

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W.,)	
)	
Plaintiff,)	
)	
v.)	No. 3:18-cv-37-WTL-MPB
)	
EVANSVILLE VANDERBURGH)	
SCHOOL CORPORATION,)	
)	
Defendant.)	

Reply Memorandum in Support of Motion for Preliminary Injunction

Kenneth J. Falk
No. 6777-49
Gavin M. Rose
No. 26565-53
Jan P. Mensz
No. 33798-49
ACLU of Indiana
2457 E. Washington St., Suite Z
Indianapolis, IN 46201
317/635-4059
fax: 317/635-4105
kfalk@aclu-in.org
grose@aclu-in.org
jmensz@aclu-in.org

Attorneys for Plaintiff

Evansville Vanderburgh School Corporation (“EVSC”) concedes that J.A.W. is transgender and is aware that he has gender dysphoria. He has consistently presented himself as male for years. Yet he is denied the ability to use male restrooms in clear contravention of *Whitaker by Whitaker v. Kenosha Unified School Dist. No. 1 B. of Ed.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed*, ___U.S.___, 138 S. Ct. 1260 (2018). EVSC’s arguments opposing J.A.W.’s request for a preliminary injunction are without merit and the injunction should issue.

Facts

J.A.W.: J.A.W. is a 17-year-old rising senior who is a student within EVSC. (Dkt. 17-1 ¶¶ 1-4; Deposition of J.A.W. [“J.A.W. dep.”] Dkt. 50-1 at 13 [l. 13-14], Deposition of Superintendent David Smith [“Smith”] Dkt. 50-2 at 7 [ll. 7-21]. The gender assigned to him at birth, as noted on his birth certificate, is female. (Dkt. 17-1 ¶ 7). But, he has long identified himself as male and has presented himself to the world as male. (*Id.* ¶ 7). It was not until he was 11, after reading on the subject, that he learned what transgender was and he recognized that he was transgender. (J.A.W. dep. at 95 [l. 2] – 96 [l. 11]).

His discomfort with his assigned gender became an issue in middle school as he felt uncomfortable using the female restroom and wanted to be more masculine. (J.A.W. Dep at 18 [l. 6] – 19 [l. 19]. He did not say anything about it until 8th grade when he and his mother raised, with a school social worker, his discomfort in the female locker rooms. (*Id.* at 19 [l. 13] – 20 [l. 18]). At the same time, he began to inform EVSC employees that he wanted to be known as J.A.W., a boy’s name, and not the female name on his birth certificate and began to dress as a boy and adopted a boy’s haircut and requested that he be addressed with male pronouns. (*Id.* at 20 [l. 22] – 22 [l. 14]; 23 [ll. 4-13]). He has consistently presented himself to the world as male since that time (Ex. 4 to J.A.W. dep).

In 8th grade he was too intimidated to raise the bathroom issue. (J.A.W. dep. at 23 [l. 25] -24 [l. 1]). However, when he was a freshman, as puberty hit and as his gender dysphoria became more pronounced, he felt extremely uncomfortable using female restrooms at school. (*Id.* at 25 [l. 5-17]). He was not yet aware that he had gender dysphoria, but he was feeling an extreme amount of discomfort and was not sure what it was. (*Id.* at 34 [l. 5] – 36 [l. 1]). He was suffering the uneasiness, unhappiness, and discomfort of not wanting to be the gender that he was born with. (*Id.* at 111 [ll. 8-18]). During this year, without permission, he started using male restrooms to change for gym as he was not comfortable being in the female locker room, but he was summoned to the school’s office and told by the dean that he could not do this. (*Id.* at 37 [l. 16] - 41 [l. 9]). Instead he, and another transgender student, were told they could change in an upstairs portion of the female locker room that was unlocked and open to other female students. (*Id.* at 41 [l. 10-22]).

In his freshman year, instead of being allowed to use male restrooms in school he was offered the options of either using female restrooms or the restroom in the nurse’s office. (*Id.* at 45 [l. 24] – 46 [l. 12]; J.A.W. dep. ¶ 13). The nurse’s restroom is open to students who are visiting the school nurse or who are proximate to the office; otherwise use of the restroom must be approved by administrators in the school. (Smith at 18 [l. 25] – 20 [l. 25]). Most students use the male and female restrooms that are proximate to where their classes are. (*Id.* at 21 [ll. 16-19]). These restrooms are designed for multiple users at the same time. (Smith at 9 [l. 19] – 10 [l. 8]). The nurse’s restroom was far from J.A.W.’s classes, but he nevertheless tried using it a handful of times, both in his freshman and sophomore years, but it was always locked, so he stopped trying. (Dkt. 17-1 ¶ 14; J.A.W. dep. at 46 [l. 10] – 48 [l. 7]).

When J.A.W. was a sophomore both he and his mother had conversations with the school’s principal about the fact that J.A.W. was not comfortable using the female restrooms, but he was

not allowed to use the male restrooms. (J.A.W. dep. at 57 [l. 4] – 58 [l. 15]). Also, in November of 2016, J.A.W. sent an email to EVSC’s Chief Diversity Officer, identifying himself as transgender and asking for EVSC’s policy on transgender and bathroom/locker room access (Ex. 11 to Smith at 2). He was told that there was no policy and that students must use the nurse’s office or individual or unisex bathrooms. (*Id.*). If there are gender neutral restrooms at a school, prior permission from staff must be obtained to use them. (Smith at 24 [l. 8] – 25 [l. 7]).¹

When J.A.W. was a sophomore he began counseling as he wanted confirmation that he had gender dysphoria and that he was not crazy. (J.A.W. dep. at 60 [l. 9] - 63 [l. 6]). His counselor recognized that he identified as male that he should receive testosterone if he wanted it. (*Id.* at 82 [ll. 1-9]). In June of 2017 the counselor wrote to J.A.W.’s medical doctor that he fit the criteria for “Gender Dysphoria of Adolescence,” noting that he would “benefit greatly both medically and psychologically from hormone therapy.” (Ex. 4 to J.A.W. dep.). He has been receiving the male hormone testosterone since the fall of 2017. (Dkt 17-1 ¶ 21; J.A.W. dep. at 6 [ll. 8-9]). He injects himself with the hormone once a week. (J.A.W. dep. at 77 [ll. 10-14]). Since beginning the hormone therapy he has developed a patchy beard, his voice has deepened, he has lost weight, and his abdomen has developed more of a male pattern. (*Id.* at 109 [ll. 3-19]). He no longer menstruates. (*Id.* at 78 [l. 24] – 79 [l. 9]). He appears to be a young man. (Ex. 6 to J.A.W. dep.). He is addressed with a male name by his teachers, (J.A.W. dep. at 100 [ll. 22-25]), and EVSC acknowledges that he is transgender, has gender dysphoria, and that he is receiving hormones. (Smith at 15 [l. 20] – 16 [l. 16; 27 [l. 22-24]). J.A.W. has spoken to the School Board, identifying

¹ As a junior, J.A.W. attended a program that was in two EVSC high schools, including the one where he had been offered the ability to use the nurse’s restroom. (Dkt. 17-1). The Superintendent opined the other high school might have a gender neutral restroom other than one in the nurse’s office, although he was not sure. (Smith at 24 [ll. 5-9]). J.A.W. is not aware of the existence of such a restroom and its use was never offered to him as an option. (Supplemental Declaration of J.A.W., Dkt. 50-3 ¶¶ 3-4). In any event, access to the restroom, if it exists, is obtained only through prior permission from staff at the school. (Smith at 25 [ll. 4-7]).

himself as a transgender EVSC student. (J.A.W. dep. at 59 [ll. 4-24]).

In January of 2018 J.A.W., through his attorney, formally requested from EVSC's counsel that J.A.W. be allowed to use male restrooms and this was refused in early February of 2018. (Exs. 1 and 8 to Smith). Although EVSC has no written policy to this effect, its consistent unwritten policy is that persons who were born anatomically male must use male restrooms and those born anatomically female must use female restrooms. (Smith at 32 [ll. 6-21]).² EVSC believes that allowing transgender persons to use the restrooms corresponding to gender identity could cause disruption, although the only example that EVSC is aware of is an incident decades ago, not concerning a transgender student, when a female walked in on a custodian using a restroom and the custodian was very upset. (*Id.* at 28 [l. 11] – 29 [l. 8]). If J.A.W. violates EVSC's policy and uses male restrooms he will be subject to discipline that could possibly include suspension if the behavior is consistent. (*Id.* at 26 [ll. 4-17]).

At the current time J.A.W. severely restricts his fluid intake in an attempt to avoid having to go the bathroom while at school. (Dkt. 17-1 ¶ 26). This causes him pain and discomfort. (*Id.* ¶ 27). On the few occasions that he could not wait he used the female restroom as he did not want to be disciplined by EVSC. (*Id.* ¶ 28). This makes him uncomfortable and cause depression and other emotional difficulties as he is not female—he is male and belongs in a male restroom. (*Id.* ¶ 28; J.A.W. dep. at 84 [ll. 6-9]). It is also uncomfortable for females in the restroom as he is now perceived as male. (J.A.W. dep. at 86 [ll. 11-22]).

² The consistency of EVSC's position is somewhat surprising given that in May of 2016 the United States Department of Justice and the United States Department of Education sent a "Dear Colleague" letter that indicated that the United States was interpreting Title IX, 20 U.S.C. § 1681(a), as requiring that when a student or the student's parent or guardian asserted that the student had a gender identity different than the student's assigned sex at birth the student was to be allowed access to bathrooms consistent with gender identity. (Ex. 9 to Smith at 3). This letter was rescinded by President Trump's administration on February 22, 2017. (Ex. 12 to Smith). However, on May 30, 2017, the Seventh Circuit held in affirming a preliminary injunction in *Whitaker* that a policy that excluded a transgender student from bathrooms consistent with his gender identity violated both Title IX and equal protection. 858 F.3d at 1049-50, 1053-54. Nevertheless, EVSC has never wavered from its policy.

Social transitioning (*see* below) requires that J.A.W. present as a male and the EVSC policy is forcing him to deny who he is and this makes him feel different and segregated from his peers. (Dkt. 17-1. ¶ 34; J.A.W. dep. at 112 [ll. 4-17]). It is not acceptable that he be relegated to a unisex bathroom, like that in the nurse’s office, if other students are allowed to go to male restrooms as this does not acknowledge that he is male. (J.A.W. dep. at 84 [ll. 4-9]). He presents as male, so he belongs in a male restroom. (*Id.* at 84 [ll. 24-25]). His mother and legal guardian is fully aware of his efforts to obtain access to male restrooms through this litigation and supports his efforts. (Dkt. 16-1 ¶ 35; Declaration of Tammy Work [“Work”], Dkt. 50-4 ¶¶ 2-3).

BACKGROUND AS TO GENDER IDENTITY, TRANSGENDER AND GENDER DYSPHORIA: The term “gender identity” is a well-established medical concept that refers to one’s sense of being congruent with a particular gender. (Declaration of Dr. Randi Ettner [“Ettner”], Dkt. 50-5 ¶ 10; Declaration of Dr. James Fortenberry [“Fortenberry”], Dkt. 50-6 ¶13; Declaration of Dr. Janine Fogel [“Fogel”], Dkt. 50-7 ¶ 9). Gender identity is fixed and firmly established early in life—it is not a choice. (Ettner ¶ 10; Fortenberry ¶¶ 13, 17; Fogel ¶ 10). The gender identity for most persons is consistent with their anatomical features, so that persons born with male sexual anatomy identify as male and persons with female sexual anatomy identify as female. (Ettner ¶ 11; Fortenberry ¶ 14; Fogel ¶ 11). However, persons who are transgender have a gender identity that differs from their birth-assigned sex and anatomy. (Ettner ¶ 11; Fortenberry ¶15; Fogel ¶ 12). This basic conflict between a person’s assigned gender at birth and the person’s gender identity gives rise to a sense of being “wrongly embodied.” (Ettner ¶ 11). Up to 0.6% of persons in Indiana identify as transgender. (Fortenberry ¶ 16).³

³ Census data discloses that as of July 1, 2017, Indiana had a population of 6,666,818. (United States Census Bureau, *Quick Facts Indiana*, available at <https://www.census.gov/quickfacts/fact/table/in/PST045217> (last visited on July 3, 2018)). Using the above figure of 0.6%, this means that there are approximately 40,000 persons in Indiana who are transgender.

This basic lack of congruence within the transgender person and the conflict experienced thereby is diagnosed as “gender dysphoria,” a medical diagnosis that is codified in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”) 302.95 and the World Health Organization’s International Classification of Diseases 10 (“ICD 10”) F. 64.0. (Ettner ¶ 12; Fortenberry ¶ 20; Fogel ¶ 14).⁴ The criteria for establishing a diagnosis of gender dysphoria for adolescents and adults is, as set forth in DSM-V 302.85:

- A. A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:
 - 1. A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).
 - 2. A strong desire to be rid of one’s primary/and or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
 - 3. A strong desire for the primary and /or secondary sex characteristics of the other gender.
 - 4. A strong desire to be of the other gender (or some alternative gender different from one’s assigned gender).
 - 5. A strong desire to be treated as the other gender (or some alternative gender different from one’s assigned gender).
 - 6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one’s assigned gender).
- B. The condition is associated with clinically significant distress or impairment in

⁴ The DSM-V and ICD-10 are both standard classifications of mental and physical disorders. (Fortenberry ¶ 20; Fogel ¶ 14). “Gender dysphoria” was previously referred to as “gender identity disorder” and the latter term is used in ICD-10 at F64.0, although the World Health Organization announced on June 18, 2018, that the new ICD-11 will use the term “gender dysphoria.” like the DSM-V. (Fortenberry ¶ 23; Fogel ¶ 17). Regardless, the ICD-10 classification of “gender identity disorder” is identical to the “gender dysphoria” noted in the DSM-V. (Fortenberry ¶ 23; Fogel ¶ 17).

social, occupational, or other important areas of functioning.⁵

Untreated, gender dysphoria results in significant distress, including anxiety and depression, and the possibility of self-harming behavior, substance abuse and suicide, and difficulty in functioning. (Ettner ¶ 12; Fortenberry ¶ 18; Fogel ¶ 18). Indeed, studies demonstrate that up to 40% of persons who identify as transgender attempt suicide at some time, compared to 5% for the American population at large. (Fortenberry ¶ 19; Fogel ¶ 20).

THE TREATMENT OF GENDER DYSPHORIA:

The standards of care for the treatment of gender dysphoria have been established by the World Professional Association for Transgender Health (“WPATH”), and are internationally recognized and have been endorsed as the authoritative standards of care by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, the American Psychological Association, the American Psychiatric Association, the World Health Organization, the American Academy of Family Physicians, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, and the American Association of Plastic Surgeons. (Ettner ¶ 14⁶; Fortenberry ¶ 24; Fogel ¶ 23). The standards of care recognize that the principal treatment of gender dysphoria is to allow the person full expression of his or her gender identity. (Fortenberry ¶ 26). This involves, generally, changes in gender expression and role consistent with gender identity, which is referred to as social role transition, and hormone therapy to feminize or masculinize the person’s body. (Ettner ¶ 16; Fortenberry ¶ 26). Additionally, psychotherapy may be helpful, not to “cure” the person of gender dysphoria, but to address the

⁵ The ICD-10, at F64, defines “gender identity disorder” as “[a] disorder characterized by a strong and persistent cross-gender identification (such as stating a desire to be the other sex or frequently passing as the other sex) coupled with persistent discomfort with his or her sex (manifested in adults, for example, as a preoccupation with altering primary or secondary sex characteristics through hormonal manipulation or surgery.” (Fortenberry ¶ 23; Fogel ¶ 16).

⁶ Dr. Ettner is the secretary and a member of the Board of Directors of WPATH. (Ettner ¶ 6).

negative impact of stigma, alleviating internal transphobia, improving body image, enhancing peer and social support, etc. (Ettner ¶ 16; Fogel ¶ 25). These problems are primarily rooted in social hostility, rejection, discrimination, and emotional and physical abuse associated with the difficulty that society has in accepting the person's expressed gender. (Fortenberry ¶ 26). Some, but not all, transgender individuals will undergo surgery to alter primary and/or secondary sex characteristics. (Ettner ¶ 5; Fortenberry ¶ 26; Fogel ¶ 27). For some, the provision of hormones and social role transition are sufficient to ameliorate the various negative consequences of gender dysphoria, including anxiety and depression. (Fogel ¶ 27).

Hormones are provided to affirm the person's gender identity and initiate the physiologic changes in body contour and appearance to match the person's experienced gender. (Fortenberry ¶ 27). Hormone therapy has a profound effect on the physical appearance of the individual. (Ettner ¶ 2). For a transgender male (*i.e.*, a person assigned as female at birth), hormones will render the person increasingly male in appearance. (Ettner ¶ 21; Fortenberry ¶ 27; Fogel ¶ 28). The person's voice will deepen, beard growth and body hair growth will be stimulated, muscle mass will increase, and body fat will be redistributed. (Ettner ¶ 21; Fortenberry ¶ 27; Fogel ¶ 28). Typically, after a year of hormone therapy the transgender male will look very masculine, although full hormone effects may require up to 18 months to realize. (Fortenberry ¶ 27; Fogel ¶ 29).

Social role transition is an essential component of treatment for transgender individuals. (Ettner ¶¶ 18, 24; Fortenberry ¶¶ 28-29; Fogel ¶ 29). Social role transition is the process through which transgender persons present themselves in a manner consistent with their experienced gender, which includes name, gender markers, dress, hair style, and other aspects of gender presentation. (Fortenberry ¶ 29; Fogel ¶ 29). The point of social role transition is to allow the person to openly live the person's gender role and the greater the immersion of the person in his

or her sexual identity, the better it is for the person’s treatment. (Fogel ¶ 29). Social role transition allows the individual to present his or her gender identity in every aspect of life—at home, work, school, and in the broader community. (Ettner ¶ 18).

Children who are transgender feel “different” and may have confusion about their assigned sex and will often have anxiety until older and they learn that there is a name for their experience — transgender — and a diagnosis for what they are suffering — gender dysphoria. (*Id.* ¶ 19).

For some, this happens in adolescence, or even adulthood. Then, a sequential internal and external process ensues: accepting and identifying as transgender, explaining to family and others about the necessity of transition, disidentifying with the assigned gender and seeking support for post-transition life. The final stage—identity consolidation—is attained when the transgender aspect of life becomes less important, and the individual refocuses on the normal challenges of life like making a living, forming relationships, etc. With identity consolidation, the shame of having lived as a “false self” and the grief of being born into the “wrong body” can be ameliorated. If any aspect of this social transition is impeded however, it destabilizes the patient and undermines the treatment goals.

(*Id.* [internal citation omitted]).⁷

THE IMPORTANCE OF ACCESS TO BATHROOMS THAT ARE CONSISTENT WITH GENDER IDENTITY: It is vitally important that social transition occur in all aspects of the transgender person’s life. (Ettner ¶ 24). To be considered male in one situation, but not others, is inconsistent with evidence-based medical practice and is detrimental to the well-being and health of the individual. (*Id.*). The goal of treatment of a person with gender dysphoria is to achieve complete and unqualified social transition, as failure to achieve this is a source of distress and anxiety. (*Id.*; Fortenberry ¶ 30).

The need for social transition to be complete and unqualified requires that the transgender person be able to use restrooms and locker rooms that conform to gender identity. (Ettner ¶¶ 24-25; Fortenberry ¶ 30; Fogel ¶ 30). Being denied the ability to use such facilities that are consistent

⁷ EVSC cites to a magazine article concerning transgender issues and children. (Dkt 41 at 17 [citing Dkt. 42-10]). This article is not on EVSC’s exhibit list and to the extent that EVSC is seeking to cull expert opinions from it without an expert declaration or testimony it is inadmissible. *See* Fed.R.Ev. R. 701, 702.

with gender identity, or to insist that transgender individual use a separate restroom, is a clear statement that the person is “different,” some undifferentiated “other.” (Ettner ¶ 25; Fortenberry ¶ 30; Fogel ¶ 30). This interferes with the person’s ability to consolidate his or her identity, thus undermining the social transition process. (Ettner ¶ 25; Fogel ¶ 30).

The injuries that this causes are both psychological and physical. From a psychological perspective, the denial of the use of restrooms consistent with gender identity is a source of anxiety, making it difficult for the person to concentrate in the workplace or at school. (Ettner ¶ 26). Expelling transgender persons from spaces with peers can be deeply traumatic, particularly for adolescents, exacerbating the depression and isolation that many transgender persons experience. (*Id.*). The denial of usage of facilities consistent with gender identity is a constant micro-aggression that often leads to an outcome consistent with post-traumatic stress disorder, a problem that may persist despite appropriate therapy. (Fortenberry ¶ 31). Indeed

[u]ntil recently, it was not fully understood that these experiences of shame and discrimination could have serious and enduring consequences. But it is now known that stigmatization and victimization are some of the most powerful predictors of current and future mental health problems, including the development of psychiatric disorders. The social problems that transgender teens face at school actually create the blueprint for future mental health, life satisfaction, and even physical health. A recent study of 245 gender-nonconforming adults found that stress and victimization at school was associated with a greater risk for posttraumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality in adulthood

(Ettner ¶ 30 [internal citations omitted]).

From a physical perspective, young people with gender dysphoria frequently cut down on their consumption of liquids to try to avoid having to go the bathroom for the entire day because of not being able to use the restrooms associated with their gender identity, which can cause physical discomfort as well as kidney and/or bladder problems. (Fortenberry ¶ 30; Fogel ¶ 31). Moreover, forcing transgender individuals to use restrooms and other spaces designated for their

birth-assigned sex and inconsistent with their gender identity can lead to violence and harassment against the individual. (Ettner ¶ 28). Studies show that transgender persons have a greater risk of being assaulted than the general population. (Fogel ¶ 32). If a transgender male who has been on hormones for any length of time enters a female restroom it will be perceived as a male entering the bathroom and this could easily lead to dangerous confrontations. (*Id.*).

TRANSGENDER AND SCHOOL BATHROOM ACCESS IN THE UNITED STATES AND INDIANA: For all the reasons noted above, many school systems allow transgender youth to utilize bathrooms and locker rooms consistent with their gender identities, not their birth-assigned genders. For example, the Los Angeles Unified School District, the second largest school district in the country, adopted a policy in 2011 requiring that transgender students have full access to use facilities, including restrooms and locker rooms, that match their gender identity. (Declaration of Dr. Judy Chiasson, Ph.D. [“Chiasson”], Dkt. 50-8 ¶¶ 9-13; Exhibit B to Chiasson at 5-6).⁸ This mandatory policy was a continuation of a formal policy begun in 2005 that “strongly recommended” that transgender students be given access to facilities corresponding with their gender identity. (Chiasson ¶ 9). During the 14 years since the original policy, there have been no problems with its implementation and there have been no instances of disruption caused by the policy. (*Id.* ¶¶ 12, 15). Although people—primarily adults—have raised fears, they have been proven unfounded. (*Id.* ¶ 15).⁹ Since

⁸ Dr. Chiasson is the Program Coordinator for the Office of Human Relations, Diversity and Equity for the Los Angeles Unified School District. (Chiasson ¶ 1).

⁹ Dr. Chiasson notes that:

One fear that I have heard articulated is that a person will pretend to be transgender to be predatory. But being transgender is persistent and consistent throughout the day. A student is transgender in all of their classes, outside of their classes and in their relationships at school. I have never had someone pretend to be transgender for nefarious reasons.

(Chiasson ¶ 16).

2013, California law has required that all students must be allowed to use facilities that match their gender identities. (*Id.* ¶18). Dr. Chiasson has frequently been consulted by other school districts and notes that there are no examples of inappropriate behaviors by transgender students who were permitted to use the facilities corresponding to their gender identities. (*Id.*)

California is not alone in requiring or suggesting that public schools allow transgender students to use bathrooms consistent with their gender identities. As is shown in the attached Appendix A, this is required in all schools in Colorado, Connecticut, the District of Columbia, New Jersey and Washington. In other jurisdictions, including Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New York, Rhode Island, and Vermont, state departments of education or other state office recommend that local schools allow transgender students to utilize the restrooms consistent with their gender identities. (*See* Appendix A). Similar policies or recommendations are present in many cities' school systems, including Boston, Chicago, Milwaukee, Minneapolis, and New York City, for example. (*See* Appendix A).

And, other Indiana school districts allow transgender students to access bathrooms consistent with their gender identities. For example, Indianapolis Public Schools (“IPS”) has adopted a policy that prohibits discrimination on the grounds of sex, which includes sexual orientation or gender identity.¹⁰ (Declaration of Zachary Mulholland [“Mulholland”], Dkt. 50-9 ¶ 6; Exhibit 1 to Mulholland at 1). Consistent with this, IPS has an administrative guideline that allows for transgender students to generally use the restrooms and locker rooms associated with

¹⁰ Although EVSC’s policies do not prohibit discrimination against students because of their gender identity, *see* Smith at 33 [l. 25] – 35 [l. 25]; Ex. 10 to Smith), numerous Indiana school corporations have policies prohibiting discrimination because of gender identity and/or transgender status including Avon Community School Corporation, Bartholomew Consolidated School Corporation, Brownsburg Community School Corporation, Carmel Clay School Corporation, Elkhart Community Schools, Fort Wayne Community Schools, Gary Community School Corporation, Hamilton Heights School Corporation, Metropolitan School District of Lawrence Township, Metropolitan School District of Warren Township, Perry Township Schools, and the South Bend Community School Corporation. (*See* Appendix B).

their gender identities. (Mulholland ¶ 7; Exhibit 2 to Mulholland at ¶ 5). This guideline has apparently not caused disruptions or incidents. (Mulholland ¶ 8). Kokomo School Corporation similarly allowed a transgender male student to use male restrooms, the restrooms associated with his gender identity, for his junior and senior years, prior to his graduation in the Spring of 2018. (Declaration of Alecander Dean ¶¶ 4-6, Dkt. 50-10). To the best of the student's knowledge, his use of the restrooms did not cause disruptions or problems with his fellow students. (*Id.* ¶ 7).¹¹

Argument

I. J.A.W. will prevail on the merits of his claims¹²

A. *Whitaker* demonstrates that J.A.W. will prevail on the merits of his case

In his original memorandum, J.A.W. noted that this case is controlled by the Seventh Circuit's *Whitaker* decision. EVSC argues this is not so because there are factual differences between the situation in *Whitaker* and this case. However, there are no salient factual or, more importantly, legal differences between this case and *Whitaker* and *Whitaker* controls here.

In *Whitaker* the school district in question had an unwritten policy that prohibited the transgender male student from using male restrooms because he was born female and had not had a surgical transition to the male gender, *Id.* at 1041. Here, EVSC has an unwritten policy that, absent sex reassignment surgery, a student must use the bathroom consistent with their assigned

¹¹ A recent article in the *Indianapolis Star* notes that transgender students are allowed to use the bathrooms associated with their gender identities at Brownsburg, Lawrence Township, and Hamilton Heights public schools. Arika Herron, *Indianapolis Star*, *Beyond Brownsburg: How Indiana schools treat transgender students*, June 24, 2018, <https://www.indystar.com/story/news/education/2018/06/24/transgender-policies-indiana-schools-lgbtq-rights-discrimination/719048002/> (last visited July 4, 2018).

¹² EVSC begins its legal argument by arguing that J.A.W., a minor, lacks the legal capacity to bring this case without a next friend. (Dkt. 41 at 9-11). EVSC offers no cogent reason for this Court to reconsider its earlier decision, based on Indiana law as required by Fed.R.Civ.P. 17(b)(1), that J.A.W. may proceed in this case without a representative. (Dkt. 33). J.A.W. therefore incorporates his previous arguments contained in his opposition to EVSC's motion to dismiss. (Dkt. 18). As noted there even if EVSC is correct, the proper remedy is for this Court to appoint a guardian-ad-litem, which has nothing to do with the merits of the preliminary injunction request.

gender at birth. (Smith at 26 [l. 18] – 27 [l. 7]). Although EVSC chafes at this, its policy is identical to that of the school system in *Whitaker*. In *Whitaker* the school system had offered to allow the student to use a “gender-neutral restroom that was in the school’s main office, which was quite a distance from his classrooms.” *Id.* at 1040. The same is true here. (Dkt. 17-1 ¶¶ 13-14, 25). The student in *Whitaker* was 17, diagnosed as having gender dysphoria, and had begun hormone therapy and had been openly identifying as a boy since he was a freshman, asking teachers and friends to call him by a male name and to refer to him with male pronouns when he was a sophomore. *Whitaker*, 858 F.3d at 1040. J.A.W. is 17, diagnosed with gender dysphoria, receiving hormones, and has been openly identifying as male and requesting that he be addressed by a male name and male pronouns since 8th grade. (J.A.W. dep. at 23 [ll. 4-19]; 34 [ll. 18-23]; 77 [l. 10-14]). In *Whitaker* the student noted that the offer to use a single-user gender-neutral restroom was not a viable alternative both because it was far from his classes and because its use undermined his transition and stigmatized him. *Whitaker*, 858 F.3d at 1040, 1042. The inability to use the bathroom associated with his gender identity made him anxious and depressed and caused him to restrict his water intake so he did not have to use a restroom while at school. *Id.* at 1040-41. Similarly, J.A.W. does not want to use the unisex bathroom in the nurse’s office, even if he could find it unlocked, because it would be an acknowledgement that he is not male. (J.A.W. dep. at 84 [ll. 4-8]). Like the student in *Whitaker*, his reaction to having to use the female restrooms or the “special” unisex bathroom is to restrict his fluid intake and attempt to make it through the day without using any bathroom, which causes him pain and discomfort. (Dkt. 17-1 ¶¶ 26-27). And, like the student in *Whitaker* the experience of being denied the bathroom associated with his gender identity causes J.A.W. discomfort, embarrassment, and depression. (*Id.* ¶ 28; J.A.W. dep. at 72 [ll. 8-14]); 84 [l. 18] – 85 [l. 1]; 86 [ll. 8-10]; 112 [ll. 14-21]).

EVSC argues that J.A.W. is different than the plaintiff in *Whitaker* because here “he has merely announced that he is a different gender.” (Dkt. 41 at 14). This simply is not the case. Indeed, J.A.W. has consistently and openly presented as male for a longer period of time than did the plaintiff in *Whitaker*. It is true that due to his belief about the cost and difficulty involved J.A.W. has not yet changed his name in court. (J.A.W. dep at 27 [l. 10] – 28 [l. 25]). But, so what? EVSC concedes that it has known since at least 2016 that J.A.W identifies as transgender and it does not dispute that he has gender dysphoria and that J.A.W.’s medical records confirm this (Smith at 15 [l. 20] – 16 [l. 13]), and of course, it does not dispute that its policy is the exact same policy present in *Whitaker*—given that J.A.W. was not born male, he cannot use the male restroom. Therefore, even if he obtained a name change, he still could not use the male restroom.¹³

The facts are virtually identical and the binding precedent is clear. “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Whitaker*, 858

¹³ EVSC also notes that J.A.W. has not attempted to change his birth certificate, noting an Indiana case concerning the issue. (Dkt. 42-1). Of course, J.A.W. was born in Florida and the relevance of the Indiana case is not immediately apparent. (J.A.W. dep. at 27 [l. 15-16]). EVSC cites to a Florida statute and regulation that it asserts allows for a birth certificate change “upon presentation of a physician letter confirming clinical treatment for gender transition.” (Dkt. 41 n.8). However, neither the statute nor regulation cited by EVSC so provides. Indeed, Fla. Admin. Code Ann. r. 64V-1.0003, cited by EVSC, allows a change in birth certificate for a person under the age of 18, including changing the sex of the minor, only if the documents submitted to support the change were “established within 7 years of the date of the birth.” Of course, there are no such documents in J.A.W.’s case. Moreover, given that the school’s unwritten policy provides that students are restricted from going to restrooms that are not associated with their birth gender, it is unclear whether a change of birth certificate in the absence of a sex-change operation would be sufficient. Of course, many transgender persons never get sex-reassignment surgery. (Ettner ¶ 5; Fortenberry ¶ 26; Fogel ¶ 27), and such surgery is difficult for minors to obtain and would not be covered by J.A.W.’s insurance until he is 21. (J.A.W. dep. at 32 [l. 12] – 33 [l. 2]).

To counter this, EVSC argues that if J.A.W.’s mother had presented it with a birth certificate indicating he was male that he could have used the male restrooms (Dkt. 41 at 21). Not only does a birth certificate change appear to be impossible under Florida law, *supra*, but this new unwritten policy has *never* been articulated before. When the school district in *Whitaker* attempted to argue the same new unwritten policy it was rejected by the Seventh Circuit, which noted that “it is unclear that the sex marker on a birth certificate can even be used as a true proxy for an individual’s biological sex.” 858 F.3d at 1053.

F.3d at 1049. Moreover, although *Whitaker* demands that the discrimination against J.A.W. be assessed by elevated scrutiny – requiring it to present reasons that are both genuine and “exceedingly persuasive,” *id.* at 1052 (internal quotation and citation omitted), the only justification offered for the policy here is the perceived need to prevent disruption and protect the safety of students. (Dkt. 41 at 19). But, although EVSC promises evidence, the only disruption noted by EVSC in the deposition of its 30(b)(6) designate, its Superintendent, was an incident decades ago that concerned an adult custodian who felt discomfort when a student walked in on him in the bathroom. (Smith at 6 [ll. 3-17]; 28 [l. 11] – 29 [l. 8]; Ex. 7 to Smith). This fails to meet even a minimal evidentiary standard, let alone one requiring “exceedingly persuasive” evidence. Moreover, EVSC is ignoring the obvious disruption to female students that has been caused on the few occasions when J.A.W. has had to use a female restroom as he is reasonably perceived as male, and will only become more so as he continues his hormone therapy. (J.A.W. dep. at 86 [ll. 14-22]).¹⁴ EVSC has not come close to satisfying its burden under equal protection.¹⁵

¹⁴ EVSC notes that J.A.W. indicated a fear of being attacked while using a restroom. (Dkt. 19). However, J.A.W. was referring to using public restrooms, outside of school, in 8th grade, before he began receiving hormones. (J.A.W. dep. at 23 [l. 18] – 24 [l. 20]). Now he is male and there is no evidence that his classmates do not accept him as male. (*Id.* at 114 [ll. 1-7]; Smith at 39 [ll.19-22]).

¹⁵ EVSC appears to be critical of J.A.W.’s extensive reliance on *Whitaker*, although given that *Whitaker* is circuit precedent that is binding on this Court, the reason for the reliance should be clear. However, every federal case that has addressed the issue of whether a transgender student who has consistently presented as being a sex different than birth sex can utilize restrooms consistent with the student’s identified gender has entered decisions in favor of the student. *See, Grimm v. Gloucester Co. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018) (denying a motion to dismiss and concluding that transgender student’s claims that he was denied access to the restroom consistent with gender identity validly presented claims under both Title IX and equal protection); *M.A.B v. Bd. of Education of Talbot Co.*, 286 F. Supp. 3d 704 (D. Md. 2018) (claims that transgender student not able to use locker room consistent with gender identity presented valid claims of discrimination under both Title IX and equal protection, and motion to dismiss was denied); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. 2017) (finding that a transgender student’s claim that school policy presenting her for using the bathroom associated with her gender identity presented a valid claim under Title IX and equal protection, and motion to dismiss was denied); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (entering a preliminary injunction for transgender students, on the grounds of equal protection, against a policy restricting them to single-user bathrooms or bathrooms consistent with their sexes assigned at birth). And, in the recent case of *Doe v. Boyerton Area School Dist.*, 893 F.3d 179 (3rd Cir. June 18, 2018), the court denied a preliminary injunction sought by cisgender students challenging the school’s policy of allowing transgender students to use bathrooms and locker rooms consistent with their gender identities, concluding that that such a policy was neither unlawful or unconstitutional and that the district court did not err in concluding “that the

Eschewing case support and traditional legal analysis, EVSC argues that it has a policy of requiring some form of documentation to verify a change in sex designation and this is consistent with other government agencies. (Dkt. 41 at 15-16). But, EVSC never requested that J.A.W. provide any documentation and Dr. Smith specifically indicated that “[w]e don’t, as a matter of practice, request students to produce those things.” (Smith at 16 [l. 24] – 17 [l. 6]). It has that documentation now. (*Id.* at 15 [l. 20] – 16 [l. 16]), yet it continues to refuse to allow J.A.W. to use the male restrooms. This documentation, and the fact that J.A.W. has been openly living his life as a male since prior to high school, makes no difference given that the policy of EVSC is that J.A.W. cannot use the male restroom “[b]ecause biologically he’s a female.” (*Id.* at 26 [l. 20]). Therefore, it is curious that EVSC cites evidence that an individual’s gender designation can be altered in other areas outside of EVSC if a physician indicates that the requested designation is consistent with the individual’s gender identity or if the person is receiving appropriate clinical treatment, *see* Dkt. 42-3 at 1 (gender designation change for passport); Dkt. 42-4 at 2-3 (gender designation for social security [specifically noting that sex reassignment surgery is not necessary]); Dkt. 42-5 at 3 (explaining that to change gender marker for Medicare a person must change the gender in social security records); Dkt. 42-6 at 2 (allowing a transgender male student to participate in IHSAA-sanctioned athletics if student demonstrates that he is taking medically prescribed testosterone); 42-7 at 1 (allowing change of gender designation on immigration documents if a medical professional certifies that the gender designation is consistent with gender identity). EVSC’s enunciated policy is the opposite of those expressed in the documents it cites. For persons born anatomically female must use female restrooms—period. (Smith at 32 [ll. 6-12]). This policy

mere presence of a transgender individual in a bathroom or locker room is not the type of conduct that would be highly offensive to a reasonable person.” 893 F.3d at ___.¹

not only violates the law established by *Whitaker*, it is massively out-of-step with the various government agencies that EVSC cites to support its argument.¹⁶

Ultimately, EVSC argues that J.A.W. is not entitled to access to the restroom consistent with his gender identity “on demand.” (Dkt. 41 at 17). Again, *Whitaker* answers this claim.

while the School District repeatedly asserts that Ash may not “unilaterally declare” his gender, this argument misrepresents Ash's claims and dismisses his transgender status. This is not a case where a student has merely announced that he is a different gender. Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity. This law suit demonstrates that the decision to do so was not without cost or pain. Therefore, we find that Ash has sufficiently established a probability of success on the merits of his Title IX claim.

Whitaker, 858 F.3d at 1050. J.A.W. will also prevail on the merits of his claim.

II. The other factors favor the granting of a preliminary injunction in this case

EVSC argues that J.A.W. is not entitled to a preliminary injunction because, *inter alia*, he has delayed pursuing the relief. and therefore he has not suffered irreparable harm. (Dkt. 41 at 23). Of course, harm flowing from the equal protection violation here is presumed to be irreparable. *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 738-39 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016). Moreover, the evidence is clear that in both his freshman and sophomore years he unsuccessfully attempted to gain permission to use the male facilities— only to be refused by EVSC administrators—and that while a junior, before filing this case, he attempted one last time by having his attorney formally request such access. In assessing whether delay in seeking a preliminary injunction undercuts a claim of irreparable harm the question is

¹⁶ Also curious is EVSC’s argument that allowing J.A.W. to access a restroom consistent with his gender identity would interfere with parental rights. (Dkt. 41 at 17-18). This might be an appropriate thing to argue about if EVSC’s policy was that a transgender student could access the bathroom consistent with his or her gender identity only if a parent consented, but that is obviously not the case. Whether it be student, parent, doctor, or mental health professional requesting it, students simply cannot access a bathroom inconsistent with their birth sex. J.A.W.’s mother fully supports his efforts to access the male restroom. (Work ¶¶ 2-3). However, her assent is meaningless given EVSC’s policy.

whether a defendant was “lulled into a false sense of security” or whether it relied upon the delay in any way. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001). This was an issue that J.A.W. was consistently attempting to resolve, *see, e.g., Lanin v. Borough of Tenafly*, 515 F. Appx. 114, 118 (3d Cir. 2013) (delay excused where plaintiff believed dispute might be resolved through negotiations), and EVSC cannot claim either that it was so “lulled” or that it relied on any delay. Moreover, J.A.W. is a minor dealing with gender dysphoria and his transition who is taking on EVSC, and the delay in proceeding with litigation against his school system is hardly inexplicable or inexcusable. Within a few months of beginning hormone therapy, he, through his counsel, demanded a change to the policy, leading to the filing of this litigation shortly thereafter when the request was denied. Any delay is certainly excusable. In any event, “delay is but a single factor to consider in evaluating irreparable injury; courts are loath to withhold relief solely on that ground . . . and tardiness is not particularly probative in the context of ongoing, worsening injuries.” *ARC of Calif. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (internal quotation and citations omitted).

The delay here has not undercut the irreparable harm that J.A.W. is suffering. As previously noted the denial of constitutional rights is irreparable harm. (Dkt. 29 at 11-12). Moreover, the lack of access to the restrooms is causing J.A.W. to engage in the painful conduct of restricting fluid intake to try to make it through the day without going to the bathroom. (Dkt. 17-1 ¶¶ 26-27). Moreover, his inability to use the bathroom associated with his gender identity makes him feel different, causing stress, depression, discomfort and psychological harm. (*Id.* ¶ 34). Experts concur that failure to allow a transgender person to use the bathroom associated with gender identity undermines the essential social transition process and causes psychological harm. (Ettner ¶¶ 24-26, 30; Fortenberry ¶¶ 30-31; Fogel ¶ 30). This is most certainly irreparable harm. *See, e.g., Evancho*, 237 F. Supp. 3d at 294 (transgender students’ assertions that bathroom policy

marginalized them causing “distress, anxiety, discomfort and humiliation” demonstrated irreparable harm).

Finally, EVSC is not able to demonstrate that allowing J.A.W. to use the restroom associated with his gender identity will cause it any harm. Instead it argues that allowing this would interfere with the parental rights of J.A.W.’s mother, who supports his decision. This makes little sense. This case is not about parental consent¹⁷, it is about a policy that denies a transgender male – who appears male and is taking male hormones – access to the restroom associated with his gender identity regardless of parental desires. And, as noted by Dr. Chiasson, reflecting upon the California experience where all students have the right to use the restrooms associated with their gender identity, this “improved the educational experience for transgender students and created a more positive and inclusive school climate for everyone.” (Chiasson ¶ 18). *See also Whitaker*, 858 F. 3d at 1054-55. The balance of harms and the public interest favor J.A.W.

Conclusion

The preliminary injunction requested by J.A.W. should be granted, without bond.¹⁸

s/ Kenneth J. Falk

Kenneth J. Falk

s/ Gavin M. Rose

Gavin M. Rose

s/ Jan P. Mensz

Jan P. Mensz

ACLU of Indiana

2457 E. Washington St., Suite Z

Indianapolis, IN 46201

317/635-4059

¹⁷ “And while the School District claims that preliminary injunctive relief infringes upon parents’ ability to direct the education of their children, it offers no evidence that a parent has ever asserted this right. These claims are all speculative.” *Whitaker*, 858 F.3d at 1054.

¹⁸ EVSC does not argue that a bond should be imposed if the injunction is granted.

fax: 317/635-4105
kfalk@aclu-in.org
jmensz@aclu-in.org

Attorneys for Plaintiff

Certificate of Service

I hereby certify that on this 16th day of July, 2018, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's system on:

Patrick A. Shoulders
Robert L. Burkart
Jean M. Blanton
ZIEMER STAYMAN WEITZEL & SHOULDERS, LLP
pshoulders@zsws.com
rburkart@zsws.com
jblanton@zsws.com

s/ Kenneth J. Falk

Kenneth J. Falk
Attorney at Law

APPENDIX A

Other Jurisdictions' Requirements and Recommendations Concerning Access of Transgender Students to Bathrooms Consistent with their Gender Identities

STATES:

Colorado- Colorado's Anti-Discrimination Law prohibits discrimination against a person's "transgender status or another individual's perception thereof." Colo. Rev. Stat. § 24-34-301(7). Administrative regulations specifically note that entities covered by the anti-discrimination law must "allow individuals the use of gender-segregated facilities that are consistent with their gender identities . . . includ[ing] restrooms [and] locker rooms." 3 CCR 702-2:81.9(B). Schools are places of public accommodation covered by this requirement. See Colorado Department of Regulatory Agencies, *DORA advisory regarding Colorado protections for equal access for transgender persons to public facilities under Colorado law*, Feb. 24, 2017, <https://www.colorado.gov/pacific/dora/advisory-equal-access-transgender-Colorado-law> (last visited July 3, 2018).

Connecticut- Connecticut's governor issued an order of February 24, 2017, noting that Connecticut law prohibits discrimination on the basis of gender identity and therefore "[b]athrooms and locker rooms in public schools . . . shall be considered places of public accommodation; therefore, discrimination based on sex, including gender identity . . . in such places is prohibited by Connecticut law. State of Connecticut, Daniel P. Malloy, Executive Order No. 56, <https://portal.ct.gov/-/media/CD26957CDAEA4D7AA25C3871B8BD2034.pdf> (last visited July 3, 2018).

District of Columbia – A district statute prohibits educational institutions from discriminating on the grounds of gender identity and a municipal regulation specifically requires that persons be allowed to use gender-specific restrooms that are consistent with their gender identities. See D.C. Code Ann. § 2-1402.41(1); D.C. Mun. Regs. tit. 4, § 802.1

Hawaii - State of Hawaii, *Guidance on Supports for Transgender Students* at 6, available at <http://www.hawaiipublicschools.org/DOE%20Forms/Civil%20Rights/TransgenderSupports.pdf> (last visited July 3, 2018) ("Students should have access to restrooms that correspond to their sincerely held gender identity.")

Iowa – Iowa law prohibits discrimination on the grounds of gender identity, Iowa Code § 216.9, and the Iowa Department of Education has noted that "a student cannot be forced to use a restroom with which they do not identify" and that "[a]bsent a concern for safety school should permit a student to use the restrooms or locker rooms for which they identify." Iowa Department of Education, *Equality for transgender students*, Oct. 2017, <https://www.educateiowa.gov/resources/laws-and-regulations/legal-lessons/equality-transgender-students> (last visited July 3, 2018).

Maine – *Doe v. Regional School Unit 26*, 86 A.3d 600, 607 (2014) – Denying a transgender student access to the bathroom consistent with her gender discrimination constitutes sexual orientation discrimination prohibited by Maine statutes. And, the attorney for the Maine Human Rights

Commission has stated that “[s]tudents must be permitted to use the toilet, locker room, and shower facilities corresponding to their gender identity.” <https://www.maine.gov/mhrc/guidance/CCmemo.education.so.pdf> at 3 (last visited July 3, 2018).

Maryland - “The following suggestions may assist school systems in creating a non-discriminatory and equitable school environment. . . . Provide access to the restroom that corresponds to the student’s gender identity.” Maryland State Department of Education, *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* at 13 (Oct. 27, 2015), <http://marylandpublicschools.org/about/Documents/DSFSS/SSSP/ProvidingSafeSpacesTransgenderGenderNonConformingYouth012016.pdf> (last visited July 3, 2018)

Massachusetts - See Massachusetts Department of Elementary & Secondary Education, *Safe Schools Program for LGBTQ Students –Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment –Nondiscrimination on the Basis of Gender Identity* at 3 (Feb. 15, 2013) <http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html> (last visited July 4, 2018)

Michigan – “Students should be allowed to use the restroom in accordance with their gender identity.” [Michigan] State Board of Education, *Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* at 5 (Sept. 14, 2016), https://www.michigan.gov/documents/mde/SBEStatementonLGBTQYouth_534576_7.pdf (last visited July 4, 2018)

Minnesota – “Transgender . . . students should be afforded the opportunity to use the restroom of their choice.” Minnesota Department of Education, *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* at 10 (September 25, 2017), available through <https://education.mn.gov/MDE/dse/safe/> (last visited July 4, 2018)

New Jersey- N.J.S. 18A:36-41(b) requires that the Commissioner of Education develop and distribute guidelines to school districts that “shall include. . . information and guidance regarding. . . (9) use of restrooms and locker rooms, including not requiring a transgender student to use a restroom or locker room that conflicts with the student’s gender identity.”

New York – See (New York) State Education Department, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students* at 9-10, http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf (last visited July 4, 2018), and Letter from New York Attorney General and New York Commissioner of Education of February 28, 2018, reaffirming the previous document, <http://www.nysed.gov/common/nysed/files/nysed-oag-joint-guidance-letter-2-28-18.pdf> (last visited July 4, 2018).

Rhode Island – See Rhode Island Department of Education, *Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students* at 8-9 (June, 2016), <http://www.thriveri.org/documents/Guidance.for.RhodeIsland.Schools.on>.

Transgender.and.Gender.Nonconforming.Students-2016.pdf (last visited July 4, 2018), and Rhode Island Department of Education, *RI Department of Education Reaffirms Policy on Protections for Transgender Students*, <http://www.ride.ri.gov/InsideRIDE/AdditionalInformation/News/ViewArticle.aspx> (last visited July 4, 2018)

Vermont – “A transgender student should not be required to use a locker room or restroom that conflicts with the student’s gender identity.” Vermont Agency of Education, *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* at 6 (Feb. 23, 2017) <http://education.vermont.gov/sites/aoe/files/documents/edu-best-practices-transgender-and-gnc.pdf> 9 (last visited July 4, 2018).

Washington – “Public schools must allow students to use the **restroom** and **locker room** that corresponds to their gender identity.” State of Washington – Office of Superintendent of Public Instruction, *Equity and Civil Rights - Gender Identity and Expression in Schools* at 1 (April 10, 2018), <http://www.k12.wa.us/Equity/GenderIdentity/default.aspx> (emphasis in original) (last visited July 4, 2018).

LOCAL SCHOOL SYSTEMS

Boston - Boston Public Schools, Superintendent’s Circular, EQT-4, at 3 (Jan. 1, 2017), <https://drive.google.com/file/d/0B9mGu0dNZp6bSGIIOdDtUHVyS2s/view> (last visited July 5, 2018) (“All students are entitled to have access to restrooms, locker rooms, and changing facilities consistent with the student’s gender identity.”).

Chicago - Chicago Public Schools, Guidelines Regarding the Support of the Transgender and Gender Nonconforming Students, at 4, <http://dig.abclocal.go.com/wls/documents/FINAL%20CPS%20Student%20Transgender%20Guidelines.pdf> (last visited Jul. 5, 2018) (“Students shall have access to the restrooms and locker rooms that correspond with their gender identity consistently asserted at school.”).

New York City – New York City Department of Education, Transgender and Gender Nonconforming Student Guidelines, at 8 (Mar. 1, 2017), <http://schools.nyc.gov/NR/rdonlyres/6AAB4B91-3292-4EB0-86D8-DC0FF7811CC1/0/TransGNCGuidelinesMarch1finaltopost.pdf> at 8 (last visited Jul. 5, 2018) (“Transgender and gender nonconforming students must be provided access to facilities (restrooms, locker rooms or changing rooms) consistent with their gender identity consistently asserted at school. A transgender student may not be required to use a facility that conflicts with the student’s gender identity consistently asserted at school.”).

Milwaukee - Milwaukee Public Schools, Gender Inclusion Guidelines, at 7 (Oct. 2016), <https://esb.milwaukee.k12.wi.us/attachments/f36536ea-e075-4a98-b135-54abb5ee05c1.pdf> (last visited Jul. 5, 2018) (“Individuals are allowed to have access to restrooms and locker rooms that correspond to their gender identity.”).

Minneapolis - Minneapolis Public Schools, Permissible Grouping Principles, Reg. 6135 A, at 1 (Jan. 16, 2014), http://policy.mpls.k12.mn.us/uploads/regulation_6135_a.pdf (last visited Jul. 5, 2018) (“In any permissible grouping by gender, students shall have the option to self-select into the group of their gender identity or expression where such gender identity or expression is the consistent identity or expression that they use at school.”).

APPENDIX B

Examples of Indiana school corporation policies prohibiting discrimination because of gender identity and/or transgender status

Avon Community School Corporation, *Bylaws & Policies*, No. 2260, available through <http://www.neola.com/avon-in/> (last visited July 5, 2018)

Bartholomew Consolidated School Corporation, *Bylaws & Policies*, No. 2260, available through <http://www.neola.com/bartholomew-in/> (last visited July 5, 2018)

Brownsburg Community School Corporation, *Bylaws and Policies*, No. 2260, available through <http://www.neola.com/brownsburg-in/> (last visited July 5, 2018)

Carmel Clay School Corporation, *Nondiscrimination In District Programs and Activities*, BP 0410, <http://www.gamutonline.net/district/carmel/DisplayPolicy/1097225/> (last visited July 5, 2018)

Elkhart Community Schools, *Bylaws and Policies*, No. 2260, <http://www.neola.com/elkhartcomm-in/> (last visited July 5, 2018)

Fort Wayne Community Schools, *Bylaws & Policies*, No. 1500, available through <https://www.fwcs.k12.in.us/files/board/Bylaws-Series-1000.pdf>

Gary Community School Corporation, *Policy Manual*, No. 506 (at 206), available through <https://www.garycsc.k12.in.us/wp-content/uploads/2018/02/GCSC-Policy-Manual-.pdf> (last visited July 5, 2018)

Hamilton Heights School Corporation, *Bylaws & Policies*, No. 2260 (available through <http://www.neola.com/hamiltonheights-in/> (last visited July 5, 2018)

Metropolitan School District of Lawrence Township, *Bylaws & Policies*, No. 2260, available through <http://www.neola.com/msdlawrence-in/> (last visited July 5, 2018)

Metropolitan School District of Warren Township, *Student Rights & Responsibilities Handbook 2018-2019 School Year* at 6, available through <http://www.warren.k12.in.us/student-rights-responsibilities>)

Perry Township Schools, *Student Rights, Responsibilities, Rules and Regulations Booklet 2017-2018*, at 23, <http://www.perryschools.org/wp-content/uploads/2017/06/StudentRRRRBooklet.pdf> (last visited July 6, 2018)

South Bend Community School Corporation, *Bylaws & Policies*, No. 2260, available through <http://www.neola.com/southbend-in/> (last visited July 5, 2018)