

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child, by his next)
friend, Wyatt Squires,)
)
Plaintiff,)
)
v.)
)
EVANSVILLE VANDERBURGH)
SCHOOL CORPORATION,)
)
Defendant.)

No. 3:18-cv-00037-WTL-MPB

Memorandum in Support of Motion for Preliminary Injunction

Introduction

J.A.W. is a transgender student attending two high schools in the Evansville Vanderburgh School Corporation (“EVSC”). Despite the fact that he is taking male hormones and presents as male in appearance, EVSC is denying him the ability to use male restrooms. In a virtually identical case the Seventh Circuit has held that a student was entitled to a preliminary injunction allowing him to use male restrooms, the restrooms associated with his identified, but not birth, gender. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir 2017), *pet. for certiorari dismissed*. In *Whitaker*, the Seventh Circuit found that the student was likely to prevail on his claim that being denied the bathrooms associated with his gender identity violated both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972. *Id.* at 1046-54. Similarly, J.A.W. asserts that EVSC’s bathroom policy violates both Title IX and equal protection. And, similarly, J.A.W. is entitled to a

preliminary injunction allowing him to use male facilities within EVSC.

The preliminary injunction standard

The standard in the Seventh Circuit for the granting of a preliminary injunction is clear. In order to determine whether a preliminary injunction should be granted, the Court weighs several factors:

- (1) whether the plaintiff has established a prima facie case, thus demonstrating at least a reasonable likelihood of success at trial;
- (2) whether the plaintiff's remedies at law are inadequate, thus causing irreparable harm pending the resolution of the substantive action if the injunction does not issue;
- (3) whether the threatened injury to the plaintiff outweighs the threatened harm the grant of the injunction may inflict on the defendant; and
- (4) whether, by the grant of the preliminary injunction, the public interest would be disserved.

See, e.g., Baja Contractors, Inc. v. City of Chicago, 830 F.2d 667, 675 (7th Cir. 1987). The heart of this test, however, is "a comparison of the likelihood, and the gravity of two types of error: erroneously granting a preliminary injunction, and erroneously denying it." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 590 (7th Cir. 1984). Thus, "the more likely [the preliminary injunction movant] is to win, the less the balance of harms must weigh in his favor." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015).

Facts

It is believed that the following facts will be adduced in support of the preliminary

injunction request.¹

J.A.W. is 16 years old and resides in Evansville. (Declaration of J.A.W. , Dkt. 17-1 ["J.A.W. Dec."] ¶¶ 2-3). He is a junior and is a student within EVSC and attends a program in two separate EVSC high schools. (*Id.* ¶¶ 4-5).

The gender assigned to J.A.W. at birth, and noted on his birth certificate, is female. (*Id.* ¶ 6). Nevertheless, he has long identified himself as male and has presented himself to the world as male. (*Id.* ¶ 7). By the time he was 12 he informed his family that he identified himself as male and at that time he asked his family, teachers, and friends to refer to him by a male first name and use male pronouns in referring to him. (*Id.* ¶¶ 8, 10). Also by that time he had begun to make himself masculine in appearance, which included wearing male clothing and cutting his hair in a masculine style. (*Id.* ¶ 9). He continues to wear male clothing and has a masculine hair style. (*Id.*).

When he was a freshman and attended one of EVSC's high schools he began to use male restrooms. (*Id.* ¶ 11). However, he was instructed by a school administrator that he was not allowed to use these restrooms and he had to either use female restrooms or the bathroom in the office of the school nurse. (*Id.* ¶¶ 12-13). The nurse's restroom was not a viable option as it was a far distance from his classes and it was frequently locked as the nurse was often not in the office. (*Id.* ¶ 14).

Moreover, J.A.W. did not want to use the female restrooms as he does not identify as female. (*Id.* ¶ 15). Thus, even as a freshman he was uncomfortable using female

¹ Inasmuch as discovery has not yet occurred in this case, J.A.W. reserves the right to supplement the following factual information.

restrooms. (*Id.* ¶ 16). It caused him emotional and psychological difficulties as it prevented him from presenting himself to the world as male. (*Id.*).

During both his freshman and sophomore years he took gym. (*Id.* ¶¶ 18-19). He was required to change in the female locker room, but he and another transgender student were allowed to change together in an upstairs part of the locker room that was removed from other students. (*Id.* ¶¶ 17, 19).

When J.A.W. was a sophomore he asked a school administrator if he could use the male restrooms again as he believed it was the position of the United States Department of Education that a transgender student could use the bathroom of their identified gender. (*Id.* ¶18). He was again told that he could not use male restrooms. (*Id.*).

J.A.W. is under a physician's care and has been diagnosed with gender dysphoria. (*Id.* ¶ 20). The American Psychiatric Association notes that gender dysphoria "involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify." American Psychiatric Association—Patients & Families—Gender Dysphoria, *What is Gender Dysphoria*, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited March 9, 2018). "Treatment options for gender dysphoria include counseling, cross-sex hormones, puberty suppression and gender reassignment surgery." American Psychiatric Association—Patients & Families—Gender Dysphoria, *What is Gender Dysphoria-Treatment*, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited March 9, 2018). For more than seven months J.A.W. has been prescribed, and has been taking, male hormones. (J.A.W. Dec. ¶ 21). These have

accelerated the development of his male characteristics and he does not appear female. (*Id.* ¶¶ 22-23).

At this point, using male restrooms would undermine his transition and would just be wrong as he is not female. (*Id.* ¶ 24). Moreover, use of the bathroom in the nurse's office is no more of a viable option than it was two years ago. (*Id.* ¶ 25). Not only is it still removed from his classes and not readily accessible, but using this bathroom would emphasize to both him and the school community that he is different than everyone else. (*Id.*). This would undermine his transition. (*Id.*).

Because he is not allowed to use the male restrooms and he is uncomfortable using the female restrooms J.A.W. attempts to solve this problem by not using any restrooms while in school. (*Id.* ¶ 26). He therefore severely restricts his fluid intake in an attempt to prevent him from having to use the bathroom while attending school. (*Id.*). However, this causes him pain and discomfort. (*Id.* ¶ 27). And, sometimes he just has to use the restroom while at school. (*Id.* ¶ 28). On these few occasions he has used the female restrooms as he does not want to risk being disciplined by EVSC for using the male restrooms. (*Id.*). However, using the female restrooms makes him feel uncomfortable and has led to depression and other emotional problems. (*Id.*).

The male restrooms in the schools that J.A.W. attends have urinals and stalls with single toilets in them. (*Id.* ¶ 33).

In January of 2018 J.A.W.'s attorney contacted the attorney for EVSC asking that he be allowed to use the male bathroom facilities in the schools. (*Id.* ¶ 29). In a reply letter, dated February 5, 2018, the attorney indicated that while EVSC would continue to make

a private bathroom available to him—presumably referring to the nurse’s restroom—EVSC was not willing to allow him to use male restrooms. (*Id.* ¶ 31). And, the letter ended by specifying that J.A.W. “cannot use male restrooms without risk of punishment.” (emphasis in original). (*Id.* ¶ 32).

By not allowing him to use the restroom of his identified gender, EVSC is forcing J.A.W. to deny who he is and is making him feel different. (*Id.* ¶ 33).

EVSC is a recipient of federal funding. (*See, e.g.*, EVSC-Evansville Vanderburgh School Corporation, *Free and Reduced Lunch*, http://district.evscschools.com/family_services/food_and_nutrition/free_and_reduced_lunch/ [last visited March 11, 2018] [noting the EVSC participates in the federal National School Lunch Program²]).

Argument

I. J.A.W. will prevail on the merits of his claim

It is, of course, axiomatic that “[j]ust as courts of appeals must follow Supreme Court precedent, so to must district courts follow decisions by courts of appeal unless and until they have been explicitly overturned.” *Bontrager v. Indiana Family and Social Services Administration*, 829 F. Supp. 2d 688, 694 (N.D. Ind. 2011), *aff’d*, 697 F.3d 604 (7th Cir. 2012). The *Whitaker* case, decided less than a year ago, has most assuredly not been overturned and is therefore binding on this Court. Given that his case is on all fours with

² “The National School Lunch Program is a federally assisted meal program operating in public and nonprofit private schools and residential child care institutions. It provides nutritionally balanced, low-cost or free lunches to children each school day.” USDA-United States Department of Agriculture, Food and Nutrition Service, *National School Lunch Program (NLSP)*, www.fns.usda.gov/nslp/national-school-lunch-program-nslp (last visited March 11, 2018).

Whitaker, J.A.W. has established a probability of success on the merits here.

A. *Whitaker* demonstrates that J.A.W. has a probability of success in demonstrating that he will prevail on his Title IX claim

Title IX provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). A covered institution may not, among other things:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions or other treatment.

34 C.F.R. § 106.31(b)(1)-(4). The regulations provide that a recipient of federal funding “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

In *Whitaker* a transgender student, who was identified as female on his birth certificate, but who identified as male, and was diagnosed with gender dysphoria, sued when his high school refused to allow him to use the male restrooms. 858 F.3d at 1040-41. The school, like EVSC, had indicated that the student (“Ash”)

could only use the girls’ restrooms or a gender-neutral restroom that was in the school’s main office, which was quite a distance from his classrooms.

Because Ash had publicly transitioned, he believed that using the girls' restrooms would undermine his transition. Additionally, since Ash was the only student who was permitted to use the gender-neutral bathroom in the school's office, he feared that using it would draw further attention to his transition and status as a transgender student.

Id. at 1041.

In concluding that the plaintiff in *Whitaker* had demonstrated a probability of success on his Title IX claim the court looked first at the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality), where a four-judge plurality held Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibiting, among other things, sex discrimination in employment, was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotype." 490 U.S. at 251. (internal quotations and citations omitted). Therefore, the Seventh Circuit noted that "[f]ollowing *Price Waterhouse*, this court and others have recognized a cause of action under Title VII when an adverse action is taken because of an employee's failure to conform to sex stereotypes." *Whitaker*, 858 F.3d at 1048 (citing cases). "Our most recent application occurred when, sitting *en banc*, we held that a homosexual plaintiff can state a Title VII claim of sex discrimination based upon a theory of sex-stereotyping." *Id.* at 1048 (citing *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017) (*en banc*)).

Having set out the applicable law as to Title VII the court in *Whitaker* noted that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048. The court noted that it "look[s] to Title VII when construing Title IX," *id.* at 1047, and that, therefore, a

“transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping theory,” *id.* at 1049. The court further concluded, in language directly apposite here:

Ash can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys’ restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District’s policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act. Further, based on the record here, these gender-neutral alternatives were not true alternatives because of their distant location to Ash’s classrooms and the increased stigmatization they caused Ash. Rather, the School District only continued to treat Ash differently when it provided him with access to these gender-neutral bathrooms because he was the only student given access.

Id. at 1049-50. The same is true here. J.A.W. has been banned from the male restrooms by EVSC because of his gender non-conformance. This violates Title IX and J.A.W will prevail on the merits of his Title IX claim.

B. *Whitaker* also demonstrates that J.A.W. will prevail on his equal protection claim

In *Whitaker* the court concluded that the transgender student was discriminated against on the grounds of sex because “the School District’s policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate.” *Id.* at 1051. Therefore, the discrimination was subject to elevated scrutiny as “when a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is

‘exceedingly persuasive.’” *Id.* at 1050 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).³

At this point EVSC has not established the basis for its decision to exclude J.A.W. from the restrooms of his identified gender. However, it presumably is based on its concerns for other male students who would be sharing a bathroom with J.A.W. However, the court in *Whitaker* rejected this as a reason satisfying the required elevated scrutiny. There the school district argued that elevated scrutiny was met because of its need to protect all student privacy rights. *Id.* at 1052. However, the district presented no evidence to justify this concern. *Id.* Moreover, the court concluded, again in language directly applicable here, that

[a] transgender student’s presence in the restroom provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells

³ Given that the Seventh Circuit concluded that the student was subjected to sex-based discrimination it had no need “to reach the question of whether transgender status is per se entitled to heightened scrutiny.” *Id.* at 1051. The Supreme Court has noted that heightened scrutiny is applied to groups that have “experienced a history of purposeful unequal treatment. . . or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks and citation omitted). The Court has also noted that it must be considered whether the group in question has been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Id.* (internal quotation marks and citation omitted). Finally, the Court looks to whether the group “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group.” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Based on this, a number of courts have recognized that discrimination against transgender individuals is entitled to heightened scrutiny. *See, e.g., F.V. v. Barron*, --F. Supp. 3d--, No. 1:17-CV-00170-CWD, 2018 WL 1152405, *11 (D. Idaho March 5, 2018); *Eoancho v. Pine-Richland School Dist.*, 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). As these cases make clear, discrimination based on transgender status must be justified by elevated scrutiny, regardless of whether it represents sex discrimination. However, in light of *Whitaker* this Court need not find this, but may instead rest on *Whitaker*’s conclusion that this is unlawful sex discrimination.

us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall. Nothing in the record suggests that the bathrooms at [the] High School are particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line. Therefore, this court agrees with the district court that the School District's privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.

Id. at 1052-53.

EVSC will also not be able to mount "an exceedingly persuasive justification" for its sex-based discrimination against J.A.W. He is therefore likely to prevail on his equal protection claim as well.

II. The other requirements for the grant of a preliminary injunction are met here as well

A. J.A.W. is faced with irreparable harm for which there is no adequate remedy at law

It is well-established that the denial of constitutional rights is irreparable harm in and of itself. "Courts have . . . held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *see also, e.g., Cohen v. Coahoma County, Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law.").

Given that J.A.W.'s equal protection rights are being violated he has established

that he is suffering irreparable harm. However, he has also established that being denied access to the restrooms of his identified gender causes him stress, depression, and psychological harm. (J.A.W. Dec. ¶¶ 24-25, 28, 34). And, his attempt at managing the situation by trying to go all day without using the restroom is causing him pain and discomfort. (*Id.* ¶ 28).

In *Whitaker* the Seventh Circuit noted that the student had mental health professionals who, like J.A.W., explained how denying the use of male restrooms caused the student psychological harm. 858 F.3d at 1045. The court also found that

the School District's argument that Ash's harm was self-inflicted because he chose not to use the gender-neutral restrooms, fails to comprehend the harm that Ash has identified. The School District actually exacerbated the harm, when it dismissed him to a separate bathroom where he was the only student who had access. This action further stigmatized Ash, indicating that he was "different" because he was a transgender boy.

Moreover, the record demonstrates that these bathrooms were not located close to Ash's classrooms. Therefore, he was faced with the unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or avoid use of the bathroom altogether at the expense of his health.

Id. The court therefore concluded that the student had demonstrated irreparable harm.

Id. And, given that the student had alleged prospective harm, the court concluded that the student had no adequate remedies at law. *Id.* at 1046.

In *Evancho v. Pine-Richland School Dist.*, *supra*, the court, based on equal protection, granted a preliminary injunction to transgender students who had been prohibited from using bathrooms of their identified genders. 237 F. Supp. 3d at 295. In finding that the plaintiffs there satisfied this preliminary injunction requirement the court noted that

[c]ourts have long recognized that disparate treatment itself stigmatizes members of a disfavored group as innately inferior . . . and raises the “inevitable inference” of animosity toward those impacted by the involved classification. . . . [I]t is not a long leap, nor really a leap at all, to give credence to the Plaintiffs’ assertions that they subjectively feel marginalized, and objectively are marginalized, which is causing them genuine distress, anxiety, discomfort and humiliation. . . . This Court is in no position to downplay or minimize the nature or consequences of such harm or the likelihood that Plaintiffs will prove it. Its relatively unquantifiable nature makes the Plaintiffs’ harm no less real. In fact, that Plaintiffs’ harm is intangible and therefore cannot later be remedied by monetary relief is what makes it “irreparable” for these purposes, and is what makes a preliminary injunction appropriate in this case.

Id. at 294 (quoting *Romer v. Evans*, 517 U.S. 620, 621 (1996) (other internal citations and footnotes omitted)).

J.A.W. is faced with prospective irreparable harm for which there is no adequate remedy at law.

B. The balance of harms and the public interest favor the issuance of a preliminary injunction here

In *Whitaker* the Seventh Circuit concluded that the school district had failed to establish any harm that would result from the issuance of a preliminary injunction and that there was no evidence that the public would be harmed by the issuance of the injunction. 858 F.3d at 1054. However, in *Whitaker* the student had been able to use the bathroom of his identified gender for six months, without incident, before the prohibition was enacted. *Id.* Here, J.A.W. has been prohibited from using the male restrooms since he was a freshman. This does not change the balance of harms here.

First, the court in *Whitaker* credited the statements made by *amici*, school administrators from twenty-one states and the District of Columbia, who “uniformly

agree that the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in their combined experience, all students' needs are best served when students are treated equally." 858 F.3d at 1055.

Second, inasmuch as J.A.W. has established a substantial likelihood of success on the merits of his claim, "no substantial harm to others can be said to inhere in its enjoinder." See, e.g., *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). An injunction will only force EVSC to conform its conduct to legal norms and the requirements of the United States Constitution and federal law. And, a defendant cannot claim that requiring it to comply with the Constitution and federal law is harmful. See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (holding that if a governmental entity "is applying [a] policy in a manner that violates [the plaintiff's] First Amendment rights . . . then [the] claimed harm is no harm at all").

The public interest is also furthered by the injunction here inasmuch as an injunction in favor of constitutional rights and the rights secured by Title IX is always in the public interest. See, e.g., *Dodds v. United States Department of Education*, 845 F.3d 217, 222 (6th Cir. 2016) (denying a stay pending appeal of an injunction requiring a school district to allow a transgender student to use the female restrooms and noting that the "public interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe's constitutional and civil rights, a purpose that is always in the public interest."); *Déjà vu of Nashville*, 274 F.3d at 400 (it is "always in the public

interest to prevent violation of a party's constitutional rights) (internal quotation marks and citation omitted); *Cohen v. Brown University*, 991 F.2d 888, 906 (1st Cir. 1993) (noting that the district court did not err in concluding "that the overriding public interest lay in the firm enforcement of Title IX).

The balance of harms and the public interest therefore favor the issuance of a preliminary injunction here.

III. The injunction should issue without bond

The issuance of a preliminary injunction will not impose any monetary injuries on the school district. In the absence of such injuries, no bond should be required. *See, e.g., Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996).

Conclusion

For the foregoing reasons the preliminary injunction must be granted, without bond, and the Evansville Vanderburgh School Corporation must be ordered to allow J.A.W. to use male restrooms without penalty.

s/ Kenneth J. Falk

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Certificate of Service

I hereby certify that on this 10th day of April, 2018, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's system on:

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