STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1944

N.H.,
Respondent,

and

Rebecca Lucero,
Commissioner of the Minnesota Department of Human Rights, plaintiff-intervenor,
Respondent,

vs.

Anoka-Hennepin School District No. 11,
Appellant.

Filed September 28, 2020
Affirmed in part, reversed in part, and remanded;
Certified questions answered, affirmed in part, reversed in part, and remanded
Reyes, Judge
Dissenting, Johnson, Judge

Anoka County District Court
File No. 02-CV-19-922

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Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

S Y L L A B U S

A transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned states a claim upon which relief can be granted of sexual-orientation discrimination under Minn. Stat. § 363A.13, subd. 1 (2018).

The intermediate scrutiny standard applies to an equal-protection claim of sexual-orientation discrimination under article I, section 2 of the Minnesota constitution.

A transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned states a claim upon which relief can be granted of an equal-protection violation under article I, section 2 of the Minnesota Constitution.

O P I N I O N

REYES, Judge

Appellant-school-district argues on appeal that the district court erred by denying its motion to dismiss respondent-transgender-student's claims arising out of the school district's requirement that the student use separate locker-room facilities. The district court certified two questions as important and doubtful:

> Under Rule 12.02(e) of the Minnesota Rules of Civil Procedure and the Minnesota Human Rights Act, Minn. Stat.

> § 363A.13, subd. 1 (2018), may relief be granted when a school district requires a transgender boy to use locker-room facilities separate from the main boys' locker-room facilities, or is the claim barred by *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001)?
>
> Under Rule 12.02(e) of the Minnesota Rules of Civil Procedure and the equal-protection rights granted under the Minnesota Constitution, may relief be granted when a school district requires a transgender boy to use locker-room facilities separate from the main boys' locker-room facilities and, if so, what level of scrutiny applies?

We rephrase the certified questions, answer in the affirmative, affirm the district court's denial of appellant's motion to dismiss, reverse on the district court's application of strict scrutiny as opposed to intermediate scrutiny, and remand for proceedings consistent with this opinion.

FACTS

While born female, N.H. identifies as and has socially transitioned to male. N.H. uses masculine pronouns, has selected a name that aligns with his male gender identity, and styles his hair and dresses in a traditionally masculine fashion. N.H. attended Coon Rapids High School (CRHS), a public high school in Anoka-Hennepin School District No. 11 (the school district) from 2015 to 2017. During his freshman year, N.H. joined the boys' swim team, and CRHS initially allowed him to use the boys' locker room. Toward the end of the swim season, the school district notified N.H. that he could not use the boys' locker room and had to use the girls' locker room, but retracted its decision later that same day. Four days later, N.H. was hospitalized because of mental-health concerns.

In March 2016, the school district's general counsel and director of student services and Title IX[1] coordinator wrote a memorandum addressing transgender-student use of bathrooms and locker rooms. The memorandum refers to "uncertainty between Minnesota state law, federal law, and the federal Office of Civil Rights," and indicates that restroom and locker-room use will "be determined on a case-by-case basis . . . . to ensure that all students feel safe and comfortable."

Between N.H.'s freshman and sophomore year, the school district remodeled the CRHS boys' locker room, creating a new "enhanced privacy" boys' changing area adjacent to the main boys' locker room, with a separate entrance. It includes a private toilet stall and two private stalls for changing and showering. In March 2017, the school district wrote to J.H., N.H.'s mother, recommending that N.H., then a sophomore, "use the boys' locker room with enhanced privacy" in connection with his physical-education class.

N.H. continued to use the main boys' locker room. The school district informed J.H. that N.H. would be disciplined if he continued to use the main boys' locker room. In April 2017, N.H. transferred to a school outside the school district. In August 2017, J.H. filed a charge of discrimination with the Minnesota Department of Human Rights (MDHR).

In 2019, J.H. filed this civil action in Anoka County, alleging one count of violating the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363A.13, subd. 1, and one count of violating the equal-protection provisions of article I, sections 1 and 7 of the Minnesota

[1] Title IX is a federal civil rights law that prohibits sex discrimination in educational institutions receiving federal funding. 20 U.S.C. §§ 1681-1688 (2018).

Constitution, and withdrew the charge filed at the MDHR. *See* Minn. R. 5000.0550. The complaint seeks, among other things, to permanently enjoin the school district from requiring transgender students to use facilities that are inconsistent with their gender identity. The school district moved to dismiss the complaint. When N.H. turned 18, he replaced J.H. as plaintiff, and the MDHR filed a notice of intervention. The district court denied the school district's motion to dismiss N.H.'s complaint for failure to state a claim upon which relief can be granted, determined that N.H.'s complaint stated a claim under both the MHRA and the Minnesota Constitution for violations of his constitutional rights to equal protection and due process,[2] determined that the strict scrutiny standard applied to N.H.'s equal-protection claim, and granted the MDHR's motion to intervene.

In October 2019, the district court granted the joint motion of the school district and N.H. to certify two questions of law for appeal pursuant to Minn. R. Civ. App. P. 103.03(i) (providing that district court may certify "important and doubtful" questions presented, in context of order denying motion to dismiss for failure to state claim). In February and March 2020, amici curiae filed eight amicus curiae briefs in support of N.H. This appeal follows.

ISSUES

I. Are the district court's certified questions important and doubtful?

II. Did the district court err by denying the school district's motion to dismiss N.H.'s claim for failure to state a claim upon which relief can be granted?
    A. Does a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies

[2] N.H. agreed to dismiss his claim for violation of due process.

and to which the student has socially transitioned state a claim upon which relief can be granted of sexual-orientation discrimination under Minn. Stat. § 363A.13, subd. 1?

B. Does a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned state a claim upon which relief can be granted of an equal-protection violation under article I, section 2 of the Minnesota Constitution?

ANALYSIS

I. The district court's certified questions are important and doubtful.

A party may appeal an order denying a motion to dismiss a complaint for failure to state a claim upon which relief can be granted "if the [district] court certifies that the question presented is important and doubtful." Minn. R. Civ. App. P. 103.03(i). Because certified questions present issues of law, we review them de novo. *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005). We independently determine whether certified questions are important and doubtful. *Nat'l City Bank of Minneapolis v. Lundgren*, 435 N.W.2d 588, 590 (Minn. App. 1989), *review denied* (Minn. Mar. 29, 1989).

"A question is increasingly important if" (1) it has a statewide impact; (2) its resolution will dispose of potentially lengthy proceedings; (3) incorrectly decided, it will substantially harm the parties; and (4) it is likely to be reversed. *Jostens, Inc. v. Federated Mut. Ins. Co.*, 612 N.W.2d 878, 884 (Minn. 2000). We "give special consideration to whether reversal would terminate potentially lengthy proceedings." *Persigehl v. Ridgebrook Invs. Ltd. P'ship*, 858 N.W.2d 824, 830 (Minn. App. 2015) (quotation omitted). "A question is doubtful only if there is no controlling precedent" and it is "one on which there is substantial ground for a difference of opinion." *Id.* (quotation omitted).

As a matter of policy, appellate courts may rephrase certified questions to allow an unqualified "yes" or "no." *See Minn. Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 429-30 (Minn. 2005) (rephrasing certified question); *Ames & Fischer Co., II, LLP v. McDonald*, 798 N.W.2d 557, 561-62 n.2 (Minn. App. 2011) (same), *review denied* (Minn. July 19, 2011).

The parties here ask us to review the district court's decision on a rule 12 motion in light of the allegations in N.H.'s complaint, which describes the relevant facts. Because the certified questions are both compound, making it difficult to answer the first question in the form of an unqualified "yes" or "no," and impossible to answer the second question as stated, we rephrase the parties' certified questions as follows: (1) Does a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned state a claim upon which relief can be granted of sexual-orientation discrimination under Minn. Stat. § 363A.13, subd. 1? and (2) Does a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned state a claim upon which relief can be granted of an equal-protection violation under article I, section 2 of the Minnesota Constitution?

Regarding whether the certified questions are important, there is no dispute that both have statewide impact. According to the district court, an estimated 24,250 adults in Minnesota identify as transgender, all of whom were high-school students at some point. Further, resolution will potentially be dispositive of lengthy proceedings because, if we

reverse the district court's denial of the school district's motion to dismiss, the matter will be remanded to dispose of the remaining aspects of the case. On the other hand, if we decide either question in N.H.'s favor, the matter will be remanded to develop a factual record.

Regarding whether the certified questions are doubtful, both questions are doubtful because there is no controlling precedent on either and there is a substantial ground for a difference of opinion regarding their resolution, as the dissent demonstrates. We conclude that both questions are important and doubtful.

II. The district court did not err by denying the school district's motion to dismiss N.H.'s claim for failure to state a claim upon which relief can be granted.

Our resolution of this issue requires us to assess the certified questions, to which we now turn.

A. A transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned states a claim upon which relief can be granted of sexual-orientation discrimination under Minn. Stat. § 363A.13, subd. 1.

The school district argues that *Goins*, 635 N.W.2d 717, controls our interpretation of the MHRA either as binding precedent or persuasive authority.

We review the construction and application of the MHRA de novo. *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 353 (Minn. App. 2004). Because this case arises from the district court's denial of the school district's motion to dismiss, "[we] accept the facts alleged in the complaint as true and construe all reasonable

inferences in favor of [N.H.]" *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

1. *Goins* is not binding authority.

The school district does not contest that it "segregated or separated" N.H. because of his sexual orientation of being transgender. Instead, it contends that *Goins* is binding precedent, requiring us to conclude that segregating or separating a transgender student from accessing a locker room of the gender with which the student identifies does not violate the MHRA. We disagree.

Before analyzing the *Goins* opinion, we first provide background on the differences between the MHRA education provision, which applies to this case, and the MHRA employment provision, which applied in *Goins*. The school district contends that, because the MHRA centrally defines both "discrimination" and "sexual orientation," Minn. Stat. § 363A.03, subds. 13, 44 (2018), even if the education and employment contexts differ, the MHRA contains no indication that it treats these two contexts differently. The MHRA definition of "discriminate" "includes [to] segregate or separate." Minn. Stat. § 363A.03, subd. 13. The definition of "sexual orientation" includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363A.03, subd. 44.

But even though the MHRA's anti-discrimination language applies to both the education and employment provisions, the scope of those provisions differs significantly. The MHRA education provision, Minn. Stat. § 363A.13, subd. 1, broadly states that "It is an unfair discriminatory practice *to discriminate in any manner in the full utilization of or*

benefit from any educational institution, or the services rendered thereby to any person because of . . . sexual orientation." (Emphasis added.) In contrast, the MHRA employment provision, Minn. Stat. § 363A.08, subd. 2(3) (2018), states that "[I]t is *an unfair employment practice for an employer*, because of . . . sexual orientation . . . to . . . discriminate against a person *with respect to* hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." (Emphasis added.) The plain language of the MHRA education provision differs from and provides a much broader prohibition against discrimination than the MHRA employment provision.

Moreover, as the MDHR argues, the employment and education contexts differ because (1) education is compulsory in Minnesota, Minn. Stat. § 120A.22 (2018); (2) education is a constitutional right, Minn. Const. art. XIII, § 1; (3) students should not be required to "shop" among schools and districts to obtain a discrimination-free education; and (4) "[s]chools play a pivotal role in a young person's development and intellectual, mental, and emotional health." We now turn to an analysis of the *Goins* opinion.

The school district relies on the *Goins* court's language that "the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender" to argue that its holding is not limited to the employment context, but instead "made a sweeping, unanimous pronouncement about the contours of the MHRA." 635 N.W.2d at 723. But that is not the holding in *Goins*. The Minnesota Supreme Court in *Goins* specifically held that "an *employer's* designation of *employee* restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA." *Id.* at 720 (emphasis added). The *Goins* holding is specific to the employment context and

focused on the MHRA's employment provision, now codified at Minn. Stat. § 363A.08, subd. 2(3). *Id.* at 720. Notably, *Goins* does not cite to, does not interpret, and does not analyze the MHRA's education provision, section 363A.13, subdivision 1, which applies here. Nor does it interpret the MHRA's education provision's language of "full utilization," "benefit," or "services rendered" in "any educational institution," language not found in the MHRA's employment provision. Minn. Stat. § 363A.13, subd. 1. *Goins* is not binding authority.

The school district's attempt to reframe and broaden the *Goins* holding is also contrary to well-established caselaw requiring us to "determine what is binding in an opinion in light of the issues actually presented and resolved." *Jackson ex rel. Sorenson v. Options Residential, Inc.*, 896 N.W.2d 549, 553 (Minn. App. 2017); *see also Skelly Oil Co., v. Comm'r of Taxation*, 131 N.W.2d 632, 645 (Minn. 1964) ("As [the Supreme Court] said in *Sinclair v. United States*, 279 U.S. 749, 767, 49 S. Ct. 471, 477, 73 L.Ed. 938, 947, 'Always the language used in an opinion must be read in the light of the issues presented.'"). Plaintiff Goins alleged that her *employer* engaged in *employment discrimination* under the *MHRA's employment provision* "based upon her sexual orientation by designating restrooms and restroom use on the basis of biological gender." 635 N.W.2d at 720. The *Goins* holding is consistent with this limited employment discrimination claim against her employer based on the MHRA's employment provision.

a. The plain language of the MHRA's education provision prohibits segregating and separating transgender students with respect to locker-room use.

The school district argues that *Goins* controls because the MHRA comparably defines discrimination in both the employment and education contexts. Because (1) the MHRA education provision, based on its plain language, prohibits discrimination against transgender students in an education setting; and (2) federal caselaw applying analogous federal statutes; (3) the MDHR's interpretation of the provision; and (4) subsequent legislative action further support our plain-language interpretation, we disagree.

i. Plain language

The parties agree that the education-provision language of the MHRA is plain and unambiguous. When interpreting statutes, our goal is to give effect to the legislature's intent. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 613 (Minn. 2008). When the language of a statute is clear and unambiguous, we apply its plain language. *In re Buckmaster*, 755 N.W.2d 570, 576 (Minn. App. 2008). Because we conclude that the MHRA's education provision is not ambiguous, we apply its plain language. *See* Minn. Stat. § 645.16 (2018). Moreover, we note that a plain-language interpretation accomplishes the legislature's stated goal of liberally construing the MHRA to broadly protect against discrimination. Minn. Stat. § 363A.04 (2018); *see also, e.g.*, *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 795 (Minn. 2013).

Under a plain reading, the MHRA's education provision protects the rights of any student to use locker rooms without discrimination. The MHRA prohibits discrimination "in the full utilization of or benefit from any educational . . . services rendered." Minn.

Stat. § 363A.13, subd. 1. Because schools provide locker rooms in connection with physical-education coursework and activities, locker rooms fall within the broadly described "services rendered" by schools. *See id.* Furthermore, Black's Law Dictionary defines "benefit" to include "[t]he advantage or privilege something gives; the helpful or useful effect something has." *Black's Law Dictionary* 188 (10th ed. 2014). One of the many "benefits" a school offers is its facilities, such as locker rooms, which enable physical education, development, and recreation. The "full utilization" of schools therefore includes use of school facilities. Finally, the provision explicitly prohibits discriminating in any manner on the basis of sexual orientation, which includes segregating or separating transgender students. Minn. Stat. §§ 363A.13, subd. 1, .03, subds. 13, 44.

Moreover, as both respondents note, the legislature did not include locker-room usage among the exceptions it identified from the application of the MHRA in the education context. *See* Minn. Stat. § 363A.23, subds. 1-2 (2018) (exempting religious or denominational institutions from certain religion- or sex-based admission-discrimination prohibitions and exempting athletic teams from certain sex-discrimination prohibitions); *see also* Minn. Stat. § 645.19 (2018) ("Exceptions expressed in a law shall be construed to exclude all others."). Similarly, the legislature exempted locker rooms from sex-discrimination prohibitions in the public-accommodations context, but not in the education context. *See* Minn. Stat. § 363A.24, subd. 1 (2018). "[Appellate courts] will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently." *See Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006).

Here, the school district prohibited N.H., a transgender male, from using the boys' main locker room. The school district constructed an additional enhanced-privacy locker room separate from the main facility and required N.H. to use it because he is transgender. Applying the plain language of the statute, we conclude that requiring a transgender student to use a different locker-room facility because of his sexual orientation is discrimination under Minn. Stat. § 363A.13, subd. 1.

ii. Federal caselaw

Minnesota courts may look to federal court decisions interpreting similar anti-discrimination statutes for guidance when evaluating claims under the MHRA. *See Kolton v. County of Anoka*, 645 N.W.2d 403, 407, 410 (Minn. 2002) (concluding similarity of purpose and language of Minn. Stat. § 363A.03 and Title I of the Americans with Disabilities Act (ADA) allows ADA to be used to analyze MHRA); *Cummings v. Koehnen*, 568 N.W.2d 418, 422 n.5 (Minn. 1997) ("[W]e have looked in the past to federal cases interpreting Title VII for guidance in interpreting the MHRA because the statutes are similar in many respects."). Although the supreme court has not yet considered this issue under Title IX, both Title IX and the MHRA prohibit discrimination in education in similar manners. *Compare* 20 U.S.C. § 1681(a) ("No person in the United States shall, 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"), *with* Minn. Stat. § 363A.13, subd. 1.[3] Thus, we may consider federal cases applying Title IX, for their persuasive value.

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[3] Title IX examines "sex" discrimination and does not articulate gender identity discrimination like the MHRA does, but the United States Supreme Court has recently

See Kolton, 645 N.W.2d at 407; *see also State v. McClenton*, 781 N.W.2d 181, 191 (Minn. App. 2010) ("[A]lthough we are not bound to follow precedent from other states or federal courts, these authorities can be persuasive."), *review denied* (Minn. June 29, 2010).

As N.H. argues, the overwhelming majority of federal courts that have recently examined transgender education-discrimination claims under Title IX have concluded that preventing a transgender student from using a school restroom or locker room consistent with the student's gender identity violates Title IX. *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1046-50 (7th Cir. 2017) (holding transgender student likely to succeed on claim that high school's policy barring bathroom use consistent with student's gender identity constitutes sex discrimination under Title IX); *Dodds v. U.S. Dep't. of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (same); *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 462-63 (E.D. Va. 2019) (same, holding transgender student's claim succeeds), *aff'd* ___F.3d ___ (4th Cir. Aug. 26, 2020) (noting its holding "join[s] a growing consensus of courts" by deciding that "equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender"); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 841 (S.D.

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equated transgender discrimination with sex discrimination. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1742 (2020) (analyzing context of Title VII and noting that "transgender status [is] inextricably bound up with sex. . . . because to discriminate on [this] ground[] requires an employer to intentionally treat individual employees differently because of their sex"); *see also id.* at 1746 ("We agree that . . . transgender status [is a] distinct concept[] from sex. But, as we've seen, discrimination based on . . . transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."). As discussed further below, federal caselaw examining Title IX has also equated transgender discrimination with sex discrimination.

Ind. 2019) (holding school's refusal to allow transgender student to use school restroom conforming to his gender identity violates Title IX); *Adams by Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018) (holding "meaning of 'sex' in Title IX includes 'gender identity' for purposes of its application to transgender students"), *aff'd*, 968 F.3d 1286 (11th Cir. 2020); *M.A.B. v. Bd. of Ed. of Talbot Cty.*, 286 F. Supp. 3d 704, 723 (D. Md. 2018) (holding prohibiting transgender student from locker room consistent with student's gender identity constitutes Title IX sex-discrimination claim and gender-stereotyping claim); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018) ("Forcing transgender students to use [restroom, locker room, and shower] facilities inconsistent with their gender identity [rather than their biological sex assigned at birth] would undoubtedly harm those students and prevent them from equally accessing educational opportunities and resources."); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017) (holding that excluding transgender student from restroom consistent with student's gender identity states sex discrimination claim under Title IX); *Bd. of Ed. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 863-64 (S.D. Ohio 2016) (same as *Whitaker*). *But see, e.g.*, *Johnston v. Univ. of Pittsburgh Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 666-71 (W.D. Pa. 2015) (holding that school's policy of segregating its bathroom and locker-room facilities on basis of student's sex assigned at birth failed to qualify as discrimination under Title IX), *appeal dismissed* (3d Cir. Mar. 30, 2016). Federal caselaw interpreting comparable Title IX claims further support our plain-language interpretation of the MHRA's education provision.

iii. The MDHR's opinion

The MDHR's interpretation of the MHRA is entitled to "great weight." *Minn. Mining & Mfg., Co. v. State*, 289 N.W.2d 396, 399-400 (Minn. 1979). While we do not defer to an agency's interpretation on an unambiguous statute, *Schwanke v. Dep't of Admin.*, 851 N.W.2d 591, 594 n.1 (Minn. 2014), the MDHR's plain-language interpretation is consistent with our interpretation. The MDHR argues that, based on its plain language, the MHRA's education provision prohibits the school district from preventing N.H. from using the boys' locker room. The MDHR also contends that, because the MHRA (1) articulates exemptions from unfair-discrimination-practice prohibitions in the education context but does not include locker rooms and (2) exempts locker rooms from sex-discrimination protection in the public-accommodations context but not the education-discrimination context, the MHRA by inference intends to protect the rights of students to use locker rooms. For the reasons stated above, we find this argument persuasive and accord it great weight. *See Minn. Mining & Mfg.*, 289 N.W.2d at 400.

The school district urges us to ignore the MDHR's brief in favor of an opinion the MDHR published in 1999 because the MDHR 1999 decision is closer in time to the 1993 MHRA amendment prohibiting transgender discrimination that is at issue before us. *See Cruzan v. Special Sch. Dist. No. 1*, No. 31706 (Dep't of Human Rights Aug. 26, 1999) (noting that MHRA does not prohibit employers from designating restroom use based on biological gender). But the MDHR expresses its position regarding the MHRA's *education* provision here, not in a probable-cause determination for a different case analyzing the

different MHRA employment provision. *See Minn. Mining & Mfg.*, 289 N.W.2d at 399 ("[I]t is quite likely that the legislature which enacted the original sex-discrimination provision in 1969 did not have in mind a particular application of the provision but instead contemplated that the [MHRA] would interpret the provision as circumstances arose."). The MDHR's opinion further supports our plain-language interpretation of the MHRA's education provision.

iv. Subsequent legislative action

Even though we conclude from the plain language that the MHRA prohibits separating and segregating a transgender student from locker-room access, we nevertheless find subsequent legislative action helpful. *But see contra*, *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) ("Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted, and courts apply the statute's plain meaning."). We do not consider subsequent legislative action as necessary for us to conclude from the plain language that the MHRA prohibits the school district's actions, but rather as helpful to contextualize actions the legislature has taken subsequent to *Goins* and the guidance it has since provided to school districts regarding transgender students.[4]

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[4] The school district correctly points out that, when assessing the legislature's intent, courts are to consider "the circumstances under which [a law] was enacted" and "the *contemporaneous* legislative history." Minn. Stat. § 645.16 (emphasis added). However, the supreme court has relied on subsequent legislative action to interpret statutes. *See, e.g.*, *State v. Scovel*, 916 N.W.2d 550, 557-58 & n.11 (Minn. 2018) ("There is undoubtedly some danger in relying on subsequent legislative history. But that does not mean that such subsequent legislative history is wholly irrelevant." (quoting *County of Washington v. Gunther*, 452 U.S. 161, 194 n.6, 101 S. Ct. 2242, 2260 (1981) (Rehnquist, J., dissenting)).

In *Goins*, the supreme court premised its holding on an "[absence of] more express guidance from the legislature." 635 N.W.2d at 723. But the legislature has taken relevant action since *Goins*. In 2014, the legislature passed the Minnesota Safe and Supportive Schools Act, which established the School Safety Technical Assistance Council (the council), Minn. Stat. § 127A.051, subd. 1 (2018), which in 2017 developed and amended a toolkit to assist school districts in supporting transgender and gender-nonconforming students. Minn. Dep't of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* (Sept. 2017) (*Toolkit* or the toolkit).

The school district contends that (1) the council published the toolkit after N.H. left the school; (2) the toolkit does not create new legal obligations; and (3) the school district followed the toolkit's nuanced guidance on locker-room use.

It is true that N.H. left CRHS before the council published the toolkit. However, we may still look to the toolkit to ascertain "more express guidance from the legislature" for the purpose of answering the broader question that the parties certified. *See Goins*, 635 N.W.2d at 723.

It is also true that the toolkit does not create new legal obligations. However, we are not examining the toolkit to determine whether the school district followed it. Instead, our analysis of the toolkit shows that, in the time since the supreme court decided *Goins* in 2001, the legislature has provided more "express guidance." To that point, the toolkit encourages schools to work with transgender students to "ensure that they are able to access needed facilities in a manner that is safe, consistent with their gender identity and does not

stigmatize them." *Toolkit* at 10. It is difficult to imagine how requiring only the transgender student to use a separate locker room would not stigmatize that student.

Consistent with the toolkit, the following excerpts from the district court's findings of fact highlight the important underlying challenges facing transgender students:

> Transgender individuals frequently suffer from gender dysphoria; a recognized medical condition that causes transgender people to experience persistent and clinically significant distress due to the difference between their gender identity and the sex assigned to them at birth. Gender dysphoria is a medical condition recognized by the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders. Gender dysphoria can cause serious medical problems such as clinically significant psychological distress, dysfunction, depression and self-harm. *It is widely accepted in the medical community that the treatment for gender dysphoria is for transgender people to socially transition and live their lives in a way that is consistent with [their] gender identity.*
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> . . . .
>
> Major medical and mental health organizations; including the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and American Psychological Association, have found that *excluding transgender students from sex-sep[a]rated bathrooms and changing rooms that are consistent with their gender identity harms their health and may cause acute psychological damage*. The segregation of transgender youth from these facilities increases their risk of depression, anxiety, and feelings of isolation associated with gender dysphoria. Research has found that transgender youth are at high risk of suicidal ideation and actions. Research also suggests that the risk of suicidal ideation and action is reversed if transgender youth are allowed to socially transition and live their lives in a manner that is consistent with their gender identity.

(Emphasis added.)

The toolkit also encourages coaches to "consider how they can utilize privacy curtains, restrooms and separate changing schedules to provide privacy for all students." *Id.* The toolkit constitutes relevant, subsequent legislative action demonstrating "more express guidance from the legislature" and further supports our plain-meaning interpretation of the MHRA's education provision.

We conclude that *Goins* is not binding precedent, and we answer the first rephrased certified question in the affirmative. We hold that a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned states a claim upon which relief can be granted of sexual-orientation discrimination under Minn. Stat. § 363A.13, subd. 1.

B. A transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned states a claim upon which relief can be granted of an equal-protection violation under article I, section 2 of the Minnesota Constitution.

The school district argues that (1) we must apply the similarly situated test; (2) N.H. cannot pass the threshold similarly situated test because he is not similarly situated to his peers; (3) even if N.H. passes the similarly situated threshold inquiry, rational basis or intermediate scrutiny apply; and (4) the school district's actions meet both tests because they are substantially related to protecting the privacy interests of male students to disrobe and shower outside the presence of biological females. We address each argument in turn.

We review alleged violations of the Equal Protection Clause de novo. *See State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018).

1. We apply the threshold similarly situated test.

The Minnesota Constitution ensures that people receive equal protection under the law. Minn. Const. art. I, § 2. The supreme court has noted that "[i]t is well settled that in order to establish that [an appellant] has been denied equal protection of the laws, [the appellant] must show that similarly situated persons have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (quotation omitted). The supreme court has stated this as a "threshold question in an equal protection claim," without distinguishing between the subsequent level of scrutiny to be applied. *Holloway*, 916 N.W.2d at 347. "This is so because the guarantee of equal protection does not require that the State treat persons who are differently situated as though they were the same." *Paquin v. Mack*, 788 N.W.2d 899, 906 (Minn. 2010); *see also Cox*, 798 N.W.2d at 521 ("[W]e have routinely rejected equal-protection claims when a party cannot establish that he or she is similarly situated to those whom they contend are being treated differently.").

N.H. argues that the similarly situated test does not apply because the supreme court has declined to use this test in recent decisions, and applying this test "short-circuit[s]" an equal-protection analysis. The supreme court did not apply the similarly situated test in only one case because it determined it could "decide the case without great difficulty by applying the proper degree of scrutiny to the classifications created by the Legislature." *In re Guardianship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015).

Here, we have no Minnesota precedent allowing us to easily decide the result of this case by determining and applying the proper degree of scrutiny. Moreover, the supreme court has applied the similarly situated test even in the context of strict scrutiny, although it has declined to determine whether the test applies as matter of law. *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 128, 132 (Minn. 2014) (determining parents facing parental-right-termination petition, whether rights terminated voluntarily or involuntarily, are similarly situated). The supreme court in *R.D.L.* noted its hesitancy in applying the similarly situated test within the strict scrutiny framework, but nonetheless applied it. *Id.* at 132. While the supreme court has expressed serious doubts about the applicability of the similarly situated test, it has not explicitly eliminated its application. We are therefore bound to apply it.[5] *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018).

2. N.H. is similarly situated to other males because he identifies as male.

"The focus . . . in determining whether two groups are similarly situated is whether they are alike in all relevant respects." *Cox*, 798 N.W.2d at 522. The school district correctly contends that we and other federal courts have held men and women are not similarly situated when a distinction is based on physiological differences between unclothed male and female body parts. *Tagami v. City of Chicago*, 875 F.3d 375, 379-80 (7th Cir. 2017) (affirming, without applying similarly situated test, dismissal of equal-

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[5] Nevertheless, we note the doubt the supreme court expressed that applying the similarly situated test does not make sense in all contexts. *See id.* at 132. We also note that the supreme court in *R.D.L.* declined to determine as a matter of law whether the similarly situated test applies in all circumstances because "the parties d[id] not squarely present the question." *Id.* The parties here have squarely presented the issue, and we have as well.

protection claim challenging ordinance prohibiting women from exposing breasts in public), *cert. denied*, 138 S. Ct. 1577 (2018); *Ways v. City of Lincoln*, 331 F.3d 596, 600 & n.3 (8th Cir. 2003) (dismissing equal-protection claim against ordinance preventing only women from exposing their breasts); *State v. Turner*, 382 N.W.2d 252, 256 (Minn. App. 1986) (denying woman's equal-protection challenge to law requiring only women to cover chest in public parks), *review denied* (Minn. Apr. 18, 1986). But the federal cases and *Turner* are inapposite because they addressed a different context of public displays of nudity. *Tagami*, 875 F.3d at 379-80; *Ways*, 331 F.3d at 598-600; *Turner*, 382 N.W.2d at 252.

The school district also contends that, because N.H. has not undergone medical treatments or procedures to conform his body to his gender identity, he is not similarly situated to biologically male students when it comes to using the boys' locker room's changing and showering facilities. However, the record contains no information regarding the appearance of N.H.'s body. Because we must view the complaint and any assumptions that can be drawn from it in the light most favorable to N.H., the school district's inference that N.H. is physically female is contrary to caselaw. *See Walsh*, 851 N.W.2d at 606. N.H.'s complaint merely states that he "transitioned socially prior to high school" and that, "[b]efore puberty, transgender children typically have no need to affirm their gender with medical interventions such as hormones or surgery. Instead, children may socially transition."[6] Thus, the only "relevant respect[]" we may assess on the record before us is

[6] The parties could have developed the factual record. But the school district moved to dismiss under rule 12 and then agreed to certify issues to this court before further

gender identity, and there is no dispute that N.H. and his cisgender[7] peers both identify as male.

Moreover, we may rely on federal law to determine whether two groups are similarly situated. *Cox*, 798 N.W.2d at 521 (noting acceptance of federal principle that equal protection "does not require the state to treat things that are different in fact or opinion as though they were the same in law") (quotation omitted). Federal caselaw examining the unique issue of transgender classification[8] within the context of school-facility access is more on point than either *Tagami* or *Ways*, and has either assumed or determined that transgender students are similarly situated to cisgender students in regards to school-facility access, including those who socially transition only. *See, e.g.*, *Whitaker*, 858 F.3d. at 1050-51 (acknowledging Fourteenth Amendment's Equal Protection Clause as "a direction that all persons similarly situated should be treated alike" but nevertheless beginning analysis by determining what type of scrutiny applies (quotation omitted)); *J.A.W.*, 396 F. Supp. 3d at 843 (undertaking same approach as *Whitaker*); *M.A.B.*, 286 F. Supp. 3d at 717 (same, for transgender student who socially transitioned only); *A.H.*, 290

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developing the record. This court and the parties are therefore bound by the limited record before us.

[7] The American Heritage Dictionary defines "cisgender" as "[i]dentifying as having a gender that corresponds to the sex one has been assigned at birth; not transgender." *The American Heritage Dictionary of the English Language* 338 (5th ed. 2018).

[8] Transgender persons are a unique classification with regard to applying the similarly situated test because being "transgender" implicates a range of physical manifestations. Transgender persons seek different forms of treatment: social, pharmacological, and surgical. These treatments vary significantly in the physical impacts they have on the body: while social transitioning involves no physical changes, pharmacological and surgical treatments result in the modification of primary or secondary sex characteristics.

F. Supp. 3d at 330 (same, for transgender student who socially transitioned only); *Grimm*, 400 F. Supp. 3d at 457 ("Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where *similarly situated students* are permitted to go." (emphasis added)); *Adams*, 318 F. Supp. 3d at 1318 (noting that difference in sex not relevant because "it is [student's] failure to act in conformity with his sex assigned at birth that is causing the School District to treat [student] differently"); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285 (W.D. Pa. 2017) ("Plaintiffs have shown that the District is treating them differently from other students *who are similarly situated on the basis of their transgender status* . . . . The Plaintiffs are being distinguished by governmental action from those whose gender identities are congruent with their assigned sex." (emphasis added)).

N.H. identifies as male, has socially transitioned to male, and lives as male. Others also identify him as male and treat him as male. Based on this record, we conclude that N.H. is similarly situated to his peers because he, like his peers, sought to use a locker room that corresponded with his gender identity.

3. Intermediate scrutiny applies.

The school district argues that the district court erred by determining that transgender persons are a suspect class requiring strict-scrutiny review and that rather intermediate scrutiny or rational basis apply. We agree that intermediate scrutiny applies.

If the challenge implicates a suspect classification or a fundamental right, we apply strict scrutiny, under which the classification must be "narrowly tailored and reasonably necessary to further a compelling governmental interest." *Durand*, 859 N.W.2d at 784

(quotation omitted). If the challenge instead implicates quasi-suspect classifications such as gender, we apply intermediate scrutiny, *id.* at 784, 786 n.4, under which the classification must be "substantially related to an important governmental objective," *State v. Craig*, 807 N.W.2d 453, 462 (Minn. App. 2011) (quotation omitted), *aff'd*, 826 N.W.2d 789 (Minn. 2013). In all other instances, we apply the rational-basis test. *Durand*, 859 N.W.2d at 784.

N.H. argues that strict scrutiny applies because the Education Clause of the Minnesota Constitution protects the fundamental right to education. The Minnesota Constitution protects the right of its people to "a general and uniform system of public schools" that are "thorough and efficient." Minn. Const. art. XIII, § 1; *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) ("We hold that education is a fundamental right under the state constitution"); *Cruz-Guzman v. State*, 916 N.W.2d 1, 9, 11 (Minn. 2018) (noting that Education Clause "imposes an explicit 'duty' on the Legislature" (quotation omitted)). "[T]o establish a violation of the Education Clause, a plaintiff must demonstrate that the legislature has failed or is failing to provide an adequate education." *Forslund v. State*, 924 N.W.2d 25, 34 (Minn. App. 2019). But N.H. is not challenging an action by the legislature or claiming that requiring him to access a separate locker room renders state-guaranteed education inadequate. The Education Clause guarantees a floor of adequate education as opposed to guaranteeing equal treatment across all aspects of education such as facility access. *See Skeen*, 505 N.W.2d at 312.[9]

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[9] Nor do we consider amici curiae Vivian Fischer et al.'s claim that the school district's actions implicate the fundamental right of privacy. These amici have provided no binding

Respondents N.H. and the MDHR also rely on a nonbinding state district court opinion to argue that strict scrutiny applies because transgender persons qualify as a suspect class. But Minnesota appellate courts have not specifically addressed what level of scrutiny applies to classifications based on "transgender status" or "gender identity," nor have any federal courts determined that transgender persons qualify as a suspect class receiving strict scrutiny, and we decline to do so here. *See Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (noting that our role is to correct errors made by district courts, not to change law), *review denied* (Minn. June 17, 1998).

Instead, the Supreme Court has recently equated transgender discrimination with sex discrimination, *see Bostock*, 140 S. Ct. at 1742, and it previously held that classifications based on either sex or gender receive intermediate scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 515, 532-33, 116 S. Ct. 2264, 2275 (1996); *Craig v. Boren*, 429 U.S. 190, 197-98, 97 S. Ct. 451, 456-57 (1976); *see also Durand*, 859 N.W.2d at 784 (providing that appellate courts apply intermediate scrutiny to gender-based classifications).[10] We hold that the intermediate-scrutiny standard applies to an equal-

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cases in support of their argument that the fundamental right to privacy "*should* . . . protect a transgender person's right to . . . use a restroom or locker room that aligns with their gender identity." (Emphasis added.) *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997).

[10] Federal cases apply either intermediate scrutiny or the rational-basis test to challenges based on transgender status. *See, e.g.*, *Whitaker*, 858 F.3d at 1050 (intermediate scrutiny); *Grimm*, 400 F. Supp. 3d at 460 (same); *J.A.W.*, 396 F. Supp. 3d at 843 (same); *Adams*, 318 F. Supp. 3d at 1293, 1312-13 (same); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 641-45 (M.D.N.C. 2016) (same); *Johnston*, 97 F. Supp. 3d. at 668 (applying rational-basis but noting same outcome even under intermediate scrutiny).

protection claim of sexual-orientation discrimination under article I, section 2 of the Minnesota Constitution. We conclude that the district court erred by applying strict scrutiny.

4. N.H.'s complaint states an equal-protection claim under the Minnesota Constitution based on the intermediate-scrutiny standard.

Although the district court did not apply the intermediate-scrutiny standard, because the facts are undisputed and the district court has certified this question, we analyze whether N.H.'s claim survives a rule 12 motion under intermediate scrutiny. *See* Minn. R. Civ. App. P. 103.04 (noting that appellate courts may address issues as justice requires); *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982) (considering constitutional issues not addressed by district court when parties briefed the issues and issues implied in lower court).

Minnesota courts have not addressed the issue of whether requiring a transgender student to use a separate locker room is "substantially related to an important governmental objective." *Craig*, 807 N.W.2d at 462 (quotation omitted). However, we may look to federal caselaw in analyzing the Equal Protection Clause because the Minnesota Constitution "embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Durand*, 859 N.W.2d at 784 (quotation omitted).

Even if we were to assume that the school district had an important governmental objective, the majority of federal cases have concluded that a transgender plaintiff succeeds in challenging a restrictive school-facility-access policy under intermediate scrutiny. *See,*

e.g., *M.A.B.*, 286 F. Supp. 3d at 723, 725-26 (applying intermediate scrutiny and determining that school district's policy of prohibiting transgender student who had solely socially transitioned from accessing male locker rooms violated equal protection); *Whitaker*, 858 F.3d at 1050 (applying intermediate scrutiny and holding student likely to succeed on claim that high-school policy barring him from using bathroom consistent with his gender identity constitutes sex discrimination under Equal Protection Clause); *Grimm*, 400 F. Supp. 3d at 459-61 (applying intermediate scrutiny and holding that denying transgender boy access to school restrooms matching his gender identity violates Equal Protection Clause); *J.A.W.*, 396 F. Supp. 3d at 842-43 (same); *Adams*, 318 F. Supp. 3d at 1293, 1312-13 (same); *A.H.*, 290 F. Supp. 3d at 331 (applying intermediate scrutiny and determining that transgender student who had solely socially transitioned stated equal-protection claim against school district who prohibited her from accessing female locker rooms); *Evancho*, 237 F. Supp. 3d at 289 (applying intermediate scrutiny and holding that excluding transgender students from restrooms consistent with their gender identity likely constitutes sex-based discrimination in violation of Equal Protection Clause); *Highland*, 208 F. Supp. 3d at 872-77 (same). *But see Carcaño*, 203 F. Supp. 3d at 641-45 (applying intermediate scrutiny and holding transgender plaintiffs not likely to succeed on equal-protection challenge to law requiring transgender persons to use bathrooms, changing facilities, showers, and similar facilities based on biological sex); *Johnston*, 97 F. Supp. 3d. at 666-72 (applying rational-basis but holding that, even under intermediate scrutiny, school's policy of segregating bathroom and locker-room facilities on basis of student sex at birth does not violate equal-protection clause).

Moreover, many federal courts have held that transgender facility restrictions do not permissibly advance the objective of safeguarding privacy. *See, e.g.*, *Parents for Privacy v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020) ("[T]here is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth."); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018) ("[T]he presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender.") *cert. denied*, 139 S. Ct. 2936 (2019); *id.* at 531 (noting that right to privacy in school locker room not broad enough to sustain claim that transgender student's presence violates other students' constitutional right to privacy because locker rooms are "by definition and common usage, just not that private"); *Whitaker*, 858 F.3d at 1052 (noting presence of transgender student poses equal privacy risk as cisgender student).

By contrast, the school district provides United States Supreme Court and federal precedent legitimizing a more broadly stated privacy interest that students have in their unclothed bodies.[11] But the school district's cases, with the exception of *Carcaño* and

[11] *See, e.g.*, *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 374, 129 S. Ct. 2633, 2641 (2009) (school search exposing female student's breasts implicates reasonable expectations of privacy); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 495-96 (6th Cir. 2008) (surveillance cameras in locker rooms implicate privacy rights of students); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604-05 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); *York v. Story*, 324 F.2d 450, 455 (2d Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."). A review of additional federal caselaw reveals a widely acknowledged right to

Johnston, stand for broader privacy principles. By contrast, N.H. cites more on-point cases that have determined that allowing transgender students access to school facilities does not unconstitutionally infringe on the privacy interests of other students and that transgender students seeking access to bathrooms or locker rooms succeed under intermediate scrutiny.

The school district distinguishes, for the first time on appeal, between cases analyzing restrooms and those analyzing locker rooms. Nevertheless, the reasoning of *Whitaker* applies equally to bathrooms and locker rooms when it stated that "A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions." 858 F.3d at 1052; *see also Grimm*, 400 F. Supp. 3d at 460-61 (applying *Whitaker*); *Adams*, 318 F. Supp. 3d at 1314 (same). And as the *Whitaker* and *M.A.B.* courts have expressed, students with privacy concerns are free to use single-user changing rooms. *Whitaker*, 858 F.3d at 1052; *M.A.B.*, 286 F. Supp. 3d at 724.

For the foregoing reasons, we answer the second rephrased certified question in the affirmative and hold that a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to

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privacy from the other sex. *See, e.g.*, *Carcaño*, 203 F. Supp. 3d at 641 ("There is no question that the protection of bodily privacy is an important government interest and that the State may promote this interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions."); *Johnston*, 97 F. Supp. 3d at 670 ("[S]eparating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause.").

which the student has socially transitioned states a claim upon which relief can be granted of an equal-protection violation under article I, section 2 of the Minnesota Constitution.

We are sympathetic to all parties involved and readily acknowledge the task the school district faced as it sought to balance the privacy interests of all of its students while addressing issues that are of first impression in Minnesota. The school district held numerous meetings, sought legal counsel, reviewed its obligations, and formulated a case-by-case policy because it recognized that the unique challenges of being a transgender high-school student may change from student to student. We highlight that the toolkit provides useful guidance, including the recommendation that, to the extent feasible, schools "should consider how they can utilize privacy curtains, restrooms and separate changing schedules" to make locker rooms more private so *all* students may feel more comfortable when disrobing and showering.

DECISION

We answer the rephrased certified questions in the affirmative. We affirm the district court's denial of the school district's motion to dismiss, reverse on the application of strict scrutiny, conclude that intermediate scrutiny applies to N.H.'s equal-protection claim, and remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded; Certified questions answered, affirmed in part, reversed in part, and remanded.

JOHNSON, Judge (dissenting)

The Anoka-Hennepin School District was in a difficult situation when it was asked to accommodate the gender-identity needs of N.H., who was designated female at birth but self-identified as male when he was a student at Coon Rapids High School between 2015 and 2017. The school district's locker rooms were designed and built according to the long-standing tradition in which users are separated by sex. N.H. wanted to use a locker room that did not align with the sex he was assigned at birth but aligned with his gender identity. There was a lack of caselaw as to whether a transgender high school student has a right to use the locker room of his or her choice. There were only non-binding statements of administrative agencies. But none of those administrative agencies recommended what this court's opinion requires—that school districts allow transgender students to shower and change clothes alongside cisgender students in multiple-user locker rooms, even if the transgender students and the cisgender students are anatomically different.

The earliest statement of an administrative agency on the subject appears to be an opinion letter issued by the United States Department of Education in January 2015. The letter stated that, to ensure compliance with federal law, "a school generally must treat transgender students consistent with their gender identity." Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Dep't of Educ., to Emily T. Prince, Esq. 2 (Jan. 7, 2015). The school district's actions toward N.H. did not contradict that statement because the school district treated him as male by assigning him to a boys' locker room.

The federal government followed up a year later with a May 2016 "Dear Colleague" guidance letter concerning schools' obligation to prevent discrimination against transgender students under federal law. Under the heading "Restrooms and Locker Rooms," the document states:

> A school may provide separate [restroom and locker room] facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.

Dear Colleague Letter from Catherine E. Lhamon, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., and Vanita Gupta, Principal Dep'y Ass't Attorney Gen. for Civil Rights, U.S. Dep't of Justice 3 (May 13, 2016). The school district's actions toward N.H. did not contradict this guidance because the school district did not require him to use a girls' locker room or an individual-user facility.

The school district had issued its own internal guidance two months before the federal government's May 2016 guidance letter. A March 2016 memorandum authored by the school district's general counsel and its equity coordinator states, in relevant part:

> The issue surrounding rest room and locker room access is quickly evolving. Due to the uncertainty between Minnesota state law, federal law, and the federal Office of Civil Rights, *the use of rest rooms and locker rooms shall be determined on a case-by-case basis*. The goal is to ensure that all students feel safe and comfortable.
>
> When rest room and locker room accommodations are considered, there needs to be a balancing of rights between the

> transgender student and other students. We will strive to have rest rooms and locker rooms with private enclosed changing areas, shower areas, and toilets for all students. Any student who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g. a nearby rest room stall with a door, an area separated by a curtain, a PE instructor's office in the locker room or a nearby health office rest room) or with a separate changing schedule. Any alternative arrangements should be provided in a way that protects a student's ability to keep his or her transgender status confidential. Generally, the goal should be maximizing the student's social integration and equal opportunity to participate in physical education classes and sports, ensuring the student's safety and comfort, and minimizing stigmatization of the student.
>
> Plans for accommodation for rest room and locker room use shall be made in consultation with the building administrators, Title IX Coordinator, and Superintendent.

Nothing in this memorandum is necessarily inconsistent with either the federal government's January 2015 opinion letter or its May 2016 guidance letter. In any event, the federal government's 2015 and 2016 letters were withdrawn in 2017. Dear Colleague Letter from Sandra Battle, Acting Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., and T.E. Wheeler, II, Acting Ass't Attorney Gen. for Civil Rights, U.S. Dep't of Justice 1 (Feb. 22, 2017).

The State of Minnesota did not speak on the subject until September 2017, when a multi-agency task force, which included the commissioners of education and human rights, published a ten-page document entitled, *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students*. With respect to locker rooms, the document states as follows:

> Students use locker rooms during their school day for physical education classes, sports and other activities. Some transgender and gender nonconforming students may prefer a private space while others may wish to use the locker room consistent with their gender identity. Coaches should consider how they can utilize privacy curtains, restrooms and separate changing schedules to provide for privacy for all students.

Toolkit at 10. Nothing in the *Toolkit* is inconsistent with any action of the school district for which N.H. seeks relief.

The commissioner of human rights cites the *Toolkit* in her responsive brief but does not explain how it supports N.H.'s argument that the school district violated the MHRA. The commissioner of education states in an *amicus* brief that the *Toolkit* was "intended . . . as a guide for compliance with relevant laws, including the MHRA," and urges this court to conclude that N.H.'s MHRA claim may proceed. But the *Toolkit* does not state that the MHRA requires school districts to allow a transgender student to use the locker room of his or her choice. To the contrary, the *Toolkit* encourages schools "to provide for privacy for all students." *Toolkit* at 10. In essence, the commissioners now are urging this court to recognize a statutory right that their departments previously have declined to recognize.

In the absence of any clear statement of law, and in light of conflicting interests, the Anoka-Hennepin School District responded in a reasonable and balanced manner to N.H.'s request to use the general boys' locker room for his gym class in the spring of his sophomore year at Coon Rapids High School. N.H. now seeks a determination that the school district violated his rights and a permanent injunction requiring the school district to change its policies and practices for future purposes. He has pleaded two legal theories, one statutory and one constitutional. Under either theory, a judgment in N.H.'s favor

presumably would require the school district to allow transgender students to shower and change clothes alongside cisgender students in multiple-user locker rooms, to the extent transgender students wish to do so, even if the transgender students and the cisgender students using the same spaces are anatomically different.

As explained below in part I, N.H.'s MHRA claim is foreclosed by an opinion of the Minnesota Supreme Court. As explained below in part II, N.H.'s equal-protection claim is not viable because N.H. cannot satisfy the threshold requirement that he was similarly situated in all relevant respects to the persons to whom he compares himself, the cisgender boys in his gym class. But if N.H. were to establish that threshold requirement (contrary to part II.B. of this dissenting opinion), he would need to acknowledge that the school district's goal of protecting students' privacy is an important governmental objective, and his claim ultimately would depend on whether the school district's actions were substantially related to that objective, and there is no caselaw that would preclude a finding of such a substantial relationship.

Therefore, I respectfully dissent from the opinion of the court.

I. Minnesota Human Rights Act Claim

N.H.'s statutory claim of sexual-orientation discrimination is effectively governed by the supreme court's opinion in *Goins v. West Grp.*, 635 N.W.2d 717 (Minn. 2001). In *Goins*, the plaintiff was a transgender employee who was born male, who self-identified as female, and who appeared to co-workers to have male anatomy. *Id.* at 720-21. Goins alleged that her employer discriminated against her "by denying her access to a restroom consistent with her self-image of gender." *Id.* at 723. The supreme court observed, "We

do not believe the MHRA can be read so broadly." *Id*. The supreme court concluded that "the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender." *Id*. The supreme court's reasoning in *Goins* should lead this court in a simple, straightforward way to the conclusion that the school district did not violate the MHRA by allowing N.H. to use a locker room consistent with his gender identity (which the employer in *Goins* did not do) but requiring N.H. to use an enhanced-privacy boys' locker room.

The *Goins* opinion effectively governs this case even though it was concerned with an allegation of discrimination in employment rather than an allegation of discrimination in education. In either context, the MHRA prohibits "discrimination" based on "sexual orientation." *Compare* Minn. Stat. § 363A.13, subd. 1 (2018) (discrimination in education), *with* Minn. Stat. § 363A.08, subd. 2 (2018) (discrimination in employment). In either context, the pertinent statutory definition of the term "discriminate" is to "segregate or separate." Minn. Stat. § 363A.03, subd. 13 (2018). That statutory definition of "discriminate" was in effect at the time of the *Goins* opinion. Minn. Stat. § 363.01, subd. 14 (2000). In essence, the supreme court held in *Goins* that "denying [Goins] access to a restroom consistent with her self-image of gender"—*i.e.*, segregating or separating her from women who were designated female at birth—was *not* "discrimination" based on "sexual orientation," as those terms are used in the MHRA. Given that the same anti-discrimination provisions that applied in *Goins* also apply in this case, there is no logical reason to conclude that the school district's actions in this case violate the MHRA's prohibition of discrimination in education.

The majority opinion distinguishes *Goins* on the ground that the MHRA provides broader anti-discrimination protections by stating that a school may not "*discriminate in any manner in the full utilization of or benefit from any educational institution*." *See supra* at 13 (quoting Minn. Stat. § 363A.13, subd. 1) (emphasis added in majority opinion). But the supreme court did not rule as it did in *Goins* because the employment-discrimination provisions of the statute were not broad enough to cover the employer's conduct. To the contrary, the supreme court noted that the MHRA prohibits discrimination against employees "'with respect to . . . conditions, facilities, or privileges of employment.'" *Goins*, 635 N.W.2d at 724 (quoting Minn. Stat. § 363.03, subd. 1(2)(c)). The supreme court emphasized that "the issue is Goins' use of West's restroom facilities" and that "[i]t is hardly open to debate that the use of employee restrooms qualifies as a condition, facility, or privilege of employment." *Id.* at 724 n.4. There is no reason to believe that the result in *Goins* would have been different if the employment-related provisions of the MHRA had included the words "in any manner" or had referred to the "full utilization of or benefit from" the conditions, facilities, or privileges of employment. Thus, *Goins* cannot be distinguished on the ground that the MHRA's employment provisions are narrower in scope than its education provisions.

Accordingly, there is no need for this court to engage in the task of interpreting statutory text in the first instance. *See supra* at 13-15. The operative statutory terms—"to discriminate" and "to segregate or separate"—already have been interpreted in *Goins*, and we are bound by that interpretation. *See State v. Rohan*, 834 N.W.2d 223, 227 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). Similarly, there is no need to consider the

absence of a locker-room exemption in section 363A.23. *See supra* at 14. Any such exemption would apply only if a discriminatory practice were to exist. Because *Goins* precludes a finding of discrimination, no exemption is necessary. Likewise, there is no need to refer to federal caselaw concerning a federal statute. *See supra* at 15-17. N.H.'s MHRA claim is based on a state statute, and this state's caselaw resolves the contested issue. We may not allow federal caselaw interpreting a federal statute to effectively overrule *Goins*.

In addition, this court is not free to disregard *Goins* on the ground that the commissioner of human rights urges us to do so. *See supra* at 18-19. We may consider an administrative agency's position concerning the meaning of a statute if the statute is ambiguous. *See, e.g.*, *Marks v. Commissioner of Revenue*, 875 N.W.2d 321, 327-28 (Minn. 2016). In such a case, "we give deference to the administrative interpretation of the relevant statute by a state agency if the agency is charged with the responsibility of applying the statute on a statewide basis and its interpretation is reasonable." *A.A.A. v. Department of Human Services*, 832 N.W.2d 816, 823 (Minn. 2013). But, importantly, "we owe no deference to an agency's interpretation of an *unambiguous* statute." *Schwanke v. Department of Administration*, 851 N.W.2d 591, 594 n.1 (Minn. 2014) (emphasis added). The supreme court recently applied this principle in another case arising under the MHRA, stating, "The Minnesota Human Rights Act is not ambiguous on this point, and so we reject the request of the Minnesota Department of Human Rights to defer to its interpretation of the Act to reach the opposite result." *McBee v. Team Industries, Inc.*, 925 N.W.2d 222, 230 n.4 (Minn. 2019). In this case, the relevant provisions of the MHRA

are not ambiguous for present purposes because the supreme court in *Goins* clearly said what they mean. Thus, we should give no deference to the litigation position of the MDHR commissioner, who intervened as a co-plaintiff during district court proceedings.

Furthermore, to conclude that N.H. has stated a claim for relief despite the *Goins* opinion is contrary to the principle that "judicial construction of a statute becomes part of the statute as though written therein." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012). We presume that the legislature has full knowledge of the supreme court's interpretation of a statute. *Wynkoop v. Carpenter*, 574 N.W.2d 422, 426 (Minn. 1998). We also presume that, if the legislature does not amend a statute after the supreme court has interpreted it, the legislature has effectively acquiesced to the supreme court's interpretation. *Engquist v. Loyas*, 803 N.W.2d 400, 406 (Minn. 2011); *State, Dep't of Pub. Safety v. Ogg*, 246 N.W.2d 560, 562 (Minn. 1976). This is especially true in this case in light of the fact that the supreme court in *Goins* expressly stated that a ruling in Goins's favor would be contrary to the role of the judiciary. The supreme court stated that to adopt Goins's arguments would mean going "beyond the parameters of a legislative enactment," which "would amount to an intrusion upon the policy-making function of the legislature." 635 N.W.2d at 723. The supreme court essentially invited the legislature to enact legislation on the subject when it concluded, "Accordingly, *absent more express guidance from the legislature*, we conclude that an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA." *Id.* (emphasis added). If the legislature intends a different policy with respect to transgender persons' use of bathrooms in public places, it would

have passed a bill to amend the MHRA to so provide. The legislature has not done so in the 19 years since *Goins*. Given the lack of any subsequent amendment to the MHRA after the supreme court's *Goins* opinion, this court should not interpret the MHRA in a manner contrary to *Goins*.

Moreover, the Safe and Supportive Schools Act is irrelevant to N.H.'s MHRA claim. The act did not amend the MHRA in any way. *See* 2014 Minn. Laws ch. 160. The act did not address the subject of transgender students' use of locker rooms. *See id.* The act was primarily concerned with bullying and required schools to adopt and implement anti-bullying policies. *See* 2014 Minn. Laws ch. 160, § 1 (codified at Minn. Stat. § 121A.031 (2018)). The act also created the council that published the *Toolkit*. *See* 2014 Minn. Laws ch. 160, § 6 (codified at Minn. Stat. § 127A.051 (2018)). But, as stated above, the *Toolkit* does not recommend allowing transgender students and cisgender students to share locker rooms; rather, the *Toolkit* recommends ensuring the privacy of all students.

Finally, this court should observe the supreme court's *dicta* in *Goins* concerning the potential consequences of adopting Goins's argument: "To conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace *shower and locker room facilities*, *a result not likely intended by the legislature*." *Id*. at 723 (emphasis added). There is no reason to believe that the legislature's likely intention is any different with respect to shower and locker room facilities in schools.

In sum, I would conclude that count 1 of N.H.'s complaint claim does not state a claim on which relief can be granted. Accordingly, I would answer the first certified question, as reformulated, in the negative.

II. Equal Protection Claim

N.H.'s state constitutional equal-protection claim is a novel claim, but it may be resolved according to well-established general principles.

A.

I begin by noting that the procedural posture of this case and the nature of N.H.'s constitutional claim makes it difficult for this court to provide a useful answer to the second certified question. The development of a factual record generally is understood to be essential to the presentation of certified questions concerning constitutional issues because "the factual context upon which the attack is based is essential to a correct decision of constitutional issues." *F. & H. Inv. Co. v. Sackman-Gilliland Corp.*, 232 N.W.2d 769, 772 (Minn. 1975). But a motion to dismiss pursuant to rule 12.02(e) does not depend on, or even allow, the development of a factual record. In considering such a motion, a district court must "consider only the facts alleged in the complaint." *Finn v. Alliance Bank*, 860 N.W.2d 638, 653 (Minn. 2015) (quotation omitted). The motion must be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). A district court may not consider any other document unless it is attached to the complaint or referenced in the complaint. *Northern States Power Co. v. Minnesota Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004).

In light of these procedural restrictions, a rule 12.02(e) motion must be resolved based on a statement of facts that is limited in scope. Furthermore, the relevant statement of facts is one-sided because it consists only of the allegations in the complaint, which may or may not be consistent with the findings of fact that might be made after a trial. The limited and one-sided nature of the relevant facts is consequential here because N.H.'s equal-protection claim is an as-applied challenge, not a facial challenge. Accordingly, this court's answer to the second certified question does not pre-determine the final judgment in this case because the school district has not yet had an opportunity to submit any evidence. In addition, the opinion of the court may have limited value in other, seemingly similar cases in which the relevant facts or the procedural posture are different.

B.

I agree with part II.B.1. of the majority opinion insofar as it determines that, as a matter of state law, N.H. must satisfy the threshold requirement that he was similarly situated in all relevant respects to the cisgender boys in his gym class. *See supra* at 23-24. But I respectfully disagree with part II.B.2. insofar as it determines that N.H. can satisfy that requirement. *See supra* at 24-27.

"The threshold question in an equal protection claim is whether the claimant is treated differently from others to whom the claimant is similarly situated *in all relevant respects*." *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018) (emphasis added) (quotation omitted). N.H. argues that he satisfies this threshold requirement because he self-identifies as male. The school district argues that N.H. does not satisfy this threshold

requirement with respect to "changing clothes or showering in a communal space without privacy features" because he is "biologically female."

The school district's argument is consistent with this court's caselaw. This court has held that men and women are not similarly situated for purposes of an equal-protection claim if governmental action legitimately depends on differences in their respective anatomies. In *State v. Turner*, 382 N.W.2d 252 (Minn. App. 1986), *review denied* (Minn. Apr. 18, 1986), the plaintiff challenged a city ordinance that forbade women, but not men, from exposing their breasts in a city park. *Id.* at 253. This court considered the commonly understood "real differences between the sexes with respect to breasts." *Id.* at 255 (quotation omitted). We quoted with approval a concurring opinion of the United States Supreme Court, which stated that "the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded." *Id.* at 256 (quoting *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 481, 101 S. Ct. 1200, 1210-11 (1981) (Stewart, J., concurring)). Accordingly, we determined that "men and women are not similarly situated" for purposes of the ordinance. *Id*. In applying *Turner* to this case, differences between transgender boys and cisgender boys should be considered in the same manner as differences between cisgender women and cisgender men.

The majority opinion does not dispute the vitality of our *Turner* opinion. Rather, the majority opinion resolves this issue by reasoning that the only relevant factor is gender identity and that both N.H. and his cisgender peers identified as male. *See supra* at 24-27. The majority opinion reasons that gender identity is the only relevant factor by construing

the complaint to "contain[] no information regarding the appearance of N.H.'s body." *See supra* at 25. On that point, I respectfully disagree. The complaint alleges that N.H. was designated female at birth and that he "transitioned socially" from female to male before he started high school in the fall 2015. The complaint also alleges that pre-pubescent transgender children typically do *not* undergo medical interventions, such as surgical procedures or hormone therapy.[1] By alleging that N.H. was designated female at birth, that he had "transitioned socially," and that transgender children typically do not take steps to alter their anatomy, the complaint effectively alleges that, when N.H. attended Coon Rapids High School, he had not undergone surgical or pharmacological treatment and, thus, retained the female anatomy with which he was born.[2] Accordingly, N.H. was like cisgender boys in terms of gender identity, but he was *unlike* cisgender boys in terms of anatomy. The anatomical differences between transgender boys and cisgender boys are relevant for the obvious reason that they are visible when boys shower or change clothes in shared spaces. If the majority opinion's contrary conclusion necessarily depends on its interpretation of N.H.s complaint as being devoid of information about his anatomy, then the precedential value of this court's answer to the second certified question is diminished even further because it leaves open the possibility that the result might be different in a

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[1]This allegation is consistent with the federal government's May 2016 guidance letter, which states that "medical authorities 'do not permit sex reassignment surgery for persons who are under the legal age of majority.'" *Dear Colleague Letter*, *supra*, at 6 n.7.

[2]This interpretation is consistent with the brief of *amici curiae* World Professional Association for Transgender Health, JustUs Health, and Family Tree Clinic of St. Paul, which states that treatment for gender dysphoria may include social transition, pharmacological treatment, and surgical treatment.

case in which a complaint is more detailed or a case in which a factfinder has found that a transgender student's anatomy is different from the anatomy of cisgender students of the same gender identity.

Thus, I would conclude that N.H. was not "similarly situated *in all relevant respects*" in comparison to the cisgender boys in his gym class. *See Holloway*, 916 N.W.2d at 347 (emphasis added). That is a sufficient basis for concluding that N.H.'s equal-protection claim does not state a claim upon which relief can be granted.

C.

The majority opinion, after concluding that N.H. was similarly situated to all boys who identified as male, proceeds to analyze N.H.'s equal-protection claim. Even though I believe that such an analysis is unnecessary because N.H. cannot satisfy the threshold similarly-situated requirement, I will offer an alternative analysis of the remaining issues.

I would agree with part II.B.3. of the majority opinion insofar as it determines that intermediate scrutiny applies to N.H.'s equal-protection claim. *See supra* at 27-30. In applying that level of scrutiny, I would recognize that the caselaw is favorable to the school district's justification for its actions toward N.H. But I would conclude that the constitutionality of the school district's actions cannot be determined unless and until the school district has had an opportunity to introduce evidence.

The majority opinion asks whether the school district's actions toward N.H. were "substantially related to an important governmental objective." *See Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 457 (1976); *see also United States v. Virginia*, 518 U.S. 515, 532, 116 S. Ct. 2264, 2275-76 (1996). The school district describes its objective as

protecting "the privacy interests of students where the main boys' locker room has no privacy features for changing or showering." The unstated premise, which we know from common experience, is that most people are more reluctant to expose their naked bodies to persons of the opposite sex than to persons of the same sex. The majority opinion concludes in part II.B.4. that the school district's actions do not withstand intermediate scrutiny. *See supra* at 30-34. The federal caselaw suggests that we ask two distinct questions: first, whether the school district's objective was an important governmental objective and, second, whether the school district's actions toward N.H. were substantially related to that objective.

1.

Three federal circuit courts have considered whether a school's interest in protecting the privacy of its students is an important governmental objective, and all three of those courts have determined that it is. *See Grimm v. Gloucester County Sch. Bd.*, No. 19-1952, 2020 WL 5034430, *19 (4th Cir. Aug. 26, 2020) ("No one questions that students have a privacy interest in their body when they go to the bathroom."); *Adams by Kasper v. School Board of St. Johns County*, 968 F.3d 1286, 1297 (11th Cir. 2020) ("we recognize an important government interest behind the School Board's bathroom policy"); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1052 (7th Cir. 2017) ("this court certainly recognizes that the School District has a legitimate interest in ensuring bathroom privacy rights are protected"). The majority opinion cites all three opinions as supportive of its reasoning. But in each of the three cases, the court recognized that the school's objective

was valid and important. Thus, as a matter of law, the objective identified by the school district in this case is an important governmental objective.

2.

Three federal circuit courts and several federal district courts have considered whether a school's restrictions on transgender students' access to bathrooms or locker rooms are substantially related to the important governmental objective described above. These courts have issued decisions that typically depend on the particular facts and procedural posture of each case. Some courts have held that a school's bathroom restrictions did not actually serve the school's important governmental objective because the school's bathrooms had individual toilet stalls, with dividers and doors, so that, as a practical matter, it was difficult or impossible for persons using the bathrooms to intrude on the privacy of other persons using the bathrooms. We need not decide whether those federal decisions are correct. In any event, none of those decisions dictate a particular result in this case because none of them are based on a fully developed factual record concerning a locker room.

For example, in *Whitaker*, the school sought "to protect the privacy rights of all 22,160 students" and argued that "[t]he mere presence of a transgender student in the bathroom . . . infringes upon the privacy rights of other students with whom he or she does not share biological anatomy." 858 F.3d at 1052. After recognizing the school's "legitimate interest in ensuring bathroom privacy rights are protected," the court reasoned that "the School District's privacy argument is based upon sheer conjecture and abstraction" because it "ignores the practical reality" that the transgender student used the

bathroom "by entering a stall and closing the door." *Id.* Accordingly, the *Whitaker* court affirmed the issuance of a preliminary injunction in favor of the transgender student.[3] *Id.* at 1055.

In *Adams*, the court reviewed a judgment entered in favor of the plaintiff after a bench trial. 968 F.3d at 1291-92, 1295. The district court had made numerous findings of fact that undermined the school's privacy concerns, including a finding "that Mr. Adams's presence in the boys' bathroom does not jeopardize the privacy of his peers in any concrete sense" because "he 'enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves.'" *Id.* at 1299. Consistent with the district court's findings, the circuit court stated, "The School Board has demonstrated no substantial relationship between excluding Mr. Adams from the communal boys' restrooms and protecting student privacy," primarily because "the School Board's privacy concerns about Mr. Adams's use of the boys' bathroom are merely 'hypothesized,' with no support in the factual record." *Id.* at 1297.

In *Grimm*, the court reviewed the entry of summary judgment in favor of the plaintiff. 2020 WL 5034430, *9-10. The circuit court reasoned that all students "have a

[3]In *Whitaker*, the circuit court considered the merits of the plaintiff's claims according to the "low threshold" of whether "his chances to succeed on his claims are better than negligible" and concluded with respect to his equal-protection claim that he had "met the low threshold of demonstrating a probability of success." 858 F.3d at 1046, 1050 (quotation omitted). As a non-final opinion, *Whitaker* has limited precedential value. Other opinions cited in the majority opinion also were concerned with a motion for a preliminary injunction. *See Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 293 (W.D. Pa. 2017); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 640-45 (M.D.N.C. 2016).

privacy interest in their body when they go to the bathroom." *Id.* at *19. But the court reasoned that the school's policy was not substantially related to that important governmental objective:

> [T]he Board ignores the reality of how a transgender child uses the bathroom: by entering a stall and closing the door. Grimm used the boys restrooms for seven weeks without incident. When the community became aware that he was doing so, privacy in the boys restrooms actually increased, because the Board installed privacy strips and screens between the urinals. Given these additional precautions, the Board's Rule 30(b)(6) deposition witness could not identify any other privacy concern. The Board does not present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student. Put another way, the record demonstrates that bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms. Therefore, the Board's policy was not substantially related to its purported goal.

Id. (quotations and citations omitted).

These three circuit court opinions demonstrate that the second part of the intermediate-scrutiny analysis typically is a fact-bound inquiry, which requires a well-developed factual record. In addition, two federal district courts have denied a school's rule 12(b)(6) motion to dismiss a transgender student's equal-protection claim where the defendant school had not yet introduced evidence to show that its policies are substantially related to its important governmental objective. *See A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 541 (M.D. Pa. 2019); *M.A.B. v. Board of Educ. of Talbot County*, 286 F. Supp. 3d 704, 725 (D. Md. 2018).

The *M.A.B.* decision is particularly relevant because it is one of only two federal court decisions concerning a locker room. The district court's analysis was limited; it simply noted that "the Court may only consider [plaintiff's] allegations in the Complaint," that the plaintiff did "not describe the basis of Defendants' privacy concerns in his Complaint," and that "Defendants have not offered a factual basis to support their privacy concerns." 286 F. Supp. 3d at 724. The district court also noted that "[n]o allegations in the Complaint suggest that the High School's boys' locker room is 'particularly susceptible to an intrusion upon an individual's privacy'" and that "the boys' locker room here has partitioned stalls for changing clothes." *Id.* The district court did not describe the showers in the school's locker rooms. *See id.* at 708-10. The district court's reasoning in *M.A.B.* does not necessarily mean that the plaintiff ultimately will prevail. The *M.A.B.* decision differs from the decision in *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), the only other federal court decision concerning a locker room. The district court in *Johnston* granted the defendant's rule 12(b)(6) motion to dismiss the plaintiff's equal-protection claim, reasoning that the university's "policy of segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest'" because "the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex." *Id.* at 669 (quotation omitted).

In *Granville v. Minneapolis Pub. Sch. Special Sch. Dist. No. 1*, 668 N.W.2d 227 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003), this court considered an equal-

protection claim on appeal from the grant of a rule 12.02(e) motion to dismiss. *Id.* at 229. After reciting the applicable law, we stated that,

> in the context of a Rule 12.02(e) motion to dismiss, . . . the record, in its current state, does not permit the determination of whether [the challenged statute] passes the rational-basis test . . . . At this early stage of the proceedings, there is insufficient evidence from which the district court can determine whether the legislature's choice of [a particular policy] is arbitrary under current market conditions, as appellants assert, or, on the contrary, creates a constitutional classification that is relevant to the statute's purpose. . . . In order to decide whether the statute meets the federal and state rational-basis tests, evidence . . . is required.

Id. at 234-35. Consistent with *Granville*, N.H. contends that the school district's justification for its actions "is factually . . . unsupported" because the school district "offers no evidence any other student at [the school] felt their privacy interests were infringed by N.H.'s presence."

As in *M.A.B.* and *Granville*, it appears that N.H.'s complaint does not allege facts that would foreclose his equal-protection claim by compelling the conclusion that the school district's actions toward him were substantially related to the important governmental objective of protecting students' privacy. The parties' appellate briefs indicate that relevant facts have yet to be fully developed. For example, N.H.'s complaint alleges that he used a boys' locker room without incident when he was a member of the boys' swim team as a ninth-grade student during the 2015-2016 academic year. The school district asserts that the locker room N.H. used as a member of the swim team is not the same locker room that he was prohibited from using as a student in the gym class during the 2016-2017 academic year. The school district explains that the boys' swim team held

its practices and meets at another school because the Coon Rapids High School does not have a swimming pool. The school district explains further that the locker room at the other school had "privacy features," which implies that members of the team could shower and change clothes without exposing their naked bodies to others. The school district explains further that the boys' locker room at the Coon Rapids High School that was used for the gym class did *not* have such privacy features, which implies that boys using that locker room must shower and change clothes in undivided spaces. The school district suggests that the differences between the two locker rooms explain why there were no issues when N.H. was a member of the boys' swim team during the 2015-2016 academic year but why concerns were raised when N.H. enrolled in the gym class during the 2016-2017 academic year. But the school district's argument is not based on the allegations in N.H.'s complaint.

Furthermore, relevant details are absent from N.H.'s complaint, such as descriptions of the physical features of the general boys' locker room and the enhanced-privacy boys' locker room, the frequency and manner in which students typically use the locker rooms, and the likelihood that boys using the general boys' locker room would be able to see each others' unclothed bodies. A record of these and other relevant facts must be developed before the district court may determine the key factual issues, either on a motion for summary judgment or at trial. If the record eventually includes evidence of a shared, multiple-user shower space (*i.e.*, an undivided space with multiple showerheads), I would expect findings different from the findings in *Adams*. But in the present procedural posture, I would conclude, consistent with *M.A.B.* and *Granville*, that if N.H. could satisfy the

threshold similarly-situated requirement (and I would conclude that he cannot, as discussed in part II.B. of this dissenting opinion), count 2 of his complaint would state a claim upon which relief can be granted.

In sum, I would conclude that count 2 of N.H.'s complaint claim does not state a claim on which relief can be granted because N.H. was not similarly situated in all relevant respects to the cisgender boys in his gym class. Accordingly, I would answer the second certified question, as reformulated, in the negative.