. Regs. tit. 4, § 801.1(d) (2013) 38

94-348 C.M.R. ch. 3, § 3.02(C)(2).....18

94-348 C.M.R. ch. 4, § 4.13.....24-26, 28, 34-36, 40

94-348 C.M.R. ch. 4, § 4.20(B) 26

94-348 C.M.R. ch. 4, § 4.20(C) 26

OTHER AUTHORITIES

Comm. Amend. A to L.D. 1046, No. H-452 (125th Legis. 2011) 23

House Amend. E to L.D. 1196, No. H-86 (122nd Legis. 2005).....24

L.D. 1046, § 1 (125th Legis. 2011) 22

L.D. 1589, § 1 (123rd Legis. 2007) 23

Macy v. Holder,

EEOC Decision No. 0120120821, 6 (Apr. 20, 2012) 31-32

Connecticut Safe School Coalition, *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws,*
Connecticut Commission on Human Rights and Opportunities, *available at* http://www.ct.gov/chro/lib/chro/-Guidelines_for_-Schools_on_Gender_Identity_and_-Expression_final_4-24-12.pdf
(last visited March 7, 2013) 38-39

Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity,
Massachusetts Department of Elementary & Secondary Education, *available at* http://www.doe.mass.edu/ssce/-GenderIdentity.pdf
(last visited March 7, 2013) 39

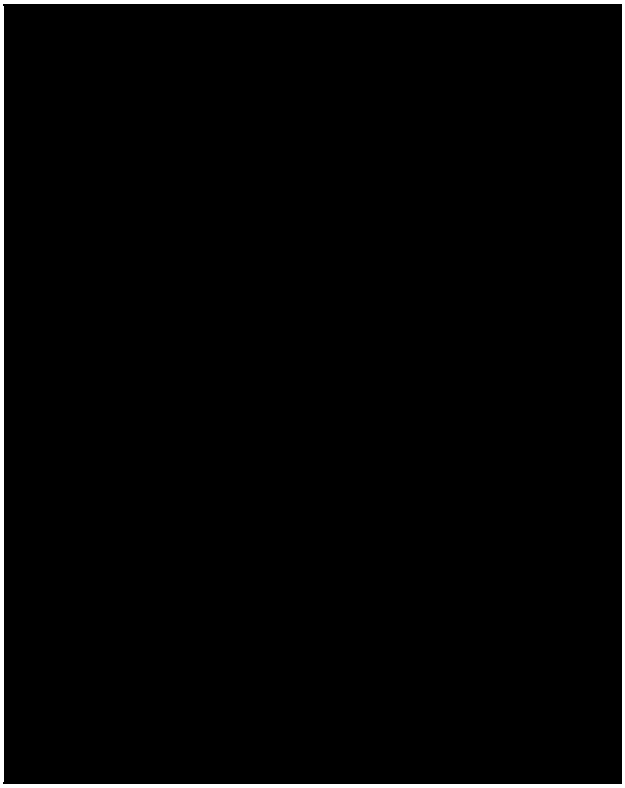
Prohibiting Discrimination in Washington Public Schools: Guidelines for school districts to implement Chapter 28A.640 and 28A.642 RCW and Chapter 392-190 WAC,
State of Washington Office of Superintendent of Public Instruction, (February 2012), *available at* http://www.k12.wa.us/Equity/pubdocs/ProhibitingDi-scriminationInPublicSchools.pdf 39

Statewide Employment Laws & Policies,
Human Rights Campaign,
http://www.hrc.org/files/assets/resources/-Employment_Laws_and_Policies.pdf
(last updated June 12, 2012) 37-38

STATEMENT OF FACTS

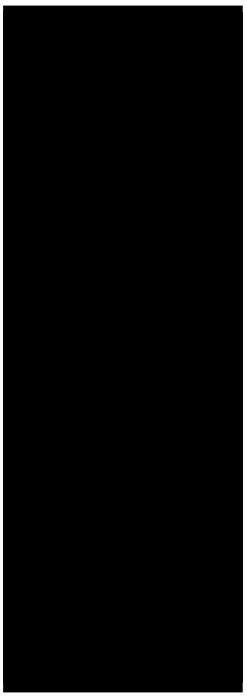
The following facts are undisputed:

Plaintiff Susan Doe was a fifth grade student at the Asa Adams Elementary School in Orono, Maine during 2007-2008. (A. 187 ¶ 73). She was a sixth grade student at the Orono Middle School during 2008-2009. (A. 203 ¶ 142). The following is a photograph of Susan in fifth grade:



(A. 83).

The following is a photograph of Susan in sixth grade:



(A. 99).

Susan Doe is a girl. (A. 173 ¶ 1; 218 ¶ 81). She is also transgender. (A. 173 ¶ 1). This means that although assigned the sex of male at birth, Susan has always had a female gender identity. (A. 174 ¶ 2). In fact, school personnel acknowledge that at the time of the events at the center of this case, Susan was "not a boy" and "was living full-time as a female in our school environment." (A. 218 ¶ 81; 178 ¶ 29).

Susan's journey began at a very young age. (A. 174 ¶¶ 3-6). Her parents recount that she frequently wore a shirt or towel on her head to create the feeling of long hair. (A. 174 ¶ 4). She wore tutus and played with Barbie dolls. *Id.* When Susan entered Asa Adams Elementary School in first grade, she carried a Kim Possible lunchbox and wore pink shoes and a pink backpack. (A. 175 ¶¶ 8-10). 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. (A. 175 ¶¶ 12-13).

The school counselor, Lisa Erhardt, stated that in third grade "[Susan] pretty much live[d] completely as a female." (A. 176 ¶¶ 14-15). Teachers and students referred to her as "she." (A. 176 ¶ 16). The following are photographs of Susan in third grade:

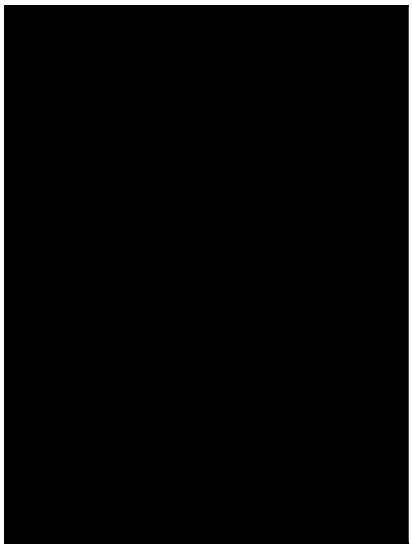




(A. 79).

In fourth grade, Susan wore skirts, dresses, female-style bracelets, barrettes in her hair, and nail polish. (A. 177 ¶ 23). She had shoulder-length hair. *Id.* She could typically be found with a "bunch of girls that became kind of her cadre of friends." (A. 177 ¶ 26). She was placed in the girls' section of the school choir. (A. 176-177 ¶ 20). With the agreement and support of school staff, Susan used the girls' restroom in third and fourth grades. (A. 177 ¶ 21). Other students were comfortable with Susan's use of the girls' restrooms. (A. 177 ¶ 22).

The following are photographs of Susan in fourth grade:





(A. 81).

By the fourth grade, Susan, as a transgender girl, had a diagnosis of gender dysphoria. (A 180 ¶¶ 40-43). Gender dysphoria is a medical term that refers to the psychological distress that results from having a gender identity that is different from one's assigned sex at birth. (A. 180 ¶ 40). It is frequently used interchangeably with Gender Identity Disorder (GID), for which Susan also met the criteria. (A. 180 ¶¶ 41-43).[1] GID is a rare, but serious, medical condition that can occur in children, adolescents or adults. (A. 180 ¶ 39). GID is classified in both the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) published by the American Psychiatric Association and the International Classification of Diseases-10 of the World Health Organization. *Id.* For persons with GID or gender dysphoria, the individual's gender identity differs from their sex ascribed at birth. (A. 179 ¶ 38).

If left untreated, the discordance between one's sex ascribed at birth and one's gender identity can cause debilitating psychological harm. (A. 180 ¶ 42). The standard course of care to alleviate gender

[1] Plaintiffs submitted the expert affidavit of Randi Ettner, Ph.D. on January 31, 2012, which was unrebutted. (A. 9). Dr. Ettner explained the nature and treatment of gender dysphoria and GID. She based her conclusions about Susan's gender identity on her review of Susan's medical and therapy records and the depositions of certain school personnel. *See* Ettner Aff. ¶ 7 (not included in Appendix). During the summary judgment briefing, defendants filed a motion in limine on February 28, 2012 to exclude Dr. Ettner's testimony, asserting that the Superior Court's ruling on defendants' motion to dismiss had "already held that the Defendants did not have the obligation to provide Susan Doe with access to the girls' restroom and Dr. Ettner's testimony on this subject is thus irrelevant." (A. 9). *See* Defs' Mot. Limine ¶ 2. Defendants' relevance objection was misguided because the Court had not made such a ruling. (A. 24; 25 n.2). Defendants' admissions of Dr. Ettner's testimony thus stand in the summary judgment record. The Superior Court did not rule on the motion in limine. (A. 13).

dysphoria in children is called social role transition. (A. 181 ¶ 45). Social role transition for a transgender girl requires the child's full integration into society as a female. (A. 182 ¶ 48). If any feature of social role transition is impeded, it undermines the entirety of social role transition. (A. 182 ¶ 49). According to Dr. Ettner, telling a transgender girl that she can be female in one situation, but not another, is inconsistent with the therapeutic goal of living in the female social role. (A. 182 ¶ 50). Access to the restroom consistent with one's gender identity is central to social role transition. (A. 182 ¶ 51). Being viewed and accepted by her peers as a girl and treated as a girl by school personnel were essential to Susan's psychological health. (A. 184 ¶ 61).

By spring of fourth grade, Susan had completed the social transition to female. (A. 181 ¶ 47). School personnel understood that living consistent with one's gender identity is important to educational development and psychological health. (A. 179 ¶ 35). They therefore determined that an educational plan allowing Susan to integrate her female gender identity into the school environment was important for her educational success. (A. 179 ¶ 34).

A team consisting of Director of Special Services, Sharon Brady; Susan's counselor, Ms. Erhardt; and Susan's mother and teachers met in March, 2007 to develop Susan's education plan, called a "504 Plan." (A. 183-184 ¶¶ 56-57). The team agreed that using a male name would harm Susan. (A. 184 ¶ 60). Rather, they decided that it was important for

Susan to be referred to by her female name and using female pronouns. (A. 184 ¶ 59). Ms. Erhardt, who had the most knowledge of Susan's needs, reported that for a transgender girl like Susan using the communal female restroom was the "best practice." (A. 185 ¶¶ 67-68). The team reached a consensus that Susan's use of the shared female restroom was important to her educational success. (A. 185 ¶ 66). [2] Everybody at the 504 meeting agreed that the boys' restroom would not be appropriate for Susan. (A. 186 ¶ 71).

Susan's use of the girls' restroom at the beginning of fifth grade went smoothly until a male student followed her into the restroom on September 28, 2007 and again disrupted her use of the girls' restroom on Ocotber 3, 2007. (A. l87 ¶ 74). The male student entered the restroom at the instigation of his grandfather, who was his guardian. (A. 187 ¶ 75). The grandfather disagreed with the sexual orientation anti-discrimination law. *Id.* He told the male student that Susan was really a boy and shouldn't be allowed to use the female restroom. *Id.* The grandfather instructed his grandson that if Susan used the girls' restroom, he should do so as well. *Id.* The male student's conduct was a violation of the school's anti-harassment policies. (A. 198 ¶ 116). The school then terminated Susan's use of the girls' restroom over the

[2] The 504 Plan provided that Susan would use the shared female bathroom. There was a potential backup plan to use a staff bathroom. The Superior Court determined, and plaintiffs agree, that the parties' dispute about what circumstance would trigger the backup plan is immaterial to the interpretation of the gender identity nondiscrimination provisions of the MHRA. (A. 27-28).

objections of Susan and her parents. (A. 188 ¶ 79). There had been no other complaints about Susan's use of the girls' restroom. (A. 188 ¶ 77).

At the time that the school terminated Susan's use of the girls' restroom, the school admits that "it was not possible for her to use the boys' shared restroom and therefore the school never at any time considered that to be an option." (A. 196 ¶ 107) (emphasis added). Ms. Erhardt testified that "[i]t wasn't feasible for [Susan] to use the boys' [room]—we would never—that was never a consideration . . . in the entire time that she was there." (A. 196 ¶ 108). Asa Adams Principal Sue O'Roak testified that it was not safe for Susan to use the boys' restroom. (A. 196 ¶ 109). According to Special Services Director Brady, the option of using the boys' restroom "was just a moot point, not even something that anyone wanted to consider" at a meeting on October 9, 2007 held to discuss Susan's restroom use. (A. 197 ¶ 110) (emphasis added).

The school required that Susan use a separate, staff-only restroom in the fifth grade wing. (A. 188 ¶ 79). No student other than Susan Doe used the staff restroom; all other fifth-grade students used either the shared girls' restroom or the shared boys' restroom. (A. 188-189 ¶¶ 81-82). Susan's exclusion from the shared girls' restroom made her feel isolated and abnormal. (A. 189 ¶ 84). It was "sort of like something that's pulling you out from a crowd, like here are the normal kids, here's you." (A. 189 ¶ 85). She explained that "[t]here's no one to socialize with in there except yourself in the mirror." (A. 189 ¶ 86).

Dr. Ettner testified that when a child is in fifth grade and entering early adolescence, the peer group becomes of paramount importance to social development. (A. 190 ¶ 90). At that point, "'belonging,' conforming—being like everyone else—is critical to healthy social and emotional development." (A. 191 ¶ 91). The group socialization and bonding that takes place in the girls' restroom is critical to the development of the sense of self. (A. 191 ¶ 93). Ms. Erhardt agrees with Dr. Ettner that Susan was deprived of this key component of a fifth grade girl's development. (A. 190 ¶¶ 88-89).

The group socialization in the girls' restroom was also important for the consolidation of Susan's female gender identity. (A. 191 ¶ 94). As Dr. Ettner explained, the school's decision to terminate Susan's use of the female restroom communicated to her that she was not really a girl. (A. 194 ¶ 100). It called into question the legitimacy and acceptability of her female gender identity by the very people—school personnel—upon whom she had relied to affirm it in the educational environment. (A. 193 ¶ 99). The exclusion from the girls' restroom increased Susan's anxiety, which interferes with learning. (A. 195 ¶¶ 103-104). It was especially harmful because Susan had already been accepted as a girl within the school community. (A. 193 ¶ 97). After Susan was forced to use the staff-only restroom, her mother reported to school personnel that Susan was experiencing feelings of "depression, lack of self-worth, and as she put it, freak-ness." (A. 190 ¶ 87).

In Susan's sixth grade year at Orono Middle School, the school continued to exclude her from the girls' restroom and forced her to use a separate restroom. (A. 203 ¶ 142). At the end of Susan's sixth grade year, the Doe family left Orono and moved to another part of the state in order to ensure that Susan could function in school consistent with her female gender identity and her medical treatment protocol. (A. 10, Second Affidavit of Jane Doe, ¶¶ 11-12 (not included in Appendix)).

On April 10, 2008 John and Jane Doe, as next friend of Susan Doe, filed a complaint with the Maine Human Rights Commission (hereinafter, "MHRC") alleging that Orono School Department Superintendent Kelly Clenchy and various other school district entities had violated the Maine Human Rights Act (hereinafter, "MHRA") by excluding Susan from the girls' restroom based on her gender identity during her fifth grade year (2007-2008). (A. 55 ¶ 21). After the MHRC unanimously found reasonable grounds for discrimination, the Does and the MHRC filed a Complaint in Penobscot Superior Court on September 23, 2009, asserting claims for unlawful discrimination in education (Count I) and a place of public accommodation (Count II) on the basis of sexual orientation. (A. 51; 55 ¶ 23). The Does additionally asserted a claim for intentional infliction of emotional distress based on certain disclosures about Susan made to the media and interest groups (Count

III). (A. 57).[3] The Superior Court (Penobscot County, Anderson, J.) granted a motion to proceed under pseudonyms. (A. 3).

The defendants moved to dismiss all counts pursuant to M.R. Civ. P. 12(b)(6). On April 5, 2011, the Superior Court (Penobscot County, Anderson, J.) denied the motion to dismiss in its entirety, with the exception that it ruled that the theory of reasonable accommodation asserted by the MHRC was not viable under the MHRA's sexual orientation discrimination provisions. (A. 15, 19-23; 25 n.2). The Does and MHRC filed an Amended Complaint on May 11, 2011. (A. 59). The Amended Complaint added facts to Counts I and II based on a subsequent charge of discrimination the Does had filed with the MHRC asserting Susan's unlawful exclusion from the girls' restroom during her sixth grade year at Orono Middle School (2008-2009). (A. 60-66). The Amended Complaint also added new Counts IV and V by the Doe plaintiffs alleging that the school failed to remedy a hostile education environment resulting from peer harassment during Susan's fifth and sixth grade years. (A. 67-74). The MHRC had found reasonable grounds for discrimination on the sixth grade restroom access claim and dismissed the peer harassment case. (A. 64, 73).

After discovery, the Doe plaintiffs and the school defendants filed cross-motions for summary judgment on Counts I and II of the Amended

[3] The Complaint named as defendants: 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. (A. 52-53).

Complaint. The MHRC, in its opposition to defendants' motion, requested that summary judgment be entered for it pursuant to M.R. Civ. P. 56 (c). The school defendants also moved for summary judgment on Counts III, IV and V. (A. 9).

During the pendency of the summary judgment briefing, the parties stipulated to the dismissal of Count III. (A. 10). The parties also stipulated that this action would be prosecuted solely against defendant Regional School Unit 26 which assumed liability for any conduct attributable to the other named defendants that is found to violate the MHRA. (A. 11). All other defendants were dismissed.

By Decision and Order dated November 20, 2012, the Superior Court (Penobscot County, Anderson, J.) (hereinafter, "Decision"), granted defendants' motion for summary judgment as to all counts. (A. 25). Judgment entered on that date. (A. 12). The Doe plaintiffs filed a timely notice of appeal on December 7, 2012. (A. 13).[4]

STATEMENT OF THE ISSUES FOR REVIEW

I. Does the exclusion of a transgender girl from a school's communal girls' restroom violate the MHRA because:

a. the plain and unambiguous language of the MHRA prohibits a school from treating a transgender girl differently than all other girls; and

[4] The plaintiffs do not pursue an appeal of the Superior Court's entry of judgment for the defendants on Counts IV and V of the Amended Complaint regarding peer harassment.

b. the clear application of the MHRA's gender identity provisions is not altered by a regulation regarding sex-designated restrooms in schools, as the purposes of both provisions are in harmony when a transgender girl who "is not a boy" and is "living full-time as a female" uses the restroom designated for girls?

II. Does a school engage in unlawful segregation in violation of the MHRA when it denies a transgender girl access to the girls' restroom, knowing that it is impossible for her to use the boys' restroom, thereby preventing her from using any communal use restroom and forcing her to use a separate, staff-only restroom?

SUMMARY OF THE ARGUMENT

Susan Doe is exactly the person the legislature intended to integrate seamlessly into the mainstream life of a school when it amended the MHRA in 2005 to prohibit discrimination on the basis of a person's sexual orientation, which includes a person's gender identity. Everyone in the school—peers, teachers, administrators—knew her to be a girl. The plain language of the MHRA's gender identity provisions prohibits a school from treating a transgender girl differently from all other girls. It reflects the legislature's determination that a transgender girl, such as Susan Doe, cannot receive equal access to an education unless she is treated the same as every other girl in all aspects of school life. To fulfill this commitment, the statutory language plainly includes equal access to restroom facilities without any exception based on

"biological sex," which is confirmed by the rejection of repeated legislative attempts to impose such a restriction. It is undisputed that Susan Doe was excluded from the girls' restroom, which she had been using for over two years, because she is a transgender girl. (Argument § II(A) and (B)).

The Superior Court erred when it cast aside the plain meaning and manifest purpose of the MHRA based on its misinterpretation of an MHRC education regulation. The regulation and the MHRA's gender identity provisions can and should be construed in harmony. The regulation at issue reflects a common-sense societal norm favoring the maintenance of separately-designated restrooms for boys and girls. It is neither necessary nor realistic to impose a strict biological test for restroom access in order to realize this purpose. As a practical matter, restrooms are voluntarily sex-separated in our society based on those who identify as, and whom we understand to be, a particular gender. No biological inspection or confirmation takes place on the first day of class (or ever) in order to assign students to a particular restroom. Such a process would be absurd and offensive. This construction also fulfills the purposes of the gender identity nondiscrimination law by allowing transgender students to access restrooms in the only way they can—consistent with their female or male gender identity. (Argument § II(C)(1)).

In addition, this harmonization of the MHRC regulation and the MHRA's gender identity provisions is consistent with contemporary sex discrimination jurisprudence which long ago rejected the view that "sex"

means only "biological sex." (Argument § II(C)(2)). It is also necessary to avoid the absurd and illogical consequences that result from the Superior Court's Decision. (Argument § II(C)(3)). Further, this Court should disregard *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), a twelve year-old case interpreting the nation's first gender identity nondiscrimination law. *Goins* is out of step with the prevailing views in jurisdictions which have more recently adopted gender identity laws. (Argument § II(D)).

Susan Doe is also entitled to summary judgment on an additional basis. When the school denied Susan access to the girls' restroom, knowing that it was impossible for her to use the boys' restroom, it unlawfully segregated her under the MHRA. The Superior Court ignored the record evidence that the school unlawfully forced Susan to use a separate, noncommunal restroom, improperly ruling that the school did not ban Susan from using the boys' restroom nor have a policy to that effect. This was error as the statutory language does not require an explicit prohibition of any type, including a ban or policy. (Argument § III).

ARGUMENT

I. STANDARD OF REVIEW.

The Law Court "review[s] a summary judgment de novo." *See Morgan v. Marquis*, 2012 ME 106, ¶ 6, 50 A.3d 1 (quoting *Parrish v. Wright*, 2003 ME 90, ¶ 8, 828 A.2d 778). The Court reviews "for errors of law, viewing the evidence in the parties' statements of material facts and any record references therein in the light most favorable to the party against whom the judgment was entered . . . ." *Barr v. Dyke*, 2012 ME 108, ¶ 12, 49 A.3d 1280 (quoting *Estate of Cummings v. Davie*, 2012 ME 43, ¶ 9, 40 A.3d 971) (internal quotation mark omitted). A question of statutory interpretation is a legal issue subject to de novo review by this Court. *Ashe v. Enterprise Rent-A-Car*, 2003 ME 147, ¶ 7, 838 A.2d 1157 (citation omitted). The Court "independently determine[s] whether the record supports the conclusion that there is no genuine issue of material fact and that the prevailing party is entitled to judgment as a matter of law." *Hutz v. Alden*, 2011 ME 27, ¶ 12, 12 A.3d 1174 (quoting *Abbott v. LaCourse*, 2005 ME 103, ¶ 8, 882 A.2d 253) (internal quotation marks omitted).

II. THE EXCLUSION OF SUSAN DOE FROM THE GIRLS' RESTROOM BECAUSE SHE IS A TRANSGENDER GIRL VIOLATES THE MHRA AS A MATTER OF LAW.

A. The Plain Language of the MHRA Requires the Integration of Transgender Students into Every Sphere of School Life—Including Restrooms—Consistent With Their Gender Identity.

The "main objective in statutory interpretation is to give effect to the Legislature's intent." *Town of Eagle Lake v. Comm'r, Dep't of Educ.,* 2003 ME 37, ¶ 7, 818 A.2d 1034 (citation omitted). The Law Court "first examin[es] [the statute's] plain meaning," *Fuhrmann v. Staples the Office Superstore East, Inc.*, 2012 ME 135, ¶ 23, 58 A.3d 1083 (citation omitted), and "seeks to discern from the plain language the real purpose of the legislation, avoiding results that are absurd, inconsistent, unreasonable, or illogical." *Town of Eagle Lake*, 2003 ME 37, ¶ 7, 818 A.2d 1034 (quoting *Wood v. Superintendent of Ins.*, 638 A.2d 67, 70 (Me. 1994) (internal quotation marks omitted).

The plain and unambiguous language of the MHRA prohibits a school from treating a transgender girl differently from every other girl. 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 and violative of a civil right 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). *See also* 5 M.R.S.A. § 4601 (declaring a civil right).

Similarly, it is unlawful and violative of a civil right for:

> any public accommodation . . . to directly or indirectly refuse, 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 and 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(1). *See also* 5 M.R.S.A. § 4591 (declaring a civil right). A place of public accommodation includes an "elementary" or "secondary" school. 5 M.R.S.A. § 4553(8)(J).

Turning to the definition of the protected class under both statutes, 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 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). Accordingly, the MHRA prohibits discrimination because a person's gender identity does not match his or her assigned sex at birth. The fact that the MHRC's regulation specifically includes a "transgender" gender

identity within the phrase "gender identity" further supports the understanding that the MHRA prohibits discrimination by schools against individuals whose gender identity does not match their assigned sex at birth.

The public accommodation nondiscrimination law applies to "any" of the "accommodations," "facilities," or "privileges" of a school. 5 M.R.S.A. § 4592(1). This language indisputably includes equal access to restroom "facilities," one of the most basic yet essential requirements for every person—and every student—to function in daily life. As the Superior Court observed, the education nondiscrimination statute also clearly prohibits discrimination in restroom access on the basis of gender identity. (A. 34-35). Further, the legislature in the public accommodation law used the most comprehensive and all-encompassing language to describe the range of prohibited conduct. The statute prohibits discrimination "directly" or "indirectly," and "in any manner." 5 M.R.S.A. § 4592(1). Access to school facilities must be "full" and "equal." *Id.*

Thus, a manifest purpose of the applicable provisions of the MHRA must be to ensure the full integration of transgender students into the mainstream life of a school and make a student's gender identity an irrelevant criterion with regard to the student's educational experience. The gender identity nondiscrimination law reflects the legislature's determination that transgender and nontransgender girls are similarly

situated with respect to access to public accommodations. It unambiguously requires that a transgender girl be treated the same as every other girl in all aspects of daily school life, notwithstanding that she is a girl whose gender identity is different from her sex ascribed at birth.

Applying the plain meaning of the MHRA to the undisputed facts in the summary judgment record, Susan was excluded from the girls' restroom because she is transgender. First, all other girls used the girls' restroom. Susan, however, was treated differently. She was excluded from the girls' restroom and made to use a separate, noncommunal facility because she is a transgender girl. Her gender identity was at the root of her exclusion from the girls' restroom. Susan is, in fact, 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. Susan was "not a boy." (A. 218 ¶ 81). She lived "full-time as a female in [the] school environment." (A. 178 ¶ 29). Susan was indistinguishable from other fifth grade girls: she was referred to with female pronouns, wore skirts, dresses, hair barrettes and nail polish, used the girls' restroom starting in third grade, and sang in the girls' section of the choir. (A. 176-178 ¶¶ 16-33). Teachers and students alike accepted Susan as a girl. (A. 176-178 ¶¶ 16-27). The school understood that the integration of Susan's female gender identity into her environment was critical to her

educational development and success. (A. 179 ¶ 35; 183 ¶ 56). If the gender identity provisions of the MHRA for educational settings are to have any meaning, they must at the very least mean that a transgender girl 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, including with access to the communal girls' restroom.

Second, regardless of whether the school had an affirmative legal obligation to grant a transgender girl access to the restroom consistent with her gender identity in the first instance, the particular facts of this case demonstrate that the school nonetheless violated the MHRA by granting her access to the girls' restroom for over two years and reversing course only upon the instigation of a disruptive student. It is undisputed that the school granted Susan access to the girls' room because it was the "best practice" for a transgender girl. (A. 185 ¶ 67). The school then removed Susan not for any educational reason, but solely because another student objected to the presence of a transgender girl in the girls' restroom. The school departed from "best practices" for a student's education and removed her from a school facility solely because of a disruption caused by a student biased against her transgender status. It literally altered the school environment for her because of her gender identity. The existence of third party pressure as a justification for discrimination has been routinely rejected by courts. *See, e.g.*, *Redgrave v. Bos. Symph. Orch.*, 502 N.E.2d 1375, 1379 (Mass. 1986).

B. 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.

Because the language of 5 M.R.S.A. §§ 4602 and 4592 unambiguously includes access to the restrooms in a school consistent with the student's gender identity, this Court need look no further than the statutory language. *See Roy v. Bath Iron Works*, 2008 ME 94, ¶ 10, 952 A.2d 965 ("We look to legislative history and other extraneous aids in interpretation of a statute only when we have determined that the statute is ambiguous.") (citation omitted). It is worth noting, however, that the legislature has three times rejected language exempting restrooms from the gender identity nondiscrimination provisions of the MHRA. Most recently, in 2011, the Judiciary Committee voted "ought not to pass" an amendment which would have permitted public accommodations with restrooms to deny access to persons based on "biological sex regardless of sexual orientation."[5] 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.

(S.A. 4).

[5] L.D. 1046, § 1 (125th Legis. 2011). The bill and relevant parts of the legislative history are contained in Plaintiff John and Jane Doe's Supplemental Appendix of Legal Authorities (hereinafter, "S.A.") at S.A. 1-8.

The bill left the committee with an attached Minority Report which amended the language to allow public accommodations 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 all members of a biological sex regardless of sexual orientation." Comm. Amend. A to L.D. 1046, No. H-452 (125th Legis. 2011). *See* S.A. 5. The House and Senate voted down the bill. (S.A. 6).

In 2007, a similar bill was proposed and unanimously rejected with an "ought not to pass" recommendation made by the Joint Standing Committee on Criminal Justice and Public Safety.[6] It stated, in relevant part:

> [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.

(S.A. 11).

In 2005, legislators similarly considered and rejected a proposed amendment to the bill that ultimately added sexual orientation to the MHRA. (S.A. 15-23). The amendment, House Amendment "E" (H-86), would have provided that the MHRA "may not be construed to permit a person to use a locker room or the bathroom facilities of a public rest room designated for use for a gender other than the gender of that

[6] L.D. 1589, § 1 (123rd Legis. 2007). *See* S.A. 9-13.

person at birth [unless the person has undergone] a medical procedure in which that person's gender is changed."[7] The full House of Representatives soundly rejected the proposed amendment by a vote of 83-67. (S.A. 24-25).

This Court should not read into clear and unambiguous statutes a silent exception which the legislature has consistently rejected.

C. The Clear Application of the MHRA's Gender Identity Nondiscrimination Provisions Is Not Diminished by a Regulation Regarding the Maintenance of Sex-Designated Restrooms in Schools.

Notwithstanding the clear meaning of the gender identity nondiscrimination mandates of §§ 4602 and 4592, the Superior Court concluded that an MHRC regulation which provides that "[a]n educational institution may provide separate toilet . . . facilities on the basis of sex," 94-348 C.M.R. ch. 4, § 4.13, permits an anatomical litmus test for restroom admission. *See* Decision at A. 37 ("The school's decision to exclude Susan from the girls' room was explicitly permitted by [this regulation] because Susan's biological sex was that of a male."). This was error.[8]

---

[7] House Amend. E to L.D. 1196, No. H-86 (122nd Legis. 2005). *See* S.A. 20.

[8] During the pendency of this appeal, plaintiffs learned of a statute not cited by either the defendants or the Superior Court below, 20-A M.R.S.A. § 6501, which provides:

> Sanitary facilities shall be provided as follows.
> 1. Toilets. A school administrative unit shall provide clean toilets in all school buildings, which shall be:

As this Court has directed, "multiple provisions must . . . be read to provide a coherent result," *Adoption of Tobias D.*, 2012 ME 45, ¶ 15, 40 A.3d 990 (citation omitted), leaving the "efficacy of both intact." *Fuhrmann*, 2012 ME 135, ¶ 27, 58 A.3d 1083 (citation omitted). The education regulation at issue, § 4.13, reflects a common-sense societal norm favoring the maintenance of separately-designated restrooms for boys and girls. This accepted custom is entirely consistent with the MHRA's purpose and plain meaning that a transgender girl, who is "not a boy" and is "living full-time as a female," be able to use the restroom consistent with her female gender identity. In other words, the gender identity provisions of the MHRA provide the answer to the question of which restroom—the boys' restroom or the girls' restroom—should be used by a transgender girl. In contrast, the Superior Court's view sets the regulation on a collision course with an important legislative commitment that transgender girls be treated as girls. Such a faulty construction must be avoided when there is a sensible reading that fulfills the core purposes of both provisions. *See Town of Eagle Lake*,

---

> A. Of the flush water closet type and connected to a sewer, filter bed or septic tank, or of another design approved by the Department of Health and Human Services;
> B. Separated according to sex and accessible only by separate entrances and exits;
> C. Installed so that privacy, cleanliness and supervision are assured; and
> D. Free from all obscene markings.

Because the substance of 20-A M.R.S.A. § 6501 is no different from that contained in § 4.13, plaintiffs exclusively focus on the meaning of § 4.13 in light of the sexual orientation law. Their arguments, however, are equally applicable to 20-A M.R.S.A. § 6501.

2003 ME 37, ¶ 10, 818 A.2d 1034 ("[T]he correct interpretation is one that reasonably reconciles the two statutes in light of their legislative purpose."). Moreover, the Superior Court's rationale is inconsistent with the sex discrimination jurisprudence of this Court and the federal courts, and creates absurd, illogical, inconsistent, and unreasonable consequences the legislature could not have intended.

1. The Purposes of Both the MHRA and § 4.13 Are Fulfilled by Permitting Transgender Girls to Use the Restroom Designated for Girls.

The context of 94-348 C.M.R. ch. 4 makes clear its intention to clarify that societal customs regarding separately designated spaces for boys and girls in educational settings are not vitiated by sex discrimination prohibitions. Section 4.20(B), for example, provides that "special events organized for members of one sex, such as father-son, mother-daughter dinners" do not run afoul of sex discrimination laws. Similarly, § 4.20(C) ensures that "the single-sex membership practices of The Girl Scouts, Boy Scouts, Young Men's Christian Association, Young Women's Christian Association . . . or other such groups" do not preclude their use of school facilities. These provisions are not based on intrinsic anatomical differences between the sexes. Rather, they reflect cultural norms.

The restroom provision in § 4.13 similarly represents a benign convention of designating separate restrooms for boys and girls. In light of the gender identity nondiscrimination provisions of the MHRA, it is

neither necessary nor appropriate to construe this provision as setting up a strict test for access based on "biological sex," as the Superior Court decided.

As a practical matter, restrooms are sex-separated in our society based upon those who identify as, and whom we understand to be, a particular gender. Those who identify as boys, and whom we understand to be boys, use the boys' restroom and those who identify as girls, and whom we understand to be girls, use the girls' restroom. Nothing more or less happens in the real world. There is no anatomical inspection of students on the first day of class in order to assign them to a particular restroom. They sort themselves.

For Susan Doe, the selection of the restroom designated for girls is entirely consistent with her sex because with the single exception of the sex she was designated at birth, every other marker regarding Susan's sex is female. It is how she lived, it is how she was perceived and treated by peers, teachers, and school administrators, who understood she was "not a boy," and it was consistent with the social transition she underwent as part of the course of medical care for the gender dysphoria from which she suffered.

The undisputed facts demonstrate that Susan felt distressed and stigmatized when she was plucked from her peer group and separated into a staff-only restroom. (A. 189-190 ¶¶ 84-87). In addition, the separation of her from her peers undermined her social development and

disrupted her ability to learn. (A. 190-191 ¶¶ 88-93; 195 ¶¶ 103-104). This is hardly surprising as excluding a transgender student from the restroom consistent with her gender identity and relegating her to a noncommunal use facility is hugely consequential. It results in the difference between inclusion in the educational environment and separation and marginalization that undermines the MHRA's important goal of integrating transgender students into school life.

Interpreting § 4.13 consistent with the MHRA avoids significant harm to transgender students and also permits life to go on unchanged for nontransgender students. Indeed, for 99% of students or more, this will mean that they will use the restroom that is consistent with their anatomy or assigned sex at birth. They will do so with no focus or attention being brought to them. At the same time, transgender students covered by the MHRA will also be able to access bathrooms in the only way that they can—consistent with their female or male gender identity.

2. The Proper Harmonization of the MHRA and § 4.13 is Consistent With the Sex Discrimination Jurisprudence of This Court and the Federal Courts That the Term "Sex" Does Not Mean Narrowly "Biological Sex."

The Superior Court's equation of the term "sex" in § 4.13 with so-called "biological sex" is mistaken and contrary to current sex discrimination jurisprudence. While decisions issued shortly after the passage of Title VII construed the term "sex" to be limited to "biological sex," federal courts have long since rejected that narrow construction.

Rather, courts now consistently recognize that the term "sex" also encompasses gender—the socially meaningful norms associated with a person's sex. [9] The term "sex" as used in the law does not exclusively refer to the biological distinctions between men and women but refers to socially conceived and meaningful differences as well. This now well-established view should not be rejected or reversed in this case.

Federal court decisions under Title VII that preceded the United States Supreme Court's watershed decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), adopted a limited view of "sex." For example, in *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978), Bennie Smith brought a claim of sex discrimination in employment when Liberty Mutual rejected his application "because the interviewer considered [him] effeminate." *Id.* at 326. The Fifth Circuit rejected his case, explaining, "the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females." *Id.* at 327. In even more pointed language, the Ninth Circuit explained, "[g]iving [federal sex discrimination law] its plain meaning,

---

[9] Because both Title VII and the MHRA prohibit discrimination on the basis of sex, this Court has noted that "[i]t is appropriate to look to analogous federal case law for guidance . . . ." *Watt v. UniFirst Corp.*, 2009 ME 47 ¶ 22 n.4, 969 A.2d 897. *See also Maine Human Rights Comm'n v. Local 1361*, 383 A.2d 369, 374-375 (Me. 1978) (Because Maine's sex discrimination statute bears "striking structural and linguistic similarities" to federal anti-discrimination law, this Court should look to the federal case law to "provide significant guidance in the construction of [the MHRA].").

this Court concludes that Congress had only the traditional notions of 'sex' in mind." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (emphasis added). *See also Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) ("[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (same).

In 1989, *Price Waterhouse* rejected the narrow reading that federal courts had been assigning to the word "sex" in those earlier cases. Instead, the Court declared that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)); *Price Waterhouse* at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . ."). The Court construed the prohibition of sex discrimination in Title VII to mean "that gender must be irrelevant to employment decisions." *Id.* at 240.

Since 1989, and in reliance upon *Price Waterhouse*, federal courts have consistently rejected a limited reading of the word "sex," finding that while it may include biological sex, it also includes non-biological

gendered characteristics that make up the social determinations of whether someone is a man or a woman. The Ninth Circuit, in overturning its prior decision in *Holloway*, explained that "'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender." *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (emphasis in original). The Court plainly stated that "the terms 'sex' and 'gender' have become interchangeable." *Id.*

Similarly, the Sixth Circuit observed that "in the past, federal appellate courts regarded Title VII as barring discrimination based only on 'sex' (referring to an individual's anatomical and biological characteristics), but not on 'gender' (referring to socially-constructed norms associated with a person's sex)." *Smith v. City of Salem,* 378 F.3d 566, 573 (6th Cir. 2004). The Court declared that such an approach had been "eviscerated by *Price Waterhouse*." *Id.* The Court explained that "[b]y holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination. . . ." *Id.* Most recently, the EEOC Commissioners have declared in a case brought by a transgender woman that "Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex." *Macy v. Holder*, EEOC Decision No. 0120120821, 6 (Apr. 20, 2012) (emphasis added). *See*

also Enriquez v. West Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. 2001) (citation omitted) ("'[s]ex' embraces an 'individual's gender,' and is broader than anatomical sex. '[S]ex is comprised of more than a person's genitalia at birth.'").[10]

The federal courts' reversal puts them in line with the approach taken by this Court over two decades ago when it recognized pre-*Price Waterhouse* that discrimination on the basis of sex-linked characteristics and stereotypes can constitute sex discrimination. In *Maine Human Rights Commission v. Auburn,* 408 A.2d 1253 (Me. 1979), this Court found that assumptions that a woman was not sufficiently "the 'rough-tough' type" to "handle a physical situation" could not justify discrimination against women in police officer hiring. *Id.* at 1266. *See also Beal v. Beal*, 388 A.2d 72, 74 (Me. 1978) (citation omitted) (holding that distinctions between men and women "can no longer be justified by outdated sexual stereotypes"). These cases recognized that sex discrimination prohibits not just discrimination against women because

[10] *Accord Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Miller v. City of New York*, 177 Fed.Appx. 195, 197 (2d Cir. 2006); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring); *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258-259 (1st Cir. 1999). Courts have similarly construed "sex" in Title IX broadly, including that it prohibits discrimination on the basis of sex stereotypes. *See Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005); *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001 WL 276975, at *4 (D.N.H. Mar. 21, 2001); *Montgomery v. Local Sch. Dist. No. 709,* 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000); *Miles v. New York Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997).

they are biologically women and discrimination against men because they are biologically men, but also prohibits the range of discrimination that people face due to broadly held social stereotypes regardless of the person's biological sex.

Moreover, these cases illuminate the Superior Court's error in assuming that there could be no overlap between the prohibitions on sex discrimination and gender identity discrimination. *See* Decision at A. 40 ("If the concept of sex that was expressed in the statute had included sexual orientation or gender identity, then there would have been no need to add sexual orientation . . . . "). This view cannot be sound because the term "sex" must have the same meaning throughout the MHRA and its regulations. *See, e.g., Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'"); *Ratzlaf v. U.S.*, 510 U.S. 135, 143 (1994) (citation omitted) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). If the term "sex" were limited to "biological sex," the scope of sex discrimination coverage under the MHRA would be rolled back to pre-*Auburn* and pre-*Price Waterhouse* days, eliminating claims for sex stereotyping and a range of other discriminatory practices. This Court should avoid a construction that so drastically curtails established sex

discrimination protections.

It is more likely that the legislature understood that while sex encompasses aspects of gender, the explicit inclusion of "gender identity" and "gender expression" in the MHRA was necessary to eradicate discrimination against transgender people. A key purpose of anti-discrimination laws is to communicate clearly the prohibited conduct, which with respect to gender identity may not have been readily apparent to covered entities by prohibitions on sex discrimination.

In addition, the legislature itself has indicated its understanding of the broad meaning of sex by having introduced the distinct and narrower concept of "biological sex" when that is what it intended. It used that term, as distinct from "sex," when in 2011 it proposed to amend the sexual orientation law to deny equal bathroom access based on gender identity. *See* § II(B), *supra*. The legislature thus understood that the more limited concept of "biological sex" needed to be expressly conveyed.

All that plaintiffs argue with respect to the interpretation of § 4.13 is that, consistent with prevailing precedent, the term "sex" should take into account more than the sex Susan was designated at birth, but also the socially meaningful gender characteristics associated with sex. This understanding fulfills the promise of sex discrimination protections for all at the same time that it facilitates the harmonious reading of § 4.13 and the MHRA.

3. The Superior Court's Interpretation Should Be Rejected Because it Creates Absurd and Illogical Results.

The Superior Court's decision must be rejected because it eschews a readily available harmonization in favor of an interpretation "that produces absurd, illogical or inconsistent results." *Morgan*, 2012 ME 106, ¶ 14, 50 A.3d 1 (quoting *Tobias D.*, 2012 ME 45, ¶ 15, 40 A.3d 990). *See also Town of Eagle Lake*, 2003 ME 37, ¶ 7, 818 A.2d 1034 (quoting *Wood,* 638 A.2d 67, 70 (Me. 1994) (internal quotation mark omitted) (courts must "avoid[] results that are absurd, inconsistent, unreasonable, or illogical.").

The Superior Court's interpretation means that students who are transgender will be unable to use any communal student restroom and will be forced into social isolation. In this case, Susan could not use the boys' restroom because, as the school admitted, she is "not a boy" and was "living full-time as a female in our school environment." (A. 218 ¶ 81; 178 ¶ 29). Such an interpretation thus creates absurd results because § 4.13 on its face contemplates the use of bathrooms "for students of one sex" or "for students of the other sex." 94-348 C.M.R. ch. 4, § 4.13. It does not contemplate a student's exclusion from both bathrooms. Similarly, it is absurd and unreasonable to believe that the legislature intended the MHRA to integrate a transgender student into every aspect of daily school life consistent with her gender identity, with a sole exception—the restroom. This not only undermines

the student's gender identity, but also calls out the identity of a transgender student to the entire school community. The legislature could not have intended to recognize the importance of living consistent with one's gender identity and at the same time intended a reading that segregates and stigmatizes a transgender student. In fact, the legislature has repeatedly rejected this anomaly. *See* § II(B), *supra*. The Superior Court's decision also creates inconsistency for schools and students alike. Under its view of § 4.13, a transgender girl may be prohibited from using the girls' restroom on school premises, but has the right to use the girls' restroom on field trips to museums, theatres, lecture halls or other public accommodations because there is no provision like § 4.13 that is applicable in those settings.

D. *Goins v. West Group* Is Distinguishable and Out of Step With the Views of More Recent Jurisdictions Passing Gender Identity Nondiscrimination Laws.

This Court should not look to *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), cited by the Superior Court (A. 37), for guidance interpreting the gender identity provisions of Maine law. In *Goins*, the court ruled that "absent more express guidance from the legislature . . . an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination . . . ." *Goins* at 723. As already discussed, the Maine legislature has provided the further guidance contemplated by the Court in *Goins*, rejecting three times amendments to the MHRA that would have adopted the rule in *Goins*.

See § II(B), *supra.*[11]

Moreover, the *Goins* Court ignored the statute's plain meaning, making a values-based decision that ignored that legislature's reasoned policy judgment. The Appellate Court decision in *Goins* reached a sounder result by giving effect to the law's language and purpose. *See Goins v. West Group*, 619 N.W.2d 424, 429 (Minn. Ct. App. 2000) (ruling that the legislative language "does not require an employee to eliminate an inconsistency between self-image and anatomy; it protects the employee from discrimination based on such an inconsistency").

As the first judicial precedent interpreting the first gender identity nondiscrimination provision in the country, the Court in *Goins* failed to fulfill the law's promise of equal opportunity and full participation in society for transgender people—in this case, a fifth grade girl who can only use the girls' restroom. To put the decision in context, Minnesota became the first state to add gender identity protections to its nondiscrimination law and did so in 1993. 1993 Minn. Laws ch. 22. The *Goins* case was decided in 2001, the same year that the second state, Rhode Island, added gender identity protections to its law. 2001 R.I. Pub. Laws ch. 340. Since that time, 14 states plus the District of Columbia have added laws to protect transgender citizens from discrimination. *See Statewide Employment Laws & Policies,* Human Rights Campaign,

[11] *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005) is also cited by the Superior Court. (A. 38). It contains no independent analysis, but simply follows the *Goins* result.

http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf (last updated June 12, 2012). With more than a decade elapsing since *Goins*, much has been learned about the needs and concerns of transgender persons and the way to ensure that laws intended to protect that population can realize those goals.

Jurisdictions with more recently adopted gender identity laws have rejected the *Goins* outcome and affirmed the social norm of separating bathrooms by sex while simultaneously assuring nondiscriminatory access to those same facilities for transgender persons. Colorado and the District of Columbia, for example, have done so by the adoption of regulatory guidance. *See* 3 Colo. Code Regs. § 708-1, Rule 81.11 (2013) ("All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity."); D.C. Mun. Regs. tit. 4, § 801.1(d) (2013) ("[U]nlawful discriminatory practices shall include . . . denying access to restrooms and other gender specific facilities that are consistent with a student's gender identity or expression."). Connecticut, Massachusetts, and Washington have done so by the issuance of school guidance. *See* Connecticut Safe School Coalition, *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws*, Connecticut Commission on Human Rights and Opportunities, 8, *available at* http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf (last visited March 7, 2013)

("Schools may maintain separate restroom facilities for male and female students provided that they allow students to access them based on their gender identity and not exclusively based on student's assigned birth sex."); *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity*, Massachusetts Department of Elementary & Secondary Education, *available at* http://www.doe.mass.edu/ssce/GenderIdentity.pdf (last visited March 7, 2013) ("In all cases . . . the student may access the restroom, locker room, and changing facility that corresponds to the student's gender identity."); *Prohibiting Discrimination in Washington Public Schools: Guidelines for school districts to implement Chapter 28A.640 and 28A.642 RCW and Chapter 392-190 WAC,* State of Washington Office of Superintendent of Public Instruction, 30 (February 2012), *available at* http://www.k12.wa.us/Equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf ("School districts should allow students to use the restroom that is consistent with their gender identity consistently asserted at school.").

In sum, the *Goins* analysis clearly cannot be translated to Maine as a matter of understanding legislative intent and is also out of step with developing law throughout the country and with the proper plain meaning interpretation of statutes protecting against gender identity discrimination.

III. THE UNDISPUTED FACTS ESTABLISH THAT THE SCHOOL UNLAWFULLY SEPARATED AND SEGREGATED SUSAN IN VIOLATION OF THE MHRA BECAUSE HER EXCLUSION FROM THE GIRLS' RESTROOM INEVITABLY PREVENTED HER FROM USING ANY COMMUNAL USE BATHROOM.

As a result of Susan Doe's exclusion from the girls' restroom, she was not only treated differently than all other girls, she was treated differently than all other students. All of the undisputed record evidence demonstrates that the school understood that Susan, a transgender girl who is "not a boy," could not possibly use the boys' restroom. *See* § III(B), *infra*.

When the school denied Susan access to the girls' restroom, knowing full well that she could not use the boys' restroom, it engaged in unlawful segregation under the MHRA. The Superior Court disregarded the uncontroverted evidence on this point and instead concluded that "[t]here is no indication in the summary judgment record that school officials banned her or prevented her from using the boys' restroom." (A. 36-37). *See also* Decision at A. 13 n.13 ("[T]he school did not prevent [Susan] from using [the boys' restroom] or enact a policy prohibiting her from using it."). This is legal error because illegal segregation in a place of public accommodation under the MHRA plainly does not require an explicit prohibition of any type, including a ban or policy. Also, it should be noted that § 4.13 of the MHRC Regulations is inapplicable to an analysis of this independent theory of liability. While that regulation contemplates separate bathrooms based on sex, it contains nothing that

contemplates or permits the exclusion of a student from *both* the boys' restroom and the girls' restroom.

A. The MHRA Prohibits Segregation or Separation of Students on the Basis of Gender Identity "Directly or Indirectly" or "in any Manner."

Contrary to the lower court's implicit legal conclusion, the public accommodation antidiscrimination provisions of the MHRA do not require an express ban or policy of prohibition to establish segregation, but are broad enough to encompass the actions of a school that have the inevitable effect or consequence of segregating or separating a student on the basis of gender identity.

The term "discriminate" includes "without limitation, segregate or separate." 5 M.R.S.A. § 4553(2). 5 M.R.S.A. § 4602(4)(a) makes it unlawful to "subject a person to . . . discrimination" in education. Moreover, because public accommodations are prohibited from discriminating "directly or indirectly" and "in any manner," 5 M.R.S.A. § 4592(1), it is patent that the statute encompasses more than explicit prohibitions resulting in segregation. The inclusion of the word "indirect" must at the least mean that the legislature intended to bring within the statute actions or decisions with the known consequence or outcome of separation or segregation. Similarly, the phrase "in any manner" indicates that the type of conduct creating the segregation is not circumscribed in any way. The plain language of 5 M.R.S.A. § 4592 covers a situation where, as here, the school was aware that its

prohibition of Susan Doe's use of the girls' restroom would necessarily exclude her from all restrooms used by other students.

B. The Undisputed Facts Demonstrate That the School Knew That It Was Impossible for Susan to Use the Boys' Restroom.

All of the testimony of Susan's teachers and counselors demonstrates that she could not use the boy's restroom. In fact, in its response to the plaintiffs' statement of facts, defendants squarely admitted that "it was not possible for [Susan] to use the boy's shared restroom." (A. 196 ¶ 107) (emphasis added). This fundamental admission is hardly surprising. The school's Director of Special Services testified that Susan is "not a boy." (A. 218 ¶ 81). She therefore acknowledged that use of the boys' restroom was "not even something that anyone wanted to consider." (A. 197 ¶ 110) (emphasis added). Ms. Erhardt, the counselor most familiar with Susan, testified that Susan was "living full-time as a female in our school environment." (A. 178 ¶ 29). She further testified that it was not "feasible" for Susan to use the boys' restroom and therefore "that was never a consideration . . . in the entire time she was [at school]." (A. 196 ¶ 108). The school principal did not believe it was safe for Susan to use the boys' restroom. (A. 196 ¶ 109).

In the face of this undisputed evidence, the school puts forth only conjecture about what every school official to have been deposed testified was unthinkable—that either Susan or her parents would have asked to use the boys' restroom. (A. 126-127). On this record, it would be legal

error to consider this as anything more than rank speculation. *See, e.g.*, *Flaherty v. Muther*, 2011 ME 32, ¶ 51, 17 A.3d 640 ("[S]ummary judgment is appropriate 'if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation . . . .'") (*quoting Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821). *See also Spickler v. Greenberg*, 586 A.2d 1232, 1234 (Me. 1991) (opposing summary judgment affidavit must rise above the level of "conclusory assertions" or "mere speculation").

Not only does the school acknowledge that it was not possible for Susan to use the boys' restroom, but it is axiomatic that a student who is "not a boy" and is "living full-time as a female" cannot use the boys' restroom. When the school excluded Susan from the girls' restroom, they understood the impossibility of her using the only other bathroom available to other students. The school's exclusion had the foreseeable and inescapable consequence of segregating and separating Susan from all other students. This is certainly direct segregation, but at the very least must qualify as indirect segregation that the legislature intended to outlaw. This Court should rule that Susan Doe is entitled to summary judgment on Counts I and II of the Amended Complaint because she was subjected to illegal separation and segregation.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the Law Court vacate the entry of summary judgment in favor of the

defendants on Counts I and II of the Amended Complaint and direct the Superior Court to enter judgment for the plaintiffs on Counts I and II.

FILED: March 14, 2013

Respectfully Submitted,

Jennifer Levi
Bennett H. Klein
Admitted *pro hac vice*
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108
(617) 426-1350

Jodi L. Nofsinger
Bar No. 8373
Berman & Simmons, P. A.
P.O. Box 961
Lewiston, ME 04243-0961
(207) 784-3576

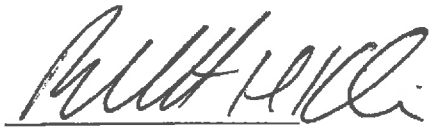
CERTIFICATE OF SERVICE

I, Bennett H. Klein, hereby certify that two copies of this Brief of Appellants John and Jane Doe as Parents and Next Friend of Susan Doe were served upon counsel at the addresses set forth below by first class mail, postage-prepaid on March 13, 2013:

Melissa Hewey
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480

John Gause
Maine Human Rights Commission
51 State House Station
Augusta, ME 04333-0051

DATED: March 13, 2013



Bennett H. Klein
Admitted *pro hac vice*
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108
(617) 426-1350
Counsel for Appellants John and Jane Doe