THE SUPREME COURT OF THE UNITED STATES

Spring Term, 2024

---

Docket No. 23-1234

---

JANE BOE, by and through her
next friend and father, JACK BOE,
Plaintiff-Petitioner

v.

DUNE UNIFIED SCHOOL DISTRICT
BOARD,
Defendant-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

**Brief for Respondent**

---

Issue Addressed:

[redacted] Issue 1

[redacted] Issue 2

## Table of Contents



## Table of Authorities
### Cases

**Constitutional Provisions**



**Statutes**

## Questions Presented

1. Whether a school board policy compelling specially tailored, single-sex human sexuality classes in compliance with Department of Education regulations discriminates on the basis of sex in violation of Title IX.
2. Whether a school board violates the Equal Protection Clause of the Fourteenth Amendment in passing a policy on single-sex human sexuality classes where they are acting outside the color of state law.

## Opinion Below

Boe v. Dune Unified Sch. Bd., 123 F.7th 45 (13th Cir. 2023).

## Constitutional Rules and Provisions

U.S. Const. Amend. XIV

20 U.S.C. § 1681

34 C.F.R. § 106.30

34 C.F.R. § 106.34

## Introduction

This case concerns whether a school board policy's assignment on the basis of biological sex to further proper instruction on human sexuality, in compliance with Title IX of the Education Amendments Act of 1972 ("Title IX") and its regulations, furthers a compelling government interest and was carried out under color of state law within the meaning of the

Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Application of Resolution 2022-14 ("the Policy"), enacted by the Dune County Unified School District Board ("the Board"), will not violate Title IX or the Equal Protection Clause for the following reason.

Firstly, the controlling regulations of the Department of Education expressly permit single-sex human sexuality classes. Independent of these regulations, the classification on the basis of sex within the meaning of Title IX — i.e., biological sex or gender — cannot harm the Plaintiff and indeed will further her education. Thus, this classification complies with, and furthers the interests of, Title IX.

Secondly, an Equal Protection Clause requires the Board to act under color of state law in discriminating on the basis of sex. The Board, while regulating a public school, did not act under color of state law in passing the Policy, nor would application of the policy discriminate on the basis of sex unlawfully.

The Plaintiff has failed to demonstrate application of the Policy discriminates against her under Title IX or the Equal Protection Clause on the basis of sex. As such, application of the Policy to the Plaintiff is constitutional and should be upheld.

## Statement of the Case

The facts of the instant case arise out of the Dune County Unified School District Board ("the Board"), the Respondent, passing Resolution 2022-14 ("the Policy") in December 2022. The Policy concerns the Board's human sexuality education program for grades seven through twelve. To provide "accurate, age-appropriate, and evidence-based information" to the Board's students, the Policy determines "[s]tudents shall be assigned to human sexuality classes according to biological sex as determined by a doctor at birth and recorded on their original birth certificate[,]" and that schools must "tailor" their instruction "according to anatomical and physiological characteristics, and the unique experiences and health care needs associated with these characteristics." R. 3. A non-exclusive list of topics to be covered is provided in the Policy. Id. The Policy also provides schools may provide information evenly to both sexes, and mandates an optional opt-out for parents who object to the instruction. R. 4.

Prior to the Policy, in July 2021, the Board, with many of the same members, passed Dune School Board Resolution 2021-4 (2021) ("the Resolution"), which requires: 1) gender identity to be included as an enumerated characteristic in their anti-bullying policies; 2) transgender students to be allowed to

use the restroom or 3) play on the sex-segregated sports team which matches their gender identity. R. 4.

Petitioner, Jane Boe, is a transgender seventh-grade girl who commenced suit by and through her father Jack Boe after learning she was initially assigned to the boys' class due to her biological sex under the Policy. R. 2. Boe protests her initial assignment, and Boe's parents believe opting-out is not financially feasible. R. 2;5.

Fearing gender-based bullying from boys under the Policy's application, Boe brought claims under Title IX and the Equal Protection Clause of the Fourteenth Amendment, alleging the Policy unjustifiably discriminates against her based on sex and her transgender status. R. 5. The Board responded that the Policy acts within the permitted range of Title IX, which explicitly allows for sex-segregated human sexuality classes, and that such separation furthers a compelling government interest, thus satisfying the Equal Protection Clause. Id. Summary judgment was entered for Respondent and affirmed on appeal. Petitioner appeals.

## **Argument**

### I. PLAINTIFF CANNOT SUPPORT HER TITLE IX DISCRIMINATION CLAIM AGAINST THE BOARD'S COMPLIANT AND INNOCUOUS POLICY.

Plaintiff Jane Boe cannot sustain her Title IX challenge because she will not suffer harm or experience discrimination

under the Policy. Title IX provides that no student "on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Under this provision, "discrimination" broadly encompasses intentional inequitable treatment relative to one's peers. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998); Roberts v. Colo. State Bd. of Agriculture, 998 F.2d 824, 833-34 (10th Cir. 1993). Jane Boe, as a private plaintiff, may challenge the Board and their Policy. Cannon v. Uni.of Chi., 441 U.S. 677, 717 (1979). But, to sustain her challenge, Plaintiff must demonstrate (1) that she was excluded from participation or denied the benefits of an educational program "on the basis of sex"; (2) that the educational institution challenged receives federal funding at the time of the challenged act; and (3) that the improper discrimination caused her harm. Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 617 (4th Cir. 2020). As a Unified School District, the Defendant will not refute that it receives federal funding. Despite this concession, Jane Boe cannot sustain her Title IX challenge because the Policy is compliant; were it applied, it would not exclude or deny her the benefits of a

proper education, nor would she be discriminated against "on the basis of sex" or gender.

### A. The Policy facilitates Jane Boe's education within the permissible scope of Title IX because it allows for sex-appropriate human sexuality education.

#### 1. "Sex" may be defined as physiological or gender-based traits under Title IX.

Application of the Policy does not discriminate against Jane Boe, nor will it cause harm, on the basis of sex or gender. Sex and gender may be parsed, and indeed must be parsed to evaluate compliance with Title IX. The Department of Education explicitly dodges defining "sex" in their definitions for sexual harassment. 34 C.F.R. § 106.30. The Department's report to the Federal Register on the regulation notes the nonessential nature and deleterious effect of defining "sex" relative to a person's biological characteristics or gender identity to ef.fecting the regulation's aim of halting sexual harassment, as "[a]nyone may experience sexual harassment, irrespective of gender identity…. Defining 'sex' will have an effect on Title IX regulations that are outside the scope of this rulemaking." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (to be codified at 34 C.F.R. 106) ("Federal Register Report"). But the Department notes that the definition of "sex" based on biological characteristics proposed by the federal government

within the scope of Title VII litigation – which heavily influences the interpretation of Title IX – "may be relevant as to the public meaning of the word 'sex' in other contexts as well." Id.

Courts independently arrived at this same conclusion. See Grimm, 972 F.3d at 616 (observing "interpret[ing] Title VII … guides our evaluation of claims under Title IX.") (citations omitted). See also Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997) (observing "it is helpful to look to Title VII to determine whether the alleged sexual harassment … constitute[s] illegal discrimination on the basis of sex for purposes of Title IX."). Indeed, following Title VII is critical to determining the scope of unlawful discrimination as it relates to sex, gender, and transgender status within Title IX. In Johnson v. Baptist Med. Ctr., the Court notes Title IX gender discrimination claims for employment discrimination at institutions of higher learning must match those of Title VII. 97 F.3d 1070, 1072 (8th Cir. 1996) (citing O'Connor v. Peru State College, 781 F.2d 632, 642 n. 8 (8th Cir. 1986)). In Bostock v. Clayton Cty., the Supreme Court determined employment discrimination against transgender individuals in violation of Title VII can be based on sex or gender, as the employer must observe incongruence between one's current and birth-assigned sex and their culturally associated traits or actions. 140 S.Ct.

1731, 1741-43 (2020). See also Doe v. Snyder, 28 F.4th 103, 114 (9th Cir. 2022) ("We construe Title IX's protections consistently with those of Title VII."). This interplay between Titles VII and IX accords with the legislative history of Title IX, which suggests Congress intended Title IX to be interpreted similarly to the related Title VI. Cannon, 441 U.S., at 694–696. Thus, under Title VII, discrimination against an employee on the basis of gender or transgender status are themselves "on the basis of sex[,]" and Title IX should employ a similar analysis.

But precedent surrounding gender and transgender discrimination claims often employ standards rooted in cisnormativity, as evidenced by the interchanging, and often conflating, language surrounding the distinctions between male and female, men and women. For example, in the equal protection claim of United States v. Virginia (VMI), the court says:

> Inherent differences between *men* and *women*, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either *sex* or for artificial constraints on an individual's opportunity. *Sex* classifications may be used to compensate *women*…[b]ut such classifications may not be used…to create or perpetuate the legal, social, and economic inferiority of *women*.

518 U.S. 515, 533 (1996) (internal quotations omitted). The Department supports such an interpretation, noting "the ordinary public meaning of 'sex' at the time of Title VII's passage was *biological sex* and thus the appropriate construction of the word 'sex' does not extend to a person's sexual orientation or

transgender status[.]" Federal Register Report. This strict reading of "sex" as "biological" has been endorsed in certain jurisdictions. See, e.g., Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty., 57 F.4th 791, 812 (11th Cir. 2022) ("Reputable dictionary definitions of "sex" from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females."). See also A.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 770 (7th Cir. 2023). The original meaning of "sex" under Title IX thus does not apply to gender or transgender status.

*Bostock* does not alter this meaning. The Supreme Court in *Bostock* reasoned their decision applies only to Title VII. 140 S.Ct. at 1753 ("But none of these other laws are before us…and we do not prejudge any such question today."). See also Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("[I]t does not follow that principles announced in the Title VII context automatically apply in the Title IX context."). However, the law evolves. Gender-based discrimination is allowable under Title IX. See, e.g., Charlton-Perkins v. Univ. of Cincinnati, 35 F.4th 1053, 1060 (6th Cir. 2022) (finding prospective university employer's failure-to-hire was gender discrimination in violation of Title IX). Similarly, discriminating against transgender status can violate Title IX.

See also Grimm, 972 F.3d at 616-17 (observing a challenged bathroom policy's determination of a student's transgender status hinged on observing that student's birth-assigned sex and thereby triggering an unlawful sex-based classification under Title IX). Indeed, the Seventh Circuit has identified a "circuit split" regarding whether transgender students' use of gender-affirming triggers a Title IX challenge. A.C., 75 F.4th at 770 (evaluating and affirming the value of Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034 (7th Cir. 2017) with respect to other jurisdictions). Thus, two interpretations of Title IX's definition of "sex" emerge from past jurisprudence and the original intent: "biological" sex, or the sex assigned at birth based on physiology; and "sex" as applied to an intermixed, cisnormative gender binary. Under these definitions, discrimination against transgender students is predicated on either a "biological" distinction or an incongruence with the gender binary. Therefore, to violate § 1681 of Title IX by discriminating "on the basis of sex" with regard to a transgender student, a party must discriminate against such student on the basis of physiology or incongruence with the gender binary. Such classification must underlie the student's exclusion from participation, denial of benefits of, or subjection to

discrimination under any education program or activity receiving financial assistance

Agencies hold authority to promulgate and enforce effectuations of the statute's nondiscrimination mandate. 20 U.S.C. § 1682; Gebser, 524 U.S. at 292. The extensive reach of Title IX and the Department of Education's authority to enforce the statute suggest statutory or regulatory exceptions to Title IX are inherently notable. Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 129 (4th Cir. 2022). Notably, the regulation provides:

> *Except* as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

34 CFR § 106.34(a) (emphasis added). § 106.34(a)(3) then enumerates an exception for human sexuality classes: "Classes or portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls." The specific exclusion of human sexuality classes survived a 2006 amendment to the regulation, and was actually expanded from "[p]ortions" of classes to "[c]lasses and portions of classes." 34 C.F.R. 106.34(e) (West 2006). The exclusion and preservation of such exclusion for more than fifteen years suggests a compelling

interest and purpose in preserving sex-segregated classes on human sexuality classes.

The modern, amended regulation adds that schools may provide single-sex classes only if such division is based on an important objective "to meet the particular, identified educational needs of its students, provided that the single-sex nature of the class…is *substantially related* to achieving that objective[.]" 34 CFR § 106.34(b)(1)(i). Further, the school must implement its objective in an evenhanded manner, with a "substantially equal" coeducational class or single-sex class offered for the excluded sex. § 106.34(b)(1)(ii), (1)(iv), (2). Critically, to comply with the regulation, enrollment in a single-sex class must be completely voluntary. § 106.34(b)(iii). Thus, a class on human sexuality which is divided on the basis of sex to achieve a specific objective, which is voluntary, and which is administered evenly between sexes is compliant with Title IX and its associated regulations.

**2. The Policy complies with Title IX and its regulations because it furthers Jane Boe's education under biological and gender-based definitions of "sex".**

The Policy fully complies with Title IX. Dividing human sexuality classes on the basis of sex furthers the Policy's initiative of providing "accurate, age-appropriate, and evidence-based information about human sexuality" to students, Dune Sch. Bd. Resolution 2022-14 §(1)(a), including Jane Boe,

and is therefore "substantially related to achieving [the] objective[.]" § 106.34(b)(1)(i). Critically, the Policy mandates specially tailored education for both sexes but does not bar the provision of information between groups, allowing each sex to receive the same information. §(1)(c). Lastly, if Jane Boe objects to the Policy's mandate, she and Mr. Boe could voluntarily opt-out and receive the information independently.

The Policy's mandate of specially tailored instruction exceeds the requirements of Title IX while still providing the required evenhanded administration of sex-based courses. In relevant part, the Policy determines that an initial assignment will be made based on the students recorded biological sex, and that the instruction for either sex will be specially tailored "according to anatomical and physiological characteristics, and the *unique experiences* and health care needs associated with these characteristics." Dune Sch. Bd. Resolution 2022-14 §(1)(c) (emphasis added). Prior to the enumerated list of topics to be covered in human sexuality classes, the Policy determines "[i]nstruction on human sexuality must cover the following topics, *and may include others as each school deems appropriate*[.]" Id. at §(1)(b) (emphasis added). Under the Policy, Boe's school in the Dune County Unified School District could provide identical, transgender inclusive information to both single-sex classes, eliminating the issue of evenhanded

administration while meeting the "substantially equal" requirement of Title IX.

However, Jane Boe fears she will be singled out for being assigned to the boys' class. Within the intent of the the Board, the assignment-based on sex could be initial, not final. A previous resolution, Dune Sch. Bd. Resolution 2021-4 (2021), allows for transgender students to play sports and use restrooms according to their gender identity and identifies gender identity as a factor for anti-bullying policies. The Policy's mission "to protect and advance the individual and public health of young Dune residents" supersedes the precise language that students "shall" be assigned on the basis of biological sex because the Policy orders schools to tailor education according to the "unique experiences and health care needs" associated with a student's anatomy, including but not limited to healthy relationships. R. 3-4. Given the critical importance and impetus to acknowledging a student's gender identity to effective education, a superseding principle emerges: if there is a substantial chance of gender-based bullying, a school must tailor a student's human sexuality instruction by assigning them to the class which matches their gender identity. Within this reading, all schools in Dune County, as they are "compliant" with the 2021 Resolution, could conceivably assign Jane Boe to a girl's human sexuality class and provide transgender-inclusive

human sexuality classes, allowing for specially tailored education which is evenhanded and substantially equal while defeating gender-based bullying.

Participating within a single-sex human sexuality class is also "voluntary" because parents reserve the option to remove their children from the single-sex class, as possible under Title IX. In Doe v. Wood Cty. Bd. of Educ., the Court construes "voluntary" under 34 C.F.R. §106.34(b)(1)(iii) to require the "parent or guardian's *clear and affirmative* assent[,]" specifically rejecting a passive failure to opt-out to indicate voluntary assent, as in class action lawsuits, in lieu of an affirmative definition by the Department of Education. 888 F.Supp.2d 771, 775-76 (S.D. W. Va. 2012)(citing Voluntary, Black's Law Dictionary (7th ed. 1999)(emphasis in original). This definition is current, Voluntary, Black's Law Dictionary (11th ed. 2019), but our facts are distinguishable. In Doe, the Court struck down the school's implementation of a completely single-sex education – a clear violation of 34 C.F.R. §106.34 and Title IX which demands a higher level of scrutiny. However, Jane Boe challenges the Policy, which deals only with human sexuality education – a specific exception to the issue of single-sex education under the relevant regulation. §106.34(a)(3). A more permissible definition of "voluntary" allowing a failure to opt-out, or alternatively phrased as

continuing with the designated course of action, should suffice as in class actions. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, (1985) ("We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.' "). Much like class actions, a large number of students belong to each class, and to provide that each student within the Dune County Unified School District should positively opt-in to a single-sex class would usher administrative issues and problems of predictability for educators, who must positively design and tailor the education to each class, and potentially student, under the Policy. To require a positive opt-in clause to the Policy would crush it beneath the administrative load, hampering its execution and sacrificing the education of Dune County's students. A more permissive definition of "voluntary" allowing for positive assent through inaction should be adopted, allowing the Policy to endure.

Further, as Jane Boe plainly objects to the Policy, it should be noted that she could receive the information through the school without voiding the Policy, as it does not bar "a school from providing the same information to male and female students" in line with its goal of providing "accurate, age-appropriate, and evidence-based information…to students in

grades seven through ten." Dune Sch. Bd. Resolution 2022-14 §(1)(a); (c)(a). Students' parents and guardians hold "an opportunity to opt-out of this *instruction*" which must cover the enumerated topics and be provided separately for male and female students. Dune Sch. Bd. Resolution 2022-14 §(1)(b)-(d) (emphasis added). "Instruction" thus delivers "information", denoting the two are severable. Boe's parents subscribe to this interpretation, as:

> Boe's parents have explained that opting out of human sexuality *instruction* is not suitable for their family. … They state that it would be costly and burdensome for them seek out this *information* for Boe if it is not provided by the school.

R. 5 (emphasis added). Jane Boe could thus opt-out of the "instruction" of the human sexuality class while receiving its "information", alleviating the burden cited by the Boes and removing any unfounded fear of receiving sex-based instruction cited by Jane Boe. Jane Boe's dilemma can be solved within the bounds of the Policy because it is compliant with Title IX:

In summary, the Policy is compliant with Title IX because it furthers Jane Boe's education through specially tailored administration. If she truly objects, she may affirmatively opt-out by and through her guardian while receiving the relevant information, but the Policy should endure.

**B. The Policy does not discriminate against or harm Jane Boe on the basis of sex or gender because she is not treated differently from her equals.**

Application of the Policy cannot discriminate against Jane Boe. Title IX broadly proscribes discrimination, or the intentional inequitable treatment of a party "on the basis of sex" by a school. § 1681(a); Jackson, 544 U.S. at 175 (citing North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 521 (1982) (Courts " 'must accord' " Title IX " 'a sweep as broad as its language' ")). "[O]n the basis of sex" requires sex to be a factual cause in the challenged institutional practice or policy. Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 236-37 (2021) (citations omitted). The Court's construct Title IX to encompass all discrimination conducted "on the basis of sex", rather than only enumerated conduct as in Title VII, 42 U.S.C. § 2000e-3(a). Peltier, 37 F.4th at 128-29; Johnson, 544 U.S. at 175. Such reasoning has allowed for a myriad of discriminatory behavior to fall under the purview of Title IX, as they were not excepted to. See generally Doe v. School Dist. No. 1, Denver, Colorado, 970 F.3d 1300 (10th Cir. 2020) (sexual assault and deprivation of educational opportunity); Atkinson v. LaFayette Coll., 460 F.3d 447 (3d Cir. 2006) (employment retaliation for pay discrimination); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 529 (1999) (sexual harassment and hostile environment). In essence, Jane Boe alleges a hostile environment, necessitating she prove that the school district (1) had actual knowledge of; (2) and was deliberately indifferent to; (3) harassment because of sex

that was; (4) "so severe, pervasive, and objectively offense that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Parents for Privacy v. Dallas Sch. Dist. No. 2, 326 F.Supp.3d 1075, 1104 (D. Or. 2018), aff'd, 949 F.3d 1210, 1227-28 (9th Cir. 2020) (quoting Davis, 526 U.S. at 650). Such acts include "egregious and persistent acts of sexual violence and verbal harassment[.]" Id. In Parents for Privacy, the court affirms the dismissal of the plaintiff's claim that a school district's policy allowing transgender students in sex-segregated spaces matching their gender identity creates a hostile environment, as the Policy does not target any particular student, the policy is applied evenly, and the presence of a transgender person does not inherently create a hostile environment. 949 F.3d at 1228.

On this rule, application of the Policy neither creates or sustains a hostile environment. As previously articulated, the Policy mandates specially tailored but equal educational practices across single-sex human sexuality classes, and affords Jane Boe the opportunity to sit with the girls' class based on the compelling interest of halting gender-based bullying. Thus, no unequal treatment on the basis of sex by the School will occur. Further, the harassment Jane Boe alleges, mere verbal harassment predicated on the human sexuality class, does not rise to the burden of "severe, pervasive, and objectively

offensive" conduct on par with sexual assault or harassment. Given all Dune County schools are compliant with the 2021 Resolution, and are therefore taking action to prevent gender-based bullying which may stymy Jane Boe's education, school administrators will not be deliberately indifferent to any form of harassment, let alone that which would deprive her of an educational opportunity. Jane Boe's allegations of harassment fail to meet the burden of a hostile environment claim, and if through some deeply unfortunate circumstance such harassment should occur, the Board's policies preempt any deliberate indifference necessary to creating or sustaining a hostile environment. The Policy, and Dune County Unified School District, are therefore in compliance with Title IX.

## II. PLAINTIFF CANNOT SUSTAIN AN EQUAL PROTECTION CLAUSE CHALLENGE BECAUSE THE BOARD DID NOT ACT UNDER COLOR OF STATE LAW.

Jane has not established the elements required to prove a violation of the Equal Protection Clause. The Equal Protection Clause states that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In essence, the Equal Protection Clause is "a direction that all persons similarly situation should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Violations of the

Equal Protection Clause consist of two elements that a plaintiff must prove. First, the plaintiff must prove that they suffered discrimination on the basis of sex. Second, the plaintiff must prove that the alleged violation was committed by a person acting under color of state law. Both elements must be established for a plaintiff to prove the Equal Protection Clause violation.

**A. Plaintiff has not Suffered Discrimination on Basis of Sex.**

Jane has not suffered discrimination on the basis of sex. To establish the element requiring that discrimination be on the basis of sex, the plaintiff must allege that purposeful discrimination existed because of the plaintiff's sex. Johnston v. Univ. of Pittsburgh of the Commw. Sys. Of Higher Educ., 657, 97 F. Supp. 3d 657, 667 (W.D. Penn. 2015). Furthermore, for a gender discrimination claim to be established under the Equal Protection Clause, "a plaintiff must allege: (1) disparate treatment in relation to other similarly situated individuals, and (2) that the discriminatory treatment was based on sex." Id.

Laws created on the basis of protected classifications, like sex, undergo a heightened scrutiny review. United States v. Virginia, 518 U.S. 515, 531-33 (1996). Contrarily, laws that treat people evenly do not undergo a heightened review. Vacco v. Quill, 521 U.S. 793 (1997). When a law is related to sex and regulates an aspect of peoples' lives in a way that can be

applied to all individuals, the law lacks sex discrimination. L. W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 479 (6th Cir. 2023).

Here, the policy should have a heightened standard of review since the policy is based on sex classifications. However, strict scrutiny is not triggered since the classification of the school's policy does not favor one sex over another. The school's policy equally applies to all male and female students attending the school, transgender and cisgender students alike. As the lower court establishes, the policy meets the "exceedingly persuasive" justification interest that the Supreme Court requires for sex-based classifications. Boe v. Dune Unified Sch. Bd., 123 F.7th 45 (13th Cir. 2023). This unmistakably important interest, explicitly asserted in the policy itself, is "to protect and advance the individual and public health of young Dune residents[.]" R.3. The policy is directly related to this interest as it seeks to provide comprehensive, age-appropriate instruction to all students regarding their own specific anatomical characteristics.

In Grimm, a transgender student filed suit against his public school because of the school's bathroom policy. 972 F.3d at 586. The male student initially enrolled in the school as a female then began using the men's restrooms while in public. Id. Eventually, he informed his school of his male transgender

status and received permission to use the school's multi-stall bathroom for boys. Id. Once the school learned that he was using the boy's restroom, the school initiated a new bathroom policy requiring students to use the bathroom designated to the sex they were assigned at birth. Id. The school claimed that this was to protect student's privacy. Id. The court, however, found that this policy violated the Equal Protection Clause. Id. The court held that the policy did not promote privacy for students and, instead, was unnecessary since the student had used the boy's restroom for several weeks. Id.In Grimm, the bathroom policy was a form of sex-based discrimination because it targeted the student based on his transgender status. Id.

In this case, unlike in Grimm, the school did not target Jane in any way on the basis of her transgender status. Thus, the school did not discriminate on the basis of Jane's sex. Here, although Jane had been living many aspects of her life through her female expression, she had not updated her status legally and it is unclear whether she was enrolled at the school under the category of female. R.4. Also here, the school had already initiated the sexuality instruction policy prior to her enrollment, unlike in Grimm where the policy was changed once the school learned about the transgender student's status. Early in Jane's enrollment to the school and prior to the sexuality instruction, Jane's parents were aware of the policy, as it was

provided to all students' parents at the beginning of the school year. R.4 Here, the policy does not separate the students for the instruction based on their transgender status. Rather, it separates them based on their sex of either male (boys) and female (girls). Unlike in Grimm, both transgender and cisgender statuses are included in the two categories of boys and girls. As a result, there is no special instruction present here for transgender students. In conclusion, the court should find that Jane has not suffered discrimination on the basis of sex.

**B. The Board was not acting under color of state law.**

The Board has not committed a violation acting under color of state law. To establish the element requiring the violation to be committed by a person acting under color of state law, the plaintiff must prove that the person has passed "the exclusive government function approach, the joint participation or symbiotic relationship approach, and the nexus approach". Groman v. Twp. Of Manalapan, 47 F.3d 628, 639 (3d Cir. 1995).

Under the exclusive government function approach, most constitutional rights are only protected against infringements by governments. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 1733 55 L.Ed.2d 185 (1978). On one hand, private individuals who have deprived a person of a right will be liable if that person acts under color of law and if their actions can be properly attributable to the state. Id. On the other hand,

public individuals will be liable if their actions are exclusively reserved to the state. Id.

Under the joint participation approach, private entities relying primarily on government funding are not automatically considered to be acting under color of state law. Rendell-Baker v. Kohn, 457 U.S. 830, 842, 102 S.Ct. 2764, 27771, 73 L.Ed.2d 418 (1982). Typically, entities primarily relying on public funding can only be held liable for constitutional violation allegations when it either overtly or covertly exercises or significantly encourages coercive power. Id.

Under the nexus approach, state-regulated entities are not automatically considered to be acting under color of state law. Jackson v. Metro. Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). The nexus approach states that the only way a business can be a state actor is if their actions are so connected to the state that their actions are principally the actions of the state. Id.

First, the school in this case does not pass the exclusive government function approach, so the function of the human sexuality education is not exclusively reserved to the state. There are multiple means for parents to address their interest or disinterest in the school's human sexuality policy, so students are not limited to an exclusive option for receiving this education. The school's policy allows an option for parents

and guardians to opt their children out of the human sexuality instruction. However, Jane's parents declined to pursue this alternative. Although this was an option readily available to Jane's parents, they decided that opting out would not be a suitable option for their family. In the case that Jane's parents would have requested to opt-out of the human sexuality instruction, they would have waived the instruction for Jane. Since there were multiple means for Jane's parents to address the situation, including making other educational arrangements for Jane, then the school's action is not a state action.

The school also does not pass the joint participation approach. The school is a public entity receiving most of its funding from the government. However, this fact alone does not inherently make the school a state actor. Although the school performs a public function by educating the children of the Dune district on human sexuality, the school is in compliance across all Dune public schools. Additionally, the school uses neither an overt nor a covert coercive authority to enforce the policy for the instruction. This may be evidenced by the board's vote resulting in a unanimous passing of the policy.

Finally, the school also does not pass the nexus approach. Although the school is an institution regulated by the state, its actions again are not automatically governed by the Fourteenth Amendment. The only way the school's actions would be

considered governed by the state would be if the school's actions were so connected to government actions that they would be presumed to be government actions. The mere evidence that the school serves a public interest does not convert the school's actions into state actions. The state doesn't require human sexuality instruction, hence the option for parents and guardians to opt-out of the instruction. Therefore, the specific sexuality instruction is not a public function. Although the government may regulate the manner in which public schools must provide instruction, this alone does not inherently convert the action of the instruction into the state's action as it relates to the Fourteenth Amendment.

For these reasons, and since both elements must be established to prove an Equal Protection Clause violation, the court should find that the Board was not acting under color of state law when the alleged violation occurred.

## **Conclusion**

For the foregoing reasons, the respondent, the Dune Unified School District Board, respectfully requests that the Supreme Court affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that the application of the policy on human sexuality education does not violate Title IX of the Education Amendments Act of 1972 or the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

[redacted]

[redacted]

Attorneys for Respondent