

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DREW ADAMS, a minor, by and
through his next friend and
mother, ERICA ADAMS KASPER,

Plaintiff,

vs.

THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,

Defendant.

Jacksonville, Florida

Case No. 3:17-cv-739-J-32JBT

August 10, 2017

2:58 p.m.

Courtroom No. 10D

MOTION FOR PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

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transcript produced by computer.)

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P R O C E E D I N G S

August 10, 2017 2:58 p.m.

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COURT SECURITY OFFICER: All rise. The United States District Court in and for the Middle District of Florida is now in session. The Honorable Timothy J. Corrigan presiding. Please be seated.

THE COURT: Good afternoon. This is the case of *Adams versus The School Board of St. Johns County*. The case is numbered 3:17-cv-739. It looks like we've got a lot of lawyers here.

Ms. Doolittle, if you want to enter your appearance. And you can either introduce your co-counsel or let them introduce themselves.

MS. DOOLITTLE: Thank you, Your Honor. Good afternoon.

Kirsten Doolittle on behalf of the plaintiff. We actually have our plaintiffs here, Drew and Erica Adams.

Thank you, Your Honor. I'll let my co-counsel introduce themselves.

THE COURT: Okay.

MS. BORELLI: Good morning, Tara Borelli with Lambda Legal on behalf of the plaintiffs.

MR. GONZALEZ-PAGAN: Good morning, Your Honor. Omar Gonzalez-Pagan with Lambda Legal on behalf of the plaintiffs.

1 THE COURT: You know it is 3 o'clock in the
2 afternoon, right? Are y'all from California?

3 MR. KOSTELNIK: Good morning, Your Honor. Paul
4 Castillo with Lambda Legal for plaintiff.

5 MR. LAPOINTE: Good afternoon, Your Honor. Markenzy
6 Lapointe from the law firm of Pillsbury Winthrop Shaw Pittman
7 for the plaintiff.

8 THE COURT: Okay. And I'm not sure who's leading --
9 Mr. Harmon, are you lead here? Do you want to make your
10 appearance and introduce your co-counsel?

11 MR. HARMON: Yes, Your Honor. Terry Harmon, counsel
12 on behalf of defendant, St. Johns County School Board. One of
13 our client representatives here is Deputy Superintendent
14 Brennan Asplen. And I'll let co-counsel introduce themselves.

15 THE COURT: Okay.

16 MR. SPELLMAN: Good afternoon, Your Honor. Michael
17 Spellman on behalf of the defendant.

18 MR. UPCHURCH: Your Honor, Frank Upchurch. I'm a
19 St. Johns County School Board attorney. I'm not of record with
20 this case.

21 THE COURT: Okay.

22 MR. SNIFFEN: Good afternoon, Your Honor. Robert
23 Sniffen, Sniffen & Spellman, Tallahassee, Florida.

24 MR. KOSTELNIK: Afternoon, Your Honor. Kevin
25 Kostelnik on behalf of the defendants.

1 THE COURT: Okay. So -- well, of course, I know
2 Ms. Doolittle and I know Mr. Upchurch, who are local. And I
3 don't think I've met any of the rest of you. But good to have
4 everybody here.

5 So we're here today for an argument on a motion for
6 preliminary injunction. And in preparation for that hearing, I
7 have reviewed quite a bit of material.

8 My lawyer over there, my law clerk, has reviewed even
9 more. But I've reviewed quite a bit of the material, and been
10 briefed on the remainder of it.

11 And I've read all the briefs. I've read
12 substantial -- the declarations. I've read substantial
13 portions of the -- other portions of the record that were given
14 to me. I've read some of the lead cases in this area that were
15 cited to me by the parties.

16 And so I think I have a working familiarity with the
17 issues, not a case I -- not a case I've dealt with before. So
18 it was an educational process for me to -- to get prepared for
19 the hearing.

20 As all of you know, that under the local rules,
21 unless otherwise ordered or requested, the hearing on a motion
22 for preliminary injunction is a non-evidentiary hearing,
23 meaning we're not going to actually have live witness testimony
24 today.

25 There are declarations and affidavits of people that

1 I have reviewed. And that's part of the argument. But we will
2 be limited to argument today, and not -- not actual live
3 evidence.

4 And in terms of how we're going to proceed, I don't
5 have a clock on the hearing. But I think what I'll generally
6 try to do is to let the moving party, the plaintiffs, go first.

7 And I'm looking at maybe about a half an hour or so,
8 and then like -- like amount of time for the defendant.

9 And then we'll kind of see where we are. If I feel
10 like there's still more to do, we will do it. And if I end up
11 asking questions, which I've been known to do, you know, that
12 may extend us out a little bit, too. But that's generally what
13 I'm aiming for.

14 So I think that with that run-up we're ready to
15 proceed.

16 Is it Ms. Borelli? Is that how you say it?

17 MS. BORELLI: Correct.

18 THE COURT: Okay. You may proceed.

19 MS. BORELLI: Thank you. Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MS. BORELLI: I would like to start by focusing on
22 what it is that we're asking for with this motion. And what
23 that is is a return to the status quo that existed at the start
24 of Drew's time at Nease High School.

25 Drew used the restroom for six weeks with no

1 problems, no incidents, no issues. We're simply asking for a
2 return to the way things were.

3 Drew is a boy. That is exactly why it is so harmful
4 for the school to exclude him. Saying to any 16-year-old,
5 You're different, is painful. But for Drew this really cuts to
6 the core of who he is.

7 It says to him multiple times a day every day, You're
8 not a real boy. There is something so wrong with you that we
9 can't let you set foot into the communal restrooms that all
10 other boys use.

11 As Drew has testified, this is deeply hurtful. It
12 feels as if the school is saying to him, There's something
13 dangerous or even perverted about him, something so serious
14 that he has to be excluded.

15 That's a terrible message for any adolescent.
16 Obviously adolescence is a time when a key goal is just fitting
17 in.

18 But for Drew this heightens the symptoms of his
19 gender dysphoria. He testified he experiences heightened
20 depression and heightened anxiety, because this is entirely at
21 odds with the course of medical care that's been recommended
22 under the treatment of his physicians. It also denies him
23 equal educational opportunity, because it interferes with his
24 class time.

25 And I'll note we have a number of quibbles with some

1 of the arguments that were made in the opposition about exactly
2 how accessible gender neutral restrooms are on the campus.

3 But before getting into that, I want to suggest that
4 that isn't even the main issue here. In the same way that the
5 court in *Evancho* said, it does not matter -- it does not solve
6 the problem to tell the person who's experiencing
7 discrimination that they can solve it by further separating
8 themselves out from their peers. That is the equal protection
9 violation. That's not the answer to the equal protection
10 violation.

11 THE COURT: Well, I understand that. I wonder,
12 though -- you told me that this is a -- the effort here is to
13 return to the status quo.

14 But the truth of it is, the status quo that you're
15 talking about, and accepting what you're saying as being true,
16 was about, what, two years ago, or so?

17 The status quo for the last -- the first -- the rest
18 of the freshman year and all of the sophomore year was that
19 apparently there was a policy that didn't allow Mr. Adams to
20 use the -- I see everybody refers to it as the boys' restroom.
21 I guess that's what I'll call it if that's what everybody's
22 calling it.

23 So how long does something have to go on before it
24 becomes the status quo? And that's just another way of asking,
25 Why now; why in the summer of 2017 did the suit get filed; why

1 now seek preliminary injunctive relief, as opposed to going to
2 trial over the matter?

3 What is the -- what was the impetus for the suit to
4 be filed at this time when Mr. Adams, whether begrudgingly or
5 not, has been under this policy for close to two years?

6 MS. BORELLI: Well, Your Honor, the fact that it has
7 been that way is because the school has all the power here. As
8 Erica testified, they acted immediately, as soon as they were
9 told that Drew could no longer use the boys' restrooms.

10 The fact that the school has managed to drag this out
11 by being so intransigent, that shouldn't be held against the
12 16-year-old.

13 But Erica testified the day that Drew was told he had
14 to not use the boys' restrooms anymore, she wrote letters to
15 the superintendent and the principal. She met with officials
16 at the school. Those officials said to her, We can't help you,
17 you have to talk to the district.

18 She met with district officials. As soon as it
19 became clear that those district officials would not help her,
20 she filed a complaint with the Office of Civil Rights.

21 They opened a complaint, that federal agency, within
22 a week. And to all outward appearances it appeared that that
23 was proceeding robustly. They assigned an investigator,
24 collected maps and photos, and told Erica that he'd interviewed
25 a variety of school officials. I think Erica testified, I feel

1 helpless, I feel like I have tried everything that I could try.

2 And that, in effect, Your Honor, makes this case just
3 like the *Whitaker* case, where the court there was confronted
4 with questions of timeliness.

5 And the court recognized that Ash Whitaker had done
6 something very similar. As soon as he was excluded from the
7 restrooms, he complained. He filed a federal agency complaint
8 and then he filed suit and sought a preliminary injunction over
9 the summer, when he wasn't subject even to the discriminatory
10 policy. And the court found --

11 THE COURT: Yeah. But I'm asking you a little bit
12 different question. I understand that Ms. Adams, I guess --
13 does she go by Ms. Kasper or Ms. Adams?

14 MS. BORELLI: Ms. Kasper.

15 THE COURT: Ms. Kasper. That -- I understand that
16 she and Mr. Adams made efforts through the school to talk to
17 them about it. I understand they talked to the district. I
18 understand they filed the complaint.

19 But you -- you tell me if I'm wrong. But at least in
20 reading the papers it appeared to me that the last event that
21 occurred in terms of interaction was in May of 2016. This is
22 the summer of 2017.

23 And I'm not criticizing the -- the filing of the
24 suit. I'm not saying it's untimely or anything like that.
25 What I am wondering about, though, is -- you're asking me to do

1 something that is momentous, in the sense that you're asking
2 me, on an expedited basis, on a record that is limited, without
3 any testimony from any party that's subject to
4 cross-examination, and in an area of the law that is developing
5 rapidly, but developing -- you're asking me to say, Okay.

6 Right now, St. Johns County School Board, you can't do this.

7 And what I'm wondering is -- I don't question the
8 filing of the suit. I just question why the suit was filed and
9 the motion for preliminary injunction is sought in the summer
10 of '17 when this problem has been known about and discussed for
11 the last two years, culminating with at least -- correct me if
12 I'm wrong, culminating with May of 2016.

13 That's my question.

14 MS. BORELLI: Your Honor, I think a significant
15 number of families have turned, when they haven't had any other
16 options, to the Office of Civil Rights to try to investigate
17 their complaints and indicate their rights under, for that
18 purpose, Title IX.

19 And, in fact, that office has been, at least prior to
20 the administration, robustly investigating. That's what
21 happened here.

22 That office also has entered consent decrees with
23 schools, particularly under the prior administration. And so I
24 think it -- they had every reason to believe, Your Honor, that
25 this investigation, in which a significant amount of agents and

1 resources had been sunk, that they should see that through,
2 because the agency is charged with vindicating their rights and
3 with reaching resolutions of the schools.

4 And, in fact, I understand from Ms. Kasper -- this
5 isn't in the record, Your Honor. But the investigator actually
6 said to the school at some point, You should go look at some of
7 those consent decrees, you should take a look at that, I don't
8 think things are looking good for you here.

9 Obviously there's been some confusion about what it
10 meant to have a different administration, what approach the
11 agency would take. But the fact that they --

12 THE COURT: Are you saying that the matter is still
13 pending with that agency?

14 MS. BORELLI: We have notified the agency of the
15 filing of the suit. We expect that that will lead to the
16 closure of that complaint, Your Honor, but we have not heard
17 from them. But we have notified them of the filing.

18 THE COURT: When was the last time you heard from
19 them in any official way -- in any official way?

20 MS. BORELLI: I don't know the answer to that, Your
21 Honor. I don't know the answer to that.

22 THE COURT: Well, I've got in my head that -- that
23 there was an effort as late as May of 2016 to try to talk with
24 the school board and get them to change their mind and that
25 that was unsuccessful. And I didn't see anything in any of the

1 papers filed of what was happening between May of 2016 and the
2 summer of 2017.

3 And so that's a concern of mine. Because you're
4 talking about irreparable harm and -- you're talking about
5 imminent irreparable harm.

6 And the -- the difference that we're talking about is
7 the ability of a court to, in a considered, deliberate manner,
8 on a full evidentiary record, in light of all precedence and,
9 really, having the ability to do what courts are supposed to do
10 when they can, and decide the case in that way, as opposed to
11 this, which is a hurry-up.

12 And you can see examples of hurry-up. Your opponents
13 just copied and pasted a brief from another case into their --
14 into their papers.

15 And I'm sure if I asked them they'll say, Well,
16 that's because we only had three weeks to respond. Then y'all
17 filed a reply, and you get the person from Duke and some other
18 people.

19 I don't see anywhere in here where anybody actually
20 is saying they've examined Mr. Adams himself. And to the
21 extent that either medical evidence is important or
22 psychological evidence is important -- I know you have that
23 fellow from California. But I didn't get the feeling that he
24 had ever met Mr. Adams before. You tell me if I'm wrong about
25 that.

1 So I guess what I'm saying is -- and none of that --
2 none of that is to be criticized, because that's to be expected
3 when you file a lawsuit and everybody runs around and tries
4 to -- tries to get something in front of the court on an
5 expedited basis. And sometimes that's vitally necessary.

6 But I'm just wondering -- that's the concern of mine
7 in this case, is that irreparable harm not only has to do with
8 the types of things you want to talk about. It also has to do
9 with timeliness and what the status quo has been and how
10 that -- how the person is dealing with that status quo.

11 So I'm laying my cards on the table. That's an
12 element that's of concern to me. So -- and I will let you talk
13 now.

14 MS. BORELLI: Thank you, Your Honor.

15 So the status quo is often thought of as, What is the
16 last uncontested status between the parties? That, Your Honor,
17 was the six-week period when Drew used the restrooms with no
18 problem.

19 This is not an instance where a party has sat on
20 their hands, failed to make efforts to try to vindicate their
21 rights.

22 Again, simply because the school has managed to drag
23 this out for such a long period of time, and because this
24 family didn't have many options, other than to protest, write
25 letters, have meetings, file a federal agency complaint, all of

1 which they did -- I would point out that this was exactly the
2 basis in which the Seventh Circuit in *Whitaker* said: We don't
3 see any evidence of somebody sleeping on their rights here.

4 THE COURT: Well, *Whitaker* was a little different,
5 because that was -- that was all done over a summer, as I -- as
6 I recall it.

7 They had the -- they had the complaint pending. They
8 dismissed the complaint. He didn't -- he filed it in late
9 summer. And that was it. That was *Whitaker*.

10 This case, you know -- and you will correct me if I'm
11 wrong. I didn't see anything in the record of anything
12 happening between May of 2016 and the summer of 2017, which is
13 an entire school year that Mr. Adams was under the regime that
14 you're complaining about.

15 And so that's just something that I see. If you tell
16 me I'm wrong about that -- you talk about them dragging it out.
17 What was going on between May of 2016 and the summer of 2017?
18 What was the triggering event that caused the suit to be filed
19 now?

20 I mean, obviously, Mr. Adams and Ms. Kasper were very
21 successful getting your group and the Pillsbury firm, a big
22 firm, to sign on, and Ms. Doolittle, who does a lot of civil
23 rights work in our area, you know, all good -- all very good.

24 I'm happy to -- I'm happy to have this tested, if
25 that's what people want to do. But I just -- we're talking

1 about a preliminary injunction, and we're talking about
2 constitutional issues and Title IX issues, we may be talking
3 about factual issues, both medical and psychological.

4 I'm just wondering: Are we really where we need to
5 be with all that? Are you really happy with everything you've
6 got? Are they really happy with everything they've got?

7 If you tell me this is the entire record you want to
8 go to trial on, then maybe that's it, but -- those are my
9 concerns.

10 MS. BORELLI: Your Honor, I do want to make sure I go
11 back to the point that you mentioned in a prior question. I
12 would start by minding -- by underscoring that the nature of
13 this relief is preliminary.

14 And so just as the court said, intends to be on a
15 faster timeline, but that is, of course, the nature of
16 preliminary relief.

17 This record is quite similar to the record in other
18 matters where preliminary injunctions have been granted.
19 Particularly, those courts have recognized that the requests
20 were quite narrow in several of those cases. Indeed, as it is
21 here, this is just a request about Drew, just a request that he
22 be allowed to use the boys' restrooms, as he did with no
23 problems at the start of his time at the school.

24 The court said -- mentioned that Dr. Ehrensaft did
25 not examine Drew. That is correct. Dr. Ehrensaft also offered

1 testimony in the *Evancho* matter and the *Highland* matter in
2 substantially similar form.

3 Dr. Ehrensaft began -- I think because the nature is
4 preliminary, did not investigate -- or, I'm sorry, interview
5 the plaintiffs in those matters either, Your Honor. But the
6 courts found Dr. Ehrensaft's testimony credible.

7 And, in fact, I think each court actually said, I
8 don't even need to look at that testimony to see that there is
9 harm here that is non-compensable, that a harm is being done
10 for which no check could be written later on to restore to this
11 person -- what this child -- is being taken away from them.

12 In *Evancho* the court said, Look, it's not really a
13 long leap, it's really not a leap at all to credit these
14 plaintiffs that they feel subjectively and are objectively
15 being marginalized and humiliated and stigmatized.

16 And in the *Highland* case, the court said, Look, I've
17 been presented with evidence about gender dysphoria by both
18 sides. I don't actually even need to look at that evidence to
19 see that Jane Doe is being harmed by this separation, this
20 exclusion from her peers.

21 And that's exactly the sort of unrebutted testimony
22 we have from Drew and Erica here as well, Your Honor.

23 THE COURT: Okay.

24 MS. BORELLI: So then, if I might, I might move
25 through some points that we'd like to make sure we've

1 contested --

2 THE COURT: Sure.

3 MS. BORELLI: -- from the other side's opposition.

4 So there's a map that was attached to a declaration,
5 I believe Principal Kunze's. And we want to return to
6 something I mentioned at the beginning, which is it actually
7 should not matter where the gender neutral restrooms are, in
8 the same way that I think if the school had a policy that said
9 to a child, You have to use race neutral restrooms.

10 THE COURT: Well -- and I promise I'm going to ask
11 them questions, too. So don't think I'm picking on you.

12 MS. BORELLI: Please, Your Honor.

13 THE COURT: You're kind of having it both ways. And
14 I -- they're trying to have it both ways in a couple of ways,
15 too. But you're trying to have it both ways.

16 Part of your irreparable harm argument is how long it
17 takes them to get to this gender neutral bathroom, and only if
18 it was closer. The implication is if it was closer it would be
19 better. But now you're arguing it doesn't really matter.

20 I mean, one of the questions I wrote on my list of
21 questions, which I won't possibly ever get to all of them, is:
22 What if there was a gender neutral bathroom attached to every
23 single multi -- what do they call them, multi -- you know,
24 boys' room and girls' room, so that your client, Mr. Adams, had
25 the same proximity and availability to a restroom that every

1 other student at Nease did?

2 Would that make a difference, or it wouldn't make a
3 difference? That -- you kind of say, Well, he has to walk 15
4 or 20 minutes away, which I understand, if that's true -- and,
5 of course, it's debated -- but then, okay, that's one thing.

6 But if that doesn't really matter, and if you're
7 telling me there could be gender neutral bathrooms all over the
8 place, but that doesn't really remedy the problem, then that's
9 another.

10 Which one is it?

11 MS. BORELLI: There are multiple routes to find
12 irreparable harm. We think it is true that even if those
13 restrooms were evenly distributed throughout the campus -- and,
14 Your Honor, that's actually the *Evancho* case.

15 In that case there were roughly a dozen restrooms,
16 and there was no real dispute that they were relatively evenly
17 disbursed throughout that campus, Your Honor. So the court
18 didn't even need to consider there, and didn't look at the
19 accessibility of those bathrooms.

20 The reason we have raised that issue here is because
21 it is yet another layer of harm. It's not one we think the
22 court needs to reach to see that non-compensable irreparable
23 harm is being done here, but it is yet another reason to reach
24 that conclusion.

25 So in terms of these gender neutral restrooms, one

1 way to understand that it is harmful is not only because of the
2 separation -- when a school says to a child, There is something
3 so shameful about you that we cannot allow you to even set foot
4 in a restroom that all other boys get to use, but, in addition
5 to that, it does rob him of --

6 THE COURT: Can I ask you another question that I'm
7 going to ask them? It's probably more directed at them, but...

8 Do you understand the school board to be saying that
9 they want Mr. Adams to use the girls' room?

10 MS. BORELLI: I believe I saw that suggestion in the
11 opposition, Your Honor, that that is an option open to him.

12 THE COURT: Well, that's the -- I mean -- and let me
13 ask you another question, which, again, I'll ask them.

14 Where is this policy written down?

15 MS. BORELLI: So my understanding, Your Honor -- and
16 I'll certainly defer to the attorneys for the school board --
17 is that the policy had not been in written form and that there
18 was then a written Best Practices guide, which my clients don't
19 have a memory or a record of seeing.

20 THE COURT: Well, I've got it. I mean -- I mean, I
21 know you -- but the Best Practices guide doesn't -- you know,
22 maybe this is -- I should ask them, but...

23 What did I do with it, Susanne?

24 I had it. I was going to ask you a question about
25 it.

1 But it doesn't say that Mr. Adams has to -- cannot
2 use the boys' room. It says, We're not requiring him to use
3 the girls' room, I think.

4 Where is the -- do I have it? Hold on. I thought I
5 had it right in front of me here.

6 MS. BORELLI: Your Honor, I understand, also, that
7 Tim Forson's declaration, paragraph five, may give an
8 indication here.

9 THE COURT: Well, but that's just him talking, right?
10 I mean, that's -- maybe this is -- maybe I better ought to ask
11 them, but...

12 I don't see it. What did I do with it? Here it is.

13 It says, Transgender students will be given access to
14 gender neutral restrooms and will not be required to use the
15 restroom corresponding to their biological sex.

16 That's what -- that's what the Best Practices says.
17 So that doesn't -- that doesn't say that he can't use the boys'
18 room. It just says, We're giving an option so he doesn't have
19 to use the girls' room.

20 So what policy are we talking about?

21 MS. BORELLI: I do think that's a great question for
22 the school board. Just to complete the record, the reference I
23 gave a moment ago to Mr. Forson's declaration says, in
24 paragraph five, Since I started, and throughout my employment
25 with the district, the district maintained a policy that

1 required students to use the bathroom corresponding to their --
2 this is not in quotes, but I would put it in quotes, biological
3 sex.

4 THE COURT: Right. And what I'm asking you: Is that
5 written down anywhere? Do we --

6 MS. BORELLI: I know where there's a writing in the
7 Best Practices.

8 THE COURT: I'll ask them. I'll ask them. Because a
9 policy can be oral, it can be custom.

10 MR. BORELLI: Correct.

11 THE COURT: They can just say, From the beginning of
12 time, boys use the boys' room and girls use the girls' room. I
13 mean, that can be a policy. But this is written down. And it
14 doesn't say that your client can't do what you want him to be
15 able to do.

16 MS. BORELLI: Your Honor, I would love it if we were
17 simply having a big misunderstanding, and, indeed --

18 THE COURT: Well, I doubt it, but...

19 MS. BORELLI: Unfortunately I doubt it, especially
20 after he was pulled out of his class and told by three
21 counselors, You cannot go into the boys' restroom.

22 THE COURT: Is that what happened?

23 MS. BORELLI: Yes, Your Honor.

24 THE COURT: So tell me about that.

25 MS. BORELLI: So freshman year -- and this is also in

1 Drew's declaration, if the court wishes to refer to it
2 directly.

3 Freshman year he was pulled out of class to go talk
4 to three counselors. And three counselors said, We've -- we've
5 gotten a complaint that you're using the boys' restroom, and
6 you can't do that anymore. And Drew was sort of shocked and
7 confused. And Drew said, Did I do anything wrong? And the
8 clear answer -- this has never been rebutted -- was no.

9 And so, really, we have to understand this as a
10 policy -- and if it's an unwritten policy -- I think that was
11 also the case in *Whitaker*. There is nonetheless a clear
12 exclusion here.

13 We have to understand that as a bar this says to him,
14 You're not an adequate real boy. You're not -- you don't
15 satisfy our stereo-typed views about an adequate boy that
16 belongs in the restroom with other boys.

17 So, Your Honor, I was starting to discuss the gender
18 neutral restrooms. And, again, to the court's point, they --
19 they are part of the violation. But they also, we think,
20 support our case of initial element of irreparable harm, which
21 is lack of --

22 THE COURT: How do you reconcile all this with the
23 Title IX policies which say that it's okay to have distinct
24 restrooms segregated by sex?

25 How do you -- how are we -- and I'm really asking

1 you, maybe, more of a policy question than I am a legal
2 question, but...

3 So how do you square that with what we're talking
4 about here?

5 MS. BORELLI: They're entirely consistent, Your
6 Honor.

7 That policy says that a school can have a boys'
8 restroom and a girls' restroom. And nothing about this case
9 challenges that. To the contrary, Drew seeks to fit entirely
10 within that system, because he is a boy. And he belongs in the
11 boys' restroom.

12 So nobody is asking for a boy, for example, to be
13 allowed to go into the girls' restroom. To the contrary, what
14 we're saying is that Title IX and the Equal Protection Clause
15 are violated when the school says this boy cannot go into the
16 boys' restroom.

17 THE COURT: Are we heading in -- are we heading for a
18 society in which all bathrooms are gender neutral?

19 MS. BORELLI: If we are, Your Honor -- I'm not sure
20 I've seen it. But one thing I would point out to the court is,
21 there are schools across the country every single day that have
22 inclusive policies that treat their transgender students
23 equally.

24 And to give a couple of data points, there are 19
25 states in this country, plus the District of Columbia, that

1 prohibits discrimination in public accommodations, and that
2 includes schools.

3 So in 19 states, in every school --

4 THE COURT: I thought it was 21 school districts
5 were -- oh, I guess you're talking about states. I thought --

6 MS. BORELLI: I'm talking about statewide, all
7 schools in those states. And then, in addition to that, there
8 are several Florida schools -- now, Your Honor, if you're
9 referring to 21 school districts, I think you're referring to
10 an amicus brief.

11 In full disclosure, that was not submitted here
12 because Pillsbury and Lambda Legal have authored and worked on
13 that amicus brief. But that 21 districts -- by the time we
14 were at --

15 THE COURT: Well, I thought it was cited in one of
16 the opinions, I thought.

17 MS. BORELLI: It was relied on fairly heavily by
18 *Highland*. And then the last number of the paragraphs of the
19 *Whitaker* decision --

20 THE COURT: *Whitaker* was where I remembered it.
21 Okay.

22 MS. BORELLI: Exactly. By the time we had filed that
23 at the Supreme Court in the *Gavin Grimm* case, Your Honor, we --
24 33 states and 80 administrators in the District of Columbia.

25 The point is, with all of the schools, districts,

1 states where transgenders are treated differently, no one has
2 eliminated gender restrooms. They've remained intact.

3 And, actually, that amicus brief says, If anything,
4 this is about reassign that system. This is about all boys
5 belong in the boys' restroom; all girls belong in the girls'
6 restroom. That's really what this is about.

7 And I also think it's important, Your Honor, that
8 *Glenn* --

9 THE COURT: So is the concept, then, of a gender
10 neutral restroom superfluous? I mean, is it -- do we not need
11 them? I mean, because everybody is either going to be a boy or
12 everybody's going to be a girl. So we don't really need gender
13 neutral bathrooms?

14 MS. BORELLI: That's a great question, Your Honor. I
15 do think that some schools are beginning to offer them because
16 there are some students who want privacy for a variety of
17 reasons.

18 You know, there are students who may have
19 self-consciousness about their body, perhaps because of weight
20 issues. There are other students with disabilities who need to
21 use catheters.

22 There's a significant number of students that for any
23 given reason may want more privacy in a particular moment. You
24 know, it's -- so I think that's the role that they're serving
25 and why some schools are offering them.

1 But there's nothing about transgender boys, who,
2 indeed, are boys, that affects the existence of boys' restrooms
3 and girls' restrooms.

4 THE COURT: Can I ask you this -- I did not
5 necessarily expect, when I started to review the briefing, to
6 see a medical debate about -- about this topic in the sense
7 that I did.

8 I mean, as I read the defendant's briefs, there are
9 doctors who doubt -- for lack of a better term, doubt the
10 legitimacy of transgender persons, in terms of -- they view it
11 as more something to be treated and -- as opposed to your
12 doctors, from Duke and other places, who obviously feel
13 differently about it -- is this a -- is this a legitimate
14 medical debate that's going on now?

15 Is this like climate change, where there's people --
16 is this like evolution back in the 19- -- you know, the Scopes
17 Monkey Trial?

18 Or is this something that you view as being
19 established in the law, and we're really talking, then -- we
20 have to assume that transgender persons are an identifiable
21 group of persons that then we determine legally if
22 discrimination against them is actionable or not?

23 What are we talking about here?

24 MS. BORELLI: Well, Your Honor, I don't think there's
25 any serious debate whatsoever. There is only one expert who is

1 in front of this court, Your Honor, who has offered testimony
2 in this case.

3 And we, of course, offered rebuttal testimony to show
4 that there are clear responses to these outlier declarants who
5 offered testimony that the defendants provided the court from
6 the North Carolina litigation.

7 But to be clear, the medical establishment -- the
8 mainstream, preeminent national medical, mental, and behavioral
9 health organizations, are entirely on one side of this issue.

10 They are exactly where Dr. Ehrensaft has described
11 the scientific consensus as B. And we supplied the court with
12 a host of materials to help underscore that.

13 It is the position of the American Medical
14 Association --

15 THE COURT: Is that why you didn't brief the medical
16 up front? In other words, you only briefed it, really, once
17 you saw that they were coming at it from the way they came at
18 it?

19 MS. BORELLI: Well, I think part of it, Your Honor,
20 is we worked very hard to stay within that 25-page limit. We
21 certainly would have had more material to offer the court had
22 we done an over-length brief.

23 But because the science is so settled, as far as
24 these preeminent national organizations -- I would also defer
25 the court to an amicus brief that we submitted on reply with 17

1 of the national organizations, including the American Academy
2 of Pediatrics, the American Psychiatric Association -- there is
3 no real debate.

4 Everyone recognizes that transgender people -- and
5 this is another point I do want to make, Your Honor. I was
6 somewhat puzzled, honestly, about the sort of importing of some
7 of that North Carolina material, partly because the suggestions
8 really culled questions that the court doesn't have to decide,
9 and the school board certainly isn't in a position to decide,
10 including the suggestion, for example, that we should try to
11 prevent transgender children from existing by withholding
12 medical care that the medical establishment agrees is
13 well-founded and medically necessary.

14 It really isn't a question any longer in the Eleventh
15 Circuit after the *Glenn versus Brumby* decision, Your Honor,
16 about whether transgender adults and children have a right to
17 exist.

18 THE COURT: What happened in the North Carolina case?

19 MS. BORELLI: So in that case, Your Honor, there was
20 a ruling on a preliminary injunction. It was partly granted,
21 partly denied. The denial was appealed.

22 The state then, I would just say, Your Honor, came to
23 its senses and repealed some of the worst aspects of the HB2
24 legislation.

25 The subject of the appeal was among the provisions

1 repealed by the legislature. There is ongoing litigation about
2 the -- the new legislation that was enacted in its place. But
3 that's the current status.

4 THE COURT: Are you aware of any court that has
5 accepted the defense medical critique?

6 MS. BORELLI: I am not, Your Honor. And to the
7 contrary, the great weight of the cases in this area, from
8 *Whitaker* to *Evancho* to *Highland*, for example, have credited the
9 testimony of Dr. Ehrensaft, and recognized that the
10 establishment really is going --

11 THE COURT: Well, I understood in those cases -- and
12 that's why I'm really talking to you about it. And, of course,
13 I'll talk to them about it. But that didn't seem like that was
14 an argument in those cases.

15 Those cases, it seemed like the school boards
16 acknowledged that transgender persons are an identifiable
17 group. And the debate was things like the privacy rights of
18 other students potentially or -- you know, there were other
19 issues that -- but the actual fundamental idea that transgender
20 persons are -- are an identifiable group that's entitled to the
21 protection of the law didn't really seem to be debated in those
22 cases, but it obviously is being debated here, I think.

23 I'm going to ask them, but -- and so I just wondered
24 what -- what was going on around the country that I don't know
25 about.

1 MS. BORELLI: Uh-huh (affirmative). I do think, Your
2 Honor, that that actually speaks to the somewhat extreme nature
3 of some of this information that they've offered the court from
4 that other case.

5 But I would note that the *Highland* court, for
6 example, said, you know, I've been given testimony on both
7 sides; of course, including Dr. Ehrensaft's testimony.

8 I don't even have to look at it to see that this is a
9 little girl who's being irreparably harmed, that what's being
10 done to her is something that no check can be written later to
11 make up to her. And that's why preliminary injunctive relief
12 is appropriate here.

13 And Drew's request is just as narrow, if not
14 narrower, than the requests that were made in those cases, as
15 well.

16 Again, he seeks just to use the restroom. This is a
17 preliminary injunction that includes just Drew. So the request
18 for relief is as tailored as it can possibly be.

19 THE COURT: All right. I have gone over budget here,
20 but I haven't let you talk very much, although I hope -- you
21 know, obviously, I'm the one that's got to decide this thing,
22 so I've got to ask what I need to ask.

23 But I'm going to try to be quiet for five minutes and
24 let you make whatever points you really wanted to make. And
25 then I'm going to turn to your opponents. Okay?

1 MS. BORELLI: Thank you so much, Your Honor.

2 So, again, although we don't think the gender neutral
3 restrooms in any way rectify or are a solution -- we actually
4 think they're the cause of the problem here by relegating the
5 student just to them.

6 I do want to correct some -- what we believe is
7 misinformation in the opposition about the accessibility of
8 these, because they underscored that not only is Drew being
9 separated and treated any different -- treated, in effect, as a
10 pariah, Your Honor, which alone should be enough -- but he is
11 in a position where for the entire first half of his day for
12 this semester he has no access to a restroom that he could
13 actually use without being late or having to miss class.

14 That is yet another layer of irreparable harm. And
15 the cases we cited from within the circuit, a number of which
16 focused on the burdens of having to try to attend class when
17 you've got a go cart above your college, and the facts that --
18 you know, there are various ways that educational opportunities
19 are interfered with when you burden a student's concentration.

20 That's exactly what these gender neutral restrooms do
21 to Drew, because he's relegated to them and can't use the
22 restrooms that everyone else does.

23 So quick summary, they suggest that there are 11
24 restrooms open to Drew on the campus. I want to take the court
25 through what we think is the accurate count here.

1 Six of them are in a brand-new building in which Drew
2 has absolutely no classes, so that's over half of the 11. He
3 has no classes in that building.

4 And, of course, at least one, if not several, appear
5 to be designated as girls' rooms. And he's not a girl. So he
6 can't use the girls' restroom. That's not appropriate for him.

7 Out of the 11 restrooms, 7 through 8 appear to be
8 concentrated in a building with locker rooms. Again, one of
9 them is in the girls' locker room area. That's not available
10 to him. He's not a girl.

11 But, regardless, they both might as well not exist,
12 because his classes are nowhere near that building. There's no
13 way that he can reasonably walk to and from those restrooms
14 without missing class time.

15 So that takes us up to No. 9 out of 11. That's in
16 the building called the H pod. He's not in that building until
17 fifth period.

18 No. 10 would be the K pod. That's in a classroom.
19 He only has access to that art classroom when he has art in
20 sixth period, Your Honor.

21 And, of course, No. 11 is in the middle of the C pod,
22 another building where he has no classes, Your Honor. So
23 even --

24 THE COURT: Are there other students -- are there
25 other identified transgender students at Nease that you know

1 of?

2 MS. BORELLI: I understand from my client that there
3 is a very small handful of out transgender students and that
4 they generally suffer and cope exactly the way that our client
5 does, Your Honor.

6 Just a couple of other points to make sure that I've
7 gotten them on the record, and then I want to let the rest of
8 the argument proceed.

9 So with respect to a suggestion that was in their
10 opposition about whether this is a suspect classification, of
11 course, the court doesn't have to answer that question.

12 We think under *Glenn versus Brumby*, it is very clear
13 that a sex-based classification is being made here. The burden
14 rests entirely on the state to justify it.

15 We don't think they've begun to meet that heavy
16 burden here, because they have offered precisely the same
17 generalized speculative assertion of privacy without tying it
18 in way, shape, or form to Drew.

19 That argument has failed repeatedly in *Evancho* and
20 *Whitaker* and *Highland*, where it was recognized that type of
21 speculation is just inadequate to meet the heavy burden you
22 have under heightened scrutiny.

23 But I do want to note, because there seems to be a
24 suggestion to the contrary, that the Fifth Circuit has not
25 decided this issue, let alone, you know, contrary to our

1 position, Your Honor.

2 The Fifth Circuit said in a relevant case, We don't
3 even reach that issue. And so that question remains open.
4 And, of course, the *Highland* and the *Evancho* court both found
5 that it was appropriate to consider those hallmarks of a strict
6 or heightened scrutiny, and found they applied there, and that
7 that was an additional reason that heightened scrutiny was
8 required.

9 Let's see. I also just want to make sure that I
10 address Title IX. Really, I have no argument about Title IX.
11 They're certainly silent about the fact that *Glenn v Brumby*
12 does interpret what sex discrimination is in this circuit. And
13 that's for equal protection, as well as the claim in the *Glenn*
14 case, but, also, equally for statutory protection from sex
15 discrimination.

16 THE COURT: Does the withdrawal of the guidance from
17 the Department of Education change anything? I thought I read
18 one decision -- I think maybe from Pennsylvania -- that said
19 that, Now, I'm not -- the judge was saying, Now it's kind of
20 unclear what Title IX requires.

21 And do you -- what's the effect, if any, of the
22 withdrawal of the guidance?

23 MS. BORELLI: It creates a clean slate, Your Honor.
24 So the *Evancho* court -- it had been suggested to the court that
25 it would be appropriate to give deference, as originally had

1 happened in the *Gavin Grimm* case, to the non-binding guidance
2 that was issued under the Obama administration.

3 At the time the *Evancho* court had looked at that
4 argument, the *Gavin Grimm* case had been granted cert by the
5 Supreme Court.

6 And I think that is exactly why the *Evancho* court
7 said, This looks uncertain to me.

8 But now we are writing on a clean slate. The
9 decision of the guidance, you know, as a recent political
10 reversal of a longstanding agency position, that certainly
11 wouldn't get any deference.

12 It didn't contradict. It didn't set anything new or
13 different. It simply creates a clean slate. *Glenn* tells us
14 how we are to interpret sex discrimination under Title IX.

15 And with that, Your Honor, I will --

16 THE COURT: Thank you. I appreciate it. I may --
17 may hear from you again. Thank you.

18 MS. BORELLI: Thank you very much.

19 MR. HARMON: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. HARMON: May it please the court?

22 THE COURT: Yes, sir.

23 MR. HARMON: Minor students, Your Honor, do not have
24 a right under Title IX or the Equal Protection Clause of the
25 Fourteenth Amendment to self-identify their sex and to decide

1 on their own which bathroom in a school district they're
2 entitled to use.

3 And I want to focus on a point Your Honor made.
4 Today -- in terms of the expedient nature of this, today is the
5 first day of school in St. Johns County.

6 Administrators, staff, and students, parents are
7 scrambling right now to address the challenges of a new school
8 year.

9 But we're here today in front of Your Honor on the
10 first day of school because plaintiff waited almost two years
11 to bring this action, and, in fact, didn't seek injunctive
12 relief until less than a month before the school year started
13 in this case.

14 The type of relief that this court in this circuit
15 has recognized is rare, and only to be appropriate when the
16 facts and the law are clearly in favor of the moving party.

17 With respect to the status quo, the request for the
18 injunction is not to return this case to the status quo. The
19 request in the injunction is to change the status quo, which
20 this court in this circuit recognizes is an affirmative or a
21 mandatory injunction, which takes the standard for the granting
22 of the preliminary injunction to even a higher level, a heavier
23 burden.

24 But the law and facts in this case are not clearly in
25 plaintiff's favor. Plaintiff is before you trying to make new

1 law based on inconsistent non-binding --

2 THE COURT: It's not all that new, right? The
3 decisions that have been coming out this year, unless you tell
4 me I'm wrong, have pretty universally favored the plaintiff's
5 side, haven't they?

6 MR. HARMON: I don't agree with that, no, Your Honor.

7 THE COURT: All right. Tell me why.

8 MR. HARMON: Okay. So we'll go through a couple of
9 the different cases, if that will help. We'll start with
10 *Whitaker*, because that seems to be a case that continues to be
11 repeated by plaintiff's counsel in this matter.

12 THE COURT: Well, wouldn't you repeat it if you were
13 the plaintiff?

14 MR. HARMON: Of course. But there's some
15 distinguishing factors in the *Whitaker* case. In the *Whitaker*
16 case, Ash Whitaker, the plaintiff, was the only student who was
17 allowed to use a gender neutral bathroom in the entire school.
18 They gave him a key. The only student in that case.

19 In our particular case, the gender neutral bathrooms
20 are open to all students. It doesn't target any one person.
21 Also in the *Whitaker* case, Your Honor, there were medical
22 issues -- there were medical opinions from people who actually
23 treated Ash Whitaker, and gave testimony to the court about
24 what the effect of having to use these gender neutral bathrooms
25 had, fainting, dizziness, migraines, depression, suicidal

1 tendencies.

2 Doctors actually met with the student in that case
3 and the mother. That is not existing in this case. *Whitaker*
4 had clear, documented medical opinions from people who actually
5 treated the student.

6 What we have in this case -- and I'll point out,
7 Dr. Ehrensaft, from my reading of the case in *Whitaker*, did not
8 treat Ash Whitaker. Dr. Ehrensaft, much like in this case,
9 gave general opinions about things.

10 Also in the *Whitaker* case, the student there filed a
11 complaint with OCR much like the plaintiff in our case, but
12 sought an injunction one month after going to OCR. In our
13 case, it was in November of 2015 when plaintiff went to OCR,
14 and then waited until June of 2017.

15 THE COURT: So here's -- here is *Whitaker*. Quote, a
16 policy that requires an individual to use a bathroom that does
17 not conform with his or her gender identity punishes that
18 individual for his or her gender non-conformance, which in turn
19 violates Title IX.

20 The school district's policy also subjects Ash as a
21 transgender student to different rules, sanctions, and
22 treatment than non-transgender students, in violation of Title
23 IX. Providing a gender neutral alternative is not sufficient
24 to relieve the school district from liability, as it is a
25 policy which itself violates the act.

1 Further, based on the record here, these gender
2 neutral alternatives were not true alternatives, because of
3 their distant location to the classrooms.

4 And then they also go on to say that this is not a
5 situation where Ash unilaterally declared his gender. That
6 argument misrepresents the claims. They go on to say all the
7 other things they say.

8 I mean, I understand why the plaintiff cites it,
9 because -- I agree with you there are some factual differences.
10 There's a different standard in the Seventh Circuit for
11 preliminary injunctive relief. There's some different facts.

12 I agree with that. But on the fundamental
13 proposition, it's kind of on all fours, isn't it?

14 MR. HARMON: Well, the *Carcaño* case and the *Texas v*
15 *United States* case completely disagree with *Whitaker*. And with
16 that -- what the *Carcaño* case said, When you're looking at
17 bodily privacy issues in a bathroom, we're not basing that on
18 gender identity -- differences in gender identity, but
19 differences in physiological -- physiological characteristics.

20 I mean, the school won on equal protection grounds in
21 the *Carcaño* case. The same argument that I'm being treated
22 differently, this isn't fair, that I'm being outed, that I have
23 a right to identify with my gender, the *Carcaño* case, said,
24 Well, look bodily privacy rights, the interests of the
25 government override that.

1 So my representation to Your Honor is I think
2 *Whitaker* just got it wrong. For whatever reason, *Whitaker*,
3 with its very low threshold --

4 THE COURT: Bodily privacy rights, it is the interest
5 of the government that overrides that -- say that again.

6 MR. HARMON: Yeah. The *Carcaño* case said that bodily
7 privacy is an important governmental interest and the
8 government may promote that interest by excluding members of
9 the opposite sex, based on physiological differences, rather
10 than differences in gender identity.

11 So *Carcaño* is at odds with the *Whitaker* case in terms
12 of that finding. Again, the *Whitaker* case had, from what I can
13 tell -- I never practiced in the Seventh Circuit -- a more than
14 negligible standard in terms of granting an injunction.

15 And then in the *Texas v United States* case, I mean,
16 an injunction was entered by a federal court in a Texas --
17 Texas federal court, finding that Title IX, the term sex means
18 biological sex.

19 So, yes, the *Whitaker* case found in favor of a
20 plaintiff student on much different facts, on a quicker
21 process, on a much lower burden, but there are courts out there
22 who disagree.

23 THE COURT: What about *Glenn*?

24 MR. HARMON: Just to discuss *Glenn*?

25 THE COURT: Well, I mean, it's the Eleventh Circuit,

1 and -- which I kind of have to pay attention to. And, you
2 know, certainly it's not this case, but it certainly
3 acknowledges the rights of transgender individuals and accords
4 that right enough importance that a discrimination case based
5 on that was upheld, right?

6 MR. HARMON: Under equal protection the court -- yes.
7 But what I would represent is the *Glenn* case, which did find
8 intermediate scrutiny applies in sex-based classifications, had
9 nothing to do with Title IX and a regulation that says schools
10 can provide bathrooms separate based on sex.

11 THE COURT: Isn't there case law that says you
12 look -- that Title IX looks to Title VII for guidance?

13 MR. HARMON: Yes, for guidance. But there is no
14 provision in Title VII when we're talking about employment in
15 the workplace that gives employers the right to separate
16 bathrooms based on sex.

17 There is -- and that's not even as far as -- there is
18 no case in the Eleventh Circuit that has said for Title IX
19 purposes we're going to interpret sex to mean gender identity.
20 There is no case.

21 And when we're talking about an affirmative
22 injunction, where the law has to be clear, again, we're talking
23 about making new law today. And I think plaintiff even
24 represented under Title IX context it's a clean slate.

25 So to enter an affirmative injunction on the first

1 day of school when you sat on your rights for two years, in a
2 case that's about making law with no binding precedent and a
3 clean slate, represents that's not the type of case where this
4 drastic and rare relief should be entered, Your Honor.

5 THE COURT: All right. Well, let's back up.

6 MR. HARMON: Yes, Your Honor.

7 THE COURT: Where is this policy? Where is it
8 written down?

9 MR. HARMON: There is no -- that I'm aware of in
10 front of Your Honor, a written-down policy.

11 THE COURT: So how do we know it's the policy?

12 MR. HARMON: From what our -- from what we were able
13 to gather, and our facts in preparation, if you look at Tim
14 Forson, who's the current superintendent, what he has said is
15 for 37 years, as he's been in the district employed in that
16 time, the district's practice -- its longstanding practice has
17 been to separate bathrooms based on biological sex.

18 THE COURT: Well, I would think that's everybody's
19 practice, right? I mean --

20 MR. HARMON: Yes, Your Honor.

21 THE COURT: -- you have the boys' rooms and girls'
22 rooms. The plaintiffs aren't even saying anything different
23 than that, right?

24 MR. HARMON: Yes.

25 THE COURT: So, no, I'm talking about the policy that

1 says that the bathroom you have to use has to correspond with
2 the gender that you were identified with on your birth
3 certificate.

4 MR. HARMON: There is no written policy that says
5 that.

6 THE COURT: So how do we know that's the policy?

7 MR. HARMON: Based on the representations from my
8 client that that has been the longstanding practice.

9 THE COURT: Okay. And how did that practice come
10 about? What situation or event occurred where the school board
11 had to say, We're only going to allow people who have a birth
12 certificate that says boy to use the boys' room?

13 In order to have a practice or a policy, you either
14 have to adopt it explicitly or there has to be a situation that
15 has occurred that causes you to create one. You can't have a
16 policy or a practice that you just announced after it's already
17 happened, right?

18 MR. HARMON: Right.

19 THE COURT: All right. So tell me what event, what
20 custom, when -- when this happened that the school board
21 decided that only people that say boy on their birth
22 certificate can use the boys' room.

23 MR. HARMON: Yes, Your Honor.

24 THE COURT: Or is it just something that everybody
25 knows, so we don't have to really talk about it?

1 MR. HARMON: I think it's somewhat of the latter,
2 which is, This has been what everybody has always done; this
3 has been the longstanding practice; this is the norm of the
4 district that we do it this way.

5 I mean, in the limited time we had to gather this
6 information -- the St. Johns County School District has been
7 operating for quite a while. We tried to trace back --

8 THE COURT: Well, is it the case that Mr. Adams --
9 that the policy developed at the time that Mr. Adams was using
10 a boys' room and somebody complained -- is that when the policy
11 was announced?

12 MR. HARMON: No, no. The policy has always been to
13 use the bathroom of biological sex. So that's -- Nease High
14 School's building departments back in 1979 even show bathrooms
15 separated on sex.

16 THE COURT: Well, no, that's two different things.

17 MR. HARMON: Are you talking about the Best
18 Practices?

19 THE COURT: No. I'm talking about -- I mean, yes, of
20 course, you have boys' rooms and girls' rooms. I mean, I'm
21 sure if you build a school, that's what you do, right?

22 MR. HARMON: Right.

23 THE COURT: What's new, frankly, is these gender
24 neutral bathrooms. But they're starting to crop up in a lot of
25 places.

1 What I'm asking you is when -- if this is a policy of
2 the St. Johns County School District, it had to -- that is, the
3 policy is, You have to use the bathroom corresponding to the
4 sex on your birth certificate, that had to happen at some
5 point, that that became the policy of the school board.

6 But you can only have that one of two ways. You can
7 just have a meeting and adopt it, even if you don't write it
8 down, or something could have happened at the school and the
9 principal or the school board has to say, No, from now on this
10 is the way it's going to be.

11 MR. HARMON: Right.

12 THE COURT: And what I'm asking you is, predating
13 Mr. Adams' situation, when did that happen?

14 MR. HARMON: So my only answer I can have, Your
15 Honor -- again, in the -- I think we had two business weeks to
16 prepare and get as much evidence as we could before you on this
17 issue. We're also in the summer, where some folks are not
18 there.

19 So we tried to, in preparing to come and answer this
20 question, trace the policy back as far as we could. The best
21 that we could present to Your Honor, in terms of establishing
22 that this has been the longstanding norm of the district, is
23 through, now superintendent, Tim Forson, who said, This is how
24 it's been done in the 37 years I've been here.

25 THE COURT: All right.

1 MR. HARMON: That's the best we could do for purposes
2 of this.

3 THE COURT: The second question is: So y'all write
4 about this Best Practices. And I -- you know, frankly, you
5 seem kind of proud of it, which I understand.

6 In other words, what your point is, is that the
7 school district was trying to be proactive. They sent people
8 to these conferences. They came back. They tried to develop
9 these practices. Because, you know, it's a -- I don't -- I
10 don't deny the difficulty of these issues. I don't, but...

11 And so we came up with these Best Practices. And so
12 we ought to -- we ought to get credit for that. But the --
13 the -- what it says is, Transgender students will be given
14 access to gender neutral restrooms and will not be required to
15 use the restroom corresponding to their biological sex.

16 It doesn't say they can't, though, does it?

17 MR. HARMON: I think the intent of the Best
18 Practices, if it's read, is -- the understanding is, We're not
19 going to force you to go into the bathroom of your biological
20 sex. We're not going to force that. We have an accommodation
21 for that. This is a new issue, an emerging issue, so we're
22 going to provide this accommodation by allowing access to the
23 gender neutral restroom.

24 THE COURT: But it certainly doesn't say, You cannot
25 use the bathroom corresponding to your gender identity?

1 MR. HARMON: It doesn't say that, because that was
2 the longstanding practice of the district prior to the issuance
3 of the Best Practices.

4 THE COURT: All right. Here's another question that
5 occurred to me. Mr. Adams, as I understand it -- and you can
6 help correct me. And I hope I get this right.

7 But he identifies as a -- as a male, and had taken
8 steps, surgical and other steps, to implement that, and --
9 including by appearance and otherwise.

10 Is it the position of the St. Johns County School
11 District that Mr. Adams would be perfectly free to walk into
12 the girls' restroom at Nease High School when he goes back to
13 school?

14 MR. HARMON: Yes. Mr. Adams is treated the same as
15 all biological females for purposes of this policy.

16 THE COURT: And what if you get -- hypothetically,
17 what if you get complaints from the parents of girls saying,
18 Why are you letting boys in the girls' bathroom?

19 MR. HARMON: Well, there's nothing wrong with what
20 Mr. Adams would be doing by going into the girls' bathroom.

21 THE COURT: But there would be something wrong with
22 him going into the boys' bathroom?

23 MR. HARMON: Yes. There's where privacy rights would
24 be implicated. And that's the difference. A parent saying,
25 I'm uncomfortable with a biological female going into the

1 female's restroom implicates no privacy rights in the bathroom;
2 whereas, if a parent were to say, hypothetically, or a student
3 were to say, I don't feel comfortable with somebody of the
4 opposite biological sex, that's where the privacy right kicks
5 in.

6 THE COURT: You really want him to use the gender
7 neutral bathrooms, don't you?

8 MR. HARMON: No. I mean, what we're trying to do
9 with the gender neutral bathroom is to provide an accommodation
10 if the student does not feel comfortable following the policy.

11 THE COURT: So you -- the St. Johns County School
12 District and Nease High School is prepared for Mr. Adams to
13 regularly use the girls' restrooms, and you don't anticipate
14 any problem with that?

15 MR. HARMON: Well, we -- if there was a problem with
16 it, in terms of somebody raising an issue or any of that, we
17 would have to address it, like we would in any particular case,
18 in terms of hurting a student.

19 THE COURT: What would you do? What would you do?

20 MR. HARMON: Well, I guess it would help if the court
21 were to give a hypothetical, in terms of what would -- a
22 concern about a parent saying -- if a parent came to the school
23 district and --

24 THE COURT: Isn't that how this got started? How did
25 Mr. Adams -- he was originally using the boys' room, apparently

1 without incident, and then six weeks into the term -- what
2 happened? How did it come to your attention?

3 MR. HARMON: From my understanding, and relying
4 really in this particular instance on what the plaintiff has
5 said -- I don't have independent knowledge of that issue -- is
6 a couple of weeks into his freshman year somebody complained to
7 the district about him using the boys' bathroom.

8 THE COURT: A parent?

9 MR. HARMON: I don't know, Your Honor. I don't know
10 who that is.

11 THE COURT: Okay.

12 MR. HARMON: Certainly in the course of a trial we
13 would figure that information out, but...

14 THE COURT: And as I understand it, because -- what
15 we're talking about here is that Mr. Adams, because of his
16 physiological makeup, would proceed into whatever bathroom he
17 was using and go directly into a stall and use the restroom and
18 then come out dressed and wash his hands and then leave, right?

19 MR. HARMON: I would assume, yeah.

20 THE COURT: Sure. Well, he -- he wouldn't be able
21 conveniently to use a urinal.

22 MR. HARMON: Right.

23 THE COURT: And so whichever bathroom he's using,
24 that's what's going to happen. And the reason I ask that is
25 that -- what is this privacy right that you're talking about

1 that's violated?

2 What are -- what is going to happen in this situation
3 if Mr. Adams goes into the boys' room, goes straight to a
4 stall, goes to the bathroom, opens the stall fully clothed,
5 goes and washes his hands, and goes back to class?

6 MR. HARMON: And I would turn to some of the
7 reasoning in the *Carcaño* case, where -- I mean, what the
8 school -- or, excuse me, what the -- what the defendant did in
9 that particular case was say, There's a privacy right in a
10 bathroom to not have a member of the opposite sex in there with
11 you. And that was sufficient to overcome the equal protection
12 challenge.

13 THE COURT: And the reason I ask is I -- I was
14 fortunate enough just recently to come back from a trip to
15 Europe. And a lot of the restrooms you walk in and there's a
16 separate side for the men and a separate side for the women,
17 and they go in and they go in their stalls, but, when you come
18 back out and everybody is washing their hands, they're all
19 mixed together, and -- you know, seemed to work fine.

20 But it was a little bit out of my usual frame of
21 reference, but...

22 And so I'm just -- I'm just trying to understand this
23 privacy interest. Do we have record evidence of -- well, I
24 guess you haven't been letting him use the bathroom, so we
25 don't know.

1 I mean, have there been a lot of complaints or a lot
2 of privacy issues? Are there students -- are students uprising
3 about this?

4 MR. HARMON: From my understanding -- I think Your
5 Honor answered it. From September of 2015 to now, plaintiff
6 has not used the boys' bathroom, so there would not be a reason
7 for a complaint.

8 One thing I would mention to Your Honor is when you
9 use the restroom here -- I admit, I've never been to Europe
10 before. I've only been around states in some different areas.
11 I'm not as well traveled as most.

12 But we're talking about K through 12 bathrooms when
13 we're talking about privacy rights. It's not a grocery store
14 or a mall, where there's a little different situation. We're
15 talking about kids as young as five years old.

16 And I think that's what distinguishes maybe that
17 experience. But, admittedly, I've never been, so...

18 THE COURT: Well, I'm just telling you that -- you
19 know, sometimes there's more than one way to accomplish things
20 that -- and that's why I was asking you, are we heading -- or
21 maybe I asked your opponent, are we just heading to all gender
22 neutral bathrooms, and so we don't have to have these debates,
23 or -- I don't know.

24 All right. So I have a couple more questions for
25 you.

1 MR. HARMON: Yes, Your Honor.

2 THE COURT: How do you enforce this policy? Tell me
3 how this works. I'm told that there may be other transgender
4 students at Nease High School.

5 How do you enforce this policy?

6 MR. HARMON: So the best I can answer to the other
7 transgender students at Nease High School -- I have no record
8 evidence of it. I haven't seen any record evidence of it.
9 From what I understand is that there are others, but the gender
10 neutral bathrooms have been an option.

11 Now, I don't have the record evidence to support
12 that. But in terms of enforcement, the school is not going to
13 check people's biological sex at the door.

14 I mean, that's just not going to happen in any
15 certain situation. But if the school district were to become
16 aware of a situation where a member of one sex was in the
17 bathroom of the opposite sex, I'm sure, hypothetically --
18 again, these are not the facts before the court. But the
19 district would meet with that student to discuss it.

20 THE COURT: And do you define -- do you define
21 Mr. Adams as being of the opposite sex in a boys' room?

22 MR. HARMON: For purposes of bathroom use only, yes.
23 And that's because Title IX has that provision in there that
24 allows that.

25 And if you look at *Carcaño*, there's a bodily privacy

1 right based on physiological characteristics of men and women,
2 not identifi- -- self-identification characteristics.

3 THE COURT: What seems interesting to me -- and I'm
4 just trying to think this through like everybody else. It
5 seems interesting to me that the St. Johns County School
6 District would rather Mr. Adams go into the girls' room than to
7 go into the boys' room.

8 I mean, just -- I'm just wondering -- in terms of
9 privacy and disruption and other things, I -- you could easily
10 posit that it might be more in the girls' room than in the
11 boys' room, wouldn't you?

12 MR. HARMON: But, Your Honor, this policy is about
13 more than just one student. This is a districtwide policy
14 across all schools.

15 And, you know, there hasn't been an issue -- I would
16 point this out again, it's been two years that plaintiff has
17 been going to Nease High School and we've not had a problem,
18 other than the one time that plaintiff used the boys' bathroom.
19 After that, the first month of freshman year, there have been
20 no problems.

21 I don't think the district wants to stand before a
22 plaintiff and say, You must go here or you must go there. What
23 they're saying is, This is our policy, based on biological sex.
24 And you, like any other student, for whatever reason -- any
25 student -- this doesn't apply just to transgender students. If

1 you don't feel comfortable using the bathroom of your
2 biological sex, we have 11 other different options.

3 THE COURT: And I guess I go back to -- and, again, I
4 appreciate these are difficult issues. I really, really do.
5 But I go back to: How do you know?

6 I mean, how -- what if -- what if there are
7 transgender people at Nease High School right now using the
8 boys' room freely, nobody's -- because they look like boys and
9 act like boys, and --

10 MR. HARMON: We would have to deal with it when that
11 issue arose, Your Honor. I mean, we would meet with the
12 students involved, if that happened.

13 THE COURT: Is there -- and I know this is -- this is
14 an argument that's made. Is there evidence from around the
15 country of difficulties with transgender students using the
16 restroom that accords with their gender identity?

17 I mean, have there been documented cases of privacy
18 rights or people being disadvantaged because of this?

19 MR. HARMON: Well, I know the *Carcaño* case has
20 recognized the right, but I have not served a -- all the
21 districts.

22 I know that there's been some districts' materials
23 that have been inserted into this documentation to show, Hey,
24 we do it here with no problem.

25 But I would represent there are other school

1 districts that don't do it that way. They do it on a
2 case-by-case basis.

3 THE COURT: How do you do that?

4 MR. HARMON: Well, when a student comes to you with
5 an issue, and it deals with bathroom use, you would work with
6 that student.

7 I think that's what Miami-Dade County -- I saw in the
8 declaration attached Miami-Dade County says, We deal with it on
9 a case-by-case basis.

10 THE COURT: All right. I'm going to ask you one more
11 question, and then I'm going to let you talk a little while,
12 because I haven't done a very good job of letting you talk,
13 so...

14 MR. HARMON: I'm doing a lot of talking, Judge.

15 THE COURT: So I read your brief. And I got to page
16 9 -- 9 through 15. And in that section you make a medical
17 argument that -- I don't know what the medical argument is.

18 But what's the point of page 9 through 15? What
19 point are you making? And how does it fit into this case?

20 MR. HARMON: Yes, Your Honor. I can absolutely
21 answer that issue.

22 So I think it was July 19th we received a motion for
23 a preliminary injunction. And attached to it was an affidavit
24 from plaintiff's hired expert in this case that said, It is
25 universally accepted that gender identity equals sex. That's

1 it. Universally accepted, this is the case.

2 So we thought, Okay. We're not -- for purposes of a
3 preliminary injunction, this doesn't look like we're going to
4 have time to get into all the biological issues, but let's
5 explore that a little bit.

6 So we started doing our diligence and started
7 researching this representation that it's universally accepted.
8 We came across some declarations from some other cases,
9 including what's been submitted with Your Honor.

10 And we said, Well, it's not as cut and dry as
11 Dr. Ehrensaft out in California is making this out to be. This
12 idea that, Well, everybody knows sex equals gender identity is
13 not universally accepted.

14 So I don't know if we submitted the biological -- all
15 the medical evidence to stand before you and say that
16 transgender students need help and therapy, not to be treated
17 according to their self-identity. It was to establish that
18 this is a robust debate in the medical community, where folks
19 at Johns Hopkins University are quibbling with folks at Duke
20 about what to do with all this stuff.

21 So if anything, Your Honor, it was just to show a
22 very limited period of time. It's not my practice or our
23 practice to cut and paste from other briefs. But in the
24 limited amount of time what we were just trying to represent is
25 there are other sides to this debate.

1 THE COURT: Well, the reason I ask is -- okay. I
2 hear you. The reason I ask is, it seems that -- and maybe the
3 case in Texas is different. I don't remember.

4 But it seems like in the cases I'm reading, really,
5 the school districts aren't taking the position that
6 transgender people aren't who they say they are.

7 They're taking other positions, like, We have to
8 balance that with the right of privacy of others, or they
9 haven't shown harm, or those types of things.

10 But this seemed to be an effort to discredit the
11 legitimacy of the transgender identity. And is that -- but
12 you're saying that's not really what you were trying to do? Or
13 am I misreading it? Or what?

14 MR. HARMON: The idea of -- well, I can't stand
15 before Your Honor and credibly say that we were trying to
16 discredit the idea of transgender identity. My client referred
17 to plaintiff as "he." My client changed plaintiff's photo ID
18 to be more in his male appearance.

19 That's not the issue. What we were just trying to,
20 again, in a very, very limited capacity -- when we saw this
21 information from Dr. Ehrensaft saying this is what it is, we
22 just tried to go out and see, Is this really how everybody is
23 accepting this position?

24 So I am not at all standing before Your Honor saying
25 that transgender identity is not -- is not something to be

1 understood.

2 THE COURT: Because -- and, again, I think --
3 regardless of whether -- regardless of how all this turns out,
4 I think you have made a good point, which is St. Johns County
5 was proactive on this issue.

6 But by being proactive -- I mean, it says, Guidelines
7 for LGBTQ students, follow Best Practices. And so inherent in
8 that, it seems to me, is a recognition that these folks are who
9 they say they are, and we need to figure out policies to allow
10 us to accommodate them, consistent with our other duties and
11 responsibilities.

12 MR. HARMON: That's, I think -- from what our
13 declaration shows was the purpose of the creation of those Best
14 Practices.

15 So I think, Your Honor -- you know, again, on a
16 limited time frame here, if we -- when we get to trial, the
17 relevance of the medical testimony, I think, will be better
18 developed.

19 But in a case where parties are filing replies two
20 days before an injunction hearing to say, Huh-uh (negative),
21 essentially, you know, that is a rather undeveloped record on
22 the side of the medical side.

23 THE COURT: Well, do you view this as a case in which
24 I will be hearing pro and con medical evidence on the
25 legitimacy of transgender identity?

1 MR. HARMON: No, because I think gender dysphoria is
2 identified in the DSM-5. I mean, it's out there. In terms of
3 the medical evidence, I think what a trial would show is what
4 doesn't exist in this case. We have no medical opinions
5 whatsoever in this case specific to plaintiff.

6 The plaintiff's hired expert out in California has
7 never met plaintiff, never talked to plaintiff, never met his
8 mother, never talked to his mother, never reviewed his medical
9 records, and never reviewed his education records.

10 That is what makes this case completely
11 distinguishable from *Whitaker* and *Evancho*, and even *Highland*,
12 where there were opinions from folks who treated the students
13 to say, This is what this is causing.

14 What you've got in this case is taking
15 Dr. Ehrensaft's generalized descriptions of what happens to
16 transgender students and saying, This is what will happen. And
17 that's pretty weak evidence for purposes of entering an
18 injunction in a case.

19 And I think that's, when we get to trial -- we filed
20 some information under seal, Your Honor, in terms of some of
21 the issues that plaintiff's had in school that deal with
22 psychological issues. I think those will be explored more in a
23 trial. And we can get to the heart of whether plaintiff's
24 issues are really tied to bathrooms.

25 If there is not -- the causation element is not

1 existing in this case.

2 THE COURT: All right. Go ahead.

3 MR. HARMON: Yes, Your Honor.

4 And I think we've alluded to it. The one area where
5 my client simply cannot accommodate plaintiff's request is the
6 use of bathrooms.

7 And I want to be clear, it's not because plaintiff --
8 we want plaintiff to act like a girl, or because we're
9 asking plaintiff -- we're asking plaintiff to conform to
10 stereotypes.

11 And that's what's different about *Glenn*. *Glenn* --
12 and I've read *Glenn* more times than I can count now in
13 preparation for today. *Glenn* was all about stereotypes.

14 THE COURT: Well, you are asking him to use the
15 girls' room.

16 MR. HARMON: But not because of -- because purely of
17 biological sex, not based on -- what *Glenn* was limited to --
18 *Glenn* looked at how you walked, how you talked, how you
19 dressed; had nothing to do with school bathrooms.

20 It had to deal with Mr. Brumby, who took an adverse
21 employment action against plaintiff because plaintiff was
22 transitioning to a female and didn't act like a man.

23 And when it came to the legitimate governmental
24 interest in that case, the only thing that the government was
25 able to say was a quote, I guess from Mr. Brumby's deposition,

1 where he said, It might make others uncomfortable. That was
2 it.

3 And that's not -- there are much more well-developed
4 facts in this case to show this policy treats all biological
5 females and all biological males the same.

6 It does not ask anybody to conform to how we think
7 you should act. It's purely -- and, again, that goes back to
8 *Carcaño's* recognition, that bodily privacy interest is not
9 based upon gender identity, it's based on physiological
10 characteristics.

11 THE COURT: And does that distinction you've just
12 drawn -- does that -- what's the constitutional basis or legal
13 basis for drawing that distinction?

14 Is it just custom and practice? Is it privacy of
15 others? Is it -- or there doesn't have to be any reason;
16 that's just the policy?

17 What is the -- you say that's the policy, and you say
18 that's what the effort is, to draw the distinction between
19 using restrooms based upon your biological sex at birth --

20 MR. HARMON: Right.

21 THE COURT: -- as determined by the doctor who writes
22 the birth certificate. What is the underpinning of that?

23 MR. HARMON: Yeah. If you -- well, there's two
24 areas, really. Some of the cases that we quoted in our
25 response that go to this recognized right of privacy in a

1 bathroom, to not be subjected to having to be in there with a
2 member of the opposite sex. The other side is --

3 THE COURT: No matter how much that person looks like
4 and acts like a member of the sex that you are?

5 MR. HARMON: But I think if you get to the
6 looks like/acts like, you're not talking gender non-conformity
7 issues. And that's where *Glenn* steps in.

8 If we were to say, Drew, you can't use the girls'
9 bathroom because you look like, walk like, and talk like a
10 male, then we've got a *Glenn* issue, for gender stereotyping
11 Drew to say, You need to act more like a girl if you want to
12 use the girls' bathroom. That's what makes this different.

13 Sorry, Your Honor.

14 The other issue, which I think Your Honor talked a
15 little bit about -- I'm sorry. Let me rewind a little bit.

16 Title IX is the other area. I talked about case law
17 saying this. But Title IX also says -- there's a regulation
18 directly on point, 106.33, that schools can -- since 19- -- I
19 believe it was 1980 when it was enacted; 1972 for Title IX in
20 general, says that schools can separate bathrooms, locker
21 rooms, and showering facilities on the basis of sex.

22 And I do want to touch on that, if I can, just
23 briefly. I think it's -- you'll note in the briefing, and even
24 in the oral argument today, that plaintiff has said, Look, this
25 is about bathrooms only.

1 And for purposes of looking at the irreparable harm
2 prong and looking at the balancing interest prong, that's the
3 case.

4 And that's where *Whitaker* looked at it, in the
5 balancing of interest. But when we're looking at substantial
6 likelihood on the merits, plus the additional heavy burden for
7 injunction, you have to look at is plaintiff likely to succeed
8 on his Title IX claim, not just with bathrooms, but on his
9 Title IX claim?

10 And if you'll notice, there's been no discussion
11 about how the word sex, if we look at it as gender identity,
12 would change the regulation in Title IX that says we can
13 separate showering facilities and locker rooms based on sex.

14 And I think if Your Honor were to find that plaintiff
15 is substantially likely to prevail on this Title IX claim, that
16 sex under Title IX means gender identity, what Your Honor would
17 be finding is that it's permissible for K through 12 schools to
18 have people of the opposite biological sex taking their clothes
19 off in locker rooms together.

20 Now, that's not the facts here. And I get that. For
21 irreparable harm and all of that, that's not the facts. But
22 when we're talking substantial likelihood of success on the
23 merits, we have to go to that example. We have to go that far.

24 And I don't think that's what Congress intended when
25 it said you can separate bathrooms -- excuse me, the Department

1 of Education intended when they said, You can separate locker
2 rooms based on sex, that one day we were going to have children
3 taking their clothes off with different body parts together.

4 On the irreparable harm part, Your Honor -- and I
5 think we hit that in our brief pretty good. There are 11
6 gender neutral bathrooms on campus. It does not take 15 to 20
7 minutes to get to them.

8 The bell at the school, from my understanding, is
9 five minutes, when it rings to go from class to class. So any
10 student in the school is going to have a difficulty rushing. I
11 think most folks who went to high school can talk about how
12 difficult it was when you're changing classes to use the
13 bathroom.

14 But there are no documents in the record before Your
15 Honor showing that plaintiff was tardy to class because of
16 having to stop to use the restroom.

17 In the documents under seal, there was one instance,
18 other than two times when plaintiff was late to school -- one
19 instance where plaintiff was tardy to class.

20 So these gender neutral bathrooms that are available,
21 or single-stalled bathrooms, whatever we want to call them,
22 will not force him to have to hold his bladder or rush home to
23 use the bathroom. That's a speculative argument when it comes
24 to irreparable harm.

25 The other part, again, is this has gone on for two

1 years before getting to Your Honor. I mean, since September of
2 2015, plaintiff has used the bathroom, from our
3 understanding -- from what plaintiff has represented, the
4 gender neutral bathrooms at Nease High School without any
5 issue.

6 THE COURT: What's the equal protection scrutiny that
7 I should apply in this case?

8 MR. HARMON: I think based on what *Glenn* says and
9 *Glenn's* finding of sex-based classification -- I think our
10 policy here of "use the bathroom of your biological sex" is a
11 sex-based classification that requires intermediate scrutiny.

12 I mean, we're going to look at the rational basis
13 argument. But I just think in light of our Eleventh Circuit
14 precedent, it's difficult to go there. Certainly not strict
15 scrutiny. But intermediate scrutiny, yes.

16 But even under that prong, Your Honor, a plaintiff
17 under an equal protection case has to show that they're being
18 treated -- than similarly situated individuals.

19 And I think what I've represented is we've not
20 treated any biological females under our policy any different
21 than plaintiff in this case.

22 THE COURT: Can you answer my question on irreparable
23 harm that I also posed to your opponent? On this record, at
24 least as it's developed so far, what occurred in this case, or
25 in the saga of Mr. Adams' efforts to use the boys' bathroom --

1 what occurred between May of 2016 and the time of filing suit?
2 What was going on during that period of time?

3 MR. HARMON: I think what Your Honor -- and we're
4 talking May of '16. I think that was the end of freshman year,
5 when plaintiff met with Cathy Mittelstadt at Nease High School
6 to talk about, from my understanding, how everything went in
7 the school year, I -- I'm not aware of anything.

8 I believe if we'd even go back to the OCR
9 investigation, the district came out right away and said, We're
10 not going to mediate this, this is our position.

11 So I have no idea. I think if we get to a trial,
12 what happened between May of 2016 and May of 2017, when it
13 comes to how this policy was addressed, can be addressed.

14 But the facts before Your Honor today is there was
15 nothing, there was nothing wrong. Plaintiff used the gender
16 neutral bathrooms for an entire school year, is a very good
17 student, has very good grades, and produces nothing to show any
18 concerns from it.

19 THE COURT: Okay.

20 MR. HARMON: On the Title IX part, too, if I may talk
21 a little bit about --

22 THE COURT: You can. And then we're going to have
23 to -- but I'll give you a few minutes. Go ahead.

24 MR. HARMON: Yeah. I'll just hit a couple of points
25 that we've not already talked about.

1 The effect of the DOE letter in February of 2017,
2 when they said we're withdrawing this, it does not create a
3 clean slate.

4 What DOE said in that case is, We don't understand
5 how these prior guidance letters are consistent with the
6 expressed language of Title IX.

7 So they didn't say it was a clean slate, go figure it
8 out. What they actually said was, We don't see how this is
9 consistent with Title IX, and, in fact, we're going to leave it
10 to the states and the school districts to work through this
11 issue. That's what they said.

12 And in the *Evancho* -- I think it was *Evancho* -- but
13 the *Evancho* case, that's why the court denied the preliminary
14 injunction, is they said, Look, the case -- this is not a clear
15 issue; this is not resolved.

16 And I -- again, for every *Whitaker*, there's an
17 *Evancho*, and there's a *Texas v United States*.

18 Talking a little bit about equal protection again,
19 we've gone through the issue of what's the important
20 governmental interest here.

21 And I think regardless of the debate in the medical
22 community, the *Carcaño* case recognized, again, that's the
23 physiological characteristics. That was what Justice Ginsburg
24 even mentioned in the *VMI* case, when she said that physical
25 characteristics of men and women are enduring, and the two

1 sexes are not fungible.

2 So, again, when we're talking about bodily privacy in
3 the bathroom, that concept is not rooted in a person's
4 individual sense of gender. The bodily privacy concept in
5 these cases is rooted in what makes biological men different
6 from biological women.

7 And I'll point out, Your Honor, under intermediate
8 scrutiny, we don't have to prove that our policy is perfect.
9 The *Carcaño* case, citing the *United States v Staten* case, said,
10 under intermediate scrutiny, what you have to show is that
11 means to which you are satisfying your important governmental
12 interest, is that it's reasonable.

13 And the district's bathroom policy requiring students
14 to use the bathroom of their biological sex is the least
15 restrictive means to achieve that objective of bodily privacy.

16 This best practice document that was created in --
17 started early in 2014, finally rolled out in 2015, was a
18 solution and a best way to offer an accommodation, again, a
19 solution, to students who, for whatever reason -- whether
20 they're cisgender, transgender, they have medical reasons,
21 whether they're gender-fluid, which is a term that says
22 somebody's sex changes, even sometimes daily -- it accommodates
23 that -- that group.

24 For students who are gender non-binary, meaning they
25 don't necessarily identify as male or female, this Best

1 Practices document accommodates that.

2 It's not discriminatory. Again, this policy is just
3 the least intrusive means of addressing that privacy issue.
4 And I'll leave, again, talking -- last part of the speculative
5 injury and the balancing test. We haven't gotten into a lot of
6 that.

7 The issue here is trying to balance plaintiff's
8 desire to use the bathroom of his choice with the privacy
9 rights, right now, of 2500 students at Nease High School.

10 And in this case plaintiff is not trying to maintain
11 the status quo. Plaintiff is asking for an affirmative
12 injunction to change the status quo.

13 What he's trying to do is have Your Honor enter a
14 policy change before trial. We're going to have a trial in
15 this case. He'll have a chance to present all the arguments,
16 to present you a fully developed record, this is what medical
17 experts say, this is what's causing my anxiety and depression,
18 instead of just generalized thrown together ipse dixit from
19 Dr. Ehrensaft.

20 Denying the motion today -- if you were to deny this
21 extreme request for a remedy, what will happen is plaintiff
22 will have to go back to doing what the plaintiff has done for
23 two years without interruption.

24 On the other hand, if the injunction is granted, it's
25 going to result in the immediate impact of the privacy rights

1 of 2500 students at Nease High School.

2 And I think the long delay and the inactivity, as
3 Your Honor has recognized, for over a year without any
4 explanation of why something wasn't done in between that time
5 really militates against entering this relief that's being
6 requested today. That's what the trial is for.

7 So with that being said, Your Honor, I appreciate you
8 giving me the time. And I would respectfully request that you
9 deny the motion.

10 THE COURT: Thank you.

11 Ms. Borelli, I will give you a few minutes of
12 rebuttal since it's your motion. I'm going to have to keep it
13 short, though. And I'm -- I'm going to try to listen. But
14 I'll give you a few minutes.

15 MS. BORELLI: Thank you so much, Your Honor.

16 I would like to start by trying to clarify one really
17 key thing. I understand that this issue may seem new -- for
18 some people this issue is new.

19 But I do have to say that, respectfully, defendants
20 really still don't seem to understand. Drew is a boy. He is a
21 boy in every respect. He is on hormone therapy. He's had a
22 double mastectomy. His neurological sex, his gender identity
23 is male.

24 The defendants would have you believe that gender is
25 an on/off binary. We don't have to look very far to see that

1 plainly and ably contradicted -- all one has to do is pick up
2 the American Medical Association press release that we
3 submitted with our reply brief that specifically says gender is
4 not a binary.

5 There may be some aspects that are discordant. And
6 when they are, it is the neurological sex that governs, because
7 that cannot be changed. It is fixed.

8 And prior efforts that were used, sometimes
9 electroshock therapy, to try to fix transgender children are
10 now recognized for the deeply harmful and, the medical field
11 now believes, unethical efforts that they always were.

12 All of Drew's boys, all of the school staff, all of
13 his teachers, they all recognize him for the boy that he is.
14 He is treated as a boy in every respect.

15 That's precisely why there was no disruption when
16 Drew used the boys' restroom for six weeks, and why there will
17 be absolutely no disruption, certainly no grand privacy
18 violation that they want to suggest is occurring, because they
19 continue to paint Drew as a girl. Drew is a boy.

20 I also want to address a few things about the
21 doctrine, Your Honor. *Glenn*, we submit, is -- it's certainly
22 binding. And we would like to say the motive analysis that it
23 lays out is determinative here.

24 *Glenn* is the reason that *Carcaño* cannot persuade this
25 court, although I will note that the *Carcaño* opinion did enter

1 an injunction under Title IX saying that the school -- that,
2 you know, UNC, University of North Carolina, could not throw
3 those transgender students out of the restrooms matching their
4 gender identity on the basis of their birth certificates.

5 We don't even have that kind of policy here. Here
6 it's even more extreme. This is about anatomy, what they want
7 to call biological sex.

8 As Dr. Ehrensaft has explained, and as that -- even
9 that American Medical Association press release says, That's an
10 incoherent concept, the idea that there was one form of
11 biological sex any one of us had. There are multiple
12 sexually -- characteristics for most of us. They all point in
13 the same direction.

14 With a small population, some are discordant,
15 neurological sex governs, because that cannot be changed.

16 So in *Carcaño*, again -- even without the guidance of
17 a case like *Glenn*, there was an injunction issued. UNC wasn't
18 allowed to discriminate against its transgender students.

19 But *Glenn* says -- Mr. Brumby gave testimony in his
20 deposition that he was unsettled by his thoughts of the anatomy
21 of Vandy Beth Glenn under her dress.

22 And the court pointed to that and said, That is
23 direct evidence of sex stereotyping. That's direct evidence
24 right there.

25 And, of course, the court was in search of direct

1 evidence because it was an employment decision. And so you
2 have to look when somebody's been fired because they're tardy
3 or they're poorly performing -- and there was no dispute.

4 It was entirely Mr. Brumby was unsettled by the
5 thought of Vandy Beth Glenn's anatomy.

6 He didn't object to her hair or her makeup. He
7 didn't think that she was a -- not a sufficiently
8 gender-conforming woman.

9 And so attempts to distinguish *Glenn* on that basis
10 just fail. That's not what was going on. This was about his
11 sort of concerns about her anatomy.

12 The court said, That's impermissible sex
13 stereotyping, and I have to look very carefully at your
14 reasoning here. Does it make sense on this record in front of
15 me? And that was what the court did.

16 And on this particular record, this policy, where
17 they've taken Mr. Brumby's concerns and they have emblazoned it
18 on to the face of their policy, it makes absolutely no sense.

19 As the court recognized, not only are there no
20 generalized privacy concerns with allowing somebody of the
21 other sex into a restroom -- because that's not what Drew is
22 and that's not what Drew is asking for. There are no
23 particularized privacy concerns here.

24 The unrebutted testimony is that Drew has no interest
25 in invading anyone else's privacy. He was told he had done

1 nothing wrong. He just wants to use the bathroom, blend in
2 like every other boy, wash his hands, and leave.

3 There is no evidence, as there was in *Evancho* and
4 *Highland* and *Whitaker* -- they each had some evidence or some
5 suggestion of a complaint, sometimes multiple complaints,
6 sometimes affidavits.

7 There's none of that here, no offer of that, not even
8 a proffer. And that's because there was no problem when he
9 used the boys' restroom. That is precisely why this really is
10 so narrow and why it balances the equities so sharply in Drew's
11 favor.

12 A couple of points on the -- the map and the gender
13 neutral restrooms. I would defer the court -- the defendants
14 keep seeming to refer to the complaint, and I'm not entirely
15 sure why, but I would refer the court to Drew's declaration for
16 the preliminary injunction where he said, It can take well over
17 ten minutes to use the gender neutral restroom.

18 I would submit the defendants actually agree. If you
19 look at the testimony of Principal Kunze, it is very, very
20 carefully worded.

21 And it says, I agree that a person of normal gait
22 must take roughly five minutes to walk to a gender neutral
23 restroom. That's not the end of it. You have to walk to it.
24 Then you have to use it. And then you have to walk back. That
25 is a 10- to 15-minute endeavor. It's undisputed the pass time

1 is only five minutes.

2 So even apart from the stigma and the unequal
3 treatment and the sort of treating -- marking of Drew with a
4 badge of inferiority, if he wants to use the restroom, he
5 either has to hold his bladder for hours on end or he's denied
6 class time that he would have to use to use that restroom.

7 The fact that there is only one tardy reflected on
8 his record is entirely supported by his testimony. He's a very
9 ambitious young man. He wishes to go to medical school. And
10 he understands that his grades today will have a determinative
11 effect on where he can go to college, and ultimately the
12 medical school that he hopes to be accepted to.

13 And so that is why he holds his bladder, because
14 tardies can affect your grade. And that is why he also
15 testified that when he simply couldn't do that any longer he
16 would sometimes slip out in the middle of class, because there
17 would be fewer students around to see him wondering where was
18 he going, what was he doing.

19 So this -- his testimony is -- is entirely
20 consistent. The fact that he has had to -- I think his grades
21 were also invoked as a -- with the implication that there's
22 just no problem here, everything is fine.

23 Because he understands the stakes for his future, the
24 fact that he has had to work that much harder and bear this
25 burden, and to overcome it, to try to make sure that it doesn't

1 permanently damage his prospects by affecting his grades -- and
2 it's -- Your Honor, it's almost a suggestion that before he can
3 get the relief to prevent the irreparable harm, his grades have
4 to show damage to them. And that's not how preliminary
5 injunctions work. That's not how an irreparable harm analysis
6 works.

7 This is a terrible burden to place on any adolescent.
8 It's certainly a terrible burden to place on this young man.

9 The *Carcaño* case could not have come out here the way
10 it did in North Carolina, where the Fourth Circuit does not
11 have guidance like *Glenn*, saying specifically, Discrimination
12 against transgender people is defined as sex stereotyping.

13 There is -- there is no difference between
14 discriminating against a transgender person. Because the fact
15 that you are transgender is defined by the perception that you
16 transgress stereotypes. So that is added to the decision of
17 *Glenn*.

18 *Carcaño* didn't have that guidance and came out the
19 other way on equal protection. There was still an injunction
20 issued under Title IX, Your Honor. Here, the equal protection
21 analysis cannot go in the direction *Carcaño* did, because *Glenn*
22 said otherwise, Your Honor.

23 The Texas litigation that was invoked, that involved
24 absolutely no transgender litigants. The students, the
25 intervenors, no transgender litigants. And it was an

1 administrative procedure, that claim. So it's entirely
2 distinguishable.

3 There was a suggestion that there is no case that
4 says that Title IX includes transgender people. That case is
5 *Glenn*.

6 *Glenn* relied interchangeably on equal protection and
7 Title VII authorities to decide that sex stereotyping is
8 discrimination against transgender people and vice versa.

9 And there is no daylight between what sex
10 discrimination means in the protection of Title VII or Title
11 IX. So there is such a case. And that case is *Glenn*.

12 I have to point out that the privacy argument here is
13 absolutely incoherent. Again, all they've offered are these
14 generalized assertions that somebody of the opposite sex, which
15 is not Drew -- Drew is a boy. And the suggestion that it's
16 perfectly fine for Drew to go into the girls' restroom, I mean,
17 it's incoherent, Your Honor. It doesn't make any sense. And
18 that shows that their efforts to try to invoke privacy here
19 should be seen as ineffective.

20 The additional thing that I wanted to mention is --
21 on the subject of Dr. Ehrensaft and her testimony, I think
22 there was an inadvertent misstatement by Mr. Harmon.

23 Dr. Ehrensaft testified in *Evancho*, testified in
24 *Highland*. It was substantially identical testimony as was
25 offered here.

1 Those courts credited her testimony. She did not
2 interview those plaintiffs. And the courts found that wasn't
3 necessary, particularly at a preliminary stage.

4 It was plain to see that those students were
5 suffering under this policy. And if you singled out any
6 adolescent kid and said, There is something so shameful about
7 you that we cannot let you set foot -- even though we know
8 you've done nothing wrong, we agree you've done nothing wrong,
9 there's something so inherently bad and wrong about you --
10 transgender children hear that message. They understand that
11 message.

12 Additionally, we'd point to the *Daniels versus*
13 *Brevard* case, Your Honor, which was the case that we cited
14 about the differential treatment between the girls softball
15 team and the boys baseball team.

16 That case was yet another example of an injunction
17 entered, where the opinion suggests that there was general
18 testimony about harms to girls, of unequal treatment. It does
19 not suggest that any of the girls were examined in that case.

20 So for all those reasons, for all of those -- for all
21 of those examples, we think that certainly isn't necessary.
22 And the other courts have agreed.

23 On this last point about whether there's evidence of
24 difficulties with transgender people using the restroom, to the
25 contrary, where you have 19 states, where there are statewide

1 rules in the District of Columbia, and that amicus brief with
2 ultimately 33 states joining in to the Supreme Court, 80
3 different administrators, and where you have Miami, which is
4 the fourth largest school district in the state, and Broward --
5 and in Leon -- so this is happening all over Florida -- that
6 indicates that this works smoothly, that inclusion isn't
7 difficult.

8 And there's certainly nothing to suggest here that
9 Drew's limited request for restroom access, which is all he
10 would need for the rest of his career here -- career at the
11 high school, there's anything difficult -- you know, to the
12 contrary, the record evidence is that was fine, that was
13 smooth, nobody had any problems.

14 If there are no further questions, Your Honor, we
15 respectfully request that the injunction is granted.

16 THE COURT: Thank you.

17 Mr. Harmon, I did want to ask you about that.

18 What does it say to you that all these other school
19 districts in all these other states have the policy that's
20 being advocated for by the plaintiff in this case and seem to
21 be doing just fine?

22 What does that -- how does that play into the
23 analysis?

24 MR. HARMON: Your Honor, as I stand before you, I
25 think it's difficult to say they're doing just fine, because

1 we -- I mean, I have no idea how it's working.

2 You may get some of their folks on the stand who say,
3 in a trial, We've had a bunch of issues, or, We've had no
4 issues.

5 I don't think taking a couple of press releases from
6 a different school district here and there and saying
7 everything is great is sufficient evidence to have an
8 injunction.

9 THE COURT: Okay. All right. Thank you, sir.

10 MR. HARMON: Thank you, Your Honor.

11 THE COURT: All right. I'm going to take a brief
12 recess and confer with my brain trust over here. And then I'll
13 come out and I'll tell you what we're going to do here.

14 All right.

15 COURT SECURITY OFFICER: All rise.

16 (Recess, 4:44 p.m. to 4:57 p.m.)

17 COURT SECURITY OFFICER: All rise. This Honorable
18 Court is now in session. Please be seated.

19 THE COURT: I want to talk for a minute about
20 process, and then I'll -- then I'll make a ruling here. And I
21 don't tell you this for any reason other than to demonstrate
22 why courts act the way they do in certain situations.

23 When this case was filed in late June, it came among
24 a motion for preliminary injunction and a Commodity Futures
25 Trading Act case.

1 It came in the midst of my consideration of a motion
2 for a new trial in a public corruption case. It came in the
3 midst of my consideration and working on the 450 other cases
4 that I have in this district that I'm assigned to.

5 And, obviously, it's a case of substance and
6 importance, but I have -- it added to an already completely
7 full plate. And that was fine.

8 Then when three weeks later the motion for
9 preliminary injunction came along, and, frankly -- once I saw
10 the suit filed, I wasn't completely surprised that a motion for
11 preliminary injunction would be coming.

12 I actually thought it might come a little sooner,
13 because I assumed that the effort would be made to try to get
14 it heard before the school year started.

15 But once it started -- once that motion was filed
16 some three weeks later or so, we had to make a decision. And
17 there was disagreement between the lawyers as to how quickly we
18 needed to move here.

19 The defendants saying that, obviously, the plaintiff,
20 Mr. Adams, and his lawyers had had time -- I don't know how
21 much time, but time to figure everything out, file their
22 complaint, file their motion for preliminary injunction three
23 weeks later, and that the school board had to be responsive on
24 a very short time frame to something that they hadn't been
25 working on as the plaintiffs had.

1 And I debated that. And there was a request by the
2 defendants for more time, more effort to be able to respond.
3 And there was a -- there was a request by the plaintiffs that
4 we get to it.

5 I decided that although I gave the defendants an
6 extra week from what they would otherwise have gotten -- I
7 decided that when a plaintiff brings a suit, a serious suit,
8 which this is, and requests preliminary injunctive relief, then
9 I'm required to be responsive to that as quickly as I possibly
10 can be, that that's really my obligation to do so.

11 So even though, consistent with all my other
12 responsibilities and -- and, again, I'm not saying this -- I
13 want to be clear. I'm not complaining or anything like that.

14 I'm just saying I had, I think, 13 or 14 sentencings
15 this week. I've had other matters. And I prepared for this.
16 And I did a lot of work. And Ms. Weisman did a lot of work.
17 And so we have -- we've done that preparation.

18 But it's a big decision that I'm being asked to make.
19 And I think it demonstrates why preliminary injunctive relief
20 has its place in the judicial workload and in the -- and in
21 parties' abilities in cases of true irreparable harm and we
22 really need to do this right now; if we don't, these things are
23 going to happen, it certainly has its -- its place. But it
24 also demonstrates to me why we don't hurry normally.

25 We try to -- especially when we're dealing with novel

1 and important issues of constitutional and statutory law, when
2 we're dealing with facts which had to be kind of cobbled
3 together from outside affidavits and sources that didn't
4 necessarily directly address this case, that you only proceed
5 on that basis if that's your only choice, that a court is
6 better -- if it can, it's better to be considered, and to take
7 the time and effort to develop the record appropriately, and
8 to -- to make what hopefully is a considered judgment.

9 And so that's why we -- in a motion for preliminary
10 injunction, we talk about irreparable harm and we talk about
11 evidence of delay in bringing a lawsuit can be evidence that
12 shows there is not irreparable harm, and -- because it -- while
13 in this case Mr. Adams surely has a right to bring this
14 lawsuit, surely has a right to have me, the federal court,
15 consider it seriously and carefully, and he's got great
16 lawyers -- I thought the argument today was great. I thought
17 St. Johns County is well represented.

18 I thought this is -- you know, if you were going to
19 have to decide important issues, I thought to myself, I'm glad
20 I got good lawyers on both sides that are helping me to try to
21 make the right decision.

22 And so -- but I just want to put this into context of
23 what I'm being asked to do here and how quickly -- not only
24 were the defendants required to respond, but the court was
25 required to respond. And I don't shirk from that

1 responsibility. We worked hard to get ready for this hearing.

2 But it -- it is generally better, if it can be, that
3 a court be able to do things on a more considered basis, and to
4 schedule it on a more considered basis, consistent with the
5 needs of the case.

6 And so I just want to make that point. I'm going
7 to -- I'm going to go ahead and make a ruling today, on this
8 record, and then I'm going to tell you what we're going to do.

9 But let me go ahead and do a little bit of formality
10 here. Because I'm going to make an oral decision today that
11 will be reduced to writing, but the writing will simply say,
12 Consistent with the court's oral pronouncement, the motion is
13 adjudicated.

14 And so let me go ahead and do a little formality
15 here, and then I'll get to the meat of what I'm talking about.

16 Plaintiff, Drew Adams, through his next friend and
17 mother, Erica Adams Kasper, filed this complaint on June 28th,
18 2017, against the school board of St. Johns County, Florida.
19 Plaintiff has now voluntarily dismissed two other defendants
20 who were not necessary to be named in this case.

21 Mr. Adams, who is transgender, started his junior
22 year of high school today. He claims the school board policy
23 of not permitting him to use the boys' bathroom violates the
24 Equal Protection Clause of the Fourteenth Amendment and Title
25 IX.

1 So he's filed this complaint under the federal
2 court's jurisdiction and Section 1983, invoking the court's
3 federal question jurisdiction.

4 Three weeks later, on July 19th, 2017, Mr. Adams
5 filed a motion for preliminary injunction with supporting
6 exhibits seeking to enjoin the allegedly discriminatory
7 bathroom policy of the school board.

8 The school board filed a response and exhibits in
9 opposition. And Mr. Adams has filed a reply. And the court
10 has reviewed all of these documents.

11 The court has now conducted a couple-of-hour hearing
12 on the motion. And the record of those proceedings is
13 incorporated by reference.

14 Now, as it's been adverted to, the standard to secure
15 a preliminary injunction in the Eleventh Circuit is high. And
16 I think one of the things that's true is the standard to get a
17 preliminary injunction in the Eleventh Circuit is higher than
18 it is in the Seventh Circuit, in the *Whitaker* case. And I
19 think that turns out to be important in this case.

20 The Eleventh Circuit is very particular about --
21 about the granting of preliminary injunctive relief. A
22 district court may grant injunctive relief only if the moving
23 party shows that it has, quote, a substantial likelihood of
24 success on the merits, close quote.

25 Irreparable injury will be suffered unless the

1 injunction issues. The threatened injury to the movant
2 outweighs whatever damage the proposed injunction may cause the
3 opposing party. And, if issued, the injunction would not be
4 adverse to the public interest.

5 In this circuit, a preliminary injunction is an
6 extraordinary and drastic remedy not to be granted unless the
7 movant clearly establishes the burden of persuasion as to each
8 of the four prerequisites, citing the *Siegel* case, 234 F.3d
9 1163.

10 So, also, while the typical preliminary injunction
11 seeks to preserve the status quo pending resolution on the
12 merits, parties seeking mandatory affirmative injunction faces
13 an even higher burden, requiring a showing of clear entitlement
14 to relief based on both the facts and the law.

15 Now, I know Ms. Borelli started her argument -- I
16 thought it was interesting that she did so -- by saying that
17 what was sought here was preserving the status quo.

18 I just don't agree with that. I understand why
19 that's -- was the argument. But the status quo for the last
20 almost two years has been that the school board has been
21 enforcing this policy that Mr. Adams thinks is
22 unconstitutional.

23 The status quo was not what occurred two years ago
24 for five weeks. And so I do view this as a mandatory
25 injunction.

1 I'm being asked to use the authority and power of the
2 court to order the St. Johns County School Board to change its
3 policy on the use of bathroom vis-a-vis Mr. Adams.

4 And to me that's a mandatory injunction. And I'm --
5 the court is perfectly free to do that. But a very high
6 standard of clear entitlement has to be made on both the facts
7 and the law.

8 Now, here the parties dispute all four prongs of the
9 four-part test. I'm only going to really talk about two of
10 them in any detail.

11 First, as to substantial likelihood of success on the
12 merits, there was originally some disagreement about the
13 standard of review.

14 The defendants come up from rational basis to
15 intermediate. I think the plaintiff may still be at strict
16 scrutiny, but we're getting closer, at least, to each other.

17 And so I don't think that's going to -- you know,
18 that's not going to be a basis for decision for me today.
19 Obviously when we get into the case, that will be a basis for
20 decision.

21 And the questions are -- among the questions are
22 whether the school board has a legitimate interest in
23 protecting the privacy of other students in the bathrooms. The
24 school board disagrees. And the parties -- the plaintiff,
25 Mr. Adams, disagrees whether Title IX recognizes these claims.

1 So there's some disagreement there.

2 I will acknowledge that there is case law which is
3 favorable to the plaintiff in this area. I think the *Glenn*
4 case has to be viewed as largely a favorable case for the
5 plaintiff in the Eleventh Circuit.

6 I think *Whitaker*, *Evancho*, *Highlands*, all have to be
7 viewed as potentially favorable cases. And some of them have a
8 lot of the same discussion and facts that we may well have in
9 this case.

10 And so I don't deny that in this -- in this, really,
11 literally evolving right before our eyes -- I mean, except for
12 *Glenn*, *Whitaker* was, I think, May 30th of 2017. *Evancho* was
13 2017. *Highland* was 2016.

14 I mean, this is happening right now. And that's
15 what -- that's what makes it unusual, because it is an evolving
16 area.

17 Mr. Harmon talked to me about the -- the *Carcaño*
18 case, which was August of 2016. So it's almost old by these
19 standards, and -- but this is a very evolving area. And I do
20 not gainsay that Mr. Adams has case law that certainly helps to
21 advance his claim.

22 There are distinguishing factors in those cases. And
23 I won't take the time to talk about what they are, other than
24 the standard is secure -- on preliminary injunctive relief is
25 lower in some districts or circuits than others. The Eleventh

1 Circuit has got a pretty high standard, as I've already
2 adverted to.

3 The other thing that is important here is that the
4 Eleventh Circuit does also counsel, quote -- counsels against,
5 quote, engaging in a full constitutional scrutiny analysis,
6 close quote, on a limited -- on a limited factual record and
7 narrow argument on a preliminary injunction, citing the
8 *GeorgiaCarry* case, that was a Second Amendment case,
9 788 F.3d 1318. But the principle is the same.

10 Instead, difficult questions, according to the
11 Eleventh Circuit, especially those requiring, quote, a complete
12 constitutional analysis, close quote, deserve the full benefit
13 of our adversarial system.

14 The court goes on, With a fuller record and more
15 thorough briefing, the district court will have the opportunity
16 to engage in a complete constitutional analysis. And that's
17 kind of what I'm feeling like.

18 I feel like surely this is an important issue. It's
19 an important issue to Mr. Adams. It's an important issue to
20 the school board. It's also potentially important in terms of
21 precedent that might be set by it, especially if it goes up on
22 appeal.

23 And it deserves the type of full analysis that I
24 think the *GeorgiaCarry* court in the Eleventh Circuit was
25 talking about.

1 I think the parties' briefs are exceptionally well
2 done. I thought the arguments today were even better. I'm
3 confident I'm going to have good counsel in this case.

4 But you are asking me to decide an important, serious
5 constitutional question. And I think that I'm counseled by the
6 Eleventh Circuit to be cautious in doing that on a preliminary
7 injunction record when I -- when I don't have to.

8 We also have -- potentially have some factual
9 disputes. It's hard for me to tell how that's going to play
10 out. It seemed like the defendants were kind of downplaying
11 that in their argument.

12 But the truth of the matter is we don't -- we have a
13 bunch of experts saying things, but we don't really have focus
14 and attention brought to bear on this record vis-à-vis
15 Mr. Adams, vis-à-vis whatever other factual matters need to be
16 developed from either a medical standpoint or from a
17 psychological standpoint.

18 I don't predict exactly how that will play out, but I
19 don't feel like the expert advisements that I've gotten in the
20 papers I -- that I've received really focus in on this case as
21 well.

22 I know the plaintiffs say -- Mr. Adams says you
23 really don't need a whole lot of psychological evidence to know
24 that if you are treated differently than other people when you
25 shouldn't be that that can be harmful to you. And I sure get

1 that.

2 But I do think that I'm still going to be better off
3 if I -- if I hear from whatever experts I'm going to hear from
4 in a considered way. If they're subject to cross-examination,
5 if Mr. Adams chooses to testify, and I can really hear what he
6 has to say to me, I would welcome that.

7 And so I feel like there's still more there from a
8 factual standpoint, but I can't, at this point -- and, of
9 course, Mr. Harmon told me they -- they have more things they
10 would like to do. I don't exactly know what they all are.

11 But it is true they've only had this case a matter of
12 weeks. And so I think, in fairness, they ought to be given
13 that opportunity to develop a factual record as well,
14 because -- let there be no doubt that this is a serious matter
15 that the school board is going to have to take seriously.

16 The law is -- as it's evolving, and the practices of
17 other states and other school districts, are going to be things
18 that the school board is going to have to be able to meet and
19 explain. And I'm -- I want to give them the opportunity to do
20 that, but, make no mistake, Mr. Adams' case is a serious case.

21 And so I'm going to focus -- so I'm not going to make
22 an explicit finding of substantial likelihood of success on the
23 merits. What I will say is that Mr. Adams has put forward,
24 both factually and legally, a case that is -- requires serious
25 consideration by this court. And he will get that from me.

1 I'm going to make a determination that the plaintiff,
2 at this point, though, cannot demonstrate the irreparable harm
3 sufficient to warrant a preliminary injunction.

4 A showing of irreparable injury is the sine qui non
5 of injunctive relief, according to the *Siegel* case. This case
6 says even if a plaintiff can establish a likelihood of success
7 on the merits, the absence of irreparable injury is -- is
8 enough to make the preliminary injunction relief improper.

9 I haven't actually made the finding of substantial
10 likelihood. But even if I did, that's -- that's what that case
11 says.

12 Now, Mr. Adams claims he will suffer irreparable harm
13 because of the stigma associated with not being able to use the
14 bathroom of his gender identity, and because the school board's
15 remedy of the gender neutral bathrooms is inconvenient and
16 leaves him with untenable choices of either missing classes or
17 having to delay using the bathroom for hours at a time.

18 And I don't deny that those are potential elements of
19 a showing of injury. I surely do not. But from a legal
20 standpoint -- I hope Mr. Adams will be able to understand this.

21 From a legal standpoint, the -- courts would rather
22 decide this on a considered basis, as I've already said. And
23 we only hurry when we have to.

24 And the fact that Mr. Adams has been under this
25 regime for, now, two years, the fact that, at least as far as I

1 can tell, from May of 2016 to the summer of 2017, he was -- a
2 whole school year, he was under that regime, that cuts against
3 the idea that there's imminent irreparable harm.

4 And he has been using the gender neutral bathrooms.
5 There's going to be more available. I understand they may not
6 be conveniently located. I'm not -- I'm not making any
7 judgments about that.

8 But he is going to be operating -- until the case is
9 decided, he'll be operating under the same system he's been
10 operating under for almost two years. And that does
11 distinguish the case from some others.

12 And I will say -- I will hasten to say, though, that
13 I'm intending -- I don't intend to lollygag in this case. I am
14 intending to give the parties an expedited trial schedule.

15 Because while I think the issues need to be
16 developed, I think probably, you know, 70 percent of what we
17 need we've already got, so we're talking about the 30 percent,
18 and then we'll line it up and we will try the case.

19 And so I'm going to offer an expedited schedule to
20 the parties. Because I recognize that -- to the extent that
21 Mr. Adams is aggrieved, to the extent that he may have a
22 legally cognizable injury -- I haven't made those findings.

23 But to the extent he has, it is appropriate -- if the
24 court is not going to grant preliminary injunctive relief, it's
25 appropriate for the court to get about the business of deciding

1 this case.

2 Because the denial of preliminary injunctive relief
3 will really have absolutely no bearing on whether Mr. Adams
4 will win his case or not.

5 We will start from scratch. And -- and the fact that
6 I denied the preliminary injunction will have absolutely no
7 bearing on who wins the case at trial.

8 And I will cite just as support for what I'm doing
9 here a case called *Wreal*, W-r-e-a-l, *versus Amazon*, 840 F.3d
10 1244, 2016, Eleventh Circuit case, quote, A delay in seeking a
11 preliminary injunction of even only a few months, though not
12 necessarily fatal, militates against a finding of irreparable
13 harm. My colleague, Judge Moody, in a case called *Pippin*
14 *versus Playboy* made a similar observation.

15 The cases the plaintiff relies on -- and I think the
16 defendants cited some other delay cases in -- at page 19, if I
17 recall, of their response, that are kind of to similar effect.

18 The cases that plaintiff relies on seem
19 distinguishable, in terms of irreparable harm, *Ray* and
20 *Alejandro, Daniels* -- they are distinguishable, in terms of the
21 irreparable harm analysis. And so I'm not going to find
22 irreparable harm in this case.

23 I recognize *Whitaker* and *Evancho* did. I think they
24 are also distinguishable, and -- although you read *Whitaker*, a
25 lot of the facts are the same. And I acknowledge that.

1 But I think based on the standards and based on some
2 differences, in terms of how quickly the *Whitaker* plaintiff got
3 the matter in front of the court, I think that does create some
4 distinctions.

5 And I'm also really focused on the idea that the
6 court, in making constitutional decisions and important
7 statutory decisions, really needs to be as well-advised as I
8 can possibly be.

9 So I'm not going to rule on the other prongs in this
10 case. They're not really important once the court makes the
11 irreparable harm finding.

12 So I'm going to be denying the motion for preliminary
13 injunction today. I do want to say a couple of other things.
14 I want to talk to Mr. Adams for a minute.

15 You know, the last thing I want to do is be somebody
16 who's adding to your problems. And I want you to understand
17 that what your lawyers have properly asked me to do is to -- is
18 to go ahead and enter a preliminary relief right now that you
19 kind of win right now -- we'd still then have to have a trial
20 later.

21 I'm not prepared to do that for the reasons I've
22 tried to articulate. But I want you to know that I do take
23 your case seriously. I do intend to have a trial on it as soon
24 as I possibly can.

25 I can't predict what the result of that trial will

1 be. But I can guarantee you that you will get fair and due
2 consideration in this court. And your complaint and your mom's
3 complaint will be taken seriously. And I want you to know
4 that.

5 And so now I want to talk to the -- and let me quote
6 one more case that kind of goes along with this. A Fourth
7 Circuit case, *Wetzel versus Edwards*, where substantial issues
8 of constitutional dimension are before the court. Those issues
9 should be fully developed at trial in order to insure prompt
10 and just resolution.

11 So in addition to denying the motion for preliminary
12 injunction, I'm going to set the response for the plaintiff's
13 complaint -- right now it's due August 18th.

14 I'll ask Mr. Harmon whether that's still what they're
15 intending to do. And I'm also going to ask him what motion --
16 are they answering the complaint; are they going to move to
17 dismiss; and then what we're going to do.

18 And then I'm going to talk to the parties about what
19 discovery is needed and what we need to do.

20 I'm considering trying to have a trial -- because I
21 believe it's a non-jury issue since it's equitable relief. And
22 I'm thinking of trying to have that trial in December, which
23 would give the parties three months to get ready, or so, and
24 then -- and then get ready and go to trial.

25 My thinking there is -- Mr. Adams is entitled to

1 prompt consideration. That's probably about as quickly as we
2 could do it.

3 I won't promise a decision before the beginning of
4 the first -- of the next semester of school, but I would try to
5 make a decision before that, so that the further delay does not
6 hurt Mr. Adams any more than it already is.

7 Now, I don't -- I don't predict how it will turn out.
8 I don't -- I'm not saying Mr. Adams is going to win the
9 lawsuit.

10 But if he were to win it and I were to offer relief
11 to him, I would be trying to get there before the beginning of
12 the next semester.

13 All right. So, Mr. Harmon, are you prepared to
14 respond to the complaint by August 18th, as previously ordered?

15 MR. HARMON: Yes, Your Honor.

16 THE COURT: All right. And what is your intention
17 with respect to how you're going to respond?

18 MR. HARMON: Subject to change, of course, I think
19 our intention at this point may be to move to dismiss the
20 Title IX claim and to respond to the equal protection claim.

21 THE COURT: Okay. So I would give the plaintiff,
22 Ms. Borelli -- unless you want to do it sooner, I would --
23 let's see. If it comes in August 18th -- there's a motion to
24 dismiss -- I would give you three weeks, September 8th?

25 Is that good?

1 MS. BORELLI: Yes, Your Honor.

2 THE COURT: Okay. September 8th to respond to the
3 motion to dismiss. I'll try to rule on it as soon as I can. I
4 doubt I would have an argument, because I kind of feel like
5 we've talked about most of this stuff today. I probably would
6 just rule on the papers.

7 All right. Now, Ms. Borelli, can -- regardless of
8 whether I granted an injunction or denied it, we were going to
9 go to trial in this case.

10 Tell me what -- from the plaintiff's, from Mr. Adams'
11 perspective, what do you need to do, how long do you need, what
12 are you requesting me to do, in terms of scheduling?

13 I've already told you I'm kind of looking at
14 December, but I'm willing to be reasonable about it. If you
15 need longer, we'll consider longer. If -- we'll see about
16 shorter.

17 But tell me what needs to happen from the
18 plaintiff's -- Mr. Adams' perspective in order to get us to
19 trial.

20 MS. BORELLI: Well, Your Honor, I think we're eager
21 to make the trial date work that the court -- the timeline that
22 the court is offering us.

23 THE COURT: Okay.

24 MS. BORELLI: So a trial in December is acceptable.
25 Obviously, I have not conferred with my co-counsel or my

1 client. But one reason that just springs immediately to my
2 belief that might come -- my belief would be if --

3 THE COURT: Do you have -- can you press that button
4 so the green is --

5 MS. BORELLI: I apologize, Your Honor.

6 THE COURT: Yeah. I'm having trouble hearing you.
7 There you go.

8 MS. BORELLI: I'm so sorry, Your Honor.

9 So one reason that springs immediately to mind, in
10 terms of why we might need to ask for just a little bit longer,
11 is if our experts were unavailable.

12 THE COURT: Right.

13 MS. BORELLI: And I don't have that information. But
14 we'd be motivated to take the time that the court is offering
15 us.

16 THE COURT: Okay.

17 All right. Mr. Harmon, what says the school board?

18 MR. HARMON: Your Honor, I speak loudly so hopefully
19 you can hear me.

20 THE COURT: I can.

21 MR. HARMON: I can talk into the mike. I have kind
22 of a booming voice at times.

23 At this point, just kind of talking out loud about
24 it, I would assume there would be some discovery, in terms of
25 depositions of the plaintiff.

1 I don't know about plaintiff's mother, but likely
2 plaintiff, plaintiff's mother, those individuals that have
3 treated plaintiff for various issues. I don't know how many
4 we're talking about.

5 I know there was the Duke Medical Center, which is in
6 North Carolina. I know there's some pediatricians that have
7 been referenced. I don't know who they are.

8 The challenge with that is not necessarily my
9 schedule, but I often find sometimes deposing pediatricians or
10 medical doctors -- their schedules are somewhat tough.

11 THE COURT: Well, the only thing I'll say to you is,
12 obviously -- putting aside a motion for preliminary injunction,
13 going to trial within six months of a complaint being filed
14 is -- is hustling. There's no question about it.

15 But I feel -- if I was going to deny the preliminary
16 injunction, I feel it's important that I give Mr. Adams a trial
17 as soon as I possibly can. And so even if you have to hustle a
18 little bit, I'm going to be asking you to do that.

19 MR. HARMON: Sure.

20 THE COURT: And we were going to be here anyway,
21 whether I did it on a preliminary injunction or we were going
22 to go to trial, and -- and so I hear what you're saying.

23 I'm looking here -- what I'm kind of inclined to do
24 is this -- I've got a trial term in December -- you know,
25 obviously, December -- as you get later in the month, people

1 start to not want to be doing too much.

2 But I've got -- I've got a trial term that begins
3 December the 4th. And it goes for two weeks. And so, you
4 know, I'm guessing -- y'all tell me if I'm wrong.

5 I'm guessing the trial of this case on a non-jury
6 format -- what, two or three days, or something? It's not --
7 this isn't like -- right? Something like that?

8 MR. HARMON: I was going to say three, yes, Your
9 Honor.

10 THE COURT: Okay. Yeah. So we're not talking about
11 having to block off two weeks or anything. So I'm looking
12 somewhere in that window.

13 And I think what I might do is this, because even --
14 even Ms. Borelli acknowledges she's got to talk to her experts
15 and figure out -- you know, and people may not, frankly, have
16 thought exactly, What is my trial going to look like and
17 what -- and so what I think I'm going to do is to have you-all,
18 after I leave, either today or by phone, or whatever you want
19 to do -- to confer with each other, see if you can agree on a
20 schedule, see if you can come up with a protocol to get us from
21 here to there, and then -- and then submit that to me.

22 If you can't, then, you know, I'll do it. But I'd
23 rather have you-all do it. So what I'm going to do is just
24 tell you that right now I could probably offer you a trial
25 somewhere from December the 4th through December the 14th, some

1 three-day window in there.

2 Because right now I don't have any civil cases set
3 for that month, because nobody wants to go to trial in
4 December. And I might have a criminal case, but I would be
5 able to -- I would be able to handle that.

6 So I'm going to tentatively offer you that window.
7 I'm going to ask you-all to go with each other, talk, and then
8 submit to me a proposed schedule.

9 And all the schedule really needs to say is deadline
10 for fact discovery, deadline for expert discovery, and -- and
11 make sure that there's time to take depositions that you need
12 to take.

13 Since it's going to be a non-jury trial, I don't need
14 to consider motions for summary judgment or anything like that.
15 I would just -- I would probably look for proposed findings of
16 fact and conclusions of law or trial briefs in advance of the
17 trial, and then we'd try the case and then I would decide it.

18 So it can be a fairly bare-bones schedule. But
19 that's kind of what I'm looking for. Typically what I do in
20 non-jury trials -- rather than have you file actual briefs, I
21 actually ask you to submit proposed findings of fact and
22 conclusions of law, because that's what I have to write when I
23 decide the case.

24 And I have you do it in advance of trial that, in --
25 in a way that you predict what the evidence is going to be and

1 you cite the law and you make a finding, and -- you know, just
2 like I'm going to have to do under the rules.

3 Then we have the trial and then I let each of you
4 polish up your findings of fact based on what actually occurred
5 at the trial, submit it to me post trial, and then I help --
6 those help me to make my decisions.

7 I'm not saying, of course, that I'm just going to
8 pick one or the other, but that helps -- that replicates what I
9 have to do in order to decide the case under the rules. And so
10 that's likely what I'll do.

11 And so I'm not really thinking there will be a lot of
12 motion practice before trial or anything. I'm assuming y'all
13 will work in good faith with each other.

14 I'm assuming that you'll understand that you are on
15 an expedited schedule and things need to kind of get going. So
16 that's what we'll do.

17 And in order to kind of get us going, because --
18 because of the clock, I'm going to go ahead and ask you-all to
19 try to confer and to submit to me, on August 18th, some type of
20 joint proposal. That's the same day that the defendant's
21 motion to dismiss is due.

22 Ms. Borelli, is there anything else from the
23 plaintiff today that I can -- that I can address?

24 MS. BORELLI: No. No, Your Honor. Thank you.

25 THE COURT: Mr. Barron -- I'm sorry, Mr. Harmon.

1 MR. HARMON: That's okay, Your Honor. It's been a
2 long day.

3 THE COURT: It has.

4 MR. HARMON: Nothing else at this point, Your Honor.

5 THE COURT: All right. I'm going to issue a very
6 brief order, which denies the motion for preliminary injunction
7 and just simply refer back to the transcript of the hearing.

8 So if you want -- if you want that ruling, you'll
9 need to talk to the court reporter about that.

10 And then I will simply wait for the August 18th
11 submission based on that submission. I'll then issue some type
12 of a scheduling order. And hopefully we can land in the window
13 that I gave to you.

14 If it turns out that you think it's just too
15 ambitious, you know, I'm willing to consider going out a little
16 further. But I am sensitive to getting Mr. Adams' case tried
17 and decided, because I have denied the motion for preliminary
18 injunctive relief.

19 Anything else? Anything else, Mari?

20 COURTROOM DEPUTY: No, sir.

21 THE COURT: Anything else from the parties?

22 All right. Court is in recess. Thank you.

23 COURT SECURITY OFFICER: All rise.

24 (The proceedings concluded at 5:36 p.m.)

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