

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

ORLANDO DIVISION

JOHN DOE, a minor, by his parents
and next friends, SUSAN AND JACK
DOE,

Plaintiff,

No. 6:18-CV-102-RBD-GJK

v.

VOLUSIA COUNTY SCHOOL BOARD,

Defendant.

**REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

John Doe submits this reply in support of his Motion for Preliminary Injunction, and supporting declarations from himself (“John Supp. Decl.”) and Cynthia Fisher, LCSW (“Fisher Decl.”). Plaintiff has established irreparable harm and that he is likely to succeed on the merits of this case. Accordingly, a preliminary injunction is warranted and necessary.

I. Plaintiff Has Submitted Extensive Evidence of Irreparable Harm

In addition to the irreparable harms that inherently result from school-based discrimination, *Ray v. Sch. Dist. of DeSoto Cty.*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987); *Daniels v. Sch. Bd. of Brevard Cty.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997), John has submitted extensive evidence that VCSB’s conduct is causing him to suffer irreparable harm, ECF No. 24-1, 24-2. In response, VCSB contends only that John appears “happy” to various staff members who occasionally see him at school. But that in no way rebuts the substantial evidence of serious harm established by the far more probative testimony of John, his mother, and his treating therapist. *Id.*; John Supp. Decl. ¶¶ 3-5; Fisher Decl. ¶¶ 6-14. VCSB also erroneously contends that there is no “actual” or

“imminent” harm because John is not enrolled in any PE class or sports activity this year “by choice.” ECF No. 31, at 13. As the Supreme Court has explained, actual harm exists where a defendant “erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group,” and thereby discourages a member of the disadvantaged group from participating in a program or activity. *See, e.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). On this basis, in *Doe I v. Trump*, the court found that a transgender military academy student was irreparably harmed by the President’s ban on transgender military service where the student was likely to graduate and attempt to join the military. 275 F. Supp. 3d 167, 200, 216 (D.D.C. 2017). Similarly, here, John would sign up for elective PE courses and try out for the boys’ basketball team if he could use the boys’ locker room, but the policy is prohibiting him from doing so. ECF No. 24-1 ¶¶ 23-24. Being deprived of the opportunity to participate in these activities constitutes irreparable harm.

Finally, VCSB’s claim that John cannot show irreparable harm because he did not file this lawsuit sooner has no merit. John will only experience high school and adolescence once; he is experiencing male puberty and recently had chest surgery, both of which heighten the harms caused by VCSB’s refusal to treat him like other boys. And as VCSB’s opposition to this motion establishes, John’s only hope of obtaining relief lies with this Court. In short, John has demonstrated the precise harms that necessitate preliminary injunctive relief. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *6 (E.D. Wis. Sept. 22, 2016) (“spending the [remaining years of high school] trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized” cannot be “rectified by a monetary judgment”), *aff’d*, 858 F.3d 1034 (7th Cir. 2017); *see also Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (finding irreparable harm where Plaintiff’s marginalization causes “distress, anxiety, discomfort and humiliation”); *Bd. of*

Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 878 (S.D. Ohio 2016) (“the stigma and isolation [Plaintiff] feels when she is singled out and forced to use a separate bathroom contribute to and exacerbate her mental-health challenges”).

II. Plaintiff Seeks a Prohibitory Injunction But Also Meets the Standard for a Mandatory Injunction

VCSB’s argument that John seeks a mandatory rather than a prohibitory injunction is without merit. Prohibitory injunctions “restrain a party from doing something,” *see United States v. Gilbert*, 244 F.3d 888, 908 n.49 (11th Cir. 2001), such as “further violating” the law, *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). An injunction restraining a public entity from enforcing an unconstitutional law or policy is a quintessential example of such an injunction. *See, e.g., Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001). Here, John seeks a prohibitory injunction to “enjoin[] [VCSB] from enforcing its policy.” ECF No. 31, at 20. Moreover, “as a practical matter,” prohibitory injunctions often “alter the status quo.” *See Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). For example, in *Horton* the injunction altered the status quo by barring the City from continuing to “ma[k]e arrests [and] seize[] instruments” under the statute. Nonetheless, the injunction was prohibitory because it *restrained* the city’s actions rather than requiring some affirmative act. *See* 272 F.3d at 1322, 1326.

In contrast, mandatory injunctions require a party to “take action,” *Meghrig*, 516 U.S. at 484; *accord King Ranch, Inc. v. King Ranch Contractors, LLC*, No. 6:12-CV-597-ORL-37, 2013 WL 2371246, at *4 (M.D. Fla. May 30, 2013) or “command[] some positive act.” *Preferred Sites, LLC v. Troup Cty.*, 296 F.3d 1210, 1221 (11th Cir. 2002) (quoting *Doherty Assocs.*, 60 F.3d at 34). Unlike the relief sought here, the cases cited by VCSB required some affirmative act. ECF No. 31, at 4 (citing *Powers v. Sec’y, Fla. Dep’t of Corr.*, 691 Fed App’x 581, 582 (11th Cir. 2017) (per

curiam) (“directing prison officials to provide [a prisoner’s] Shabbat meals”); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (requiring addition of representatives to a governing board); *Exhibitors Poster Exch., Inc. v. Nat’l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) (per curiam) (directing defendant to sell plaintiff’s products)). Here, VCSB is not being asked to do anything other than refrain from “enforcing any policy, custom, or usage that treats Plaintiff differently than other boys.” ECF No. 24-5, at 2.

In any event, John meets the mandatory injunction standard, which requires that a “plaintiff must make a clear showing of entitlement to the relief sought *or* demonstrate that extreme or serious damage would result absent the relief.” *King Ranch, Inc.*, 2013 WL 2371246, at *4 (emphasis added) (citation omitted). Here, a wall of authority holds that treating transgender students differently violates Title IX and the Equal Protection Clause. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-54 (7th Cir. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, No. GLR-16-2622, 2018 WL 1257097, at *4-17 (D. Md. Mar. 12, 2018); *Evancho*, 237 F. Supp. at 284-95; *Highland*, 208 F. Supp. 3d at 865-77. And absent relief, John will experience serious irreparable harm.

III. Title IX Prohibits VCSB from Discriminating Against Transgender Students

VCSB has failed to distinguish the many other federal court decisions ruling in favor of transgender students in Title IX cases involving virtually identical facts. Contrary to VCSB’s argument, the Department of Education’s withdrawal of its guidance on how to apply Title IX to transgender students has no bearing on this case. John does not rely on that guidance, but rather on the weight of authority holding that the statute itself prohibits school districts from discriminating against transgender students.

Courts considering similar cases have soundly rejected VCBS’s argument that the Title IX regulation permitting separate restrooms for boys and girls permits schools to exclude transgender

students from those facilities. *Whitaker*, 858 F.3d 1034; *M.A.B.*, 2018 WL 1257097; *Evancho*, 237 F. Supp. 3d 267; *Highland*, 208 F. Supp. 3d 850. As these courts have recognized, transgender students do not challenge the provision of separate restrooms for male and female students; rather, transgender boys simply wish to be treated the same as other boys, and transgender girls the same as other girls. A “[s]chool [d]istrict’s policy [that] subjects . . . a transgender student[] to different rules, sanctions, and treatment than non-transgender students . . . violat[es] Title IX.” *Whitaker*, 858 F.3d at 1049–50. The same is true here.

These courts have recognized that Title IX must be construed in accordance with its broad remedial intent and decades of precedent in sex discrimination cases under federal law. In particular, as the Eleventh Circuit held in *Glenn v. Brumby*, discrimination against a transgender person is inherently based upon impermissible gender stereotypes. 663 F.3d 1312, 1317 (11th Cir. 2011). VCSB staff assert that they “have never taken any actions against the Plaintiff that would require him to conform to a certain gender or gender stereotype.” ECF No. 33 ¶ 4; ECF No. 35 ¶ 5; ECF No. 36 ¶ 5; ECF No. 34 ¶ 4; ECF No. 32 ¶ 3. Yet it is uncontested that VCSB has a policy of excluding John from the boys’ restrooms and facilities solely because he is a boy who is transgender, rather than non-transgender. As other courts have concluded, it is difficult to conceive of a more direct example of sex stereotyping than a policy that bans transgender students, and only those students, from the group restroom and locker room facilities available to other students. *See Whitaker*, 858 F.3d at 1048; *M.A.B.*, 2018 WL 1257097, at *9.

Rather than addressing this binding precedent, VCSB relies on *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), the dissent from *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017), and *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). *See* ECF No. 31, at 7-8. The appeal in *Johnston* was dismissed after the university agreed to end its exclusionary restroom policy and

convene a working group addressing the needs of transgender students. *Joint Statement from the University of Pittsburgh & Seamus Johnston*, Univ. of Pittsburgh (Mar. 29, 2016), <http://www.news.pitt.edu/news/joint-statement-university-pittsburgh-and-seamus-johnston>.

Another court *in the same district* as *Johnston* subsequently ruled that treating transgender boys differently from other boys for the purposes of accessing restrooms violates the Equal Protection Clause, in direct contradiction to *Johnston*. *See Evancho*, 237 F. Supp. 3d 267, 286-87 & n.32-33. And both *G.G.* and *Texas* hinged on the scope of *Auer* deference towards the Department of Education's interpretation of its own regulations, which is not at issue here. *See* 822 F.3d at 719; 201 F. Supp. 3d at 832. The Fourth Circuit decision in *G.G.* was vacated, 137 S. Ct. at 1239, and the injunction in *Texas* dissolved, No. 7:16-CV-54-O, ECF No. 128, at 3 (Mar. 3, 2017), following the rescission of the May 2016 Dear Colleague Letter.

IV. Plaintiff is Likely to Succeed on His Equal Protection Claim and VCSB's Purported Interest in Protecting Privacy Rights Cannot Survive Constitutional Scrutiny

VCSB concedes that intermediate scrutiny applies to John's equal protection claim. ECF No. 31, at 17. Like the school defendants in similar cases around the country, VCSB contends that its policy of banning Plaintiff from the restrooms and facilities available to other boys is based on "recognized privacy concerns and the biological differences between the sexes." *Id.* at 20. While schools have an interest in safeguarding the privacy of all students, courts have held that excluding transgender students from the same facilities available to other students cannot satisfy even rational basis review, much less heightened scrutiny. *See, e.g., Highland*, 208 F. Supp. 3d at 874-77 (finding that a school's policy was not even rationally related to its interest in protecting its students' privacy). Non-transgender students "have no constitutional right not to share restrooms and locker rooms with transgender students." *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d

324, 387 (E.D. Pa. 2017); accord *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *24 (N.D. Ill. Oct. 18, 2016).

VCSB's privacy concerns also lack a factual basis. There is no evidence that John himself, if he used the boys' facilities, "would infringe upon the privacy rights of any other students." See *Highland*, 208 F. Supp. 3d at 874. Indeed, John has used the boys' restrooms at school in the past "without incident or complaint from another student." *Whitaker*, 858 F.3d at 1052; ECF No. 24-1 ¶¶ 6, 17. As the Seventh Circuit explained,

Common sense tells 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.

Whitaker, 858 F.3d at 1052. VCSB has submitted no evidence that its facilities "are particularly susceptible to an intrusion upon an individual's privacy." *Id.* As such, VCSB's privacy concerns are based upon nothing more than "sheer conjecture and abstraction." *Id.* Because VCSB's purported concern for other students' privacy cannot satisfy any level of scrutiny, much less intermediate scrutiny, Plaintiff is likely to succeed on the merits of the equal protection claim.

Plaintiff is suffering irreparable harm and is likely to succeed on the merits of both his Title IX and his Equal Protection claims. In addition, the public has no interest in enforcing an unconstitutional policy and VCSB has not even articulated, much less demonstrated, any harm it will suffer if the Court grants an injunction. Accordingly, this Court should issue a preliminary injunction.

Date: March 27, 2018

Respectfully Submitted,

/s/ Asaf Orr

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send an electronic notice to all counsel of record.

/s/ Asaf Orr

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

ORLANDO DIVISION

JOHN DOE, a minor, by his parents
and next friends, SUSAN AND
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Plaintiff,

No. 6:18-CV-102-RBD-GJK

v.

VOLUSIA COUNTY SCHOOL BOARD,

Defendant.

SUPPLEMENTAL DECLARATION OF JOHN DOE

I, John Doe, under penalty of perjury, hereby state as follows:

1. I am fifteen years old and am the plaintiff student in this case. I have personal knowledge of the matters stated in this declaration.
2. I read the declarations that staff members at my school filed on March 20, 2018. I became very upset reading those declarations and especially the ones by the Dean of Students and my guidance counselor.
3. My guidance counselor is not my therapist and I have never thought of her in that way. I have a therapist who I have been seeing for almost three years. I talk to my guidance counselor about things like grades and classes. I have also talked to her about more personal things, but I do not talk to her about how hard it is to not be able to use the boys' restrooms and locker rooms. I have known for a long time that the staff

members at my school cannot or will not help me when it comes to these issues. I decided that I had to file this lawsuit because the school refused to fix these problems.

4. Some of the declarations also say that I was not upset about changing for PE in the media center. That is not true at all. I did end up choosing that option, but that was only because the school would not let me use the boys' locker room. My Principal also wrote that she thinks I chose the media room option because of its convenient location. It was never convenient for me to change for PE in the media center. I chose that option because the school would not let me use the locker room and because online PE was a terrible experience. I am not taking PE now because I don't want to have to go through that again. If I could use the boys' locker room, I would take PE. I would also try out for the boys' basketball team if I could use the locker room with the rest of the team and if I could improve my grades.

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5. I said this in my last declaration, but it is important to me to say it again. I still have more than two years of high school left. I do not want to spend that time feeling angry about school and worrying about how to make people accept me for who I am. I should be thinking about how to go to college and what I want to be when I grow up—not how to hide from other kids and adults when I use the restroom or how I can make it through the day without going to the restroom at all.

This declaration was executed this 27th day of March, 2018, in Volusia County, Florida.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

John Doe
John Doe

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

**JOHN DOE, a minor, by his parents and
next friends, SUSAN AND JACK DOE,**

Plaintiff,

No. 6:18-CV-102-RBD-GJK

v.

**VOLUSIA COUNTY SCHOOL BOARD,
Defendant.**

DECLARATION OF CYNTHIA FISHER, LCSW

I, Cynthia Fisher, declare as follows:

1. I am over the age of eighteen and submit this expert declaration based on my personal knowledge.
2. If called to testify in this matter, I would testify truthfully and based on my expert opinion. The opinions and conclusions I express herein are based on a reasonable degree of scientific certainty.
3. I received my Bachelor of the Arts (BA) degree from Rhodes College and my Masters in Social Work (MSW) from the University of Central Florida. I have in excess of 60 hours specialized training in the treatment of transgender individuals plus 4.5 years of specialized clinical field experience with transgender clients. I am a candidate for

Gender Therapist certification by WPATH (World Professional Association for Transgender Health).

4. John Doe has been my client since April 2015 when he presented for treatment of gender dysphoria. He has attended individual psychotherapy sessions regularly throughout the last 3 years in addition to a bi-weekly support group for transgender teens.

5. I am aware of John's lawsuit against the School District and have been directly involved in trying to get the school to treat John like other boys. I attended a meeting with John, John's parents, and various school staff on October 19, 2016. I reviewed the declarations of the Principal, Physical Education Director, Equity Officer, School Counselor, and Dean of John's school, which were provided to me by John's attorneys.

6. Throughout our clinical relationship, being treated differently than other students at school by being barred from boys' restrooms and changing facilities has been a recurring theme and has contributed strongly to John's daily stress and distress at school. John's psychological responses to that stress have evolved over time. In Middle School, John feared being socially ostracized and isolated and had nightmares about being outed. In both Middle School and High School, he has felt burdened and anxious about the need to lie to other students when questioned about why he is using specially designated restrooms or changing facilities. He felt and feels that he is not afforded the same privacy as other students because of this treatment.

7. When John was about to enter High School, he believed that he would have a fresh start. He thought that since none of the faculty would know him from before, and since he has been on hormone therapy and looks like other boys, he would be able to use the boys' restrooms and locker rooms. He expressed his relief and excitement over this anticipated change. Once John started school, he realized this was not the case. John was very distressed to learn that the staff at his new school were aware of his transgender identity and had again designated alternative restroom and locker room arrangements for him, refusing to treat him the same as other boys. John had a lot of anxiety and stress related to gym because of this differential treatment and the way it stigmatized him. This adverse treatment also negatively affects John's academic performance because it undermines his ability to focus on school.

8. A meeting was held in October 2016 at John's school to address these problems, which I attended. I advocated for the school to treat John the same as other boys for all purposes, but the school refused to do that with respect to restrooms and locker rooms. I have reviewed the notes about this meeting that were attached to several declarations in this case. While it is true that an agreement was reached on what would constitute the "best" of the options presented by the District, none of which John wanted and all of which singled him out as different from other boys, that does not mean that the school has addressed this issue or protected John from harm. John continues to experience stress and anxiety regarding restrooms and locker rooms at school, as would any child subjected to such stigmatizing treatment.

9. By treating John as a boy for some purposes but not for others, the school is also communicating to John that there is something wrong with him. Currently, John's greatest stress lies in his belief that the school district believes he is a threat to other boys. Despite the fact that John has undergone years of social and medical transition, he is very upset that the school administrators do not see him as a boy. These realizations create for John a pervasive experience of otherness. He feels singled out for being different, angry, and that the policy is unfair.

10. John has taken extensive steps to socially and medically transition, including by taking testosterone and recently having chest surgery, which means he looks like a typical teenage boy. The school's policy prevents him from fully completing his social transition, which is harmful to John.

11. Statistically, transgender teens who do not receive support are at significantly increased risk of anxiety, depression, substance abuse, suicidal ideation, poor academic performance, and dropping out of school. An abusive or hostile school environment has been found to be a major contributing factor to these harms, particularly when the hostility comes from staff. John clearly interprets the restroom policy as a District-sanctioned personal attack. This, in turn, undermines John's ability to trust the staff members around him, including his own teachers.

12. I read the declarations from school staff who wrote that John "[REDACTED]" None of these staff members has a therapeutic relationship with John that could provide a basis for evaluating his overall mental health. While it is true that John has so far avoided the most serious harms that are often

associated with a stigmatizing environment, that is a separate issue from whether John is experiencing significant stress and anxiety that puts him at both immediate and long-term risk of harm. John has several important protective factors available to him, including an unconditionally affirming family, access to transition-related care, regular and ongoing psychotherapy, supportive friends, and his own resilience. He also meets bi-weekly with other transgender teenagers. Although these protective factors have mitigated the impact of the harm to some degree, John still experiences serious harm as a result of the school's policy – harm that is happening now, and harm that is highly likely to have long term negative health consequences.

13. John will only experience high school and adolescence once. By stigmatizing John as different from other boys, the District is harming John's mental health and wellbeing. The full extent of that harm will not be apparent until John reaches adulthood. And while John is lucky enough to have several protective factors in place as described above, John's experiences in high school could negatively affect his mental health for years to come. If the source of John's stress and anxiety at school was alleviated, John would be less likely to need long-term psychotherapy and would be less dependent on the protective factors he does have in place.

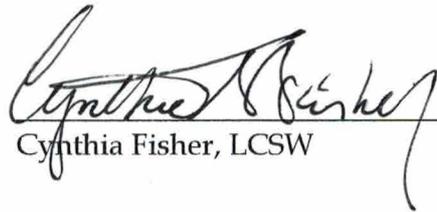
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14. If John were treated like other boys, there is every reason to believe that his mental health, attitude toward school, and ability to pay attention in class will improve significantly.

This declaration was executed this 27th day of March, 2018, in Volusia County, Florida.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.


Cynthia Fisher, LCSW