



permitted to decide which restroom he uses based on his gender identity, irrespective of the gender designation on his birth certificate and various school records, his legal status as a minor, and with or without parental consent. According to Plaintiff, a student's request to use the restroom facilities aligned with his or her professed gender identity is itself sufficient proof of such identity to trigger a statutory and constitutional right to do so. In Plaintiff's words, "I shouldn't have to, I guess, provide documentation that proves that I am transgender. I shouldn't have to, you know, show these documents to my counselor to be acknowledged as male. . . . It's what I identify with." Plaintiff's Deposition, attached as Exhibit 1, at 91 ("Deposition").

Plaintiff relies exclusively on *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed*, in support of his claims that Title IX and the Equal Protection Clause require EVSC to permit him to access the boys' restrooms. But in *Whitaker*, the Seventh Circuit specifically noted that the case before it was not one in which "a student has merely announced that he is a different gender." *Id.* at 1051. This, on the other hand, is just such a case. The birth certificate Plaintiff's mother presented to EVSC lists Plaintiff as female. All school records are maintained using Plaintiff's birth name, and all sex designations reflect that Plaintiff is female. Plaintiff's mother has never sought to change Plaintiff's sex designation, nor did she request that Plaintiff be permitted to use the boys' restrooms at school. It was only through the discovery process in this case that EVSC even learned that Plaintiff had been diagnosed with gender dysphoria and had begun cross-sex hormone therapy.

According to Plaintiff, when a student announces his or her transgender status, a school must fall in line immediately and without question. This was not the Seventh Circuit's holding in *Whitaker*, and neither Title IX nor the Equal Protection Clause compel such a result. Because

what Plaintiff seeks in this case is in fact a marked expansion of even the broadest interpretations of Title IX and the Equal Protection Clause to date, he cannot establish a reasonable likelihood of success on the merits of his claims or irreparable harm sufficient to support the issuance of a preliminary injunction. Furthermore, even if he could make these threshold showings, the balance of harms weighs in EVSC's favor.

### **Background**

As one Circuit Court recently noted, in the context of cases like this one, otherwise familiar terms—like “sex” and “gender”—can be misleading. *See Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 2018 U.S. App. LEXIS 16323, at \*3 (3d Cir. June 18, 2018). For that reason, that court's discussion of certain relevant terms may be helpful here.

“Sex” is defined as the “anatomical and physiological processes that lead to or denote male or female.” Typically, sex is determined at birth based on the appearance of external genitalia.

“Gender” is a “broader societal construct” that encompasses how a “society defines what male or female is within a certain cultural context.” A person's gender identity is their subjective, deep-core sense of self as being a particular gender. . . . “[C]isgender” refers to a person who identifies with the sex that person was determined to have at birth. The term “transgender” refers to a person whose gender identity does not align with the sex that person was determined to have at birth. A transgender boy is therefore a person who has a lasting, persistent male gender identity, though that person's sex was determined to be female at birth. A transgender girl is a person who has a lasting, persistent female gender identity though that person's sex was determined to be male at birth.

Approximately 1.4 million adults—or 0.6 percent of the adult population of the United States—identify as transgender. Transgender individuals may experience “gender dysphoria,” which is characterized by significant and substantial distress as a result of their birth-determined sex being different from their gender identity. Treatment for children and adolescents who experience gender dysphoria includes social gender transition and physical interventions such as puberty blockers, hormone therapy, and sometimes surgery.

“Social gender transition” refers to steps that transgender individuals take to present themselves as being the gender they most strongly identify with. This typically includes adopting a different name that is consistent with that gender and

using the corresponding pronoun set, wearing clothing and hairstyles typically associated with their gender identity rather than the sex they were determined to have at birth, and using sex-segregated spaces and engaging in sex-segregated activities that correspond to their gender identity rather than their birth-determined sex. For transgender individuals, an important part of social gender transition is having others perceive them as being the gender the transgender individual most strongly identifies with. Social gender transition can help alleviate gender dysphoria and is a useful and important tool for clinicians to ascertain whether living in the affirmed gender improves the psychological and emotional function of the individual.

*Id.* at \*3-5. For the purposes of this brief, EVSC will endeavor to use these terms as they are defined above.

### **Facts<sup>1</sup>**

In the fall of 2018, seventeen-year-old Plaintiff will begin his senior year at an EVSC high school. Although Plaintiff's sex is female, he has identified as a transgender boy since middle school. In early adolescence, Plaintiff informed his family, teachers, and friends of his gender identity and asked them to call him by a male first name and to use male pronouns when referring to him. In eighth grade, Plaintiff began to outwardly express his gender identity by wearing "male" clothing and cutting his hair short. Deposition at 23. In middle school, Plaintiff continued to use the girls' restrooms while at school, and he made no requests to use the boys' rooms. *Id.* at 23-24.

In ninth grade, at Plaintiff's request, school personnel referred to Plaintiff by his chosen name and male pronouns. That year, Plaintiff and another transgender student began using a boys' restroom (not a boys' locker room) to change clothes for gym because they felt uncomfortable in the girls' locker room. *Id.* at 37-39. The school was made aware of the situation when a parent called to complain that there were "two girls" using the boys' restroom.

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<sup>1</sup> EVSC anticipates that the evidence presented at the hearing will establish such facts.

*Id.* at 39. According to Plaintiff, he “didn’t pass” at that time, meaning he “looked female” because he had not yet “medically transitioned.” *Id.* at 87, 105. Further, Plaintiff had not begun counseling or been medically diagnosed with gender dysphoria at that time. *Id.* at 34-35. Plaintiff was told that he was not permitted to change in the boys’ restrooms, and that he could use the girls’ restrooms or a single-occupancy restroom in the nurse’s office. When changing for gym, Plaintiff and the other transgender student were allowed to use a separate, otherwise unused girls’ locker room. *Id.* at 41.

At the beginning of his sophomore year, Plaintiff made another request to be permitted to use the boys’ restrooms, this time in response to the Obama administration’s “Dear Colleague” letter issued on May 13, 2016. *Id.* at 57. Based on the guidance provided in the Dear Colleague letter, Plaintiff believed he was entitled to access the boys’ restrooms, but the principal denied his request to do so.<sup>2</sup> EVSC continued to allow Plaintiff to use the girls’ restrooms or the single-occupancy restroom in the nurse’s office. Plaintiff made no further request for permission to use the boys’ restrooms. *Id.* at 51.

Also around the beginning of his sophomore year, Plaintiff began counseling for the sole purpose of obtaining a diagnosis of gender dysphoria. After receiving the diagnosis he sought, Plaintiff began cross-sex hormone replacement therapy around the beginning of his junior year. Neither Plaintiff nor his mother informed EVSC of Plaintiff’s diagnosis or treatment.

On January 21, 2018, Plaintiff’s counsel sent a letter to EVSC’s general counsel in which counsel expressed his belief that Plaintiff was entitled to have access to the boys’ restrooms under the recently-issued decision in *Whitaker*, 858 F.3d 1034. On February 5, 2018, EVSC

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<sup>2</sup> The Dear Colleague letter to which Plaintiff referred was rescinded by the current administration on February 22, 2017.

responded through counsel that Plaintiff would not be permitted to access the boys' restrooms. In response, Plaintiff filed his complaint on February 22, 2018, and his motion for preliminary injunction on April 10, 2018.

To date, Plaintiff has not legally changed his name, and he does not plan to do so until after he turns eighteen.<sup>3</sup> Deposition at 27. Plaintiff's birth certificate and driver's license both bear his birth name and list his sex as female. *Id.* at 27-30. Plaintiff has not undergone surgery of any kind related to his gender transition. *Id.* at 32-33.

Plaintiff's mother is his sole legal custodian. *Id.* at 28. Plaintiff has acknowledged that his mother has not always been fully supportive of his gender transition. *Id.* at 13. Around the time that Plaintiff began counseling during his sophomore year, his mother began to become more accepting of his gender identity. *Id.* Currently, Plaintiff describes his mother as "on and off supportive[.]" *Id.* at 67. Plaintiff's mother has never made any request to anyone at EVSC that Plaintiff be granted access to the boys' restrooms or locker rooms.<sup>4</sup> When Plaintiff's principal consulted with Plaintiff's mother regarding Plaintiff's desire to use his chosen name and pronouns, Plaintiff's mother gave her assent and expressed satisfaction with the accommodations the school had offered Plaintiff.

EVSC anticipates that the evidence presented at the hearing will further establish that Plaintiff:

- Never communicated to EVSC a problem with access to nurse's bathroom;

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<sup>3</sup> It may be reasonable to infer from this that Plaintiff has been unable to obtain parental consent to change his name or birth certificate.

<sup>4</sup> Despite parental rights under Indiana law, Plaintiff's mother has never been involved in this litigation and is not listed on Plaintiff's witness list.

- Never communicated to EVSC that he was undergoing counseling for gender identity issues;
- Never communicated to EVSC that he had a medical diagnosis of gender dysphoria;
- Never communicated to EVSC that he was undergoing hormone replacement therapy;
- Never communicated to EVSC that he had any anxiety or other negative feeling in using the female restrooms or the restroom in the nurse's office;
- Has never had thoughts of suicide or harming self;
- Never communicated to EVSC any thoughts of suicide or harming self;
- Never communicated to his independent counselor any thoughts of suicide or harming self;
- Never communicated to his physician any thoughts of suicide or harming self;
- Never communicated to his independent counselor any issue with the bathroom policy at EVSC;
- Never communicated to his physician any issue with the bathroom policy at EVSC;
- Never received a transgender transition assessment or recommendation from his independent counselor;
- Never provided any counseling record or diagnosis to EVSC;
- Never provided any medical record or diagnosis to EVSC;
- Never communicated to EVSC that he has been bullied because of his transgender status;
- Only went to four counseling sessions and ceased counseling sessions after his May 9, 2017, session;

- Has suffered a lot of stress and anxiety relating to his family life and unrelated to his gender identity which has also caused him to be absent from school;
- After EVSC responded to Plaintiff about his EVSC email request, Plaintiff never followed up with EVSC;
- After speaking at an EVSC School Board meeting about a gender identity policy in February 2018, Plaintiff did not follow up with EVSC's request to discuss issues with him.
- Plaintiff's mother has never made a request to EVSC relating to Plaintiff's bathroom usage, policy change or birth certificate change requirement.

### **The preliminary injunction standard**

A preliminary injunction is an extraordinary remedy that is never awarded as of right.

*D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016). The Seventh Circuit has defined the standard applicable to a request for preliminary injunction as follows:

As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court's inquiry is over and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.

The court, sitting as would a chancellor in equity, then weighs all four factors in deciding whether to grant the injunction, seeking at all times to minimize the costs of being mistaken. We call this process the "sliding scale" approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side. This weighing process, as noted, also takes into consideration the consequences to the public interest of granting or denying preliminary relief. While we have at times framed the sliding scale approach in mathematical terms, it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.

*Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992) (footnotes, citations, and quotation marks omitted).

**1. Plaintiff lacks capacity to advance this case.**

Plaintiff is an unemancipated minor asserting claims in Federal Court based upon a federal statute (Title IX) and the U.S. Constitution. Holding that EVSC's Motion to Dismiss based upon Plaintiff's lack of capacity/standing to pursue this case with an ideologue as "next friend" was "without merit", the Court nevertheless dismissed Wyatt Squires as next friend. Finding that "in light of Indiana law, J.A.W. has the capacity to sue in his own behalf," and that the Seventh Circuit's holding in *T.W. By Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997), that "persons having only an ideological stake in a child's case are never eligible" to represent a child's interest in Federal Court is "dicta," this Court finds that the American Civil Liberties Union's presence on behalf of Plaintiff meets the requirements of Federal law and procedure to allow this case to proceed.

Again, Plaintiff rests this entire case on *Whitaker*, 858 F.3d 1034. Yet in *Whitaker*, the Court succinctly explained the capacity requirement for a minor such as Plaintiff in federal court:

Because Ash is a minor without a duly appointed representative, pursuant to Rule 17 of the Federal Rules of Civil Procedure, he may assert these claims only through a "next friend" or guardian ad litem.

858 F.3d at 1040 n. 3 (emphasis added). The Seventh Circuit did not look at Wisconsin law or beyond the language of FRCP 17 to determine a minor's capacity to sue. FRCP 17(c) sets forth the rule for a minor's capacity and states:

(c) Minor or Incompetent Person.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:

- (A) a general guardian;
- (B) a committee;
- (C) a conservator; or
- (D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

There are only two circumstances in which a minor has capacity to sue in federal court; either with a representative or a without a representative by next friend or guardian ad litem. Where a minor is unrepresented, the court “must” appoint a guardian. This clearly sets forth the federal rule and judicial obligations when it comes to minors in federal court. FRCP 17(b) does not limit or apply to FRCP 17(c).

As the Seventh Circuit held, the capacity of a child to sue in federal court does not turn on state law. FRCP 17(c) requires a minor to be represented by an adult. Otherwise, the rights of a child to pursue relief in federal court would vary from state to state. If a minor can bring an action on his/her own and without an adult representative or guardian, the minor is left with making decisions (i) which he has no legal authority, understanding, and/or maturity to make, (ii) which may contradict parental rights under state law, and (iii) which may not be legally binding. FRCP 17(c)’s straightforward approach is recognized by the Seventh Circuit. Thus, Plaintiff cannot advance this case on his own – and the American Civil Liberties Union of Indiana, no doubt “experienced and suitable counsel” for Plaintiff, cannot properly serve as a next friend or guardian.

On its website, the ACLU of Indiana states that it “works tirelessly to update the state human rights law to include gender and sexuality.” This seems more than an indication that this case is being pursued for reasons other or in addition to Plaintiff’s desire to pursue it. Lacking a duly appointed representative or next friend – one without an ideological/advocacy stake in the outcome, Plaintiff does not have the capacity to advance this suit on his own behalf.

**2. *Whitaker* is not controlling.**

All of Plaintiff’s arguments in favor of the issuance of a preliminary injunction flow from one premise: that Plaintiff’s success on his Title IX and Equal Protection claims is a foregone conclusion in light of the Seventh Circuit’s decision in *Whitaker*, 858 F.3d 1034. According to Plaintiff, *Whitaker* is “on all fours” and “virtually identical” to this one. Memorandum in Support of Motion for Preliminary Injunction, Dkt. 20 at 1, 6. It is not.<sup>5</sup>

In *Whitaker*, the plaintiff, “Ash,” was a transgender boy and a high school senior. 858 F.3d at 1040. During his freshman year, Ash began to openly identify as a boy—he cut his hair, began to wear masculine clothing, and began to use a typically male name and male pronouns. *Id.* Ash also began to see a therapist, who diagnosed him with gender dysphoria. *Id.* Thereafter, Ash began hormone replacement therapy and legally changed his name. *Id.*

In the spring of his sophomore year, Ash and his mother met with his guidance counselor several times to request permission for Ash to use the boys’ restrooms while at school. *Id.* The school denied the request and notified Ash that he could use the girls’ restrooms or a gender-neutral, single-occupancy restroom in the school’s main office. *Id.*

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<sup>5</sup> EVSC takes issue with much of the analysis set forth in *Whitaker*, but acknowledges that this court is bound by decisions of the Seventh Circuit. EVSC will therefore assume, solely for the purposes of this memorandum, that *Whitaker* was correctly decided.

During the fall of his junior year, Ash began to use the boys' restrooms despite the school's policy, and he did so for six months without incident. *Id.* at 1041. When the school became aware that Ash was using the boys' bathroom, however, Ash's guidance counselor again told Ash's mother that Ash was permitted to use only the girls' restrooms or the gender-neutral restroom in the main office. *Id.* The next month, Ash and his mother met with the school's assistant principal to discuss the bathroom policy. *Id.* The assistant principal reiterated that Ash was not permitted to use the boys' bathroom, but this time said that it was because Ash was listed as a female in the school's records and unspecified "legal or medical documentation" was required to change such records. *Id.*

Thereafter, the school was provided with two letters from Ash's pediatrician identifying Ash as a transgender boy and recommending that he be allowed to use the boys' restrooms. *Id.* The school deemed these letters insufficient and took the position that Ash would have to complete surgical transition to be permitted access to the boys' restrooms. *Id.*

In the spring of 2016, Ash engaged counsel who sent a letter to the school district demanding that Ash be permitted to use the boys' restroom at school. *Id.* at 1042. The school district again denied the request, and Ash, through his mother and next friend, filed a complaint in federal district court alleging that the school district had violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.* The district court granted Ash's motion for a preliminary injunction, and the school district appealed. *Id.* The Seventh Circuit affirmed, concluding that Ash had demonstrated a reasonable likelihood of success on both his Title IX and Equal Protection claims. *Id.* at 1046-54.

*Whitaker* stands for the proposition that an arbitrary school policy precluding transgender students' access to sex-segregated spaces consistent with their gender identity may under certain

circumstances violate Title IX and the Equal Protection Clause of the Fourteenth Amendment. But *Whitaker* left many important questions unanswered. *Whitaker* does not provide schools with any objective basis for identifying which students are transgender for the purposes of Title IX or the Equal Protection Clause. It does not discuss how far a student must be into the process of social and/or physical transition to trigger the protections of those laws, or even whether a student must be transitioning at all. It does not resolve the question of whether a school may, consistent with Title IX and the Equal Protection Clause, require evidence of a medical diagnosis and, if so, what form and quantum of proof it may demand. Nor does it resolve the extent to which a school is required to allow a student who professes to be transgender access to sex-segregated spaces consistent with his gender identity without parental knowledge or consent. It is these uncertainties that prevent Plaintiff from establishing a reasonable prospect of success on his claims solely on the basis of *Whitaker*.

Plaintiff devotes the majority of his argument to discussing the legal analysis set forth in *Whitaker*, and in so doing, neglects crucial factual differences between that case and this one. In *Whitaker*, the plaintiff's mother made several requests that he be allowed to use the boys' bathrooms, provided medical documentation to establish his transgender status, and brought suit on the minor's behalf. Thus, the *Whitaker* court rejected the school district's argument that Ash could not "unilaterally declare" his gender—not because its premise was flawed, but because the argument "misrepresent[ed] Ash's claims and dismis[s]e[d] his transgender status." 858 F.3d at 1050. The court explained further, "[t]his is not a case where a student has merely announced that he is a different gender." *Id.* Thus, the Seventh Circuit has recognized that some threshold showing is required to trigger the protections for transgender students discussed therein, and a mere "announcement" of one's transgender status is insufficient. Whatever that unspecified

standard is, local school corporations are not equipped to make such determinations independently.

Whatever legal standard can be distilled from *Whitaker*, that case does not compel the entry of a preliminary injunction in this case. Because this *is* a case where a student has merely announced that he is a different gender, the protections of Title IX and the Equal Protection Clause have not been triggered. Plaintiff has not legally changed his name and he continues to be designated female on his birth certificate, his driver's license, and all identifying documents provided to EVSC. Although Plaintiff was evidently diagnosed with gender dysphoria his sophomore year and began hormone replacement therapy around the beginning of his junior year, EVSC had no knowledge of these facts until Plaintiff initiated the instant litigation.

Moreover, while Plaintiff's mother agreed to allow him to be called by his chosen name at school, she has never requested that he be granted access to the boys' restrooms. To the contrary, she indicated to EVSC personnel that she was satisfied with the accommodations EVSC had offered Plaintiff. In January of this year, when Plaintiff's counsel sent a letter to EVSC's general counsel demanding that Plaintiff be granted access to the boys' bathrooms, Plaintiff's mother did not join as a signatory and her wishes were not mentioned. Perhaps most telling, however, is the decision of Plaintiff's mother not to participate in this litigation as Plaintiff's next friend. Plaintiff's mother is not on his witness list, and to date, she has not submitted so much as an affidavit on his behalf. It is far from clear that she wishes for Plaintiff to obtain the relief he seeks.

*Whitaker* is the only binding precedent Plaintiff cites in support of his assertion that he is likely to prevail on the merits of his Title IX and Equal Protection claims.<sup>6</sup> But for the reasons set forth above, *Whitaker* is so factually distinguishable that it cannot support such a finding. A conclusion that a school must allow students to unilaterally declare their gender and afford them access to sex-segregated facilities on that basis alone, without supporting evidence or a parental request, would be unprecedented. Because Plaintiff has cited no authority remotely supporting such a finding, he has not established a reasonable prospect of success on his claims.

**3. EVSC’s approach in this case is consistent with that taken by federal and state agencies concerning sex designations and access to sex-segregated spaces.**

An approach requiring something more than a unilateral request to use sex-segregated facilities in alignment with a transgender student’s professed gender identity is consistent with the approach taken by virtually every governmental body that draws distinctions based on sex. To change an Indiana birth certificate, a transgender person must submit a court order noting the change in male/female status. Appendix, Exhibit A. To change an Indiana driver’s license, a transgender person must submit a corrected birth certificate or a physician signed form. Appendix, Exhibit B. To change a U.S. passport, a transgender person must submit a medical certification. Appendix, Exhibit C. To change a social security card, a transgender person must submit a corrected passport or a corrected state-issued birth certificate. Appendix, Exhibit D.

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<sup>6</sup> The only other case Plaintiff cites addressing issues similar to those presented here is *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017). That case is, of course, not precedential. See *RLJCS Enters. v. Prof’l Ben. Tr. Multiple Emplr. Welfare Ben. Plan & Tr.*, 487 F.3d 494, 499 (7th Cir. 2007) (“decisions of district judges have no authoritative effect”). In any event, *Evancho* is distinguishable for the same reasons as *Whitaker*—the parents of all three of the transgender students involved in that case had made requests that they be allowed to use the facilities corresponding to their gender identities, and they had been allowed to do so until the school board passed a resolution prohibiting their access.

For Medicare, a transgender person must submit a corrected social security gender marker.

Appendix, Exhibit E. To change gender for sports competition, the Indiana High School Athletic Association requires a verified sex change for males, and proof of testosterone therapy.

Appendix, Exhibit F. *See also* Appendix, Exhibit G (requiring a court order, a government-issued document reflecting the gender change, or a physician letter to support change of sex or gender marker on immigration documents); Appendix, Exhibit H (Federal Bureau of Prisons policy on transgender inmates providing that “biological sex” is the initial determination when making facility assignments and that “designation to a facility of the inmate’s identified gender would be appropriate only in rare cases . . . and where there has been significant progress towards transition as demonstrated by medical and mental health history”); Appendix, Exhibit I (Department of Defense policy for transgender service members, providing that a transgender service member must obtain a diagnosis from a military medical provider indicating that transition is medically necessary, and allowing a gender marker change and access to sex-segregated berthing, bathroom, and shower facilities consistent with gender identity only upon completion of medical transition and presentation of a birth certificate or court order reflecting the preferred gender).<sup>7</sup>

EVSC’s policy is consistent with every other government agency in that some form of documentation is required to verify a change in sex designation. This is not discriminatory. It is sound policy aimed at ensuring a uniform policy that protects the rights of all students and allows schools to correctly identify students over the course of their enrollment and maintain accurate

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<sup>7</sup> The current administration has withdrawn this policy and instead adopted a policy disqualifying transgender persons who require or have undergone gender transition from service, but implementation of the new policy has been enjoined by court order. *See Karnoski v. Trump*, No. C17-1297-MJP, 2018 U.S. Dist. LEXIS 100789 (W.D. Wash. June 15, 2018).

academic records. Whether the Court applies a rational basis or heightened scrutiny standard of Equal Protection review, EVSC's policy, like every other state and federal government agency policy requiring verification of gender transition as a prerequisite changing ones' sex designation in official records, serves important governmental objectives and the means employed are substantially related to the achievement of those objectives.

Plaintiff has provided no persuasive explanation of why public schools should be the only governmental entity required to grant transgender people access to sex-segregated spaces consistent with their gender identity on demand and without any reasonable documentation of medical necessity or social or physical transition. If anything, an even more cautious approach is warranted where school-aged children are concerned. At the hearing, EVSC will prevent evidence to establish that gender identity may be in flux during childhood and adolescence. Whether and to what extent it is advisable for a child suffering with gender dysphoria to physically and/or socially transition is a question of appropriate medical treatment—one on which reasonable minds may disagree in a given case. *See generally* Appendix, Exhibit J.

Fundamental decisions concerning a child's upbringing, including the provision of medical and psychological treatment, are not for the school or even the child to make—the right to make such weighty judgments is reserved exclusively for parents. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000) (recognizing “the fundamental right of parents to make decisions concerning the care, custody, and control of their children”). Parents do not forfeit these rights by sending their children to public schools. *See Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S. Ct. 1526, 1532 (1972) (“a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests”). *See also* I.C. § 20-34-3-21 (providing that “[a] school corporation may not refer

a student to a mental health care provider or a community mental health center for services unless the school corporation has received the written consent of the student's parent or guardian"); I.C. § 20-30-5-17 (requiring schools to request parental consent before providing students with instruction on human sexuality); I.C. § 31-34-1-1 (providing that a child may be found to be in need of services if a parent fails to ensure that the child receives an adequate education). Although schools are endowed with broad powers to conduct educational programs, *see generally* I.C. § 2-26-5-1, *et seq.*, they are not permitted to impinge upon parents' constitutionally-protected decision-making authority.

Furthermore, although students do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969), it is also true that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 3164 (1986). "[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey v. T. L. O.*, 469 U.S. 325, 339, 105 S. Ct. 733, 741 (1985). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S. Ct. 562, 571 (1988) (holding that public school authorities may censor school-sponsored expressive activities, so long as the censorship is "reasonably related to legitimate pedagogical concerns"); *Fraser*, 478 U.S. at 683 (reasoning that student speech may be censored to a greater extent than "adult public discourse" because "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order").

Thus, to the extent heightened Equal Protection scrutiny is appropriate in this case, EVSC also has an important interest in preventing disruption and protecting the safety of all of its students, both transgender and cisgender. The evidence presented at the hearing will show that public restrooms can be a dangerous place for transgender people. Indeed, Plaintiff has acknowledged that he is sometimes concerned for his safety in public restrooms. Deposition at 24. Furthermore, restrooms cannot be monitored by school staff at all times. Requiring schools to allow students to access to sex-segregated spaces consistent with their professed gender identity, without parental permission and regardless of their transitional stage, would impair schools' ability to protect their students from harm and expose them to liability should such harm occur.

**4. If schools are to continue to provide sex-segregated restrooms and locker rooms, as they are required by law to do, they *must* be permitted to rely on objective criteria evidencing sex when making restroom assignments.**

Plaintiff does not dispute that EVSC is required by law to provide separate bathroom facilities for boys and girls. He argues instead that the school must define "boy" and "girl" in terms of currently professed gender identity as opposed to sex assigned at birth. But gender identity has been described as a "subjective, deep-core sense of self as being a particular gender." *Doe*, 2018 U.S. App. LEXIS 16323, at \*3. Gender identity is, by definition, not always readily apparent. Many cisgender individuals present themselves in a manner that challenges gender norms, and transgender people may not always have an appearance consistent with their gender identity.

To the extent Plaintiff has suggested that he must be permitted access to the boys' restrooms because he "looks male," Deposition at 84, the problems inherent in requiring schools to take such an approach are obvious. It would be unseemly (and almost certainly unlawful) for

school personnel to make restroom assignments based on their perceptions of individual students' outward appearances. The only workable solution is to allow schools to rely on objective criteria such as birth certificates, passports, immigration documents, medical records, and other enrollment documents provided by parents as a proxy for gender. This is precisely what EVSC has done in this case, and *Whitaker* does not prohibit such an approach.

The school policy found invalid in *Whitaker* required the transgender student to complete surgical transition in order to use the bathroom associated with his gender identity. 858 F.3d at 1041. The Court noted that surgical transition was not an option available to minors, and that the requirement was therefore an insurmountable burden for the seventeen-year-old plaintiff. *Id.* at 1053. The Seventh Circuit also noted that the school had indicated that Ash would be permitted to use the boys' restroom if he presented a birth certificate designating his sex as male. *Id.* This was little help because, in the state of Wisconsin, amendment of a birth certificate is permitted only after the completion of surgical transition. *Id.* The Seventh Circuit found the policy arbitrary, in large part because the school district did not require new students to provide a birth certificate to enroll; rather, a student could present either a birth certificate or a passport. *Id.* Transgender individuals may obtain a passport reflecting their gender identity upon presentation of a signed medical certification from a physician—surgical transition is not required. *Id.* The court also noted that the requirements to obtain an updated birth certificate vary from state to state, meaning that a student's ability to satisfy the school's requirements would depend on his or her place of birth. *Id.* Although the Seventh Circuit found the school policy arbitrary based on these inconsistencies, its reasoning recognizes that requiring some form of verification is not arbitrary. *Id.* at 1053-54.

EVSC, on the other hand, requires enrolling students to provide a certified copy of the student's birth certificate and publishes this requirement on its website.

[https://district.evscschools.com/about\\_us/enrolling\\_in\\_evsc](https://district.evscschools.com/about_us/enrolling_in_evsc) (“Parents/guardians will need to be present and bring the child’s legal birth certificate (hospital certificates cannot be considered) at the time of enrollment”). This is permitted by Indiana law. I.C. § 20-33-2-10. In this case, Plaintiff’s mother presented EVSC with a birth certificate indicating that Plaintiff is female. Plaintiff’s mother has never approached EVSC with a request to change Plaintiff’s sex designation in school records or to discuss the bathroom policy. If she had, EVSC would have advised her that Plaintiff will be permitted to use the boys’ bathroom upon EVSC’s receipt of an updated birth certificate indicating that he is male. Had Plaintiff’s mother indicated that Plaintiff was unable obtain an updated birth certificate,<sup>8</sup> EVSC could have considered whether an exception to its general policy should be made under the circumstances of this case. Because Plaintiff’s mother never made any such request, EVSC was not given the opportunity to make such a determination.

Perhaps school districts must, under certain circumstances and in consultation with parents, deviate from their default reliance on official documentation such as birth certificates in order to address the medical and psychological needs of individual transgender students. The contours of students’ rights and schools’ obligations in such circumstances will continue to be defined and refined both judicially and legislatively over the coming years, and it is not this court’s duty to craft a comprehensive policy to address all potential issues that may arise. *See Hazelwood*, 484 U.S. at 273 (“education of the Nation’s youth is primarily the responsibility of

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<sup>8</sup> Plaintiff was born in Florida, which allows transgender individuals to have the gender marker on their birth certificates changed upon presentation of a physician letter confirming clinical treatment for gender transition. Fla. Stat. Ann. § 382.016; Fla. Admin. Code Ann. r. 64V-1.003.

parents, teachers, and state and local school officials, and not of federal judges”). It is enough to conclude that in this case, EVSC did not violate Title IX or the Equal Protection Clause when it declined Plaintiff’s request for access to sex-segregated spaces inconsistent with the sex reported to the district by his mother, based solely on his unilateral declaration of his gender, with no accompanying parental request or permission, no evidence of a diagnosis of gender dysphoria, and no evidence that social or physical transition has been determined to be medically necessary or appropriate or recognized through the issuance of an amended birth certificate.

**5. Plaintiff has not established that he is likely to suffer irreparable harm absent preliminary injunctive relief.**

Plaintiff claims that EVSC’s bathroom policy violates his constitutional rights, which he asserts is sufficient standing alone to support a finding of irreparable harm as a matter of law. As explained above, however, the authority he cites does not support a finding that his constitutional rights have actually been violated.

Plaintiff argues further that he has established irreparable harm based on his assertion that being denied access to the boys’ restrooms “causes him stress, depression, and psychological harm.” Memorandum in Support of Motion for Preliminary Injunction, Dkt. 20 at 12. In support, he again cites *Whitaker*, but that case is again distinguishable. In *Whitaker*, the plaintiff proffered reports from two experts regarding the psychological harm the school’s bathroom policy had caused him, one of whom opined that the school’s policy was contributing to Ash’s suicidal thoughts and placing him “at risk for experiencing life-long diminished well-being and life-functioning.” 858 F.3d 1045.

Plaintiff, on the other hand, has offered only his own assertions of unquantified “stress, depression, and psychological harm.” Declaration of J.A.W., Dkt. 17 ¶ 34. He has denied any suicidal thoughts, and he has presented no expert testimony concerning the effect the school’s

bathroom policy is having on him. The notes from Plaintiff's therapist do not indicate that EVSC's bathroom policy was ever a topic of discussion during their sessions. Even if this court is inclined to credit Plaintiff's self-serving claims of emotional distress, he has not established that such distress is so severe that he is likely to suffer irreparable harm. *See Michigan v. United States Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011) (explaining that irreparable injuries "are difficult — if not impossible — to reverse"). Moreover, Plaintiff's family issues and his lack of a consistent, positive father figure is another significant source of stress and anxiety in his life. Deposition at 73, 88-89.<sup>9</sup>

Furthermore, Plaintiff's delay in filing suit and seeking injunctive relief belies any claim that EVSC's bathroom policy may cause him irreparable harm. "Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered." *Ty, Inc. v. Jones Grp. Inc.*, 237 F.3d 891, 903 (7th Cir. 2001). Whether such delay has "lulled [the defendant] into a false sense of security" or caused the defendant to act in reliance on such delay is relevant to a court's consideration of a plaintiff's delay in seeking a preliminary injunction. *Id.* "[D]elay alone may justify the denial of a preliminary injunction when the delay is inexplicable [sic] in light of a plaintiff's knowledge of the conduct of the defendant." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 894 (8th Cir. 2013).

To date, Plaintiff's mother has never requested that Plaintiff be permitted to use the boys' restrooms. Prior to engaging counsel, Plaintiff himself made only two such requests—the first

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<sup>9</sup> *See also* Appendix, Exhibit J at 7 (noting that the standards issued by the World Professional Association for Transgender Health provide that before physical interventions are considered for adolescents, "extensive exploration of psychological, family, and social issues should be undertaken").

during his freshman year and the second at the beginning of his sophomore year. His requests were denied, but EVSC attempted to accommodate him by providing access to alternative facilities. EVSC received no further requests from Plaintiff or his mother, and it received no complaints from Plaintiff or his mother concerning the alternative facilities it had offered Plaintiff. As a result, EVSC was under the impression that the matter had been resolved until it received a demand letter from Plaintiff's counsel approximately a year and a half later. Plaintiff's delay in seeking relief is highly persuasive evidence that EVSC's bathroom policy has not caused him emotional distress so severe as to cause him irreparable harm.<sup>10</sup> Further, when Plaintiff and his mother appeared satisfied with the accommodations EVSC provided, EVSC was lulled into a false sense of security and therefore took no further action to address the situation. Under these circumstances, a finding that Plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief is not warranted.

**6. The balance of potential harms weighs against granting a preliminary injunction.**

For the reasons set forth above, Plaintiff cannot make the necessary threshold showing of likelihood of success on the merits. But even if he could, the balancing of harms favors EVSC.

Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the harms faced by both parties and the public as a whole. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008); *see also Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). This is done on a "sliding scale," measuring the balance of harms against the moving

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<sup>10</sup> In *Whitaker*, the Seventh Circuit found that the plaintiff's delay in bringing suit was not indicative of a lack of irreparable harm because the plaintiff in that case had continued using the boys' restrooms notwithstanding the policy prohibiting him from doing so. 858 F.3d at 1046. That is not the case here. Deposition at 42-43.

party's likelihood of success. *Turnell*, 796 F.3d at 662. The more likely he is to succeed on the merits, the less the scale must tip in his favor. *Id.* The converse, however, also is true: the less likely he is to win, the more the balance of harms must weigh in his favor for an injunction to issue. *Id.* Substantial deference is given to the district court's analysis of the balancing of harms. *Id.*

Indiana law provides a custodial parent with the authority to make educational decisions for a minor child. "Custodial parent" means "the parent who has been awarded physical custody of a child by a court." I.C. § 31-9-2-30. Per I.C. § 31-17-2-17, the custodian may determine the child's upbringing:

- (a) Except:
  - (1) as otherwise agreed by the parties in writing at the time of the custody order; and
  - (2) as provided in subsection (b); the custodian may determine the child's upbringing, including the child's education, health care, and religious training.
- (b) If the court finds after motion by a noncustodial parent that, in the absence of a specific limitation of the custodian's authority, the child's:
  - (1) physical health would be endangered; or
  - (2) emotional development would be significantly impaired;the court may specifically limit the custodian's authority.

Thus, Plaintiff's mother has the sole right to make legal decisions for Plaintiff.

The Seventh Circuit in *Whitaker* recognized a school's right to disregard a student's mere announcement of his or her gender. In this case, EVSC was presented with nothing more than a mere announcement. Plaintiff's mother has never approached EVSC as to Plaintiff's bathroom request and she is absent from this litigation. EVSC has not only a right, but an affirmative legal duty to rely upon parental decision-making for minor students on such issues. To require EVSC to allow students to socially transition at school without a parental request runs the risk of placing schools at odds with parents and exposes schools to potential liability for interfering with

parental rights. The harm to EVSC and the public is obvious if a school corporation cannot rely upon a custodial parent's decision-making for a minor student.

Even if Plaintiff's mother had requested that EVSC allow him to use the boys' bathroom, EVSC's policy requirement for an updated birth certificate or other comparable documentation reflecting Plaintiff's gender identity change is reasonable and consistent with other state and federal requirements for changing gender markers. Plaintiff acknowledges the requirements for changing his birth certificate and indicates that he will pursue the same when he reaches the age of majority. Without parental consent and compliance with verification requirements, he demands that EVSC accept the announcement of his gender identity and allow him to choose the bathroom consistent with his announced gender identity. The Seventh Circuit has acknowledged that requiring some form of verification of gender transition is not arbitrary or prohibited. Thus, the balance of harms weighs in favor of EVSC and public as a whole.

### **Conclusion**

For the foregoing reasons, EVSC respectfully requests that Plaintiff's Motion for Preliminary Injunction be denied.

Respectfully submitted,

*s/ Patrick A. Shoulders*

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**CERTIFICATE OF SERVICE**

I certify that on the 3<sup>rd</sup> day of July, 2018, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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\_\_\_\_\_  
Patrick A. Shoulders

**In The Matter Of:**

*J.A.W., et al. v.*

*Evansville Vanderburgh School Corporation*

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*J.A.W.*

*June 21, 2018*

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EXHIBIT

**1**

tabbles

1           because I wasn't comfortable transitioning to that  
2           stage yet, really until 7th grade -- or the end of  
3           7th grade and 8th grade.

4           Q     So when did the actual outward expression begin?

5           A     8th grade.

6           Q     8th grade? And that was by dress, haircut?

7           A     Yeah, haircut, dress, and, you know, being --  
8           requesting going by my name now and male pronouns.

9           Q     And when you made that outward expression, were you  
10          telling other students as well?

11          A     Yes.

12          Q     So this was not some kind of secret then?

13          A     Yeah, it was not a secret.

14          Q     So you were kind of not only publicly displaying it  
15          in terms of your physical appearance, your clothing,  
16          but also in communicating with other students?

17          A     Yes.

18          Q     And that would have been 8th grade?

19          A     Yes.

20          Q     Did you request in 8th grade, during this time, any  
21          EVSC personnel to allow you to use the male restroom?

22          A     Not at that point.

23          Q     Okay. And so it wasn't a transitional need at that  
24          time; is that --

25          A     It was, it was just more so I was too intimidated, I

1           guess, to seek that out.

2           Q    And at this time when you're going through this  
3                outward change, when you went to a public place,  
4                which restroom would you have used?

5           A    It depended if they had a singular stall restroom.  
6                If they didn't, you know, I would use the male  
7                restroom. It just -- it depended on if I felt safe.

8           Q    And when you say you felt safe, what does that mean?

9           A    Well, a lot of -- a lot of issues with being trans is  
10               that you can very easily get attacked in a restroom  
11               for which restroom you choose, so I guess it's just a  
12               feeling of comfort, of, you know, is someone going to  
13               harass me for going into this restroom or not. I  
14               feel more safe using a singular stall restroom  
15               because no one else can go in there while I'm in  
16               there.

17          Q    So you would have recognized that using a male  
18               restroom at times would have subjected yourself to  
19               safety concerns?

20          A    I mean, it depends on where you go, yeah.

21          Q    All right. Then 9th grade comes around and you're at  
22               North and Central?

23          A    Yes.

24          Q    Are you continuing this outward change in both  
25               appearance and communication?

1 (WHEREUPON, DEPOSITION EXHIBIT 2 WAS MARKED  
2 FOR IDENTIFICATION.)

3 Q Let me just show you what's marked as 2. Can you  
4 identify that? What is Exhibit 2?

5 A I'm sorry. It's my driver's license.

6 Q Okay. And what is the name on the driver's license?

7 A My birth name, E.S.W.

8 Q And why doesn't that reflect the J.A.W. name that you  
9 go by?

10 A Because I haven't legally been able to change my name  
11 yet.

12 Q And why is it that you haven't been able to legally  
13 change your name?

14 A I'm waiting until I'm not a minor any more because  
15 it's really expensive since I was born in  
16 Jacksonville, Florida.

17 Q And what's your understanding of what's required to  
18 change your name?

19 A You have to try to get an okay from both biological  
20 parents, which then I would have to run an ad in the  
21 paper finding my biological father, which could take  
22 weeks. I know that there are a lot of fees that come  
23 involved with changing a name, changing a name  
24 legally without a reason of, you know, mar- -- of  
25 being a -- a change of custody or anything like that.

1 Q Is it your understanding that your mother has full  
2 custody, full legal custody of you?

3 A Yes.

4 Q Your biological father has no legal custody, correct?

5 A No.

6 Q And so is it your understanding that you still need  
7 his -- some kind of approval from him in order to  
8 change your name?

9 A I'm supposed to legally make an attempt.

10 Q And how do you know that?

11 A I've done research. My mom has also done research.

12 Q And so you've chosen not to legally change your name,  
13 if I understand it, because of cost?

14 A Yes.

15 Q Will the cost be any different when you turn 18 as  
16 opposed to now?

17 A Yes.

18 Q And what is that based upon?

19 A Just research that I have found. I don't remember  
20 anything specific, but --

21 Q And so in order to change your name and to get an  
22 Indiana driver's license with your J.A.W. name, you  
23 have to meet some requirements in the State of  
24 Indiana, correct?

25 A Yes.

1 Q Okay. And your most recent issuance date of this  
2 Exhibit 2 driver's license is October 10, 2017?

3 A Yes.

4 Q So you've elected to use your legal name in order to  
5 obtain the privilege of getting a driver's license?

6 A Yes.

7 Q And then your understanding that when you fill out  
8 whatever application or whatever requirement the  
9 State of Indiana needs for a driver's license, you  
10 have to specify sex; is that true?

11 A Yes.

12 Q And what did you put down as sex on your driver's  
13 license?

14 A Female.

15 Q All right. And do you know, is there some  
16 requirements in order to change how you refer to  
17 yourself as a female on this driver's license to a  
18 male?

19 A Yes.

20 Q And what are those requirements as you understand  
21 them?

22 A You'd have to change your Birth Certificate. I don't  
23 know exactly the laws for Indiana and Florida, but I  
24 know that you have to -- some states require that you  
25 have certain surgeries in order to be able to have

1           your Birth Certificate updated to what your sex is,  
2           but there is a difference between sex and gender,  
3           so -- whether or not, you know, my sex is female, my  
4           gender is still male.

5           Q    So sex, again, goes back to the biological  
6           differences we discussed earlier?

7           A    Yes.

8           Q    And you are biologically and anatomically a female  
9           currently, correct?

10          A    Yes.

11          Q    And then you've done some research in order to  
12          understand what's necessary for changing a Birth  
13          Certificate, right?

14          A    Yes.

15          Q    And you've chosen not to undertake those steps  
16          currently; is that fair?

17          A    Not at this point, yes.

18          Q    Okay. And those would be steps that are required by,  
19          I guess, the State of Florida in order to change your  
20          Birth Certificate, right?

21          A    Well, I wouldn't be able to -- I can -- my --  
22          changing my name legally and changing my Birth  
23          Certificate for what is listed as sex are different  
24          things. Yeah, I have not chosen to change my name  
25          legally yet. For the sex on my Birth Certificate, if

1 used to.

2 Q Does he head his own group now?

3 A No, not at the moment.

4 Q Why is he not active in that group?

5 A He's focusing on work right now.

6 Q He's a transgender advocate, right?

7 A Yes.

8 Q And he's assisted you with looking at these different  
9 things that are required in order to make these  
10 changes?

11 A Yes.

12 Q Is your goal sex reassignment surgery at some point?

13 A I mean, I want to have top surgery.

14 Q You want to have what?

15 A Top surgery. Sex reassignment surgery is kind of a  
16 broad term. There's different types of surgeries  
17 that you can have. Right now I am doing the part of  
18 transitioning which is just hormone replacement  
19 therapy. My goal is to have top surgery, which is  
20 surgery on my chest.

21 Q Is it like a mastectomy, kind of?

22 A Yeah.

23 Q And can you get it under 18 if you have consent of a  
24 parent?

25 A You could in some states. It's really hard to find a

1 surgeon that's willing to do it, and also my  
2 insurance won't cover me until I think I'm 21.

3 Q And from your active involvement in I think the  
4 groups you've talked about, do you think it's a good  
5 idea that kids under 18 can't have sex reassignment  
6 surgery?

7 A I -- I don't know.

8 Q You don't have an opinion one way or the other?

9 A Not really.

10 Q Would you think that kids under 18 are sufficiently  
11 mature to make that decision? That's a life-altering  
12 decision, isn't it?

13 A Yes.

14 Q And in your opinion, do you think that kids under 18  
15 have that ability, that maturity in order to make  
16 that kind of decision?

17 A I think that after undergoing therapy, yes.

18 Q Okay.

19 A I think that I would be able to make that decision.

20 Q And so without therapy, you couldn't make it; would  
21 that be fair?

22 A I could, but therapy just -- it helps people  
23 understand and learn to accept themselves before they  
24 start transitioning.

25 Q Do you have a Passport?

1 A No.

2 Q Have you ever looked up to see the requirements for a  
3 Passport in terms of requiring --

4 A I've never had a need for a Passport.

5 Q Okay. You said before, when we were talking about  
6 9th grade, you said your gender dysphoria was getting  
7 worse?

8 A Yes.

9 Q And explain to me what gender dysphoria is.

10 A It's a discomfort with the connection between what --  
11 the sex that your body is and what your gender is.

12 Q And that's a medical term?

13 A I don't know if that's the exact medical definition,  
14 but gender dysphoria is a medical term.

15 Q And that requires a diagnosis by some kind of medical  
16 provider?

17 A Yes.

18 Q And when you were a freshman, had you had some kind  
19 of diagnosis of gender dysphoria?

20 A I am not -- I'm not sure of the exact date that I was  
21 diagnosed with gender dysphoria. I think it was  
22 around my sophomore year, or at least the summer of  
23 it.

24 Q Okay. We'll get to that in a sec, but as you recall,  
25 you don't -- when you use the term "gender

1           dysphoria," you're referring to your feelings in 9th  
2           grade. That wasn't necessarily a particular medical  
3           diagnosis at that time, correct?

4           A    It wasn't diagnosed, but any therapist could have  
5           told that -- could have said that that's what it was.

6           Q    Were you seeking counseling in 9th grade at all?

7           A    No.

8           Q    And was it that this level of discomfort wasn't of  
9           such a concern that you thought you needed counseling  
10          or was there some other reason you didn't pursue  
11          counseling at that time?

12          A    I didn't know that counseling would help me at that  
13          point, I suppose. I -- I was -- I was just  
14          feeling -- I wasn't sure what I was doing.

15          Q    And when you say you were young and not sure what you  
16          were doing, you mean that these emotions were new and  
17          you weren't sure how to react?

18          A    The -- I'm not sure how to word it. I was feeling an  
19          extreme amount of discomfort and wasn't sure how to  
20          place it. I knew that it had to do with my gender,  
21          so I tried to sort of fix it on my own by expressing  
22          myself, because also I was working to try to get  
23          acceptance with my parents more so and, you know,  
24          people that were surrounding my life, so I didn't  
25          really seek counseling just because I wasn't aware

1 Q And when you were in your freshman year, you  
2 continued to use the female restrooms?

3 A Yes. And if I -- a lot of times I would just avoid  
4 using the restroom.

5 Q In your freshman year, you're pretty sharp, you're a  
6 little more mature, you understood that EVSC had  
7 separate bathrooms, one for male, one for female?

8 A Yes.

9 Q Was that an issue that you had concerns with at that  
10 time, your freshman year?

11 A Yes. Yeah. Yeah, because I wanted to use the male  
12 restrooms and I wasn't -- I was told I wasn't allowed  
13 to.

14 Q Who did you ask to use the male restrooms; do you  
15 recall?

16 A I didn't ask anyone at first, I just started using  
17 the male restrooms to change out for locker rooms. I  
18 didn't feel like I had to ask to use the restroom  
19 with the gender I identified with until I was called  
20 down to the office and was informed that, I suppose,  
21 a parent was calling because their students saw two  
22 girls using the restroom -- using the male restroom.

23 Q All right. Let me go back just because there's a lot  
24 there. So first you're saying you were, you said,  
25 changing in the locker room. Was that for class?

1 A Yeah, for gym. At first, we were expected to just  
2 use the normal female locker room. I wasn't  
3 comfortable with that, so I talked to the teacher and  
4 just used the restroom, the male restroom, before  
5 class to change out.

6 Q All right. So you've got a gym class. You have to  
7 get dressed before you go to the class, right?

8 A Yes.

9 Q Okay. And there's girls' locker rooms and boys'  
10 locker rooms; is that right?

11 A Yes.

12 Q And you're not comfortable in the girls' locker room,  
13 right?

14 A Right.

15 Q And so you asked -- do you recall which teacher you  
16 asked, who that was?

17 A No, I can't remember.

18 Q Would it have been the gym teacher, you think?

19 A Yeah. Yeah, it would have been the gym teacher.

20 Q So you asked the gym teacher about using the male  
21 locker room to get dressed?

22 A I -- I can't remember. I'm sorry. I think I -- I  
23 don't know. I'm sorry.

24 Q All right. I'm just trying to get an understanding.  
25 You said you were uncomfortable using the female

1 locker room, so you used the male locker room at some  
2 point?

3 A No, I never used the male locker room.

4 Q Then take me back, I'm missing something here. You  
5 used the male what?

6 A Restroom.

7 Q Restroom? Okay. And you used the male restroom just  
8 to get dressed for class?

9 A Yes.

10 Q And that was something that the teacher said was  
11 okay?

12 A I don't think she knew that I was using the male  
13 restroom, but yes.

14 Q Okay. All right. So you get to class early and then  
15 change in the male restroom?

16 A Yes.

17 Q And then at some point, that became a problem?

18 A Yes.

19 Q Take me through how that was communicated to you and  
20 from whom.

21 A I was called down to the office and was told that --  
22 basically to stop because they -- the office had  
23 gotten a call from a parent complaining about it,  
24 saying that there were two girls using the -- I was  
25 with another student changing, so that's why, who is

1 Q Okay.

2 A She was the Dean at North at the time.

3 Q All right. And so it was your understanding that a  
4 parent had called and had a concern about two females  
5 dressing in a male restroom?

6 A Yes.

7 Q And you were just using the male restroom at that  
8 time to get dressed for gym class, correct?

9 A Yes.

10 Q And then after that was communicated to you, where  
11 did you get dressed for gym class?

12 A They, I guess, tried to figure out another option and  
13 placed us in another female locker room that wasn't  
14 being utilized upstairs.

15 Q And was that acceptable to you?

16 A No.

17 Q Why not?

18 A Because it was still a female locker room and it was  
19 completely unlocked. Female students would go in  
20 there all of the time. There -- it wasn't really  
21 respecting our gender identity so much as separating  
22 us.

23 Q So I guess it would be fair to say EVSC offered you  
24 an alternative, but you didn't believe that that was  
25 a reasonable alternative?

1 A It wasn't a reasonable alternative.

2 Q Did [REDACTED] think that was unreasonable?

3 A Yes.

4 Q Is there any further communications you had with  
5 anyone at EVSC to advise them that that was not a  
6 reasonable alternative?

7 A My counselor, and she just proceeded to say that's  
8 all she could offer me.

9 Q And who was your counselor at that time?

10 A I don't know her first name. It's Haller,  
11 H-a-l-l-e-r.

12 Q And then you get into your sophomore year, your mom  
13 is more accepting. Did you continue to use the  
14 female restrooms?

15 A I avoided using the restroom.

16 Q Did you ever use the female restroom during your  
17 sophomore year?

18 A If I really had to, then yes, but just out of  
19 necessity.

20 Q Well, were there times you wanted to use the restroom  
21 when it wasn't a necessity?

22 A I just avoided using the restroom.

23 Q Okay. But my point is, you said you used it out of  
24 necessity, and I assume when you meant out of  
25 necessity is when you had to use --

1 A Yes.

2 Q -- the restroom urgently, you used the restroom?

3 A Yes.

4 Q And were there times you wanted to use the restroom  
5 for something other than to go to the bathroom?

6 A No, not that -- no.

7 Q Okay. And did you have any communications with any  
8 counselor or staff your sophomore year about having  
9 to use the female or male restrooms?

10 A No. The only communication that I really had with --  
11 was with my counselor and that was really freshman  
12 year, but she never really acknowledged any of my  
13 problems, she just sort of brushed them away.

14 Q And when you say she didn't acknowledge any of your  
15 problems, what were the problems that you  
16 acknowledged to her?

17 A Well, the bathroom situation and the gym class  
18 situation. We need gym credits to be able to  
19 graduate and at North, for freshman year, they have  
20 all female classrooms and all male classrooms, but  
21 oftentimes they have classrooms that have both  
22 genders in them just due to a lack of certain numbers  
23 of students, and I requested to her multiple times if  
24 I could switch -- because I was enrolled in an all  
25 female classroom.

1 hurt, they feel bad?

2 A Yeah, I suppose, yeah.

3 Q And do you know of whether there were other students  
4 that used the nurse's restroom for other reasons?

5 A I mean, I know another student who was trans that  
6 used the nurse's restroom for that reason, but I  
7 didn't know anyone else that would use it for other  
8 reasons.

9 Q And so any other conversations with EVSC about this  
10 bathroom issue during your sophomore year?

11 A No.

12 Q Then we get to your junior year, right?

13 A (Whereupon, witness nodded head up and down.)

14 Q Part of your sophomore year was spent at North and  
15 where else?

16 A Harrison.

17 Q Did you have any communications with anyone at  
18 Harrison your sophomore year about the bathroom  
19 issue?

20 A No.

21 Q And you used the bathroom in the nurse's office at  
22 Harrison also?

23 A No. I just avoided using the bathroom.

24 Q But you understood that to be an option for you?

25 A I never talked to Harrison's office about that being

1 or E.S.W., students all knew you were transgender and  
2 you were going by J.A.W., right?

3 A Yes.

4 Q Did you ever have any communications where your mom  
5 was present with anyone at EVSC concerning the  
6 bathroom or name or other transgender issues at EVSC?

7 A During my soph- -- or I don't know what year it was.  
8 Yeah, she's made a couple communications. It was my  
9 freshman year. I remember that because eventually my  
10 principal -- I'm not sure when it was, I'm sorry. I  
11 don't want to be dishonest, so I don't know which --  
12 when exactly she did.

13 Q Do you know what it was about?

14 A It -- yeah. It was about -- oh, I know exactly what  
15 it was about. It was about the new bathroom laws  
16 with the -- because the Obama administration had come  
17 out with, you know, state- -- you know, the "Dear  
18 Colleague" letter saying that, you know, transgender  
19 students should be able to use the restrooms that  
20 aligned with their gender identity and I -- at the  
21 beginning of the year, so it must have been sophomore  
22 year, I talked to my principal about it and he  
23 basically said, no, that he wasn't -- because  
24 Dr. Smith wasn't agreeing with it, that the EVSC  
25 decided not to acknowledge it, that he was not going

1 terms, I mean, was it a matter of going to meetings,  
2 doing research, trying to figure out what you  
3 associated with, or --

4 A Yeah. It had a lot to do with researching and trying  
5 to go out into the community and finding people who I  
6 could identify with.

7 Q And when it says you refer to yourself as a lesbian,  
8 at that time, were you attracted to females?

9 A Yes.

10 Q And then it said, "[REDACTED]

[REDACTED]

[REDACTED]" And, again, that's just from  
13 reading and thinking?

14 A Yes.

15 Q And it goes to the next sentence or two which says,

16 "[REDACTED]

[REDACTED]," and was that a truthful statement?

18 A Some of my peers were supportive. I wouldn't say  
19 that all of my school was supportive.

20 Q Okay.

21 A And my family -- my family has -- my mom is on and  
22 off supportive, not my entire family.

23 Q What about your grandparents?

24 A My grandparents aren't aware that I identify as male.

25 Q They are not?

1 related to being transgender, though.

2 Q And which school was he at?

3 A Harrison.

4 Q Harrison? And you said it didn't relate to  
5 transgender issues?

6 A No.

7 Q But it refers to having a positive male figure.

8 A Yeah.

9 Q And that's something you lacked in your life, right?

10 A Yes.

11 Q And do you think that caused some of the emotional  
12 distress that you've suffered over the years?

13 A Not really relating to my gender identity, but yes.

14 Q And then down towards the bottom there, it says, "■

■

■

■

18 having a male role model was something that was part  
19 of this transgender issue, wasn't it?

20 A I mean, that may have been what the counselor  
21 thought.

22 Q But you didn't see it that way then?

23 A I didn't really. I have always tried to make it a  
24 point to know that my gender identity is for myself  
25 specifically, not, you know, due to anyone else.

1 A It isn't, it isn't reasonable.

2 Q Is not?

3 A It is not.

4 Q Okay. Would a separate unisex bathroom be an  
5 accomodation that assists you with transitioning?

6 A It wouldn't because you're separating me from my  
7 peers which, by virtue of doing that, is saying that  
8 you're not acknowledging me as male. If I'm male, I  
9 belong in a male restroom.

10 Q And you've understood, as long back as you can  
11 remember, that when going to the restrooms at any of  
12 the EVSC schools, boys, biological boys, use the male  
13 restroom and biological females use the female  
14 restrooms, correct?

15 A Correct.

16 Q And so that understanding treats every student the  
17 same, doesn't it?

18 A Their -- I'm sorry, I'm trying to think about how to  
19 word it. A student who -- any student who presents  
20 as male goes to the male restroom because they  
21 identify as male and that is where they feel  
22 comfortable. A male student who is biologically male  
23 would feel very uncomfortable going to the female  
24 restroom because that student is a female. I present  
25 as male, I look male, so I belong in the male

1 A Some do, some don't, it just depends.

2 Q I mean, you've testified here today that you've  
3 publicly announced to students, teachers that you're  
4 transgender, and so that tells them that --

5 A Well, yes, but not everyone knows me.

6 Q But a large segment I think do, correct?

7 A Correct.

8 Q All right. And so there's a segment that if you, as  
9 a transgender, go into a male restroom, would you  
10 agree, may feel uncomfortable themselves with you  
11 present?

12 A Not that I know of.

13 Q Well, you've never used it, but I'm just saying, if  
14 you feel uncomfortable going into a female, there  
15 might be other students who also may be uncomfortable  
16 with you going into the boys'?

17 MR. FALK: I'm going to object, it's asked  
18 and answered for the third time. He said he doesn't  
19 think any males were uncomfortable.

20 Q But you do know that the one time you were using the  
21 boys' locker room, someone called and complained  
22 because someone felt uncomfortable with two girls in  
23 there, right?

24 A Well, I looked female. I don't look female right  
25 now.

1 Q Did you ever communicate to EVSC that you were being  
2 bullied at all because of your transgender status?

3 A No, not that I remember.

4 Q There were, I think, certain perhaps days in the last  
5 year or two that there was some kind of discipline  
6 imposed because you were missing too many days of  
7 school?

8 A Yes.

9 Q And what was the reason that you were not in  
10 attendance at school?

11 A Being on testosterone, I get a lot of migraines and  
12 I'm unable to see my doctor a lot to see -- to get a  
13 doctor's note, and -- this year alone has been  
14 particularly difficult with the divorce happening and  
15 me switching between houses. It's hard to, you know,  
16 think of when I'm going to go to -- you know, how am  
17 I going to go to school when I'm hopping between one  
18 place and another, when I don't even know where I'm  
19 going to go -- you know, where I'm going to sleep.

20 Q So you've had a lot of stress within your life in the  
21 last couple of years unrelated to your gender status,  
22 haven't you?

23 A Yes.

24 Q And that's impacted -- as you've said, it's impacted  
25 your anxiety, your stress, right?

1 A Yes.

2 Q And it's impacted your attendance at school, right?

3 A Yes.

4 Q This Exhibit 4, you never provided a copy of that to  
5 anyone at the school corporation, did you?

6 A No.

7 Q And this Exhibit 3, you never produced any of the  
8 counseling records to anyone at EVSC, did you?

9 A No.

10 Q And you never communicated to anyone at EVSC that you  
11 were undergoing counseling with Within Sight, did  
12 you?

13 A It shouldn't -- I shouldn't have to prove that I'm  
14 trans through counseling.

15 Q You just need to answer my question. My question  
16 was, all of the documents, counseling reports and  
17 records in Exhibit 3, you've never produced any to  
18 EVSC, have you?

19 A No.

20 Q And you've never communicated to anyone at the EVSC  
21 that you were undergoing counseling with Within  
22 Sight, did you?

23 A No.

24 Q And you never communicated any of the medical records  
25 in Exhibit 5 to anyone at the EVSC, did you?

1 any diagnosis of gender dysphoria, did you?

2 A No.

3 Q You made the statement that you shouldn't have to  
4 prove your gender to anyone at EVSC. What did you  
5 mean by that?

6 A I mean that I shouldn't have to, I guess, provide  
7 documentation that proves that I am transgender. I  
8 shouldn't have to, you know, show these documents to  
9 my counselor to be acknowledged as male. I feel that  
10 if I identify as male and I very much, you know, show  
11 that I present as male, then I don't -- I don't  
12 understand why I have to have countless of, you know,  
13 therapists saying -- counselors and doctors to back  
14 it up. It's what I identify with.

15 Q And you don't understand the requirements that EVSC  
16 has as to male and female students in a school, do  
17 you?

18 A Could you explain?

19 Q Well, if there were requirements that EVSC is  
20 required to maintain based upon biological sex, you  
21 wouldn't know that, would you?

22 A I suppose not.

23 Q I mean, if there are required filings with the State  
24 based upon male and female, you don't know that, do  
25 you?

1 A Outward appearance, I've always presented as male  
2 ever since 8th grade.

3 Q So your freshman year, did you change your hairstyle  
4 then?

5 A My hair was short, yeah. It's always been short  
6 since 8th grade.

7 Q When we talked earlier, you said that when you were  
8 using the male restrooms to get dressed for gym, that  
9 you looked female and that's why somebody called, it  
10 looked like two females and somebody called and  
11 complained. Do you remember that?

12 A Because I didn't -- I didn't pass as well as I do  
13 now. Passing by -- you know, by saying that I  
14 look -- if someone were to look at me, that I look  
15 male. I presented as male. I wore masculine  
16 clothes, I wore my hair masculinely, but the reason  
17 why I look more like a boy right now is because I've  
18 medically transitioned. I could have, you know,  
19 appeared more feminine then.

20 Q So someone back then thought you looked like a female  
21 in a male restroom and they called and complained,  
22 right?

23 A Right.

24 Q And so even though you were looking like a female,  
25 you still wanted to use the male restroom, right?