Nos. 22-1786, 22-2318

United States Court of Appeals for the Seventh Circuit

B.E. and S.E., minor Children by their Mother, legal guardian, and next friend, L.E., Plaintiffs-Appellees, v. VIGO COUNTY SCHOOL CORPORATION; PRINCIPAL, TERRE HAUTE NORTH HIGH SCHOOL, in his official capacity, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division Case No. 2:21-cv-00415-JRS-MG Honorable James R. Sweeney II, Judge. Appeal No. 22-2318

A.C., a minor child by his next friend, mother and legal guardian, M.C., Plaintiff-Appellee, v. METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE, and PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL, in his official capacity, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Case No. 1:21-cv-2965-TWP-MPB Honorable Tanya Walton Pratt, Chief Judge. Appeal No. 22-1786

APPELLANTS' BRIEF AND SHORT APPENDIX

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2318 (consolidated with 22-1786)

Short Caption: B. E. and S.E. v. Vigo County School Corporation, et al; A.C. v. Metropolitan School District of Martinsville et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Vigo County School Corporation & Principal, Terre Haute North Vigo High School

Metropolitan School district of Martinsville & Principal, John R. Wooden Middle School, in his official capacity

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bose McKinney & Evans LLP by Philip R. Zimmerly, Jonathan L. Mayes, and Mark Wohlford

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: _____ Date: September 12, 2022

Attorney's Printed Name: Philip R. Zimmerly

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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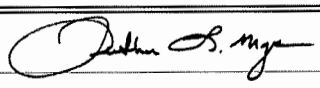
Attorney's Signature:  Date: September 12, 2022

Attorney's Printed Name: Jonathan L. Mayes

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Mark Wohlford Date: September 12, 2022

Attorney's Printed Name: Mark A. Wohlford

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

This consolidated appeal involves two actions filed in the United States District Court for the Southern District of Indiana. The first action, *B.E. and S.E., minor Children by their Mother, legal guardian, and next friend, L.E. v. Vigo County School Corporation, et al.* ("*B.E.*"), was filed on behalf of two freshman siblings whose sex and physical anatomy are female but who seek access to the boys' restrooms and locker rooms at Terre Haute North Vigo High School in Terre Haute, Indiana. The second action, *A.C., a minor child by his next friend, mother and legal guardian, M.C. v. Metropolitan School District of Martinsville, et al. ("A.C.")*, was filed on behalf of a seventh grade student whose sex and physical anatomy is female but who seeks access to the boys' restrooms at the John R. Wooden Middle School in Martinsville, Indiana.

In both cases, the District Court's jurisdiction is based on the existence of a federal question under 28 U.S.C. § 1331 for claims arising under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681.

The order sought to be reviewed in the *B.E.* case was entered on June 24, 2022. (A1-21[1] (*B.E.* Dkt. 56).) In that order, the District Court granted the Plaintiffs' motion for a preliminary injunction. (*B.E.* Dkt. 56.) The District Court contemporaneously entered a separate preliminary injunction order in compliance with Fed. R. Civ. P. 65(d)(1)(C). (A22 (*B.E.*, Dkt. 57).)

[1] "A" refers to the short appendix included with this brief.

The order sought to be reviewed in the *A.C.* case was entered on April 29, 2022. (A24-39 (*A.C.* Dkt. 50).) In that order, the District Court granted the Plaintiff's motion for a preliminary injunction. (*A.C.* Dkt. 50.) On May 19, 2022, the District Court subsequently entered a separate preliminary injunction order in compliance with Fed. R. Civ. P. 65(d)(1)(C). (A40 (*A.C.* Dkt. 65).)

The appellate jurisdiction of this Court is conferred under 28 U.S.C. § 1292(a)(1). The School Districts' consolidated Appellants' brief is due on September 12, 2022.

STATEMENT OF THE ISSUE

Whether Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause to the United States Constitution mandate that schools provide students with access to restrooms and locker rooms that match their gender identities, or whether schools may continue to maintain separate living facilities based on the sex and physical anatomy of students.

STATEMENT OF THE CASE

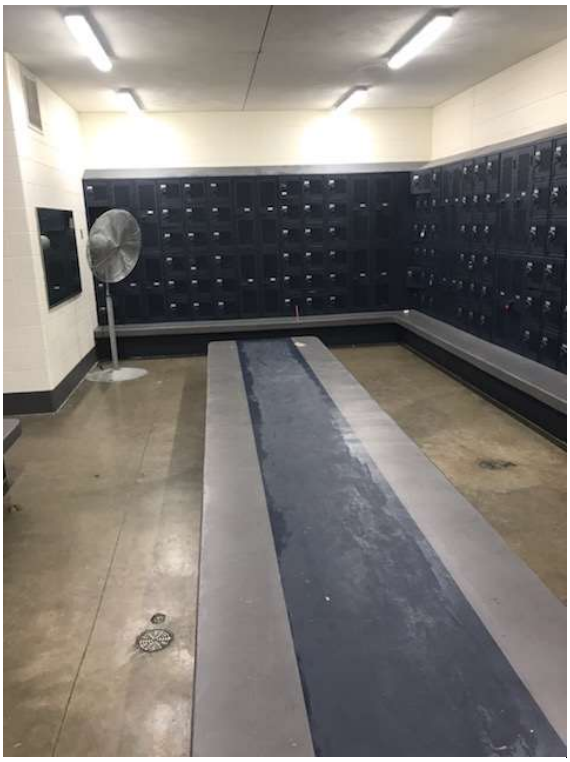
I. Factual Background

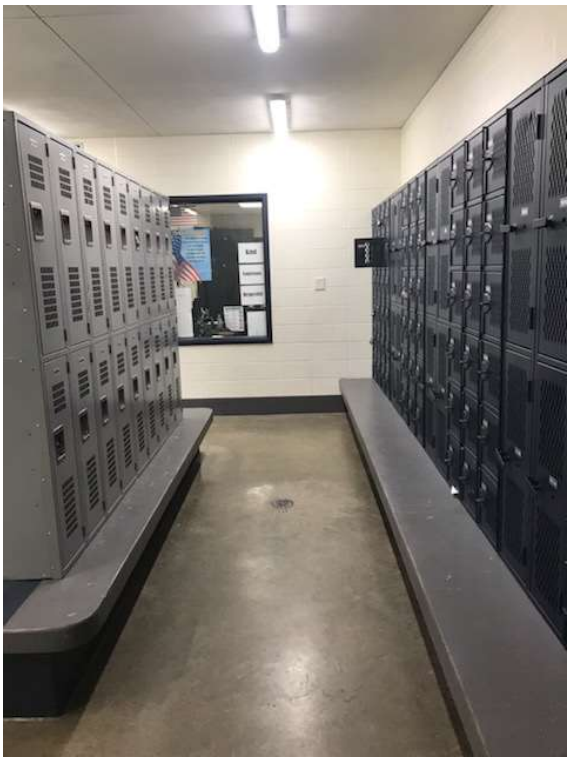
A. B.E. & S.E. / Terre Haute North Vigo High School

Appellant Vigo County School Corporation serves more than 13,000 students in three traditional high schools, five middle schools, 16 elementary schools, an alternative school, and a virtual school. (*B.E.* Dkt. 29-6 at 1 (Declaration of N. Michael Cox ("Cox Decl.") at ¶ 3).) The restrooms and locker rooms at Terre Haute

North Vigo High School are separated by sex.[2] (*B.E.* Dkt. 29-4 at 2, 4 (30(b)(6) Deposition of Vigo County School Corp. ("VCSC Dep.") at 37:20-24, 43:5-7).) There is also a unisex restroom in the health office. (*B.E.* Dkt. 29-4 at 2 (*id.* at 35:9-15).)

The high school boys' restrooms have individual stalls separating the toilets, but no partitions between the urinals. (*B.E.* Dkt. 29-4 at 2 (*id.* at 37:25-38:9).) The locker rooms have open areas where students may change:





(*See B.E.*, Dkt. 29-6 at 1, 3-12 (Cox Decl. at ¶¶ 5-6 and accompanying photos); *B.E.*, Dkt. 29-4 at 4 (VCSC Dep. at 43:22-44:5).)

[2] "Sex" is different than "gender," as a person's sex is identified "with their genitals that are typically described at birth" while a person's gender has to do with their experience relative to their sex. (*B.E.* Dkt. 51-1 at 2-3, *A.C.* Dkt. 34-3 at 2 (Deposition of Dr. J. Dennis Fortenberry ("Fortenberry Dep.") at 8:21-10:16).)

The locker room showers are an open space and do not have private stalls:

(*See B.E.* Dkt. 29-6 at 1, 3-12 (Cox Decl. at ¶¶ 5-6 and accompanying photos); *B.E.* Dkt. 29-4 at 4 (VCSC Dep. at 43:19-21).)

B.E.'s and S.E.'s sex and physical anatomy are female. (*B.E.* Dkt. 29-1 at 5, 16 (L.E. Dep. at 41:9-22, 42:12-13, 90:23-91:1, 91:17-25).) Yet, B.E. and S.E. have been "recognized as boys" at home since they were 11 years old, which means they dress in a masculine manner, have masculine haircuts, and act "lazy." (*B.E.* Dkt. 29-1 at 2 (Deposition of L.E. ("L.E. Dep.") at 22:10-24).)

During middle school, B.E. and S.E. utilized the girls' restrooms and locker rooms. (*B.E.* Dkt. 29-1 at 10 (L.E. Dep. at 64:24-65:8).) In August 2021, B.E. and S.E. began their freshman year at Terre Haute North Vigo High School. On August 18, 2021, L.E. emailed B.E.'s and S.E.'s special education teacher to ask whether

her children could utilize the boys' locker rooms before or after other students or to utilize a separate boys' locker room:

> [I]s there any way that they can use the boy locker room in a different lock [sic] room because you do have other locker rooms or let them go into boys lock [sic] room AFTER or Before the the [sic] class starts or ends??!! Please I do understand that they can't go inside with the boys and honestly they don't either it's just the fact that it is what they prefer what they are BOYS!! I honestly hate this but I have to Support their decision or maybe I don't know I'm having a hard time excepting [sic] I'm sorry!!

(*B.E.* Dkt. 29-5 at 16 (Dep. Ex. 7 at VCSC_000018).)

In early September 2021, L.E., B.E., and S.E. met with the high school vice principal after someone reported that B.E. and S.E. used the boys' restroom. (*B.E.* Dkt. 29-1 at 7 (L.E. Dep. at 54:9-55:8).) B.E. and S.E. were told to use the girls' restrooms or the restroom in the health office. (*B.E.* Dkt. 29-1 at 7 (*id.* at 54:20-25).)

In October 2021, L.E. met with the high school principal and vice principal. (*B.E.* Dkt. 29-1 at 8 (L.E. Dep. at 57:20-25).) The administrators reiterated that B.E. and S.E. were not allowed to use the boys' restrooms or locker rooms, but explained they would be provided with passes to go to the restroom during class if needed. (*B.E.* Dkt. 29-1 at 8, 11-2 (L.E. Dep. at 58:11-59:3, 70:13-72:4).) The school has complied with that accommodation. (*B.E.* Dkt. 29-1 at 11-12 (*see id.* at 70:13-72:4, 74:4-8; *see also B.E.* Dkt. 29-2 at 2 (S.E. Dep. 15:4-18).)

On or about October 18, 2021, L.E. provided physician's notes to the high school principal requesting that B.E. and S.E. be allowed to "use bathrooms and locker rooms that are congruent with his male gender." (*See B.E.* Dkt. 29-5 at 5-8

(Dep. Exs. 4, 5).) L.E. concedes that these requests are based on her children's gender and not their sex. (*B.E.* Dkt. 29-1 at 12 (L.E. Depo. at 72:5-12, 74:9-16).)

B.E. and S.E. utilized the health office restroom every day that they were at school, multiple times over the course of a day. (*B.E.* Dkt. 29-3 at 5 (B.E. Dep. at 35:4-11); Dkt. 29-2 at 4 (S.E. Dep. at 21:4-12).) There have been a few occasions where the health office has been locked, after which they waited for the door to be unlocked and were able to use the restroom. (*B.E.* Dkt. 29-3 at 5 (B.E. Dep. at 35:12-36:12); Dkt. 29-2 at 4 (S.E. Dep. at 21:13-22:9).)

B.E. and S.E. have had gastrointestinal issues since they were infants, which require laxatives. (*B.E.* Dkt. 29-3 at 3 (B.E. Dep. at 27:2-13); Dkt. 29-2 at 3 (S.E. Dep. at 18:10-13).) They claim in a declaration prepared by their attorneys that they have had restroom accidents at school as a result of this health issue, but could not identify the specifics of any such alleged accidents during high school. (*B.E.* Dkt. 29-3 at 4 (B.E. Dep. at 30:12-31:24); Dkt. 29-2 at 3 (S.E. Dep. at 19:14-21).) B.E. testified that L.E. picked B.E. up from school because B.E.'s stomach hurt on three occasions, but only once because B.E.'s stomach hurt from "holding it." (*B.E.* Dkt. 29-3 at 5 (B.E. Dep. at 33:12-35:3).) While their mother claimed that there were instances where she was required to bring B.E. and S.E. a change of clothes, she recalled only one such instance for S.E. in high school and that the other instances occurred during middle school, prior to any request to use the boys' restrooms. (*B.E.* Dkt. 29-1 at 14 (L.E. Dep. at 80:2-9, 82:9-23).)

B.E. and S.E. have been diagnosed with gender dysphoria. (*B.E.* Dkt. 22-4 (B.E. Decl. ¶ 19); Dkt. 22-5 (S.E. Decl. ¶ 19).) On December 2, 2021, B.E. and S.E. secured orders from an Indiana state court legally changing their names and gender markers to male. (*B.E.* Dkt. 29-5 at 1-4 (Dep. Exs. 2, 3).) They have begun testosterone hormone therapy. (*B.E.* Dkt. 22-4 (B.E. Decl. ¶ 19); Dkt. 22-5 (S.E. Decl. ¶ 19).) However, B.E.'s and S.E.'s sex remains unchanged, and they have not altered their physical anatomy through surgery. (*B.E.*, Dkt. 29-1 at 5 (L.E. Dep. at 41:9-22).)

B. A.C. / John R. Wooden Middle School

The John R. Wooden Middle School is a part of the Metropolitan School District of Martinsville ("Martinsville School District"). The middle school includes seventh and eighth graders, and has 676 students. (*A.C.* Dkt. 29-4 at 8 ((30)(b)(6) Deposition of Fred Kutruff ("Kutruff Dep.") at 8:11-19).) The middle school restrooms are separated by sex. (*A.C.* Dkt. 29-4 at 48 (Kutruff Dep. at 48:1-4).) There is a unisex restroom in the health office available for use by all students, with permission from the school nurse. (*Id.* at 49-50 (Kutruff Dep. at 49:13-25, 50:17-23).)

The Martinsville School District addresses a student's request seeking to use the restroom different than that student's sex on a case-by-case basis, taking into account such considerations as (1) the number of years the student has been in transition, (2) whether the student has changed his or her outward appearance, (3) whether the student has been diagnosed with gender dysphoria, (4) whether the student is receiving hormones, (5) whether the student has received surgery, and (6)

whether the student has legally requested and secured a name and gender marker change. (*A.C.* Dkt. 29-4 at 15-16, 19, 23-24 (Kutruff Dep. at 15:22-16:14, 19:6-14, 23:16-24:9).) At the middle school level, the decision to consider these items is based on the age and maturity of the student population and an effort to protect the safety and privacy of students. (*A.C.* Dkt. 29-4 at 24 (Kutruff Dep. at 24:2-7).) Consistent with this approach, the Martinsville School District has allowed students at the high school level to use a bathroom consistent with their stated gender identity. (*A.C.* Dkt. 29-4 at 23 (Kutruff Dep. at 23:6-15).)

A.C. is thirteen years old and, at the time this action was filed, was a seventh grade student during the 2021-2022 school year. (*A.C.* Dkt. 34-1 at 2 (Deposition of M.C. ("M.C. Dep.") at 6:11-12; Dkt. 34-2 at 2 (Deposition of A.C. ("A.C. Dep.") at 13:17-20).) A.C.'s sex and physical anatomy is female. (*A.C.* Dkt. 34-1 at 5, 10 (M.C. Dep. at 20:4-5, 40:1-3).)

During fifth and sixth grade, A.C. attended Bell Intermediate School in the Martinsville School District. (*A.C.* Dkt. 34-1 at 5-6 (M.C. Dep. at 21:23-22:3).) A.C. did not use the boys' restrooms at the intermediate school. (*A.C.* Dkt. 34-1 at 6 (M.C. Dep. at 23:23-24:17); Dkt. 34-2 at 2 (A.C. Dep. at 12:19-13:1).) Instead, A.C. requested, and was allowed to use, the health clinic restroom. (*A.C.* Dkt. 34-1 at 6 (M.C. Dep. at 25:1-7); Dkt. 34-2 at 2 (A.C. Dep. at 12:22-13:1).)

In August 2021, A.C. began seventh grade at the middle school, and began using the single person restroom in the health clinic. (*A.C.* Dkt. 34-1 at 7 (M.C. Dep. at 26:14-27:3).) In September or October 2021, A.C.'s stepfather called to inquire

about restroom access for transgender students. (*A.C.* Dkt. 29-4 at 38-39 (Kutruff Dep. at 38:19-39:7).) The middle school principal responded that students who identified as transgender were allowed to use the nurse's office. (*Id.*)

In October 2021, A.C. was seen by a nurse practitioner at the Riley Gender Health Clinic, who diagnosed A.C. with gender dysphoria. (*A.C.* Dkt. 34-1 at 3, 9-10 (M.C. Dep. at 11:22-12:10, 36:18-37:7, 38:16-20).) Since then, A.C. has received injections of Depo-Provera to stop periods. (*A.C.* Dkt. 34-1 at 9-10 (M.C. Dep. at 36:18-37:7, 37:24-38:2).) Although A.C. has expressed an interest in receiving hormones (testosterone), no hormones have been prescribed. (*A.C.* Dkt. 34-1 at 10-11 (M.C. Dep. at 40:14-42:8).)

After the initial visit to Riley, A.C. and A.C.'s mother, M.C., connected with GenderNexus, an advocacy organization. (*A.C.* Dkt. 34-1 at 11 (M.C. Dep. 42:17-43:2).) On November 3, 2021, A.C., M.C., and a GenderNexus employee participated in a Zoom call with middle school personnel and requested that A.C. be allowed to use the boys' restroom. (*A.C.* Dkt. 34-1 at 7, 11 (M.C. Dep. at 26:24-28:4, 43:15-45:19).) M.C. and A.C. were advised that A.C. could continue to use the health clinic restroom and would be allocated more time to utilize that restroom without being considered late for class. (*A.C.* Dkt. 29-4 at 61 (Kutruff Dep. at 61:6-25).) Following the call, M.C. gave A.C. her permission to use the boys' restroom. (*A.C.* Dkt. 34-1 at 12 (M.C. Dep. at 48:24-49:11); Dkt. 34-2 at 7 (A.C. Dep. at 34:3-15).)

In mid-November 2021, the middle school principal received an email from a teacher who encountered A.C. in the boys' restroom. (*A.C.* Dkt. 29-4 at 64 (Kutruff

Dep. at 64:2-14).) On November 22, 2021, the school social worker called A.C. to the office and instructed A.C. not to use the boys' restroom. (*A.C.* Dkt. 29-4 at 65-66 (Kutruff Dep. at 65:22-66:10); Dkt. 34-2 at 8 (A.C. Dep. at 36:19-37:12).)

Shortly after Thanksgiving, A.C. met with the middle school principal, who reiterated that A.C. was to use the health clinic restroom or the girls' restroom. (*A.C.* Dkt. 29-4 at 67 (Kutruff Dep. at 67:11-16).) A.C. complied with that request. (*A.C.* Dkt. 34-1 at 13 (M.C. Dep. at 53:18-22).) A.C. did not use the girls' restroom, and sometimes avoided using the health restroom. (*A.C.* Dkt. 34-2 at 9 (A.C. Dep. at 41:3-16); Dkt. 29-3, ¶ 22).)

A.C. has been marked tardy for being late to class but has never received discipline for it. (*A.C.* Dkt. 34-1 at 7 (M.C. Dep. at 28:5-7); Dkt. 29-3, ¶ 21).) With the exception of one or two occasions, teachers have granted A.C.'s requests to use the restroom during class. (*A.C.* Dkt. 34-2 at 3 (A.C. Dep. at 17:9-18:11).)

A.C. filed an action in Indiana state court seeking to change A.C.'s name and gender marker to male. (*A.C.* Dkt. 29-2, ¶ 15.) A.C.'s request for a legal name change was granted on March 23, 2022. (*A.C.* Dkt. 38-3.) However, A.C.'s request for a gender marker change was denied by the state court, who entered findings of fact and conclusions of law, and determined that such a change was not supported by the evidence and would not be in A.C.'s best interests. (*A.C.* Dkt. 43-1.) Rather than appealing that decision, A.C. filed a new action in a different Indiana state trial court, which granted A.C.'s request for a gender marker change. (*See A.C.*, No. 22-1786, Appeal Dkt. 39.)

II. Procedural Background

A. B.E. & S.E. / Vigo County School Corporation

On November 8, 2021, B.E. and S.E. filed a complaint and request for preliminary injunction, seeking access to the high school boys' restrooms and locker room.[3] (*B.E.* Dkt. 1, 12.) On January 4, 2022, the Vigo County School Corporation filed its answer. (*B.E.* Dkt. 27.) The parties exchanged briefing on the preliminary injunction request. (*B.E.* Dkt. 22, 30, 44, 51.) Although the Vigo County School Corporation requested oral argument, its request was denied. (*B.E.* Dkt. 46, 48.)

On June 24, 2022, the District Court entered an order granting B.E.'s and S.E.'s request for a preliminary injunction. (*B.E.* Dkt. 56.) The District Court entered a separate preliminary injunction order in compliance with Fed. R. Civ. P. 65(d)(1)(C), requiring the Vigo County School Corporation to "provide access to the boys' restrooms and locker rooms, excluding the showers." (A23 (*B.E.* Dkt. 57 at 2).) In the Order, the District Court held that *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), controls and therefore B.E. and S.E. are likely to succeed on the merits of their Title IX claim. (A22.)[4] The District Court found that the remaining preliminary injunction factors also weighed in favor of B.E. and S.E. (A22-23.)

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[3] B.E. and S.E. also initially requested an injunction mandating the use of male pronouns by school staff and the provision of male ROTC uniforms, but abandoned those requests, as staff had already voluntarily complied with the pronoun request and uniforms are provided by a different entity than the school corporation.

[4] The District Court declined to address Plaintiffs' Equal Protection claim. (*B.E.* Dkt. 56 at 5.)

The Vigo County School Corporation timely filed its notice of appeal on July 25, 2022. (*B.E.* Dkt. 60.)

B. A.C. / John R. Wooden Middle School

On December 3, 2021, A.C. filed a complaint and request for preliminary injunction, seeking access to the middle school boys' restrooms.[5] (*A.C.* Dkt. 1, 9.) On January 25, 2022, the Martinsville School District filed its answer. (*A.C.* Dkt. 28.) The parties exchanged briefing on the preliminary injunction request, (*A.C.* Dkt. 30, 35, 39), and presented oral argument on April 8, 2022. (*A.C.* Dkt. 40.)

On April 11, 2022, A.C. provided notice to the trial court that A.C.'s request for a gender marker change had been denied by the state trial court. (*A.C.* Dkt. 41.) On April 12, 2022, the Martinsville School District provided a sealed copy of the state trial court's order and requested that the District Court take judicial notice of that order and its collateral estoppel effects. (*A.C.* Dkt. 42.) The parties filed further briefing (*A.C.* Dkt. 45, 46.) The District Court ultimately granted the request to take judicial notice of the state court order, but denied that it had any collateral estoppel effects. (*A.C.* Dkt. 47.) After this appeal was initiated, a separate trial court in a different Indiana county granted A.C.'s request for a gender marker change. (*See A.C.*, No. 22-1786, Appeal Dkt. 39.)

On April 27, 2022, the District Court entered an order granting A.C.'s request for a preliminary injunction and requiring the School District to "permit A.C. to use

[5] A.C. also initially requested an injunction mandating the use of male pronouns by school staff, but abandoned that request, as staff had already voluntarily complied with that request.

any boys' restroom within [the middle school]." (A38 (*A.C.* Dkt. 50 at 15).) In the Order, the District Court held that *Whitaker* controls and therefore A.C. is likely to succeed on the merits of the Title IX and Equal Protection Clause claims against the School District. (A34-36 (*A.C.* Dkt. 50 at 10-12).) The District Court found that the remaining preliminary injunction factors also weighed in favor of A.C. (A36-38.) On May 19, 2022, the District Court subsequently entered a separate preliminary injunction order in compliance with Fed. R. Civ. P. 65(d)(1)(C). (A40 (*A.C.* Dkt. 65).)

On May 3, 2022, the Martinsville School District filed an expedited motion to stay enforcement of the preliminary injunction pending appeal, (*A.C.* Dkt. 53), which was denied by the District Court on May 16, 2022. (*A.C.* Dkt. 61.)

The Martinsville School District timely filed its notice of appeal on May 3, 2022. (*A.C.* Dkt. 52.) On August 12, 2022, this Court granted the Appellants' unopposed motion to consolidate the *B.E.* and *A.C.* appeals.

SUMMARY OF THE ARGUMENT

The School Districts have complied with Title IX and the Equal Protection Clause in maintaining sex-separated restrooms and locker rooms, a longstanding practice consistent with Title IX and the United States Constitution. Title IX expressly allows educational institutions to provide "separate living facilities for the different sexes," making clear that such separation is not unlawful discrimination. 20 U.S.C. § 1686 ("Section 1686"). Moreover, Title IX's regulations state that institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable

to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. In accordance with this authority, the School Districts have asked Plaintiffs to continue to utilize restrooms and locker rooms consistent with their sex and have also offered the use of a unisex restroom in the health office as an accommodation until further steps are taken and additional information is gathered.

Plaintiffs advocate for an interpretation of Title IX that contradicts Section 1686 and prohibits schools from maintaining separate restrooms and locker rooms as it relates to their individual gender identities. In doing so, Plaintiffs rest their position almost entirely on *Whitaker*. But *Whitaker* applied a Title VII sex stereotyping discrimination theory in analyzing restroom access, omitted any mention of Section 1686, and ignored fundamental differences between Title VII and Title IX in the context of living facility access. As an employment law, Title VII governs non-discrimination in the employment context and prohibits employment decisions (e.g. hiring, promotions, terminations) on the basis of sex. With regard to living facilities, however, Title IX recognizes the anatomical differences between the sexes and permits schools to provide separate facilities on that basis. Moreover, Title IX's implementing regulations allow institutions to make a number of distinctions on the basis of sex. Therefore, while *Whitaker* sought to support its decision based upon guidance on Title VII from the Supreme Court, the higher court has since expressly declined to extend its Title VII jurisprudence to address "bathrooms, locker rooms, or anything else of the kind." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1753 (2020).

Plaintiffs have not met the high preliminary injunction standard. The School Districts respectfully request that the preliminary injunction orders be reversed.

STANDARD OF REVIEW

"This Court gives substantial deference to a district court's decision to grant a preliminary injunction insofar as that decision involves the discretionary acts of weighing evidence or balancing equitable factors." *United States v. Baxter Healthcare Corp.*, 901 F.2d 1401, 1407 (7th Cir. 1990). However, "the more purely legal conclusions made by a district court in granting a preliminary injunction are subject to *de novo* review." *Id.*

"To obtain a preliminary injunction, a plaintiff must first show that: (1) without such relief, it will suffer irreparable harm before final resolution of its claims; (2) traditional legal remedies would be inadequate; and (3) it has some likelihood of success on the merits." *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018). "If a plaintiff makes such a showing, the court next must weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Id.* "This assessment is made on a sliding scale: 'The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor.'" *Id.* (citation omitted). "Finally, the court must ask whether the preliminary injunction is in the public interest, which entails taking into account any effects on non-parties." *Id.* "Ultimately, the moving party bears the burden of showing that a preliminary injunction is warranted." *Id.*

ARGUMENT

The critical issue in this consolidated appeal is the import of Section 1686 and whether Title IX and the Equal Protection Clause mandate access to boys' restrooms and locker rooms to students based upon their gender identities, rather than their sex. The importance of that question is evidenced by recent administrative actions and legal challenges pending in jurisdictions throughout the nation. The School Districts begin by reviewing Title IX and the Equal Protection Clause, both of which have historically allowed institutions to provide separate restrooms on the basis of sex. After examining that legal framework, the School Districts request that this Court reconsider its analysis in *Whitaker*. The School Districts then address the remainder of the preliminary injunction factors, which fail to warrant the extraordinary relief of a preliminary injunction.

I. Plaintiffs' Demands to Use the Boys' Restrooms and Locker Rooms Based Upon Gender Identity are Not Supported by Title IX or the Constitution.

A. Title IX permits separate living facilities for the different sexes based upon the physical differences between the sexes.

Half a century ago, the provisions enacted as Title IX were introduced in the United States Senate by Birch Bayh during debate on the Education Amendments of 1972. *See N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 524 (1982). "Title IX was Congress's response to significant concerns about discrimination against women in education." *Neal v. Bd. of Trustees of Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999). "Title IX was passed with two objectives in mind: 'to avoid the use of federal resources to support discriminatory practices,' and 'to provide individual citizens

effective protection against those practices.'" *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)).

Title IX mandates that no person "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 receiving Federal financial assistance." 20 U.S.C. § 1681(a). Yet, Section 1686—titled "Interpretation with respect to living facilities"—provides an express exemption with regard to living facilities:

> Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Id. § 1686.

Thus, while Title IX prohibits exclusion from participation in educational programs or activities based upon sex, it unequivocally permits separate living facilities based upon sex. In expounding upon that framework, Title IX's regulations state that institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. In other words, "Title IX authorizes sex-segregated facilities . . . ." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020). This exemption was intended to "permit differential treatment by sex . . . in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh). Thus, Title IX and its regulations permit institutions to provide separate facilities in recognition of the differences between the two sexes,

and is not in any way conditioned upon proof that a privacy violation has occurred. That is, the type of discrimination that Title IX was created to address—the type it expressly prohibits—is not the type of discrimination complained of here by Plaintiffs, which Title IX expressly permits and preserves as lawful.

Title IX's authorization for separate facilities is based upon the physical differences between the sexes. "Physical differences between men and women are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) (cleaned up). When Title IX and its implementing regulations were enacted, privacy concerns were understandably recognized as elevated in those areas where clothes are removed and personal bodily functions are performed. *See Young v. Superior Ct.*, 57 Cal. App. 3d 883, 887 (Cal. Ct. App. 1976) ("An occupant of a closed bathroom, the same as an occupant of a closed bedroom, is entitled to an expectation of privacy far greater than those persons in the common areas of a house, such as the living room and kitchen.").

These physical differences are most likely to be exposed, to varying degrees, in areas reserved for performing bodily functions or other inherently personal acts. Title IX's allowance for different facilities "undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts, and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy." *Texas v. United States*, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016) (cleaned up), *order*

clarified, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016). Title IX's regulations even extend this anatomical-centric permission to "separate educational sessions for boys and girls when dealing with instruction concerning human sexuality." *Id.* (citing 34 C.F.R. § 106.34). "[T]hese privacy interests are broader than *the risks of actual* bodily exposure," and "*include the intrusion created by mere presence*." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 634 (4th Cir. 2020) (Niemeyer, J., dissenting), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

That recognition has not changed, as those same privacy distinctions remain true today. In *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063 (Cal. 2009), the California Supreme Court reviewed an appeal of a tort claim alleging invasion of privacy in a workplace where video surveillance was used. *Id.* at 1066. In addressing the expectation of privacy, the court surveyed rulings from state and federal courts. *Id.* at 1075. "At one end of the spectrum are settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public." *Id.* (collecting cases involving an outdoor patio of public restaurant; common, open, and exposed area of a workplace; and monitoring of customers as they shop in stores). In those public settings, privacy interests are diminished. *See id.* at 1075.

"At the other end of the spectrum are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts." *Id.* Analyzing this end of the privacy

spectrum with more heightened interests, the court cited *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1099–1100, 1103, 1119–1122 (C.D. Cal. 2006), as "recognizing that employees have common law and constitutional privacy interests while using locker room in basement of police station, and can reasonably expect that employer will not intrude by secretly videotaping them as they undress"; *Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1424, 1427 (8th Cir. 1991), for the "similar conclusion as to models who were secretly viewed and videotaped while changing clothes behind curtained area at fashion show"; and *Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494, 1499, 1506 (M.D. Fla.1995), for a "similar conclusion as to dancers who were secretly viewed and videotaped while changing clothes and using restroom in dressing room at work." *Hernandez*, 211 P.3d at 1075.

While these spaces are treated differently due to privacy protections, Title IX's statutory permission to maintain different facilities does not rest upon a school corporation demonstrating a privacy violation has occurred or may occur. Rather, Title IX expressly incorporates the longstanding reasons for the adoption of different spaces for the sexes when changing or performing bodily functions, however slight or nonexistent a privacy violation might be.

Instead of addressing Title IX's statutory language approving separate facilities for different sexes, the District Courts avoided the language altogether. In particular, the District Court noted that A.C. was not complaining of inappropriate facilities for the different sexes or asking that "the current ones be redesignated in any way." (A34 (*A.C.* Dkt. 50 at 11); *see also* A11-12 (B.E. Dkt. 56 at 11-12).) But

the District Court conflated Title IX's anti-discrimination mandate with the provisions that permit different but equitable facilities. Put simply, while Title IX provisions regarding facilities do allow for claims alleging discrimination on the basis of sex, such a discrimination claim cannot be premised upon maintenance of separate living facilities for the different sexes. The District Courts erred in disregarding this statutory exemption.

B. The Equal Protection Clause permits the provision of separate male and female restrooms on the basis of sex.

The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." "Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "Equal protection of the laws means that all persons similarly situated should be treated alike." *United States v. Nagel*, 559 F.3d 756, 760 (7th Cir. 2009). However, "[t]here is no constitutional right for . . . biological males who identify as female to live, sleep, shower, and train with biological females." *Doe 2 v. Shanahan*, 917 F.3d 694, 707–08 (D.C. Cir. 2019) (Williams, J., concurring).

The Equal Protection Clause "does not make sex a proscribed classification," and therefore a policy that classifies on the basis of sex is constitutional if it survives the two requirements of intermediate scrutiny. *United States v. Virginia*, 518 U.S. at 533. First, the government must prove the "classification serves

important governmental objectives." *Id.* (internal quotation marks omitted). Second, the government must prove "the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* (internal quotation marks omitted). "This intermediate level of judicial scrutiny recognizes that sex 'has never been rejected as an impermissible classification in all instances.'" *Tagami v. City of Chicago*, 875 F.3d 375, 380 (7th Cir. 2017) (citation omitted).

A school district's decision to separate bathrooms by sex, consistent with Title IX, satisfies both prongs. First, such a policy serves important objectives of protecting the interests of students in using the restroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex. This need for privacy justifies "separate public rest rooms for men and women based on privacy concerns." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). *See Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1308 (11th Cir. 2021) ("[T]he government may promote its interest in protecting privacy by maintaining separate bathrooms for boys and girls, men and women."), *vacated and en banc rehearing granted*, 9 F.4th 1369 (Aug. 23, 2021).

"Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females." *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *vacated*, 137 S. Ct. 1239

(2017). "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." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). *See Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (recognizing constitutional right to privacy, which includes "the right to shield one's body from exposure to viewing by the opposite sex" in context of video surveillance in school locker rooms); *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980) (noting privacy interest "entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex"); *Strickler v. Waters*, 989 F.2d 1375, 1387 (4th Cir. 1993) ("[W]hen not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates his constitutional rights.").

The importance of assuring privacy is heightened for students in the secondary education setting. In particular, middle school students are less mature and only "on the threshold of awareness of human sexuality." *J.A. v. Fort Wayne Comm'y Schs.*, No. 1:12-CV-155 JVB, 2013 WL 4479229, at *6 (N.D. Ind. Aug. 20, 2013). Such children "characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 564 U.S. 261, 272–73 (2011) (Sotomayor, J.).

Moreover, such policies are administratively practical and therefore preferable given the large numbers of students with which those policies have to apply on a day-to-day and minute-by-minute basis within the confines of a school. The balancing act schools must undertake to consider all of those individual

students' respective privacy interests, as acknowledged by the common law and Title IX, while primarily serving to educate students is an important government objective in and of itself. Indeed, it is generally accepted that the "government has a substantial interest in ensuring that all of its operations are efficient and effective." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386 (2011). It is no surprise, then, that Title IX permits schools to draw the lines on how to best safeguard privacy interests by separating living facilities on the basis of sex. The practical operational benefits of such a permissible policy underscore the importance of this government interest, and any intrusion on a school's reasonable, practical, and permissible policy under the law as it pertains to facility access threatens to be an exception that swallows the rule and undermines the functionality of public schools.

With regard to the second prong of the Equal Protection analysis, separating school restrooms and locker rooms by sex is substantially related to the achievement of the objectives of maintaining privacy and operational efficiency, as students use the bathroom, locker room, and shower in a separate space from the opposite sex, are protected against exposure of their bodies to the opposite sex. "[T]he Supreme Court has long required that courts defer to the judgment of public-school officials in this context." *Adams*, 3 F.4th at 1328 (Pryor, J., dissenting). Indeed, "[c]ourts have long understood that the 'special sense of privacy' that individuals hold in avoiding bodily exposure is heightened 'in the presence of people of the other sex.'" *Id.* at 1331 (collecting authority).

This conclusion is supported by this Court's Equal Protection analysis in *Tagami v. City of Chicago*, 875 F.3d 375. There, the plaintiff claimed that the City of Chicago's ordinance prohibiting women from exposing their breasts in public amounted to sex discrimination in violation of the Equal Protection Clause. The Seventh Circuit rejected that argument, noting the ordinance furthered a substantial governmental interest "in preserving health, safety, and traditional moral norms," since the "ordinance protects unwilling members of the public—especially children—from unwanted exposure to nudity." *Id.* at 379. In doing so, this Court recognized the "basic physiological differences between the sexes." *Id.* at 380. Thus, the public-nudity ordinance easily survived, since its essential purposes of promoting traditional moral norms and public order were self-evident and important. *Id.* at 379-80.

These same interests of shielding children from unwanted exposure to the anatomy of the opposite sex are implicated here, confirming that the provision of separate restrooms, locker rooms, and showers on the basis of sex does not violate the Equal Protection Clause. Policies permitted by Title IX and which promote administrative efficiencies in schools do not frustrate the Equal Protection clause either.

Indeed, if this approach does not satisfy constitutional scrutiny, then Section 1686 is unconstitutional, as are other similar provisions in federal law and even past Supreme Court precedent. *See, e.g.*, 10 U.S.C. § 7419 (requiring Secretary of Army to "provide for housing male recruits and female recruits separately and

securely from each other during basic training," including physically separated sleeping areas and latrine areas); *United States v. Virginia*, 518 U.S. at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements . . . ."); *see also Martin v. Int'l Olympic Committee*, 740 F.2d 670, 683 n.4 (9th Cir. 1984) (Pregerson, J., dissenting) ("If the concurrence's reasoning were carried to its logical conclusion, all Olympic events in which men and women participate separately would be banned as apartheid.").

C. The *Whitaker* decision should be revisited.

In concluding that Plaintiffs were likely to succeed on the merits, the District Courts found themselves bound by *Whitaker*. Notably, since its publication, this Court has criticized *Whitaker* for using the wrong standard of review in its likelihood of success portion of its analysis, as its merits analysis was premised on the "low threshold" of the "better than negligible" standard. *See Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020). In this consolidated appeal, the School Districts respectfully request that this Court revisit the underlying holding in *Whitaker*. While, "[p]recedents do not cease to be authoritative merely because counsel in a later case advance a new argument[,] . . . as a practical matter an opinion that contains no discussion of a powerful ground later advanced against it is more vulnerable to being overruled than an opinion which demonstrates that the court considered the ground now urged as a basis for overruling." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995). Such is the case here.

1. ***Whitaker*** **failed to consider unique aspects of Title IX, and relied on "guidance" from the Supreme Court that the higher court has since declined to apply itself.**

In *Whitaker*, the panel looked to Title VII when construing Title IX, and found that a student who identified as a transgender male could bring a sex discrimination claim based on a sex-stereotyping theory under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Court opined: "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Whitaker*, 858 F.3d at 1049. Likewise, in addressing the plaintiff's Equal Protection claim, *Whitaker* found that the plaintiff was likely to succeed on the same sex-stereotyping theory because the defendant school district "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently." *Id.* at 1051.

However, *Whitaker* overlooked that "Title VII . . . is a vastly different statute from Title IX[.]" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). On one hand, "Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'" *Bostock*, 140 S. Ct. at 1741 (quoting *Price Waterhouse*, 490 U.S. at 239). On the other hand, "Title VII differs from Title IX in important respects: For example, under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in 'maintaining separate living facilities for the different sexes. 20 U.S.C. § 1686.'" *Meriwether v. Hartop*, 992 F.3d

492, 510 n.4 (6th Cir. 2021). "Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Id.*; *see* David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. Gender & L. 51, 89 (2011) (noting that, while Title VII has "just one relevant exception" that permits separation by sex, "Title IX has many").

Indeed, Title IX's allowance for separate living facilities based upon sex necessarily requires distinctions: biological females use the girls' restrooms and locker rooms; and biological males use the boys' restrooms and locker rooms. These distinctions are "on the basis of sex," and are, by definition, "discrimination." *See* Black's Law Dictionary (defining "discrimination" as "[t]he intellectual faculty of noting differences and similarities"). But such distinctions are not unlawful—Title XI expressly allows for them with regard to living facilities. Otherwise, the permission in Section 1686 to have separate living facilities for the different sexes is a nullity. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224-25 (10th Cir. 2007) (*Price Waterhouse* does not require "employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."), *overruled on other grounds by Bostock*, 140 S. Ct. 1731; *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 625 (N.D. Tex. 2021) (noting "[t]he Supreme Court has long recognized the need for privacy in close quarters, bathrooms, and locker rooms to protect individuals with anatomical differences—differences based on biological sex" and finding "that employers may have policies that promote privacy, such as

requiring the use of separate bathrooms on the basis of biological sex"), *appeal pending*; *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 150 (2d Cir. 2018) (Lynch, J., dissenting) ("Title VII . . . does not prohibit an employer from having separate men's and women's toilet facilities."), *aff'd*, *Bostock*, 140 S.Ct. 1731; *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("[T]he law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs"); *see also Goins v. W. Grp.*, 635 N.W.2d 717, 720 (Minn. 2001) ("an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination").

Whitaker did not address this aspect of Title IX. Any mention of Section 1686 and its express permission to provide separate living facilities is missing.[6] And, while *Whitaker* mentioned 34 C.F.R. § 106.33, it omitted the five key words ("on the basis of sex") from its summary of that regulation. *See* 858 F.3d at 1047.

Moreover, *Whitaker* failed to consider the logical impact of its decision on Title IX as it relates to other private living spaces and as it relates to other permitted distinctions allowed by Title IX and its implementing regulations. Logically, if "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance" in violation of Title IX, *see* 858 F.3d at 1049, then so do rules that allow institutions to "provide separate housing on the basis of sex," 34 C.F.R. § 106.32, provide separate locker rooms and shower facilities "on the basis of

[6] The District Courts in the *A.C.* and *B.E.* cases similarly failed to mention or discuss Section 1686.

sex," 34 C.F.R. § 106.33, provide "separation of students by sex" within physical education classes during contact sports, 34 C.F.R. § 106.34, provide separate classes relating to human sexuality "in separate sessions for boys and girls," *id.*, provide opportunities for athletic scholarships based upon sex, 34 C.F.R. § 106.37(c), and allow for separate teams for members of each sex where selection is based upon competitive skill or involve contact sports. 34 C.F.R. § 106.41(b).

This Court has previously held that the provision of separate sports teams on the basis of sex is "not at odds with the purpose of Title IX." *Kelley v. Bd. of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994). Yet *Whitaker* offers no help in understanding how these "on the basis of sex" distinctions would not amount to unlawful discrimination under the sex stereotyping framework borrowed from Title VII, nor does it consider the impact that its ruling may have on other aspects of Title IX, including athletics and privacy concerns in living spaces such as locker rooms and showers.

Indeed, the District Court's decision in *B.E.* extends *Whitaker* even further by granting unfettered access to locker rooms, noting that the reasoning from *Whitaker* "applies the same to locker rooms, especially considering Plaintiffs would use the stalls in the locker room, just as they used the stalls in the restroom." (A11 (*B.E.* Dkt. 56 at 11 n.2).) But the District Court's injunction order does not actually limit Plaintiffs' access in the boys' locker rooms to the stalls (with the exception of the showers). (A23 (*B.E.* Dkt. 57 at 2).) While the District Court's order seeks to give assurance that student privacy will be maintained via the use of stalls, its order

does not limit Plaintiffs to the use of the stalls. Instead, pursuant to the terms of the order, Plaintiffs may change in the open areas of the locker room, exposing their physical anatomy to their classmates, and vice versa. This result is untethered from the plain language and purpose of Section 1686, grafting a gender identity exception onto the statute found nowhere in the text.

Whitaker's rush to weld a Title VII sex stereotyping framework onto a Title IX restroom access issue is contrasted by the Supreme Court's subsequent declination to do so in *Bostock v. Clayton County*, 140 S. Ct. 1731. In *Bostock*, the Supreme Court expressly declined to extend its ruling as it pertained to sex discrimination in the workplace (which is prohibited by Title VII) to issues pertaining to sex assigned restrooms and locker rooms (which are expressly permitted by Title IX). The Supreme Court noted that issues of "sex-segregated bathrooms, locker rooms, and dress codes" were not before the Court, as it had "not had the benefit of adversarial testing about the meaning" of "other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. Moreover, the Court declined to even address the impact of its own holding in the employment context as it related to bathrooms and locker rooms. *See id.* ("Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.").

Thus, the Supreme Court specifically reserved this very issue for another day, implicitly rejecting any suggestion that *Price Waterhouse* or its Title VII jurisprudence addressed these separate issues or should be relied upon in an

apples-to-apples fashion as was done in *Whitaker*. In this way, *Bostock* declined to adopt the legal analysis predicted by *Whitaker*.

2. The few other circuits to address these issues have not reached consensus in this new area of the law.

The District Court in *A.C.* concluded that "the overwhelming majority of federal courts" have "concluded that preventing a transgender student from using a school restroom consistent with the student's gender identity violates Title IX." (A38 (*A.C.* Dkt. 50 at 15).) The court failed to provide any tally of an "overwhelming majority." In fact, a closer review reveals that the nascent push to mandate restroom access based upon gender identity has yet to be addressed by the overwhelming majority of federal circuits and is far from settled.

The only two appellate cases other than *Whitaker* that the District Court in *A.C.* cited relating to restroom access, *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) and *Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018), do not hold that Title IX mandates restroom access based on gender identity. Instead, in *Boyertown*, the Third Circuit noted that, while "Title IX prohibits discrimination based on sex in all educational programs that receive funds from the federal government . . . . , **discrimination with regard to privacy facilities is exempt from that blanket prohibition**." 897 F.3d at 533 (citing 34 C.F.R. § 106.33) (emphasis supplied). The Third Circuit explained that "[t]his exception is permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes." *Id.* Thus, allowing students to use bathrooms and locker rooms consistent with the students' gender identities as opposed to their sex did not

violate Title IX. *Id.* at 533-36. Although it noted *Whitaker*, the Third Circuit expressly declined to decide whether "barring transgender students from using privacy facilities that align with their gender identity would . . . constitute discrimination." 897 F.3d at 536.

Similarly, in *Parents for Privacy*, the Ninth Circuit concluded that a public school district "*may* allow transgender students to use school bathrooms, locker rooms, and showers that match their gender identity rather than their biological sex they were assigned at birth." 949 F.3d at 1217-18 (emphasis supplied). While deciding that sex-separated facilities are not required by Title IX, the Ninth Circuit recognized that Title IX allows for such separation. *See id.* at 1227.

Aside from *Whitaker*, only three circuit courts have addressed affirmative demands for school restroom access based upon gender identity. The analysis in those decisions—all of which were decided 2-1 and one of which has since been vacated and is undergoing en banc review—is flawed.

First, in *Dodds v. United States Department of Education*, a 2-1 per curiam order, the Sixth Circuit affirmed the denial of stay of an injunction which ordered "the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom." 845 F.3d 217, 220 (6th Cir. 2016). In questioning the school district's likelihood of success, however, the *Dodds* majority relied solely on a sex-stereotyping theory, failed to consider interests of privacy, and never mentioned Section 1686 or 34 C.F.R. § 106.33.

Second, in *Grimm v. Gloucester County School Board*, the Fourth Circuit found in a 2-1 decision that disallowing a student from using a restroom consistent with the student's gender identity violated Title IX and the Equal Protection Clause. *See* 972 F.3d 586, 615-17 (4th Cir. 2020), *rehearing en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). The majority observed that the "act of creating sex-separated restrooms in and of itself [was] not discriminatory" or unconstitutional. *Id.* at 618 & n.17. Yet, borrowing from Title VII and its own interpretation of *Bostock*, the court concluded that mandating the use of separate facilities based upon biological sex was discriminatory because it "excluded Grimm from the boys restrooms 'on the basis of sex.'" *Id.* at 616-17.

As demonstrated by the *Grimm* dissent, this position "renders on a larger scale any separation on the basis of sex nonsensical," undercutting Title IX and its underlying policies. *Id.* at 628 (Niemeyer, J., dissenting). While the *Grimm* majority criticized the school board for "rely[ing] on its own discriminatory notions of what 'sex' means," *id.* at 618, this criticism "overlook[ed] the fact that Congress expressly provided *in the statute* that nothing in its prohibition against discrimination 'shall be construed to prohibit' schools 'from maintaining separate living facilities for the different sexes.'" *Id.* at 635 (Niemeyer, J., dissenting) (quoting Section 1686). Here, even Plaintiffs' purported expert acknowledges that sex is different than gender, and that a person's sex is identified "with their genitals that are typically described at birth." (*A.C.* Dkt. 34-3 at 2 (Fortenberry Dep. at 8:21-10:16).)

Third, the Eleventh Circuit also addressed this issue, although it framed the issue differently, and its decision was vacated and is currently under *en banc* review. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299 (11th Cir.), *vacated and rehearing en banc granted*, 9 F.4th 1369 (11th Cir. 2021). Notably, in *Adams*, the 2-1 panel decision declined to undertake any analysis of Title IX, vacating a prior opinion issued on August 7, 2020, and replacing it with a decision that reached only one ground under the Equal Protection Clause. 3 F.4th at 1303-04. In its analysis, the Eleventh Circuit found that "protecting the bodily privacy of young students is an important government interest" and recognized "that the government may promote its interest in protecting privacy by maintaining separate bathrooms for boys and girls, men and women." *Id.* at 1308. Yet, in framing the issue, the Eleventh Circuit panel concluded that the school district violated the Equal Protection Clause by assigning students to bathrooms based solely on the documents the district received at the time of enrollment. *Id.* at 1308-11. The dissent criticized the majority for recasting the issue before it, and concluded that the majority decision "would require all schoolchildren to use sex-neutral bathrooms and locker rooms." *Id.* at 1321 (Pryor, J., dissenting).

Consequently, only three other circuits have addressed a student's demand to use a restroom different than his or her sex assigned at birth (and none of which addressed locker rooms). Of those, the Sixth Circuit relied upon a sex stereotyping theory that ignored the unique aspects of Title IX; the Fourth Circuit rendered Section 1686 a nullity; and the Eleventh Circuit avoided the Title IX analysis

altogether and sought to frame the issue differently (and ultimately was vacated for *en banc* review which is pending). This is far from a consensus, and underscores the importance of this Court directly addressing the plain language of Section 1686 in this consolidated appeal.

D. The School Districts' positions comply with Title IX and the Equal Protection Clause.

"Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries." *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 467 (7th Cir. 2007). Consistent with the foregoing analysis, the recognized privacy interests in living facilities, and the historical understanding of the physical differences between the sexes, the School Districts provide separate restrooms and locker rooms on the basis of sex. Their position completely aligns with an appropriate understanding of Title IX and the Equal Protection Clause.

The School Districts' positions cannot in any way be characterized as unlawful sex stereotyping. Their positions are entirely disinterested in the hairstyles, clothing choices, and interests of students and make no mention of how the students should act or behave. Instead, consistent with Title IX and its regulations, the School Districts maintain separate toilet facilities on the basis of anatomical differences in those facility spaces where it matters—those areas where disrobing and performance of bodily functions increase the exposure of these anatomical differences. That decision is entirely lawful. *See Etsitty*, 502 F.3d at 1224-25. As a result, the School Districts complied with the law in denying

Plaintiffs access to the boys' restrooms and locker rooms, in offering alternative accommodations, and in continuing to seek additional information that may alter that determination. Plaintiffs failed to establish a likelihood of success on the merits, and the preliminary injunctions should be vacated.

II. The Remaining Injunctive Factors Demonstrate that No Preliminary Injunction Should Have Been Entered.

As noted above, the analysis of the remaining preliminary injunction factors is determined upon a sliding scale: "'The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor.'" *Courthouse News Serv.*, 908 F.3d at 1068 (citation omitted). Based on the appropriate legal framework, Plaintiffs' claims do not pass legal muster under Title IX and the Equal Protection Clause. This fundamentally alters the calculus as to the appropriateness of a preliminary injunction.

A. Balance of Harms // Irreparable Harm

The balance of harms analysis weighs against Plaintiffs' request. The Martinsville School Districts has made accommodations to allow A.C. more time to use the health clinic restroom. (*A.C.* Dkt. 29-4 at 61 (Kutruff Dep. at 61:6-25).) Likewise, the Vigo County School Corporation has provided B.E. and S.E. with passes to go to the restroom during class if needed. (*B.E.* Dkt. 29-1 at 8, 11-2 (L.E. Dep. at 58:11-59:3, 70:13-72:4.).) The fact that Plaintiffs may be occasionally late to class is not evidence of irreparable harm. *Brandt*, 480 F.3d at 465 ("[T]he damages sustained by an eighth grader as a consequence of missing phys ed and labs on nine days out of an entire school year are miniscule to the point of nonexistent[.]").

With regard to A.C., the District Court credited A.C.'s and M.C.'s accounts that A.C. felt stigmatized and isolated and that exclusion from the boys' restroom worsened A.C.'s feelings of anxiety and depression. (A.36.) Yet, this evidence falls short of showing irreparable harm. Unlike the plaintiff in *Whitaker*, there is no evidence that A.C. has restricted water intake, no evidence that A.C. has any medical condition that has put A.C. at risk of harm, and no evidence that A.C. has contemplated self-harm as a result of the restroom options offered. *Cf.* 858 F.3d at 1040-42. A.C. has continued to use the unisex health office restroom, as A.C. had been doing for the two years prior without incident. (*A.C.* Dkt. 34-2 at 2, 9 (A.C. Dep. at 12:22-13:1, 41:3-16); Dkt. 29-3, ¶ 22; Dkt. 34-1 at 6 (M.C. Dep. at 25:1-7).) There is also no evidence that A.C. has been ostracized by classmates for use of the health office restroom, which is available for use by all students, with permission from the school nurse. (*A.C.* Dkt. 29-4 at 50 (Kutruff Dep. at 50:17-23).)

Furthermore, unlike the plaintiff in *Whitaker*, A.C. failed to provide the testimony of any medical professional as to any future harm that is likely to result to A.C. without injunctive relief. A.C.'s purported expert, Dr. Fortenberry, has not participated in the care of A.C., has not had any direct discussions with A.C. or M.C., has not performed an individualized assessment as to the severity of harm that A.C. will experience if not allowed to access the boys' restroom, and has not performed an individualized assessment of the reduction of harm if A.C. is allowed access to the boys' restroom. (*A.C.* Dkt. 34-3 at 9-10, 11-12 (Fortenberry Dep. at 63:16-64:20, 72:17-73:12).) The School District objected to Dr. Fortenberry's

declaration as being based on inadmissible hearsay, lack of personal knowledge, and lack of foundation. (*See A.C.* Dkt. 35 at 22.) Indeed, Dr. Fortenberry testified that there should be an individualized assessment as to what facilities a patient would be most comfortable and safe in, but that he had not performed such an assessment for A.C. (*A.C.* Dkt. 34-3 at 11-12 (Fortenberry Dep. at 72:17-73:12).) As a result, the District Court omitted any mention of Dr. Fortenberry's conclusions in its analysis of harm.

With regard to B.E. and S.E., the balance of harms analysis also weighs against their request to have unfettered access to the boys' restrooms and locker room. Although B.E. and S.E. have experienced gastrointestinal issues since birth, those issues are unrelated to any gender transition, and the Vigo County School Corporation has made accommodations to allow B.E. and S.E. to leave class whenever necessary to use the restroom. (*B.E.* Dkt. 29-1 at 11-12 (L.E. Dep. at 70:13-72:4, 74:4-8; Dkt. 29-2 at 2 (S.E. Dep. at 15:4-18).) Unlike the plaintiff in *Whitaker*, there is no evidence that B.E. or S.E. have restricted their water intake, or that they have contemplated self-harm as a direct result of the restroom options offered to them. *Cf.* 858 F.3d at 1040-42. Instead, B.E. and S.E. admitted that they have used the unisex health office bathrooms multiple times per day. (*B.E.* Dkt. 29-3 at 5 (B.E. Dep. at 35:4-11); Dkt. 29-2 at 4 (S.E. Dep. at 21:4-12).) And while there have been a few isolated instances where the health office restroom was locked, those issues have been resolved. (*B.E.* Dkt. 29-3 at 5 (B.E. Dep. at 35:12-36:12); Dkt.

29-2 at 4 (S.E. Dep. at 21:13-22:9).) There is also no evidence that B.E. or S.E. have been ostracized for their use of the health office restroom.

While B.E. and S.E. claimed in declarations that they have had multiple "accidents" from not being able to use the boys' restrooms, they could not provide any specific detail to back up their claims. (*B.E.* Dkt. 29-3 at 4 (B.E. Dep. at 30:12-31:24); Dkt. 29-2 at 3 (S.E. Dep. at 19:14-21).) B.E. testified that L.E. picked B.E. up from school because B.E.'s stomach hurt on three occasions, but only once because B.E.'s stomach hurt from "holding it." (*B.E.* Dkt. 29-3 at 5 (B.E. Dep. at 33:12-35:3.) Moreover, while their mother claimed that there were instances where she was required to bring B.E. and S.E. a change of clothes, she could recall only one instance for S.E. in high school, conceding that the other instances occurred during middle school prior to any request by B.E. or S.E. to use the boys' restrooms. (*B.E.* Dkt. 29-1 at 14 (L.E. Dep. at 80:2-9, 82:9-23).)

The balance of harms analysis also favors maintaining the status quo. Granting B.E. and S.E. unrestricted access to the boys' restrooms and locker room and A.C. unrestricted access to the boys' restrooms violates the privacy interests of other students under Section 1686 as discussed above. A primary objective in this case should be to protect the privacy interests of all students. And if school districts are unable to rely upon Title IX's plain text and its regulations, which expressly allow for separate facilities by sex, administrators and faculty will be forced to navigate this new frontier without the benefit of established rules.

B. Adequate Remedy at Law

"An injunction is an equitable remedy warranted only when the plaintiff has no adequate remedy at law, such as monetary damages." *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998). In *Whitaker*, the Court found the plaintiff satisfied this element by asserting that the bathroom policy at issue caused him to contemplate suicide, a claim credited by an expert who had met with the plaintiff and performed an individualized review. 858 F.3d at 1046. This potential harm could not be compensated by monetary damages, establishing that there was no adequate remedy of law available. *Id.*

Here, no such evidence was presented. As set forth above, there is no evidence or expert testimony that Plaintiffs have contemplated irreversible self-harm. *Cf.* 858 F.3d at 1040-42. Instead, the District Courts found this factor was met solely based upon Plaintiffs' accounts of emotional harm. (A.16-17, A36-37.) But emotional harm is not without an adequate remedy at law under the Equal Protection Clause, as such alleged emotional distress is commonly compensated by monetary awards. *See* Seventh Circuit Civil Pattern Jury Instructions, No. 7.26. Accordingly, this preliminary injunction factor also was not met, at least as it relates to the Equal Protection claim.

C. Public Policy

Finally, public policy weighs against the injunctions under review, as demonstrated by the plain language of Title IX and its regulations. "[T]he public's true interest lies in the correct application of the law." *Kentucky v. Biden*, 23 F.4th

585, 612 (6th Cir. 2022). By enacting Section 1686, Congress intentionally exempted living facilities from Title IX's prohibition against discrimination based on sex. *See Boyertown*, 897 F.3d at 533. Thus, Title IX expressly permits the separation of facilities on the basis of enduring biological differences where privacy interests are heightened. *See* 34 C.F.R. § 106.33. Public policy weighs in favor of allowing local school districts to determine how to maintain these privacy interests, as the School Districts have done here. *See Brandt*, 480 F.3d at 467 ("Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries.").

To the extent that Title IX should not allow the separation of such facilities or is based on a "discriminatory" notion of the differences between the sexes or the need for privacy, *see Grimm*, 972 F.3d at 618, that decision should be made through elected representatives in Congress, using clearly understood text. Congress is the branch "most capable of responsive and deliberate lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). Congress is in the best position to decide "what competing values will or will not be sacrificed to the achievement of a particular objective." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). As a result, this Court should defer to the statutory text, and leave these policy decisions to Congress and state legislatures. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed.").

Indeed, this consideration once again highlights the need to revisit this Court's decision in *Whitaker*. While Congress expressly permitted educational institutions to "maintain[] separate living facilities for the different sexes," 20 U.S.C. § 1686, and the implementing regulations allowed those institutions to "provide separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33, the *Whitaker* decision displaced those Congressional and administrative agency actions based upon its own "[c]ommon sense" views of how privacy should be maintained in communal restrooms. *See* 858 F.3d at 1052-53. This substitution of the Court's own views, rather than deferring to the statutory and regulatory text, is inconsistent with the separation of powers. *Cf. Tennessee v. U.S. Dept. of Educ.*, __ F. Supp. 3d __, 2022 WL 2791450, at *21 (E.D. Tenn. July 15, 2022) (holding that recent regulatory guidance promulgated by Department of Education pertaining to Title IX was "legislative" where it "creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX, or its implementing regulations").

Plaintiffs' effort to utilize the Court's authority to displace this legislative function of Congress is highlighted by the amici supporting their position, who invite the Court to follow their own policy choices. For example, an amicus brief submitted by "School Administrators from Sixteen States and the District of Columbia," notes that their "schools and districts allow transgender students to use the same facilities and opportunities as other students of the same gender," and

urges the Court to adopt the same policy. (*A.C.*, No. 22-1786, Appeal Dkt. 58 at 17, 34-35.) Likewise, an amicus brief filed on behalf of 21 states and the District of Columbia touts that they, along with "at least 225 local governments" offer state statutory protections based upon gender identity. (*A.C.*, No. 22-1786, Appeal Dkt. 59 at 19-21.) But these policy and state legislative decisions, made separate and apart from the plain language of Section 1686, only serve to underscore the importance of following the legislative process. Or, at the very least, they highlight the logical conclusion of the Ninth Circuit's reasoning in *Barr*—that Title IX permits schools to separate facilities on the basis of sex but does not require it. 949 F.3d at 1227. In other words, local communities can comply with the law in a variety of ways as it currently exists, and local schools in Indiana do not give up their right to make such policy decisions under Title IX or the Constitution.

Finally, other amicus filings preview the uncertainty and lack of any statutory mooring that school officials will be left to navigate if they are unable to depend upon the plain text of Section 1686. For example, an amicus brief submitted on behalf of "Medical, Mental Health, and Other Health Care Organizations," notes that "[a]lthough most people have a gender identity that is male or female, some individuals have a gender identity that is 'a blend of male or female[,] or an alternative gender." (*A.C.*, No. 22-1786, Appeal Dkt. 63 at 19 n.2.) In this way, amici urge this Court to adopt a framework governing access to restrooms, locker rooms, and showers that is not governed by biological sex, physical anatomy, or the binary classifications of male and female recognized by law but that is instead subject to

each individual's conceptions regarding gender identity as it exists on a spectrum. Perhaps that is a framework that Americans may agree upon through the legislative process; but it is not one found in the text of Title IX or the Constitution.

CONCLUSION

Title IX expressly allows institutions to maintain separate living facilities for the different sexes. Likewise, the Equal Protection Clause and Supreme Court jurisprudence allow for restrooms separated by sex. The School Districts have complied with the law. Accordingly, they respectfully request that this Court reverse the preliminary injunction orders and for all other appropriate relief.

Respectfully submitted,

/s/ *Philip R. Zimmerly*

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ORAL ARGUMENT REQUEST

Appellants respectfully request that oral argument be granted in this consolidated appeal, as the appeal involves issues of significant importance.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to Fed. R. App. P. 32 and Circuit Rule 32.

1. This brief complies with the type-volume limitations set forth in Circuit Rule 32(c) because it contains 11,941 words based on the "Word Count" feature of Microsoft Word.

2. This brief complies with the typeface and type style requirements set forth in Circuit Rule 32 because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 12-point Century font.

Dated: September 12, 2022

Philip R. Zimmerly
Philip R. Zimmerly

CERTIFICATE OF SERVICE

I, Philip R. Zimmerly, an attorney, hereby certify that on September 12, 2022, I caused the foregoing Brief of Defendants-Appellants to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the Brief of Defendants-Appellants to be transmitted to the Court within 7 days of that notice date.

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Nos. 22-1786, 22-2318

United States Court of Appeals for the Seventh Circuit

B.E. and S.E., minor Children by their Mother, legal guardian, and next friend, L.E., Plaintiffs-Appellees, v. VIGO COUNTY SCHOOL CORPORATION; PRINCIPAL, TERRE HAUTE NORTH HIGH SCHOOL, in his official capacity, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division Case No. 2:21-cv-00415-JRS-MG Honorable James R. Sweeney II, Judge. Appeal No. 22-2318
A.C., a minor child by his next friend, mother and legal guardian, M.C., Plaintiff-Appellee, v. METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE, and PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL, in his official capacity, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Case No. 1:21-cv-2965-TWP-MPB Honorable Tanya Walton Pratt, Chief Judge. Appeal No. 22-1786

SHORT APPENDIX OF DEFENDANTS-APPELLANTS

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Statement of Compliance with Circuit Rule 30(d)

All of the materials required by Circuit Rule 30(a) & (b) are included in this appendix. Pursuant to Circuit Rule 30(b)(7), because the materials placed in the appendix do not exceed 50 pages, the materials required by Circuit Rule 30(a) & (b) are included in the appendix bound with the brief.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

B. E., S. E., Plaintiffs,	)	
v.	)	No. 2:21-cv-00415-JRS-MG
VIGO COUNTY SCHOOL CORPORATION, PRINCIPAL, TERRE HAUTE NORTH VIGO HIGH SCHOOL, Defendants.	)	

Order on Motion for Preliminary Injunction

2022 marks fifty years of Title IX and its prohibition of discrimination "on the basis of sex" in educational programs and activities receiving federal financial assistance. 20 U.S.C. § 1681(a). Plaintiffs B.E. and S.E., transgender boys attending Terre Haute North Vigo High School, moved for a preliminary injunction, (ECF No. 12), contending that the School's refusal to allow them to use the male restroom and locker room violates Title IX and the Equal Protection Clause. Because the Court finds that Plaintiffs have shown a likelihood of success on the merits of their Title IX claim, and that the other requirements of a preliminary injunction are satisfied, the Court grants the Motion for a Preliminary Injunction.

Background

Plaintiffs were designated female at birth but have identified as male since they were about eleven years old; they are now fifteen. (B.E. Decl. ¶¶ 2–5, ECF No. 22-4; S.E. Decl. ¶¶ 2–5, ECF No. 22-5.) They use names and pronouns that reflect their

male identities, wear masculine clothes, and have masculine haircuts, all of which leads others to perceive them—correctly, in Plaintiffs' view—as boys. (B.E. Decl. ¶¶ 6–8, ECF No. 22-4; S.E. Decl. ¶¶ 6–8, ECF No. 22-5.) Plaintiffs have begun gender-affirming testosterone therapy, which initiates anatomical and physiological changes consistent with the male gender, such as deepening of the voice and the growth of facial hair. (Dr. James D. Fortenberry Suppl. Decl. ¶¶ 7–8, ECF No. 43-6; B.E. Decl. ¶ 24, ECF No. 22-4.) Plaintiffs also have legally changed their names and gender identification, and their birth certificates have been amended to reflect their masculine names and male gender.[1] (L.E. Suppl. Decl. ¶¶ 2–3, ECF No. 43-9; *id.* at Ex. 1–2.)

Plaintiffs have been diagnosed with gender dysphoria, a condition defined by the American Psychiatric Association as "a marked incongruence between one's experienced/expressed gender and assigned gender." (Fortenberry Decl. ¶¶ 21, 36, ECF No. 22-2 (citing Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders (5th ed. 2013)); B.E. Decl. ¶ 19, ECF No. 22-4; S.E. Decl. ¶ 19, ECF No. 22-5.) Untreated gender dysphoria can result in "significant distress, clinically significant anxiety and depression, self-harming behaviors, substance abuse, and suicidality." (Fortenberry Decl. ¶ 18, ECF No. 22-2.) Specifically, denial of the use of toilet facilities consistent with an individual's expressed gender is an "ever-present source of distress and anxiety," which is linked to "increases in self-harming

[1] The Court understands that Defendants have agreed to refer to Plaintiffs by their male names and male pronouns, and only the restroom and locker room issues remain for the Court. (Mason Dep. 19–20, ECF No. 43-1; Pls.' Reply 2 n.2, ECF No. 44.)

behaviors including suicidality." (*Id.* ¶ 31.) The principal treatment of gender dysphoria is "to allow the young person full expression of their experienced gender identity," which includes allowing individuals to express their gender "with social behaviors consistent with their experienced gender." (*Id.* ¶¶ 26, 29.) Hormone therapy can also help. (*Id.* ¶ 26.) Allowing the person to express themselves in a manner consistent with their gender identity is "an essential component of amelioration of gender dysphoria that is essential to future mental health," and support in doing so "at least partially ameliorates" gender dysphoria and its negative consequences. (*Id.* ¶¶ 28, 29; Dr. Janine M. Fogel Decl. ¶¶ 21–23, ECF No. 22-1.)

Plaintiffs used the boys' bathrooms at the beginning of the school year without incident. (B.E. Decl. ¶¶ 10–11, ECF No. 22-4; S.E. Decl. ¶¶ 10–11, ECF No. 22-5; Stacy Mason Dep. 29–30, ECF No. 43-1.) A school employee noticed their use and reported it. (B.E. Decl. ¶¶ 11–14, ECF No. 22-4.) The vice principal then instructed Plaintiffs that they can only use the girls' bathrooms or the unisex bathroom in the health office and that they may be disciplined if they use the boys' bathrooms. (*Id.*; Mason Dep. 39, ECF No. 43-1.) It is the School's position that Plaintiffs cannot use the boys' facilities "without surgical or anatomical change." (Mason Dep. 18, 22, 41–42, ECF No. 43-1.)

Plaintiffs have been using the health office bathroom because using the girls' bathroom "feels wrong," makes Plaintiffs extremely anxious and upset, and causes confusion among peers who do not know that Plaintiffs are transgender, forcing Plaintiffs to explain why they are using the girls' bathroom. (B.E. Decl. ¶¶ 18, 22–

23, ECF No. 22-4; S.E. Decl. ¶¶ 18, 22–23, ECF No. 22-5.) The health office bathroom is far away from Plaintiffs' classes, which makes them late for class when they need to use the restroom between classes and causes them to miss more class when they need to use the restroom during class. (B.E. Decl. ¶ 26, ECF No. 22-4; S.E. Decl. ¶ 26, ECF No. 22-5.) Similarly, Plaintiffs arrive late, and separately from other students, to gym class, as they change in the health office bathroom. (B.E. Decl. ¶ 30, ECF No. 22-4; S.E. Decl. ¶ 30, ECF No. 22-5.) Vigo County School Corporation's Director of Secondary Education, Stacy Mason, is not aware of any other students who use the health office bathroom, other than students who are in the nurse's office for a health issue. (Mason Dep. 35–36, ECF No. 43-1.) There have also been a few instances when the health office bathroom has been locked, and Plaintiffs had to "hold it" while they waited for it to be unlocked. (B.E. Dep. 35–36, ECF No. 29-3; S.E. Dep. 21–22, ECF No. 29-2.) As a result, Plaintiffs try to avoid going to the bathroom at all when at school. (B.E. Decl. ¶ 29, ECF No. 22-4; S.E. Decl. ¶ 29, ECF No. 22-5.)

This is compounded by Plaintiffs' lifelong gastrointestinal problems, which require Plaintiffs to use the bathroom frequently and urgently and to take laxatives. (B.E. Decl. ¶ 20, ECF No. 22-4; S.E. Decl. ¶ 20, ECF No. 22-5; B.E. Dep. 27, ECF No. 29-3.) The Parties dispute how frequently Plaintiffs have had restroom accidents at school, but they agree that at least once in high school, Plaintiffs' mother brought S.E. a change of clothes because of an accident. (L.E. Dep. 76–83, ECF No. 29-1.) Additionally, Plaintiffs' mother once picked B.E. up from school because B.E.'s

stomach hurt from "holding it." (L.E. Dep. 76–83, ECF No. 29-1; B.E. Dep. 33–35, ECF No. 29-3.)

Legal Standard

A plaintiff seeking a preliminary injunction must show that "(1) they will suffer irreparable harm in the absence of an injunction, (2) traditional legal remedies are inadequate to remedy the harm, and (3) they have some likelihood of success on the merits." *Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin.*, 24 F.4th 640, 644 (7th Cir. 2022). If those elements are shown, the court must "balance the harm" the plaintiff would suffer if an injunction is denied against the harm the opposing party would suffer if one is granted, "and the court must consider the public interest, which takes into account the effects of a decision on non-parties." *Id.*

Discussion

Plaintiffs assert that Defendants' actions violate both Title IX and the Equal Protection Clause of the Fourteenth Amendment. (Compl. ¶ 1, ECF No. 1.) Because the Court agrees that Plaintiffs are likely to succeed on the merits of their Title IX claim, the Court does not address the Equal Protection Clause argument. *See, e.g.*, *ISI Int'l, Inc. v. Borden Lander Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001), *as amended* (July 2, 2001), ("[F]ederal courts are supposed to do what they can to avoid making constitutional decisions, and strive doubly to avoid making unnecessary constitutional decisions.").

A. Likelihood of Success on the Merits

Title IX provides that no person "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 receiving Federal financial assistance." 20 U.S.C. § 1681(a). Defendants admit that they receive federal funding and therefore are covered by Title IX. (Answer ¶ 44, ECF No. 27.)

At the heart of the Parties' dispute are the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and the Seventh Circuit's decision in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), *abrogated on other grounds by Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

Bostock established that Title VII's prohibition of discrimination "because of such individual's . . . sex" encompasses discrimination because an individual is homosexual or transgender. *Bostock*, 140 S. Ct. at 1741–43; 42 U.S.C. § 2000e-2(a)(1). More precisely, the Court held that an employer violates Title VII when it fires an individual for being homosexual or transgender. *Bostock*, 140 S. Ct. at 1753. The Court reasoned that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex;" "homosexuality and transgender status are inextricably bound up with sex." *Id.* at 1741–42.

Three years before *Bostock*, the Seventh Circuit decided *Whitaker*. There, the court affirmed the issuance of a preliminary injunction enjoining a school district from denying a transgender boy access to the boys' restroom. *Whitaker*, 858 F.3d at 1042, 1055. The court found the plaintiff demonstrated a likelihood of success on the

merits of his Title IX claim because a "policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id.* at 1049. Further, such a policy subjects a transgender student "to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX." *Id.* at 1049–50; *see* 34 C.F.R. § 106.31(b)(4) (prohibiting institutions covered by Title IX from "[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment"). However, the *Whitaker* court applied the wrong standard for evaluating whether preliminary injunctive relief was warranted. 858 F.3d at 1046. The court stated that a plaintiff seeking a preliminary injunction need only show that his chance to succeed on his claim was "better than negligible," *id.*—a standard that has been "retired by the Supreme Court," *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020).

In Defendants' view, this error renders *Whitaker* meaningless, and *Whitaker* "should have no precedential value here." (Defs.' Resp. 13, ECF No. 30.) Defendants also stress that *Bostock* "expressly declined" to reach the issue of sex-segregated bathrooms and locker rooms. (*Id.* at 14.) The crux of Defendants' argument is that *Bostock*'s determination that discrimination based on transgender status "necessarily entails discrimination based on sex," 140 S. Ct. at 1747, should not apply to Title IX, which expressly permits institutions to "provide separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33. Perhaps the Supreme Court will adopt that position when it takes up the issue in the Title IX context. But until

then, this Court must follow *Whitaker* and, to the extent it supports *Whitaker* as relevant here, *Bostock*.

Bostock held, in clear terms, that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." 140 S. Ct. at 1741. Much like Title VII, Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). It follows, then, that Title IX similarly prohibits discrimination because of an individual's transgender status. *Whitaker* reached this same conclusion, albeit under a different theory of sex discrimination. 858 F.3d at 1046–50 (finding transgender plaintiff was discriminated against for his failure to conform to sex-based stereotypes of the sex he was assigned at birth).

To be sure, the Court in *Bostock* explicitly noted that only Title VII was before it, and not "other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. But courts have looked regularly to Title VII when interpreting Title IX. *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX . . . ."); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (applying Title VII's conception of sexual harassment as sex discrimination to Title IX claim); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) (noting that "it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX"). And the Supreme

Court's explanation of how discrimination on the basis of transgender status constitutes discrimination on the basis of sex applies just the same in the Title IX context.

It is true, however, that *Bostock* did not address the issue of "sex-segregated bathrooms, locker rooms, and dress codes." 140 S. Ct. at 1753; (Defs.' Resp. 14, ECF No. 30.) But while this might portend a different result when considering the issue squarely, it does not *sub silentio* overrule *Whitaker*, which addressed both Title IX and sex-segregated bathrooms. The defendants there made the same argument as Defendants here: Title IX specifically permits separate bathrooms based on sex, 34 C.F.R. § 106.33, so the school district can provide separate bathrooms based upon gender identity. (Kenosha Unified School District No. 1. Board of Education and Sue Savaglio-Jarvis' Appellate Brief at 11–12, 24, 26, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 585 F.3d 1034 (7th Cir. 2017) (No. 16-3522), ECF No. 25-1; Kenosha Unified School District No. 1. Board of Education and Sue Savaglio-Jarvis' Reply Brief at 11–13, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 585 F.3d 1034 (7th Cir. 2017) (No. 16-3522), ECF No. 71.) And the Seventh Circuit explicitly cited the regulation permitting institutions to do so. *Whitaker*, 858 F.3d at 1047 (citing 34 C.F.R. § 106.33). Nevertheless, the Seventh Circuit still concluded that denial of restroom access based on transgender status violates Title IX. *Id.* at 1047–51.

Of course, that is why the Parties dispute the significance of *Whitaker* after *Illinois Republican Party*. The impact of the subsequent abrogation is not totally

clear. Plaintiffs argue *Whitaker* is still binding; Defendants say the Title IX issue remains an open one. It seems clear, however, that cases abrogated in part do not lose all their value. The Seventh Circuit has continued to look to abrogated cases, and it makes sense intuitively that a court's view is not rendered meaningless merely because it looked through the wrong lens. *See, e.g.*, *Skiba v. Ill. Cent. R.R.*, 884 F.3d 708, 720 (7th Cir. 2018) (citing *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007), *abrogated on other grounds by Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016)) (citing *Hemsworth* for support that remark was too remote to establish discriminatory intent, even though *Ortiz* expressly overruled *Hemsworth* for employing the wrong legal standard by separating "direct" from "indirect" evidence in employment discrimination framework). That seems particularly true here, where the *Whitaker* court never indicated that the issue was a close one or hinted that the low threshold it applied was determinative. Indeed, decisions of other district courts, while not binding on this Court, have concluded that *Whitaker* remains good law. *See, e.g.*, *A.C. v. Metro. Sch. Dist. of Martinsville,* No. 1:21-cv-2965-TWP-MPB, 2022 WL 1289352, at *6 (S.D. Ind. Apr. 29, 2022) (recognizing that *Whitaker* "remains good law and thus is binding on this court"; granting preliminary injunction to a 13-year-old having no gastrointestinal problems and not having begun gender-affirming testosterone therapy), *appeal docketed*, No. 22-1786 (7th Cir. May 3, 2022); *see also D.T. v. Christ*, 552 F. Supp. 3d 888, 896 (D. Ariz. 2021) (citing *Whitaker*, among other cases, as support that discrimination against transgender people is discrimination based on sex). At best for Plaintiffs,

Whitaker remains binding precedent on this Court; at worst, the Seventh Circuit has tipped its hand that it thinks Plaintiffs have the better of the argument.[2] With the appeal of *A.C.* pending before the Seventh Circuit, these murky waters may soon become clear, but until then, and despite cogent arguments from Defendants, this Court is bound by *Whitaker*.

Further, other courts have agreed with the Seventh Circuit's assessment. In *Grimm v. Gloucester County School Board*, the Fourth Circuit stated that after *Bostock*, it had "little difficulty" holding that a bathroom policy precluding a transgender boy from using the boys' restroom discriminated against him "on the basis of sex." 972 F.3d 586, 616 (4th Cir. 2020). And it rejected the school board's argument—the same argument Defendants make here—that 34 C.F.R. § 106.33 allows for such a policy. *Id.* at 618. That is because transgender plaintiffs don't "challenge sex-separated restrooms;" rather, they challenge the "discriminatory exclusion" from the "sex-separated restroom matching [their] gender identity." *Id.*;

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[2] Defendants also argue that *Bostock* casts doubt upon *Whitaker* because *Whitaker* premised its finding of sex discrimination upon a sex-stereotyping theory, which "*Bostock* does not embrace." (Defs.' Resp. 13–15, ECF No. 30.) This distinction misses the point. Defendants' argument is that § 106.33 permits them "to separate toilet and locker room facilities on the basis of anatomical differences." (*Id.* at 15.) Regardless of the theory on which the Seventh Circuit relied to find sex discrimination, it still decided that § 106.33 did not alter the conclusion that the transgender plaintiff was being subjected to impermissible discrimination.

Defendants also note that *Whitaker* addressed only access to bathrooms, not locker rooms. (Defs.' Resp. 9–10, ECF No. 30.) The Court finds this distinction immaterial. The reasoning applies the same to locker rooms, especially considering Plaintiffs would use the stalls in the locker room, just as they used the stalls in the restroom. (Pls.' Reply 4, ECF No. 44; B.E. Suppl. Decl. ¶ 6, ECF No. 43-7; S.E. Suppl. Decl. ¶ 6, ECF No. 43-8.) Indeed, § 106.33, on which Defendants rely, applies to both bathrooms and locker rooms, so it follows that the outcome is the same for both.

see also id. ("All [§ 106.33] suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like [the plaintiff], the Board may rely on its own discriminatory notions of what 'sex' means."). The Eleventh Circuit reached the same conclusion, also after *Bostock*, although the opinion was later vacated in an effort to reach only the Equal Protection issue. *Adams v. Sch. Bd. of St. John's Cnty.*, 968 F.3d 1286, 1308 (11th Cir. 2020) ("Thus, the language of § 106.33 does not insulate the School Board from [the plaintiff's] discrimination claim based on his transgender status."), *vacated*, 3 F.4th 1299 (11th Cir. 2021), *rehearing en banc granted*, 9 F.4th 1369 (11th Cir. 2021). Indeed, Defendants do not cite a district court or majority circuit court case adopting their position, and the Court can find none, which speaks to Plaintiffs' likelihood of success. *Cf. Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (noting that court's order was not addressing resolution of the "difficult policy issue" of transgender students' access to facilities but whether agencies followed proper administrative procedures in promulgating guidance).

As applicants for preliminary relief, Plaintiffs "bear[] a significant burden." *Ill. Republican Party*, 973 F.3d at 763. But they need not show proof by a preponderance or that they "definitely will win the case." *Id.* Plaintiffs have carried the requisite burden here.

B. Other Requirements

Likelihood of success is not the end of the inquiry; Plaintiffs must demonstrate that the other preliminary injunction factors also weigh in their favor. *Ill. Republican*

Party, 973 F.3d at 763. While *Whitaker* might have employed the wrong standard as to the threshold showing of success, that has no bearing on *Whitaker*'s analysis of the remaining factors. The Court turns to those factors with that in mind.

1. Irreparable Harm

Similar to *Whitaker*, the Court is presented with expert opinions that use of the boys' facilities is "integral" to Plaintiffs' "transition and emotional well-being" and that Plaintiffs will suffer irreparable harm absent preliminary relief. *Whitaker*, 858 F.3d at 1045; (Fortenberry Decl. ¶ 31, ECF No. 22-2 ("The ability to be able to use toilet facilities consistent with one's experienced and expressed gender is a prime component of gender affirmation. Being denied the use [of] gendered toilet facilities consistent with expressed gender is experienced as an ever-present source of distress and anxiety.")); (Fogel Decl. ¶ 27, ECF No. 22-1 (stating that "[t]he importance of being able to use restrooms" consistent with the person's gender identity "cannot be underestimated;" "Being forced to use restrooms that differ from the person's identity is a prime reminder that the transgender person is 'different,' and this undercuts the purpose and goal of social role transition and can exacerbate the negative consequences of gender dysphoria . . . and can have permanent negative consequences.").)[3] Dr. Fortenberry noted that both Plaintiffs "have explicitly and consistently noted school-related distress associated with mis-gendering and with

[3] Defendants object to Dr. Fortenberry and Dr. Fogel's declarations "to the extent that they are based on inadmissible hearsay." (Defs.' Resp. 20 n.4, ECF No. 30.) It is not clear that the declarations are based on inadmissible hearsay, but even if they were, "hearsay can be considered in entering a preliminary injunction." *S.E.C. v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991) (citing *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986)).

restrictions on bathroom and locker room access" and that these experiences have "long-term influences on mental health, physical health, and overall wellbeing," including heightened risk for posttraumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality.[4] (Fortenberry Decl. ¶¶ 34–35, ECF No. 22-2.) He opined that Plaintiffs' "overall health and wellbeing is best served" by access to the male bathroom and locker facilities. (*Id.* ¶ 37.)

Defendants attempt to distinguish *Whitaker* by stating that unlike the plaintiff there, B.E. and S.E. have not "restricted their water intake" or "contemplated self harm as result of the restroom options offered to them." (Defs.' Resp. 19–20, ECF No. 30.) Plaintiffs have stated, however, that they try to avoid going to the bathroom at all, which is "very uncomfortable" and makes it hard to concentrate in class. (B.E. Decl. ¶ 29, ECF No. 22-4; S.E. Decl. ¶ 29, ECF No. 22-5.) And their mother testified that at least on one occasion, she picked up B.E. from school because B.E.'s stomach hurt from "holding it." (L.E. Dep. 76–83, ECF No. 29-1; B.E. Dep. 33–35, ECF No. 29-3.) Plaintiffs also stated that being excluded from the boys' facilities worsens their anxiety and depression, makes them feel isolated and punished for being who they are, and makes them not want to go to school. (B.E. Decl. ¶¶ 18, 31, ECF No. 22-4; S.E. Decl. ¶¶ 18, 31, ECF No. 22-5.) And Plaintiffs' mother testified that Plaintiffs have contemplated and carried out self-harm "because of what they are going through," although what they are "going through" likely encompasses more than just

[4] That Dr. Fortenberry based his opinions in part on conversations with the Plaintiffs for which he was not physically present—the conversations were relayed to him by the fellow he was supervising, Dr. Nomi Sherwin—does not change the Court's analysis. (*See* Defs.' Supp. R. ¶ 8, ECF No. 51.)

the School's stance. (L.E. Dep. 36, ECF No. 43-3.) While the circumstances here are not identical to those in *Whitaker*, they are sufficiently similar as to support a finding of irreparable harm.

Defendants also state that there is "no evidence that B.E. or S.E. have been ostracized or singled out for their use of the health office restroom." (Defs.' Resp. 20, ECF No. 30.) But as in *Whitaker*, the health office bathroom is not located near Plaintiffs' classrooms, and Plaintiffs are the only students who use it, other than students who are in the nurse's office for a health issue. (B.E. Suppl. Decl. ¶ 4, ECF No. 43-7; S.E. Suppl. Decl. ¶ 4, ECF No. 43-8; Mason Dep. 35–36, ECF No. 43-1.) Plaintiffs, too, are "faced with the unenviable choice between using a bathroom that would further stigmatize [them] and cause [them] to miss class time, or avoid use of the bathroom altogether at the expense of [their] health." *Whitaker*, 858 F.3d at 1045. The latter is not a viable option for Plaintiffs due to their gastrointestinal issues, and the former requires them to head to the health office—as effectively the only students who do so—and risk having an accident, while their peers use the nearby restrooms. (Mason Dep. 35–36, ECF No. 43-1; B.E. Decl. ¶ 27, ECF No. 22-4; S.E. Decl. ¶ 27, ECF No. 22-5.) Both Plaintiffs noted that this highlights that they are different than their peers; S.E. specifically testified that using the health office restroom made Plaintiffs "outcasts." (S.E. Dep. 18, ECF No. 29-2; B.E. Decl. ¶ 30, ECF No. 22-4; S.E. Decl. ¶ 30, ECF No. 22-5); *see Whitaker*, 585 F.3d at 1045 (plaintiff using restroom to which only he had access "further stigmatized" him, "indicating that he was 'different' because he was a transgender boy"). And all of this undermines the treatment for

Plaintiffs' gender dysphoria, the consequences of which have been detailed extensively by Dr. Fogel and Dr. Fortenberry. In sum, like the plaintiff in *Whitaker*, Plaintiffs have shown that they will suffer irreparable harm in the absence of a preliminary injunction.

2. Inadequate Legal Remedies

In concluding that the plaintiff in *Whitaker* had shown that there was no adequate remedy at law, the court rejected the school district's argument that any harm the plaintiff suffered could be remedied by monetary damages. *Whitaker*, 858 F.3d at 1046. The court cited the plaintiff's statement that he had contemplated suicide due to the school's position, as well as an expert's opinion that the school's actions were "directly causing significant psychological distress" and placed the plaintiff "at risk for experiencing life-long diminished well-being and life-functioning." *Id.* at 1045–46. The court concluded that there was no adequate remedy for "preventable 'life-long diminished well-being and life-functioning'" or for the potential harm of suicide. *Id.*

Here, Defendants do not appear to even argue that there is an adequate remedy at law. Regardless, while Plaintiffs have not explicitly stated that they have contemplated suicide because of the School's policy, the same risk of "preventable 'life-long diminished well-being and life-functioning'" is present. Dr. Fortenberry noted Plaintiffs' "school-related distress associated with mis-gendering and with restrictions on bathroom and locker room access" and stated that these feelings of shame and discrimination "have long-term influences on mental health, physical

health, and overall wellbeing." (Fortenberry Decl. ¶¶ 34–35, ECF No. 22-2.) He further opined that studies show that the "stress and victimization" experienced by transgender and gender nonbinary middle and high school students is associated "with a greater risk for posttraumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality as an adult" and that Plaintiffs' health and well-being would best be served by access to the boys' bathroom and locker facilities. (*Id.* ¶¶ 34, 37.) And Dr. Fogel stated that being forced to use restrooms that differ from a person's identity can exacerbate the negative consequences of gender dysphoria and "can have permanent negative consequences." (Fogel Decl. ¶¶ 27–28, ECF No. 22-1.) Plaintiffs detailed the distress and anxiety they experience and described how their exclusion from the boys' facilities worsens their anxiety and depression. (B.E. Decl. ¶¶ 18, 22–23, 27, 29, 31, 39, ECF No. 22-4; S.E. Decl. ¶¶ 18, 22–23, 27, 29, 31, 39, ECF No. 22-5; L.E. Dep. 38, ECF No. 29-1.) In short, there is a preventable risk that Plaintiffs will experience long-term detrimental effects on their health, and there is no adequate remedy for such a risk. *See Whitaker*, 858 F.3d at 1046; s*ee also J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1042 (S.D. Ind. 2018) (finding "a monetary award would be an inadequate remedy for the type of stress and anxiety" transgender plaintiff would experience if injunction allowing for restroom access were not granted).

3. Balancing of Harms and Public Interest

The Court has already described the irreparable harm Plaintiffs would suffer absent preliminary injunctive relief. Now, the Court must balance that harm against

the harm Defendants would suffer if an injunction were granted, and the Court must consider the public interest. *Camelot Banquet Rooms, Inc.*, 24 F.4th at 644.

In support of their argument that the balance of harms weighs against a preliminary injunction, Defendants claim an injunction would violate the privacy interests of Plaintiffs' classmates and would "create many uncertainties," as the School would have to "immediately police students with different anatomy disrobing and showering in the same facility." (Defs.' Resp. 21, ECF No. 30.) This argument does not tip the balance in this case for several reasons. First, like the plaintiff in *Whitaker*, Plaintiffs used the boys' restroom at the beginning of the school year without incident; "[n]one of [Plaintiffs'] classmates questioned [their] presence in the boys' bathrooms." (B.E. Decl. ¶¶ 10–11, ECF No. 22-4; S.E. Decl. ¶¶ 10–11, ECF No. 22-5; Mason Dep. 29–30, ECF No. 43-1); *Whitaker*, 858 F.3d at 1055 (dismissing school district's argument that it would be harmed when plaintiff used the bathroom for months without incident and district failed to produce any evidence that any students ever complained about plaintiff's presence or that plaintiff's presence actually caused an invasion of any other student's privacy). There is no reason to think the locker room would be any different: Plaintiffs will use the stalls to change for gym class, just as they used the stalls in the restroom. (Pls.' Reply 4, ECF No. 44; B.E. Suppl. Decl. ¶ 6, ECF No. 43-7; S.E. Suppl. Decl. ¶ 6, ECF No. 43-8.) Nor would showering be an issue: students generally do not use the locker room showers during the day, and Plaintiffs have stated that they would not use the showers in the boys' locker room. (B.E. Suppl. Decl. ¶¶ 6–7, ECF No. 43-7; S.E. Suppl. Decl. ¶¶ 6–7, ECF

No. 43-8.) Regarding Defendants' concerns about policing students with different anatomy disrobing in the same facility, to the extent Defendants mean they are concerned about distinguishing between transgender students and those students with merely a desire to gain access to the other locker room, (*see* Amicus Br. of Indiana & 13 Other States in Opp'n 11, ECF No. 35), then Plaintiffs are right: the School can require documentation to verify the legitimacy of a student's request, much like it already does. (*See* Vigo County School Corporation Administrative Guideline Regarding Accommodations for Transgender Students, ECF No. 43-2.)

Finally, Defendants argue that public policy weighs against an injunction. The decision that Title IX does not permit the separation of toilet, locker room, and shower facilities "on the basis of sex" should be made by Congress or through the notice-and-comment process, Defendants say. (Defs.' Resp. 21–22, ECF No. 30.) But that decision was already made when the Seventh Circuit decided *Whitaker*. *See, e.g.*, *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1042 (S.D. Ind. 2018) (granting transgender boy's motion for preliminary injunction to allow him to use boys' restroom; "the issuance of an injunction in this case would not require moving the applicable line from where the court in *Whitaker* has already drawn it"); *see Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 910 (7th Cir. 1994) (in a hierarchical judiciary, lower courts should follow higher courts' decisions on point). And protecting civil rights is "a purpose that is always in the public interest." *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (citations omitted) (denying

motion to stay preliminary injunction that ordered school district to allow transgender girl to use girls' restroom).

Having determined that Plaintiffs will suffer irreparable harm absent preliminary injunctive relief, and that Defendants and the public interest will not be harmed if such relief is granted, this balance weighs in Plaintiffs' favor. *Whitaker*, 858 F.3d at 1054–55.

C. Bond Requirement

Finally, Plaintiffs request that the injunction be issued without bond. (Mot. Prelim. Inj. 2, ECF No. 12; Pls.' Br. 32, ECF No. 22.) Rule 65 of the Federal Rules of Civil Procedure provides that a court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). However, Plaintiffs state that bond should not be required in this case because issuance of the injunction will not result in any monetary harm to the School. *See Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010) (district court can waive bond requirement when there is no danger the opposing party will incur any damages from the injunction). The School does not respond to this argument or contend that it would incur damages as a result of the injunction. Failure to respond to an argument results in waiver. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010). Accordingly, the Court will waive the bond requirement.

Conclusion

Plaintiffs' Motion for Preliminary Injunction, (ECF No. 12), is **granted**. The injunction shall issue in a separate order. *See, e.g.*, *MillerCoors LLC v. Anheuser-Busch Cos., LLC*, 940 F.3d 922, 922–23 (7th Cir. 2019) (per curiam) (remanding for failure, in part, to enter injunction as a separate document).

SO ORDERED.

Date: 06/24/2022

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution to registered parties of record via CM/ECF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

B. E., S. E., Plaintiffs, v. VIGO COUNTY SCHOOL CORPORATION, PRINCIPAL, TERRE HAUTE NORTH VIGO HIGH SCHOOL, Defendants.	)	No. 2:21-cv-00415-JRS-MG

Preliminary Injunction

The Court finds that Plaintiffs B.E. and S.E. have demonstrated a likelihood of success on the merits of their claim under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq*. Specifically, the Court finds that in light of *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), *abrogated on other grounds by Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); decisions from other courts; and the lack of contrary caselaw, Plaintiffs have made a sufficient showing that they are likely to succeed on their claim that Defendants' refusal to allow them to use the male restrooms and locker room violates Title IX. The Court also finds that denial of access to such facilities may exacerbate the negative consequences of Plaintiffs' gender dysphoria, which may have a life-long, detrimental impact on Plaintiffs' well-being, and that this constitutes irreparable harm for which there is no adequate remedy at law. When balancing this harm against the harm

Defendants would face if preliminary relief were granted, and when considering the impact of preliminary relief on the public as a whole, the Court finds that the balance tips in favor of Plaintiffs and an injunction.

Accordingly, the Court **orders** Defendants, Vigo County School Corporation and Principal of Terre Haute North Higo High School, to provide Plaintiffs with access to the boys' restrooms and locker room, excluding the showers.

The Court waives the security requirement of Rule 65(c) of the Federal Rules of Civil Procedure. *See Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010) (district court can waive bond requirement when there is no danger the opposing party will incur any damages from the injunction).

SO ORDERED.

Date: 06/24/2022

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution to registered parties of record via CM/ECF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A. C. a minor child, by his next friend, mother and legal guardian, M.C.,	)	
Plaintiff,	)	
v.	)	Case No. 1:21-cv-02965-TWP-MPB
METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE, and PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL in his official capacity,	)	
Defendants.	)	

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on a Motion for Preliminary Injunction filed pursuant to Federal Rule of Civil Procedure 65 by Plaintiff A.C. a minor child, by his next friend, mother and legal guardian, M.C. ("A.C."). (Filing No. 9.) A.C. initiated this lawsuit against Defendants Metropolitan School District of Martinsville and Principal of John R. Wooden Middle School in his official capacity (collectively, the "School District") seeking declaratory and injunctive relief for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment. (Filing No. 1.) A.C. seeks to enjoin the School District from restricting his use of male restrooms and requests that Defendants treat him as a male student in all respects. For the following reasons, the Court **grants** the Motion for Preliminary Injunction.

I. BACKGROUND

A.C. is a transgender, 13-year-old boy who lives with his mother, M.C., in Martinsville, Indiana. (Filing No. 30 at 9.) Though designated a female at birth, when A.C. was 8 years old he realized he identified as a boy. *Id.* When he turned 9 years old, A.C. told his mother that he was not a girl and wanted to be referred to by a boy's name and addressed using male pronouns. *Id.*

From that point, A.C. was referred to by his preferred name and addressed with "he" or "they" pronouns. *Id.* A.C. also began presenting himself as a boy, wearing masculine clothing and having a masculine haircut. *Id.* Around this same time, A.C.'s mother contacted his grade school and asked that teachers refer to him by his preferred name and use male pronouns.[1] *Id.* at 10.

A.C. has been given the clinical diagnosis of gender dysphoria, a condition that occurs when there is a marked incongruence between a person's experienced gender and their gender assigned at birth, and is accompanied by clinically significant distress or impairment in areas of their functioning. (Filing No. 29-1 at 4.) He is under the care of physicians at the Gender Health Clinic at Riley Children's Hospital where he is being given medication for menstrual suppression; and he hopes and expects to be taking male hormones in the near future.

When A.C. began school at John R. Wooden Middle School, located within the Metropolitan School District of Martinsville, he was offered the use of the school's single-sex restroom located in the school's medical clinic. (Filing No. 30 at 11.) This accommodation, however, was not convenient for A.C. as he felt singled out and the clinic restroom was far from most of his classes. Because of the distance of the restroom, A.C. was marked tardy several times, which could have resulted in possible discipline. *Id.* at 11. A.C. began to experience anxiety, depression and stigmatization. Due to his struggles, A.C.'s stepfather called the School District and requested that A.C. be allowed to use the boys' restroom. (Filing No. 35 at 6.) The School District denied this request and stated A.C. could continue using the clinic's restroom. *Id.*

Over the frustration with the restroom access, M.C. contacted a transgender advocacy group, GenderNexus, to assist in advocating to the School District on A.C.'s behalf. (Filing No. 30

[1] In his opening brief, A.C. also brought claims based on staff members and substitutes referring to A.C. with his previous name and using feminine pronouns. In his reply he withdrew these claims as a basis for the preliminary injunction.

at 12.) A representative from GenderNexus arranged and attended a meeting between M.C., A.C., and the School District. *Id.* The representative provided information about A.C.'s rights as a transgender student and the group discussed the need for A.C. to use the boys' restroom. *Id.* At the end of the meeting, a school counselor said he would ask "higher-ups" about the restroom request. *Id.* After conferring with the principal of the middle school, M.C. was advised that the School District would not allow A.C. to use the boys' restroom, but that it would no longer discipline A.C. for being late to class. *Id.* The counselor also noted that the School District was willing to allow A.C. to switch to remote learning. *Id.*

Contrary to the School District 's decision, A.C. began using the boys' restrooms after the meeting. *Id.* at 13. During the three weeks he was able to use the boys' restrooms, A.C. reported that he felt more comfortable at school, his attitude changed completely, and he felt better about himself. Additionally, there were no reported issues or complaints from A.C.'s classmates. *Id.* A staff member, however, saw A.C. using a boys' restroom and reported it to the administration. (Filing No. 35 at 8.) A.C. was called in for a meeting with the school counselor who reminded him that he was not allowed to use the boys' restrooms and would be punished if he continued to do so. (Filing No. 30 at 13.) The School District also advised staff that students should only be using the restrooms of the sex each student was assigned at birth or the clinic restroom. *Id.* Staff were also told to notify the front office when a transgender student requested to use the restroom during class so that student could be monitored for compliance with this policy. *Id.*

The week after his meeting with the school counselor, A.C. was called to the office to meet with the principal. *Id.* The principal told A.C. that he was not allowed to use the boys' restrooms, that he must only use the girls' restrooms or the one located in the clinic, and that he would be punished if he continued using the boys' restrooms. *Id.* at 13-14. M.C. was called during that

meeting and told that if she wanted A.C. to use the boys' restroom, she would need to contact the school board. *Id.* at 14.

Though it was never mentioned to A.C. or his parents prior to initiating this litigation, the School District has an unofficial policy for allowing transgender students to use the bathroom that aligns with their gender on a "case-by-case" basis. *Id.* The factors used by the School District in making these decisions include how long the student has identified as transgender; whether the student is under a physician's care; if the student has been diagnosed with gender dysphoria; if the student is prescribed hormones; and if the student has filed for a legal name and gender marker change. *Id.* After learning about this policy, A.C. submitted documentation from his supervising physician, Dr. Dennis Fortenberry. *Id.* Dr. Fortenberry has not had any direct discussions with A.C., however, he is the supervising doctor at the Gender Health Clinic at Riley Children's Hospital. (Filing No. 29-1.) The School District, however, has not granted A.C. access to the boys' restrooms since receiving this information from Dr. Fortenberry. (Filing No. 30 at 14.) As a result, A.C. reports that his education is being disrupted, "he dreads going to school, is unable to focus there, and comes home depressed and humiliated." *Id.* at 15. And despite the physical discomfort, A.C. sometimes tries to go the entire day without using the restroom at all.

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* (citation and quotation marks omitted). Granting a preliminary injunction is "an exercise of a very far-reaching power, never to be indulged in except

in a case clearly demanding it." *Roland Mach Co. v. Dresser, Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (citation and quotation marks omitted).

> To obtain a preliminary injunction, a plaintiff must establish that it has some likelihood of success on the merits; that without relief it will suffer irreparable harm. If the plaintiff fails to meet any of these threshold requirements, the court must deny the injunction. However, if the plaintiff passes that threshold, the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest.

Geft Outdoors, LLC v. City of Westfield, 922 F.3d 357, 364 (7th Cir. 2019) (citations and quotation marks omitted). Courts in the Seventh Circuit employ a sliding scale approach where the greater the likelihood of success, the less harm the moving party needs to show to obtain an injunction, and vice versa. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.,* 549 F.3d 1079, 1086 (7th Cir. 2008).

III. DISCUSSION

At this stage of the case, the only issue before this Court is whether A.C. is entitled to the preliminary injunctive relief he seeks; specifically, to use the boys' restrooms at his school.[2] To obtain a preliminary injunction, A.C. must establish the following factors: (1) that he is likely to succeed on the merits of both his Title IX and Equal Protection claims; (2) that he has no adequate remedy at law; (3) that he is likely to suffer irreparable harm in the absence of preliminary relief; (4) that the balance of equities tip in his favor; and (5) issuing the injunction is in the public interest. *Geft*, 922 F.3d at 364. The first two factors are threshold determinations. "If the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Stuller, Inc. v. Steak N Shake*

[2] In his Complaint, A.C. also requests that he be allowed to participate on the boys' soccer team, but given that soccer season is a number of months away, he elected to not seek injunctive relief on that issue.

Enterprises, Inc., 695 F.3d 676, 678 (7th Cir. 2012) (quoting *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). The Court will address each factor in turn.

A. Likelihood of Success on the Merits

Title IX provides that "[n]o 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 receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). To support a Title IX claim, a plaintiff must show (1) that the educational institution intentionally discriminated against the plaintiff based on the plaintiff's sex, and (2) that "gender was a motivating factor in the decision to impose the discipline." *Doe v. Indiana Univ.-Bloomington*, 2019 WL 341760, at *8 (S.D. Ind. Jan. 28, 2019) (quoting *King v. DePauw Univ.*, 2014 WL 4197507, at *10 (S.D. Ind. Aug 22, 2014)). The formative question the Court must answer is "do the alleged facts, if true, raise a plausible interference that [the School District] discriminated against [A.C.] on the basis of sex?" *Doe v. Purdue Univ.*, 928 F.3d 652, 667-668 (7th Cir. 2019).

The Seventh Circuit has held that discrimination against a person on the basis of their transgender status constitutes discrimination based on sex, which is prohibited by both Title IX and the Equal Protection Clause. (Filing No. 30 at 16-17.) In *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Education*, 858 F.3d 1034 (7th Cir. 2017), a transgender student alleged that a policy barring him from using the boys' restroom violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1039. The district court granted a preliminary injunction in favor of the student, and the Seventh Circuit agreed. *Id.* The Seventh Circuit held that a school policy that subjects transgender students to different rules, sanctions, and treatment than non-transgender students violates Title IX. *Id.* at 1049-50.

A.C. contends that the Seventh Circuit's decision in *Whitaker* "makes plain that denying A.C. the ability to use the boys' restrooms in his school violates Title IX." (Filing No. 30 at 19.) "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX . . . . Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act." *Whitaker*, 858 F.3d at 1049-50. A.C. asserts that just like in *Whitaker*, the School District is punishing him for his transgender status and, as the Seventh Circuit has made clear, this violates Title IX. (Filing No. 30 at 21.)

A.C. argues that he will succeed on his Equal Protection claim. *Id.* at 25. As his status as transgender is a classification based on sex, he contends the School District's action is subjected to a form of heightened scrutiny that is somewhere in between rational basis and strict scrutiny. *Id.* With intermediate scrutiny, "the burden rests with the state to demonstrate that its proffered justification is exceedingly persuasive," which requires the state to show that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Whitaker*, 858 F.3d at 1050-51.

A.C. contends the decision of the School District to deny A.C. access to the boys' restrooms was based on concerns about "privacy." *Id.* at 26-27. He points out that in *Whitaker* the court addressed alleged privacy concerns, rejected those concerns and determined that they were "insufficient to establish an exceedingly persuasive justification for the classification." *Id.* Other courts have reached the same conclusions, both for other transgender students seeking restroom access, as well as for non-transgender students seeking to prohibit students from using the restrooms associated with their gender identities. *Id.* at 28 (citing *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d

Cir. 2018)). For all these reasons, A.C. contends that he will also be successful on his equal protection claim.

In response, the School District argues that A.C.'s request to use the boys' restrooms is unlikely to succeed because Title IX expressly allows institutions to provide separate restroom facilities on the basis of sex. (Filing No. 35 at 13.) The School District contends that Title IX's implementing regulations expressly state that institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The School District asserts that Title IX expressly permits the segregation of facilities on the basis of enduring biological differences in areas where biological differences matter. (Filing No. 35 at 14.) Arguing that it is consistent with these regulations, the School District argues that it is complying with Title IX. *Id.*

The School District argues that A.C. overly relies on the Seventh Circuit's decision in *Whitaker* and that it should be disregarded for four reasons. *Id.* at 16. First, the Seventh Circuit has criticized *Whitaker* for using the wrong standard of review. *Id.* (citing *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020)). Because of this, the School District argues that the discussion of the merits in *Whitaker* should have no precedential value. *Id.*

Second, the School District argues that the court's analysis in *Whitaker* is put in doubt by the United States Supreme Court's decision in *Bostock v. Clayton Cnty, Georgia*, 140 S. Ct. 1731 (2020). *Id.* While the Seventh Circuit looked to Title VII in deciding *Whitaker*, the School District contends that in *Bostock*, the court expressly declined to extend its ruling as it pertained to sex discrimination in the workplace (which is prohibited by Title VII) to issues pertaining to sex assigned restrooms and locker rooms (which are expressly permitted by Title IX). *Id.*

Third, the School District argues that the *Whitaker* analysis assumed that the sex stereotyping framework borrowed from Title VII applies in the Title IX restroom context, which *Bostock* does not embrace. *Id.* at 17. The School District asserts that the Supreme Court "specifically reserved this very issue for another day, and *Whitaker* offers no help in understanding why the distinction is 'on the basis of sex.'" *Id.* The School District contends that if requiring students to use restrooms based on sex is unlawful sex stereotyping, then Title IX is itself unlawful. *Id.*

And finally, the School District argues that its position cannot be characterized as sex stereotyping. The School District contends that, consistent with Title IX and its regulations, the School District's position is based on Title IX allowing schools to separate restroom facilities on the basis of sex. *Id*. The School District also asserts that this aligns with the testimony of A.C.'s own expert, who acknowledges that sex is different than gender. *Id.*

The School District also argues that A.C. will not be successful on his Equal Protection claim. *Id.* at 18. The School District agrees that its classification is subject to intermediate scrutiny, but that it can meet the two requirements: (1) that the classification serves important governmental objectives; and (2) the discriminatory means employed are substantially related to the achievement of those objectives. *Id.* (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

The School District first contends that the policy or practice of separate facilities "serves important objectives of protecting the interests of students in using the restroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex." *Id.* Citing a variety of cases on the issue of privacy, the School District argues that if the approach to protect privacy does not satisfy constitutional scrutiny, then neither does Title IX's facilities provisions. *Id.* at 19.

Next, the School District argues that its policy is also substantially related to the achievement of these objectives, as it requires that students use the restroom in a separate space from the opposite sex and that this protects against exposure of a student's body to the opposite sex. *Id.* The School District argues that this position does not violate Equal Protection and weighs against granting an injunction. *Id.* at 19-20. Additionally, the School District asserts that any reliance on the Seventh Circuit's decision in *Whitaker* is unreliable as the "analysis wrongly applies Title VII jurisprudence in an area in which the U.S. Supreme Court has not yet gone." *Id.* at 20.

The School District lastly argues that, to the extent *Whitaker* applies, its position of making an individualized determination as to whether a student who identifies as transgender will be allowed access to restrooms different than their sex complies with the law. *Id.* The School District was not provided the type of information it needed prior to the initiation of the lawsuit. *Id.* at 21. Additionally, unlike the plaintiff in *Whitaker* who was a high schooler, the School District A.C. is only a seventh grader and is "less mature" and only "on the threshold of awareness of human sexuality." *Id.* A.C. has not received hormones and at the time this action was filed, he had not completed a legal name and gender marker change. *Id.* At the time of oral argument, A.C.'s legal name change had been granted by the state court; however, on the same day as oral arguments, his gender marker change request was denied by the state court. (Filing No. 41.) Given these differences, as well as the Supreme Court failing to discuss or decide the issue in *Bostock*, the School District argues that it complied with the law in its initial determination to deny A.C. access to the boys' restrooms and in continuing to seek additional information that may alter that determination. (Filing No. 35 at 21.)

The Court finds that A.C. has established a likelihood of success on the merits of his claims. For all its arguments presented both in its briefing and at oral argument, the School District has

provided no convincing argument that *Whitaker* does not control and favors A.C.'s likely success on his claims. Whitaker remains good law and thus is binding on this court.[3]

And the School District appears to confuse its Title IX compliance of maintaining separate sex restrooms with the claims A.C. is alleging in this case. A.C.'s claims are based on the School District's treatment of him as an individual, not a complaint that the School District lacks appropriate facilities. A.C. has not requested that additional facilities be built, or the current ones be redesignated in any way. Rather, he is seeking to use those facilities that already exist and align with his gender identity; his claim is solely that the School District is forbidding him from doing so.

Additionally, the School District's arguments that it was not provided enough information prior to the initiation of this lawsuit, as well as its arguments about A.C. not receiving hormones and a gender marker change, fail to undermine the likely success of A.C.'s claims. The School District's transgender policy is unwritten and was not provided to A.C. until *after* the initiation of this lawsuit. Further, there was no evidence presented that taking hormones and receiving a gender marker change on one's birth certificate are required prerequisites to identify as a transgender person, much less that either of these factors would automatically authorize A.C. to use the boys' restrooms. In fact, at oral argument, counsel for the School District was unable to say whether a gender marker change or receiving hormones would be enough for the School District to change its decision regarding A.C. using the boys' restrooms. Instead, counsel was only able to say that he thought it would have "significant impact" on the decision.

[3] The Court perceives that the School District is aware of the controlling nature of *Whitaker* given that at oral argument counsel for the School District admitted that this Court "isn't in a position to overrule *Whitaker*" and made clear that the arguments were being presented "for the purposes of our record . . . if this did go up on appeal."

Given the evidence before this Court and the controlling precedent from the Seventh Circuit, the Court finds that A.C. has established a likelihood of success on the merits of both his Title IX and Equal Protection claims.

B. Irreparable Harm, Inadequate Remedy at Law, and Balance of Harms

As argued by A.C., it is well-established that the denial of constitutional rights is irreparable harm in and of itself. (Filing No. 30 at 29.) Based on a violation of his equal-protection rights, A.C. contends that he has established irreparable harm. *Id.* at 30. Additionally, A.C. asserts that he has established that the School District 's actions caused him ongoing emotional harm and distress, for which there is no adequate remedy at law. *Id.*

A.C. also argues that because he has established a substantial likelihood of success on the merits, "no substantial harm to others can be said to inhere" from the issuance of an injunction. *Id.* at 32 (citing *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001)). An injunction will only force the School District to conform its conduct to the requirements of the Constitution and federal law, which cannot be harmful to the School District. *Id.*

In response, the School District argues that the balance of harms weighs against A.C.'s request to have access to the boys' restrooms. (Filing No. 35 at 22.) The School District notes that it has made accommodations to allow A.C. more time to use the restroom, and the fact that he may occasionally be late to class is not evidence of irreparable harm. *Id.* The School District disputes that A.C. has been ostracized for the use of the clinic's restroom, and points out that unlike the single restroom accessible for Whitaker which invited more scrutiny and attention from peers, the clinic restroom is available for use by all students with permission from the school nurse. *Id.* It argues Concerning A.C.'s expert, the School District asserts that Dr. Fortenberry,

> has not participated in the care of A.C., has not had any direct discussion with A.C. or M.C., has not performed any individualized assessment as to the severity of harm

> that A.C. will experience if not allowed to access the boys' restroom, and has not performed an individualized assessment of the reduction of harm if A.C. is allowed access to the boys' restroom.

Id. Finally, the School District argues the balance of harms analysis favors maintaining the status quo. *Id.* at 23. Granting "unrestricted access" to A.C. to use the boys' restrooms would violate the privacy interests of other students and classmates, as well as cause the School District to be unable to rely on Title IX's regulations. *Id.*

The Court is not persuaded by the School Districts arguments. Although any student may use the restroom in the clinic, in order to do so the student (including A.C.) must enter the health clinic, ask permission from the school nurse and then sign in before they may use that restroom. This process appears to invite scrutiny and attention. In support of his Motion, A.C. provided a declaration in which he described feeling stigmatized and that being excluded from the boys' restrooms "worsens the anxiety and depression" caused by his gender dysphoria and makes him feel isolated. (Filing No. 29-3 at 5.) He affirms that the School District's decision "makes being at school painful." *Id.* A.C.'s mother also reported that the issues with the restroom have been emotionally harmful to A.C. and that she is concerned for the possible medical risks associated with him trying not to use the restroom during school. (Filing No. 29-2 at 6.) Like other courts recognizing the potential harm to transgender students, this Court finds no reason to question the credibility of A.C.'s account and that the negative emotional consequences with being refused access to the boys' restrooms constitute irreparable harm that would be "difficult—if not impossible—to reverse." *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1039 (S.D. Ind. 2018) (quoting *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011). Likewise, a presumption of irreparable harm exists for some constitutional violations. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011).

Additionally, the Court finds that there is no adequate remedy at law to compensate A.C. for the harm he could continue to experience. While monetary damages may be adequate in the case of tort actions, the emotional harm identified by A.C. could not be "fully rectified by an award of money damages." *J.A.W.*, 323 F. Supp. 3d at 1039-40; *see also Whitaker*, 858 F.3d at 1054.

Finally, the Court must evaluate the balance of harms to each party. While A.C. has provided evidence of the harm he will likely suffer, the School District's alleged potential harm is unsupported. No student has complained concerning their privacy. The School District's concerns with the privacy of other students appears entirely conjectural. No evidence was provided to support the School District's concerns, and other courts dealing with similar defenses have also dismissed them as unfounded. *See Whitaker*, 858 F.3d at 1052; *J.A.W.*, 323 F. Supp. 3d at 1041. Moreover, the School District's concerns over privacy are undermined given that it has already granted permission for other transgender students to use the restroom of their identified gender, and it has presented no evidence of problems when the other transgender student have used restrooms consistent with their gender identity.

Because A.C. has demonstrated that he will likely suffer irreparable harm, and the School District has failed to support its claims of prospective harm, the Court finds that the balance weighs in favor of granting A.C.'s request.

C. Public Interest

Finally, A.C. argues that "[t]he public interest is also furthered by the injunction here, as an injunction in favor of constitutional rights and the rights secured by Title IX is always in the public interest. (Filing No. 30 at 33.) In response, the School District argues that public policy weighs in its favor. Based on its assertion that Title IX favors the separation of facilities, the School District contends that its policy furthers the interest of personal privacy. (Filing No. 35 at

24.) The School District argues "[t]o the extent that Title IX should not allow the separation of such facilities, that decision should be made through elected representatives in Congress, using clearly understood text, or through the notice and comment process for the revision of federal regulations required by the Administrative Procedure Act." *Id.*

While acknowledging that the public interest favors furthering individual privacy interests, the Court does not believe that granting A.C. access to the boys' restrooms threatens those interests. The restrooms at the middle school have stalls and as argues by A.C.'s counsel, restrooms are an area where people are usually private which minimizes exposure of a student's body to the opposite sex. Since he was eight years old, A.C. has identified as male, and has dressed as a boy and had a boy haircut. He is under a physician's care, has been diagnosed with gender dysphoria, and has been granted a legal name. The School District's arguments regarding its facilities again confuses the basis of A.C.'s claim, which is solely based on the School District's treatment of him as an individual. Having determined that granting A.C.'s Motion is in the public interest, as well as A.C. establishing the other required factors, the Court finds that A.C.'s requested preliminary injunction should be **granted**.

IV. CONCLUSION

The overwhelming majority of federal courts--including the Court of Appeals for the Seventh Circuit-- have recently examined transgender education-discrimination claims under Title IX and concluded that preventing a transgender student from using a school restroom consistent with the student's gender identity violates Title IX. This Court concurs. For the reasons stated above, A.C.'s Motion for Preliminary Injunction (Filing No. 9) is **GRANTED**. The School District shall permit A.C. to use any boys' restroom within John R. Wooden Middle School.

SO ORDERED.

Date: 4/29/2022

Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A. C. a minor child, by his next friend, mother and legal guardian, M.C.,	)	
Plaintiff,	)	
v.	)	Case No. 1:21-cv-02965-TWP-MPB
METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE, PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL in his official capacity,	)	
Defendants.	)	

PRELIMINARY INJUNCTION

Pursuant to the Court's Order Granting Plaintiff A.C. a minor child, by his next friend, mother and legal guardian, M.C.'s ("A.C.") Motion for Preliminary Injunction (Filing No. 50) and in compliance with Federal Rule of Civil Procedure 65(d)(1)(C), Defendants the Metropolitan School District of Martinsville and Principal of John R. Wooden Middle School are hereby preliminary enjoined from stopping, preventing, or in any way interfering with A.C. freely using any boys' restroom located on or within the campus of John R. Wooden Middle School located in Martinsville, Indiana. No bond shall be required.

SO ORDERED.

Date: 5/19/2022

Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

Roger A.G. Sharpe, Clerk

BY: _____
Deputy Clerk, U.S. District Court

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