

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.)	

Notice of Submission of Proposed Findings of Fact, Conclusions of Law, and Preliminary Injunction

Plaintiff, by counsel. submits his proposed findings, conclusions of law, and preliminary injunction in this case.

WHEREFORE, plaintiff submits this proposal.¹

¹ In J.A.W.’s reply memorandum counsel stated that “every” federal case entered decision in favor of the transgender student. (Dkt. 54 at 16 n. 15). As noted by EVSC in its surreply (Dkt. 59 at 2 n. 1), this is erroneous and counsel apologizes for their error.

Findings of Fact, Conclusions of Law, and Preliminary Injunction

INTRODUCTION

Plaintiff (“J.A.W.”), a 17-year old transgender male student enrolled in schools within the Evansville Vanderburgh School Corporation (“EVSC”), seeks a preliminary injunction so as to be able to use male restrooms within EVSC as his gender identity is male. On July 20, 2018, after briefing was completed in this matter, the Court held a preliminary injunction hearing where it received evidence. The Court, having reviewed the matter, concludes that a preliminary injunction should issue, without bond, and makes the following findings and conclusions to support that ruling. However, as a preliminary matter, as set out below, the Court rules on the pending evidentiary objections and matters before it.

RULING ON EVIDENTIARY OBJECTIONS AND MOTION TO FILE AND MAINTAIN DOCUMENTS UNDER SEAL

Ruling on EVSC’s objections to J.A.W.’s exhibits

1. On July 13, 2018, EVSC filed its objections to the exhibits that J.A.W. utilized at the preliminary injunction hearing. (Dkt. 49). With one exception EVSC’s objections are not well taken and will be overruled.
2. To the extent that EVSC claims that the declarations that J.A.W. has submitted are hearsay, the objection is not meritorious and is overruled. Affidavits are clearly admissible in preliminary injunction proceedings. *See, e.g., Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997).
3. This also disposes of EVSC’s objection that the declarations are not admissible because it did not have the opportunity to cross-examine the declarants. Inasmuch as sworn statements like

declarations and affidavits are admissible, EVSC's objection is not meritorious. J.A.W. disclosed his plan to use the statements in his exhibit list filed on July 6 (Dkt. 44) and the experts were listed in plaintiff's preliminary witness and exhibit list of June 29, 2018 (Dkt. 38). EVSC had the opportunity to depose the declarants but apparently chose not to do so. This choice does not render the declarations inadmissible.

4. EVSC objects to the four expert declarations submitted by J.A.W., those of Dr. Randi Ettner, Ph.D. (Dkt. 50-5); Dr. James Fortenberry, M.D. (Dkt. 50-6); Dr. Janine Fogel, M.D. (Dkt. 50-7); Dr. Judy Chiasson, Ph.D. (Dkt. 50-8).

5. EVSC claims that the evidence presented by the experts is not relevant. This is erroneous. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" Fed.R.Ev. 401(a), and the evidence presented by Drs. Ettner, Fortenberry, and Fogel is relevant for at least four purposes:

- To establish foundational facts concerning the medical and psychological basis, treatment, and effects of an individual's gender dysphoria or transgender status, which is of course at the heart of this case and certainly not within general knowledge.
- To undercut justifications for EVSC's policy, an issue central to the merits of this case, by establishing that a transgender male such as the plaintiff appears male and *is* male.
- To demonstrate the harm that a transgender person, particularly a transgender minor, suffers when he is not permitted to use the bathrooms that correspond with his gender identity and is instead relegated to "outsider" status as well as the benefits to allowing such usage as a part of the person's social role transition.
- To bolster the plaintiff's credibility by demonstrating that his experiences, either in terms of his injury resulting from the inability to use the bathrooms at school or in terms of his transgender status in general, are not unique but are instead similar or identical to what would be experienced by any transgender minor under the circumstances.

6. The information in Dr. Chiasson's declaration is also clearly relevant as she details the manner in which the second largest school district in the United States was able to allow transgender students to have access to bathrooms that correspond to their gender identities without

suffering disruption or harmful effects. Indeed, the declaration establishes the benefit that the policy has had for students and the detriment suffered by students in the absence of the policy. This is relevant and addresses concerns that EVSC expressed concerning potential disruption if J.A.W. is allowed to access male restrooms.

7. EVSC also argues that none of the experts satisfy the requirements of Fed.R.Ev. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* requires this Court to “determine whether the witness is qualified; whether the expert’s methodology is scientifically reliable; and whether the testimony will assist the trier of fact to understand the evidence to determine a fact in issue,” *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 779 (7th Cir. 2017) (quotation and citation omitted).

8. EVSC does not disagree with the qualifications of the experts or that the methodologies that they rely upon are reliable, not could it. The experts are obviously qualified and have “scientific, technical, or other specialized knowledge” that will assist the Court. Further EVSC does not dispute, and the Court finds, that Drs. Ettner, Fortenberry, and Fogel are relying upon well-accepted diagnostic and treatment protocols and regimens concerning gender dysphoria and transgender status. Dr. Chiasson is relying on factual information that she observed in implementing transgender policies for the Los Angeles Unified School District and an expert can certainly base her opinion on experience. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761 (7th Cir. 2010).

9. EVSC does not appear to challenge any of the above, but instead it argues that Drs. Ettner, Fortenberry, and Fogel did not personally examine J.A.W. and therefore cannot render an expert opinion. (It does not appear to raise a specific objection in this regard concerning Dr. Chiasson). While the three experts did review J.A.W.’s mental health and medical records, it is true that they

did not personally examine him. But, an expert can base his or her opinion “on facts or data in the case that the expert has been made aware of” as well as facts or data that he or she has “personally observed.” Fed.R.Ev. 703. *See also, e.g., Harris v. City of Chicago*, No. 14-CV-4391, 2017 WL 2080353, at *7 (N.D. Ill. May 15, 2017) (“Physicians commonly look at medical records and autopsy reports to determine a cause of death or other medical condition.” [citing cases from the Seventh Circuit]). EVSC’s objection is not well-taken.

10. EVSC argues that the declarations of Zachary Mulholland (Dkt. 50-9) and Aleczer Dean (Dkt. 50-10) are not relevant. This is erroneous as both declarations demonstrate that there are Indiana school systems that allow transgender students to use bathrooms associated with their gender identity without any disruption resulting, thus serving to support J.A.W.’s argument that there is no valid justification for EVSC’s action.

11. EVSC argues that the declaration of Tammy Work, J.A.W.’s mother, is not relevant. EVSC repeatedly notes in its briefing that Ms. Work has not been heard from in this matter. Her declaration, which indicates that she fully supports her child’s efforts to use the male restrooms, is directly responsive to EVSC’s arguments. The Court finds that this case can be resolved without reference to the mother’s wishes, but to the extent that it is EVSC that has made this an issue, the declaration is relevant and admissible.

12. EVSC objects that a certain newspaper article from the *Indianapolis Star*, cited at page 14, n. 11, of Docket 54, is inadmissible hearsay. Despite the fact that the rules of evidence are relaxed in the preliminary injunction context, *Dexia Credit Local v. Rogan*, 602 F.3d 879, 885 (7th Cir. 2010), the Court is not inclined to rely upon facts that are set out in a newspaper article that are not of the type of which the Court can take judicial notice. The Court therefore sustains the hearsay objection as to the *Indianapolis Star* article.

13. EVSC objects to J.A.W.'s listing of the complaint and answer (Dkt. 1, Dkt. 34) as exhibits. It appears that the sole purpose for which J.A.W. relies on this material is to present the fact, admitted by EVSC, that EVSC receives federal funding, which is required for an entity to be subject to Title IX of the Education Amendments Act of 1972. (Dkt. 1 ¶ 37 as admitted by Dkt. 34 ¶ 37). This is a judicial admission of EVSC and is admissible. *See, e.g., Keller v. United States*, 58 F.3d 1194, 1198 (7th Cir. 1995) (“Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them.”).

14. Therefore, with the exception of the *Indianapolis Star* article referred to above, EVSC's objections to J.A.W.'s exhibits are overruled. All other exhibits that were sought to be introduced by J.A.W., including the exhibits for which he requested that this Court take judicial notice, Dkt. 54-1 and Dkt 54-2, which were not objected to by EVSC, are therefore admitted.

Ruling on J.A.W.'s objections to EVSC's exhibits

15. EVSC sought only to admit only the documents listed in its Appendix, Dkt. 42-1 through 42-10.

16. J.A.W. objects to the introduction of Dkt. 42-10, a magazine article, noting that it is both hearsay and, inasmuch as EVSC is attempting to utilize opinions contained within it EVSC is attempting to present expert evidence, without any qualification of an expert, in violation of Fed.R.Ev. 702. J.A.W.'s objection to the exhibit are well taken and is sustained.

17. Therefore this Court takes judicial notice of Dkt. 42-1 through Dkt. 42-9 and sustains the objection to Dkt. 42-10.

Ruling on Motion to File and Maintain Documents Under Seal

18. On July 16, 2018, J.A.W. filed his Motion for Leave to File and Maintain Documents Under Seal (Dkt. 52), seeking to file certain deposition exhibits under seal, specifically: select

counseling records of the plaintiff from Within Sight (Exhibit 3 to Dkt. 50-1); an additional counseling record from Within Sight (Exhibit 4 to Dkt. 50-1); plaintiff's medical records from ECHO Community Health Care (Exhibit 5 to Dkt. 50-1); and the plaintiff's photograph (Exhibit 6 to Dkt. 50-1 and Dkt. 50-2).

19. EVSC has not objected to plaintiff's motion.

20. In light of the plaintiff's minority as well as the privacy accorded to medical and mental health records, the Court concludes that plaintiff's motion will be granted by separate order of this Court.

FINDINGS OF FACT

J.A.W.

1. J.A.W. is a 17-year-old rising senior who is a student within EVSC. (Dkt. 17-1 ¶¶ 1-4; Dkt. 50-1 at 13 [ll. 13-14]; Dkt. 50-2 at 7 [ll. 7-21])
2. J.A.W.'s assigned gender at birth, as noted on his birth certificate, is female. (Dkt. 17-1 ¶ 7).
3. But, he has long identified himself as male and has presented himself to the world as male. (*Id.* ¶ 7).
4. It was not until J.A.W. was 11, after reading on the subject, that he learned what transgender was and he recognized that he was transgender. (Dkt. 50-1 at 95 [l. 2] – 96 [l. 11]).
5. J.A.W.'s 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. (*Id.* at 18 [l. 6] – 19 [l. 19]).
6. He did not say anything about it to his school 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]).
7. 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]).
8. As an objective matter, J.A.W. has consistently presented himself to the world as male since that time. (Ex. 4 to Dkt. 50-1).

9. When J.A.W. was in 8th grade he was too intimidated to raise the bathroom issue. (Dkt 50-1 at 23 [l. 25] -24 [l. 1]).

10. However, when he was a freshman in high school, as puberty hit and as his gender dysphoria became more pronounced, he felt extremely uncomfortable using female restrooms at school. (*Id.* at 25 [ll. 5-17]).

11. J.A.W. did not yet know 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]).

12. 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]).

13. In his freshman year he identified himself as transgender and asked to use male facilities. (*Id.* at 110 [ll. 3-6]).

14. 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]).

15. 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 female students. (*Id.* at 41 [l. 10-22]).

16. In his freshman year J.A.W. was informed by EVSC staff that he could either use female restrooms or the restroom in the nurse's office. (*Id.* at 45 [l. 24] – 46 [l. 12]; Dkt. 17-3 ¶ 13).

17. The nurse's restroom is a gender-neutral, single-person, bathroom and 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. (Dkt. 50-1 at 48 [ll. 19-23]; Dkt. 50-2 at 18 [l. 25] – 20 [l. 25]; Tr. 13 [ll. 2-10]).

18. Most students use the male and female restrooms that are proximate to where their classes are. (*Id.* at 21 [ll. 16-19]).

19. These restrooms are designed for multiple users at the same time. (Dkt. 50-2 at 9 [l. 19] – 10 [l. 8]).

20. 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; Dkt. 50-1 at 46 [l. 10] – 48 [l. 7]).

21. 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. (Dkt. 50-1 at 57 [l. 4] – 58 [l. 15]).

22. Early in his sophomore year J.A.W. presented his principal with an annotated copy of the Obama Administration’s “Dear Colleague” letter (since rescinded) concerning the fact that the Administration interpreted Title IX of the Education Amendments Act of 1972 to require that transgender students be allowed to use bathrooms consistent with their gender identities. (*Id.* at 57 [l. 14] – 58 [l. 3]; Exhibit 9 to Dkt. 50-2; Preliminary Injunction Hearing Transcript (“Tr.”) at 23 [ll. 15-17]).

23. Nevertheless, he was not allowed to use the male restrooms. (Tr. at 23 [ll. 18-22]).

24. 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 Dkt. 50-2 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.*).

25. 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).

26. Although the Superintendent opined that the other high school might have a gender neutral restroom other than one in the nurse's office, while admitting that he was not sure about this, (Dkt. 50-2 at 24 [ll. 5-9]), J.A.W. indicated, without contradiction, that he was not aware of the existence of such a restroom and its use was never offered to him as an option. (Dkt. 50-3 ¶¶ 3-4; Tr. at 21 [ll. 3-5]). He was not informed of any gender-neutral bathrooms in that high school. (Tr. at 21 [ll. 3-5]).

27. If there are gender-neutral restrooms at a school, prior permission from staff must be obtained to use them. (Dkt. 50-2 at 24 [l. 8] – 25 [l. 7]).

28. 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. (Dkt. 50-1 at 60 [l. 9] - 63 [l. 6]).

29. His counselor recognized that he identified as male and that he should receive testosterone if he wanted it. (*Id.* at 82 [ll. 1-9]).

30. 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 Dkt. 50-1). His medical records demonstrate that he suffers from gender dysphoria. (Ex. 5 to Dkt. 50-2 [noting an ICD-10 diagnosis of F.64.0, which is gender dysphoria, *see* Dkt. 50-6 ¶¶ 22-23; Dkt. 50-7 ¶¶ 16-17]).

31. He has been receiving the male hormone testosterone since the fall of 2017. (Dkt 17-1 ¶ 21; Dkt. 50-1 at 6 [ll. 8-9]).

32. He injects himself with the hormone once a week. (Dkt. 50-1 at 77 [ll. 10-14]).

33. 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]).

34. He no longer menstruates. (*Id.* at 78 [l. 24] – 79 [l. 9]).

35. He physically appears to be a young man. (Ex. 6 to Dkt. 50-1).

36. He is addressed by a male name by his teachers, (Dkt. 50-1 at 100 [ll. 22-25]), and EVSC acknowledges that he is transgender, has gender dysphoria, and that he is receiving hormones. (Dkt. 50-2 at 15 [l. 20] – 16 [l. 16]; 27 [ll. 22-24]; Tr. at 36 [ll. 4-16]).

37. J.A.W. has spoken to the EVSC School Board, identifying himself as a transgender EVSC student. (Dkt. 50-1 at 59 [ll. 4-24]).

38. 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 Dkt. 50-2).

39. 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. (Dkt. 50-2 at 26 [ll. 4-17]; Tr. at 37 [ll. 1-10]).

40. At no time did EVSC request that J.A.W. produce evidence as to him being transgender or having gender dysphoria. (Dkt. 50-2 at 16 [l. 24] – 17 [l. 6]; Tr. at 20 [ll. 4-8]).

Background concerning gender identity, transgender, and gender dysphoria

41. The term “gender identity” is a well-established medical concept that refers to one’s sense of being congruent with a particular gender. (Dkt. 50-5 ¶ 10; Dkt. 50-6 ¶ 13; Dkt. 50-7 ¶ 9).

42. Gender identity is fixed and firmly established early in life—it is not a choice. (Dkt. 50-5 ¶ 10; Dkt. 50-6 ¶¶ 13, 17; Dkt. 50-7 ¶ 10).

43. 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. (Dkt. 50-5 ¶ 11; Dkt. 50-6 ¶ 14; Dkt. 50-7 ¶ 11).

44. Persons who are transgender have a gender identity that differs from their birth-assigned sex and anatomy. (Dkt. 50-5 ¶ 11; Dkt. 50-6 ¶15; Dkt. 50-7 ¶ 12).

45. 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.” (Dkt. 50-5 ¶ 11).

46. Up to 0.6% of persons in Indiana identify as transgender. (Dkt. 50-6 ¶ 16).

47. 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>). Using the above figure of 0.6%, this means that there are approximately 40,000 persons in Indiana who are transgender.

48. 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. (Dkt. 50-5 ¶ 12; Dkt. 50-6 ¶ 20; Dkt. 50-7 ¶ 14).

49. The DSM-V and ICD-10 are both standard classifications of mental and physical disorders. (Dkt. 50-6 ¶ 20; Dkt. 50-7 ¶ 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. (Dkt. 50-6 ¶ 23; Dkt. 50-7 ¶ 17). Regardless, the ICD-10 classification of “gender identity disorder” is identical to the “gender dysphoria” noted in the DSM-V. (Dkt. 50-6 ¶ 23; Dkt. 50-7 ¶ 17).

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

(Dkt. 50-5 ¶ 13; Dkt. 50-6 ¶ 21; Dkt. 50-7 ¶ 15).

51. 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)." (Dkt. 50-6 ¶ 23; Dkt. 50-7 ¶ 16).

Treatment of gender dysphoria

52. 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. (Dkt. 50-5 ¶ 12; Dkt. 50-6 ¶ 18; Dkt. 50-7 ¶ 18).

53. Studies demonstrate that up to 40% of persons who identify as transgender attempt suicide at some time, compared to 5% of the American population at large. (Dkt. 50-6 ¶ 19; Dkt. 50-7 ¶ 20).

54. 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. (Dkt. 50-5 ¶ 14; Dkt. 50-6 ¶ 24; Dkt. 50-7 ¶ 23).

55. 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. (Dkt. 50-6 ¶ 26).

56. 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. (Dkt. 50-5 ¶ 16; Dkt. 50-6 ¶ 26).

57. Additionally, psychotherapy may be helpful, not to “cure” the person of gender dysphoria, but to address the negative impact of stigma, alleviating internal transphobia, improving body image, enhancing peer and social support, etc. (Dkt. 50-5 ¶ 16; Dkt. 50-7 ¶ 25).

58. 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. (Dkt. 50-6 ¶ 26).

59. Some, but not all, transgender individuals will undergo surgery to alter primary and/or secondary sex characteristics. (Dkt. 50-5 ¶ 5; Dkt. 50-6 ¶ 26; Dkt. 50-7 ¶ 27).

60. 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. (Dkt. 50-7 ¶ 27).

61. The goal of treatment is to eliminate the stress that gender dysphoria causes and to bring and the person's body and presentation in line with who they already are at his or her core. (Dkt. 50-5 ¶ 23).

62. 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. (Dkt. 50-6 ¶ 27).

63. Hormone therapy has a profound effect on the physical appearance of the individual. (Dkt. 50-5 ¶ 2). For a transgender male (*i.e.*, a person assigned as female at birth), hormones will render the person increasingly male in appearance. (Dkt. 50-5 ¶ 21; Dkt. 50-6 ¶ 27; Dkt. 50-7 ¶ 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. (Dkt. 50-5 ¶ 21; Dkt. 50-6 ¶ 27; Dkt. 50-7 ¶ 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. (Dkt. 50-6 ¶ 27; Dkt. 50-7 ¶ 29).

64. Social role transition is an essential component of treatment for transgender individuals. (Dkt. 50-5 ¶¶ 18, 24; Dkt. 50-6 ¶¶ 28-29; Dkt. 50-7 ¶ 29).

65. 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. (Dkt. 50-6 ¶ 29; Dkt. 50-7 ¶ 29).

66. 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. (Dkt. 50-7 ¶ 29).

67. 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. (Dkt. 50-5 ¶ 18).

68. 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]).

The importance of transgender persons being given opportunity to access bathrooms that are consistent with their gender identities

69. It is vitally important that social transition occur in all aspects of the transgender person’s life. (*Id.* ¶ 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.*).

70. 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.*; Dkt. 50-6 ¶ 30).

71. 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. (Dkt. 50-5 ¶¶ 24-25; Dkt. 50-6 ¶ 30; Dkt. 50-7 ¶ 30).

72. Being denied the ability to use such facilities that are consistent with gender identity, or to insist that a transgender individual use a separate restroom, is a clear statement that the person is “different,” some undifferentiated “other.” (Dkt. 50-5 ¶ 25; Dkt. 50-6 ¶ 30; Dkt. 50-7 ¶ 30).

73. This interferes with the person’s ability to consolidate his or her identity, thus undermining the social transition process. (Dkt. 50-5 ¶ 25; Dkt. 50-7 ¶ 30).

74. 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. (Dkt. 50-5 ¶ 26).

75. Transgender persons go to great lengths to transition from the gender that they were assigned at birth and preventing them from being able to access spaces with peers can be deeply traumatic, particularly for adolescents, exacerbating the depression and isolation that many transgender persons experience. (*Id.*).

76. The denial of usage of restroom 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. (Dkt. 50-6 ¶ 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

(Dkt. 50-5 ¶ 30 [internal citations omitted]).

77. 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. (Dkt. 50-6 ¶ 30; Dkt. 50-7 ¶ 31).

78. 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. (Dkt. 50-5 ¶ 28).

79. Studies show that transgender persons have a greater risk of being assaulted than the general population. (Dkt. 50-7 ¶ 32). For example, 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.*).

EVSC's policy concerning bathroom access by transgender students and its basis

80. As noted, EVSC is clear that J.A.W. may not use male restrooms. (Dkt. 50-2 at 26 [ll. 4-17]; Tr. 37 [ll. 1-10]).

81. The basis for the prohibition is a concern that allowing transgender persons to use the restrooms corresponding to gender identity could cause disruption and an unsafe environment, although the only example that the Superintendent could articulate during his deposition on June 22, 2018, concerned an incident that was decades ago, not concerning a transgender student, when a female walked in on a custodian using a restroom and the custodian was very upset. (Dkt. 50-2 at 28 [l. 11] – 29 [l. 8]).

82. Contrary to his testimony at the preliminary injunction hearing, Superintendent Smith was specifically asked in his deposition to recount “any other examples” of how allowing a transgender

student to use the bathroom consistent with his gender identity could cause disruption or an unsafe environment, and the above was the only example he was able to articulate at that time. (Dkt. 50-2 at 29 [ll. 2-8]).

83. During his preliminary injunction testimony Superintendent Smith indicated that the day after his deposition testimony he was contacted by an EVSC employee who had, in turn, been contacted by a mother of a student who was “upset” because a transgender man had been in the bathroom with her daughter, and she felt very “scared, vulnerable and terrified.” (Tr. at 33 [ll. 10-17]). No further information was given and it is unclear whether the mother or the daughter was upset and how this was dangerous or disruptive. This is therefore not probative of anything. Additionally, a transgender man is a person who lives as a man, but was assigned the sex of female at birth. (Dkt. 50-5 ¶ 21). Thus, for example, J.A.W. is a transgender male and it makes perfect sense, and is consistent with this testimony, that a young woman would be concerned if she saw J.A.W. in a female restroom as he presents as a male. (Dkt. 50-1 at 86 (ll. 11-22); Tr. at 21 [ll. 17-19]).

84. Also during his preliminary injunction testimony, the Superintendent testified that there were other examples of disruption caused by bathroom usage. (Tr. at 55 [ll. 1-15]). However, he was not specific as to how many of these concerned transgender persons and was not able to articulate any specific examples despite being asked for them. (Tr. at 55 [ll. 16-18]). Given that the forecast of disruption arising from bathroom usage by transgender students appears to be fundamental to EVSC’s opposition here the Court finds it curious that the Superintendent was not prepared to articulate other examples and the Court does not credit his statement that there are such examples.

85. The EVSC policy concerning bathroom usage is not in writing. (Dkt. 50-2 at 32 [ll. 19-21]).

86. However, in his deposition the Superintendent specified, on a number of occasions, that the policy is that persons born anatomically male must use male restrooms and persons born anatomically female must use female restrooms. (*Id.* at 26 [ll. 18-20]; 27 [ll. 8-12]; 28 [ll. 2-10]; 32 [ll. 6-12]). He reiterated this in his testimony at the preliminary injunction hearing. (Tr. at 39 [ll. 7-8] [“So in other words, his biological sex is the determining factor.”]).

87. During the preliminary injunction hearing the Superintendent attempted to articulate a slightly different policy or practice – that EVSC would rely on the gender marker on a student’s birth certificate so that if a transgender person had a birth certificate legally changed to reflect the gender of the student’s gender identity, the policy of exclusion would not necessarily apply. (Tr. at 40 [l. 19] – 41 [l. 7]).

88. This birth certificate policy was not mentioned by the Superintendent in his deposition and it was never mentioned to J.A.W. prior to the hearing. (Tr. at 43 [l. 22] – 44 [l. 5]).

89. However, when presented with the fact that in some jurisdictions, including Indiana, gender markers on birth certificates can be changed without the person having sex-reassignment surgery, meaning that the Superintendent was enunciating a policy that would allow transgender persons who were still anatomically of their birth gender, like J.A.W., to use bathrooms consistent with their gender identity, the Superintendent indicated that if this caused disruption the bathroom access could be denied, regardless of the change in gender marker (Tr. at 54 [ll. 5-25]).

90. The Court concludes that the “birth certificate” policy or practice is, at best, an *ad hoc* approach created immediately before the preliminary injunction hearing and the Court is not inclined to view it as the actual policy or practice of EVSC. In any event, however, given that it

is clear that even if a transgender student obtains a change of gender marker on the student's birth certificate there is no guarantee that the student can use the bathroom consistent with his or her gender identity, this policy does not provide a path for J.A.W.—even if he could obtain a change on his birth certificate—to gain access to bathrooms consistent with his gender identity.

91. J.A.W. was born in Florida and, under Florida law and regulations, he is not able to obtain a change in gender marked on his birth certificate. EVSC asserted to the contrary in its briefing (Dkt. 41 at 21 n.8 [citing Fla. Stat. § 382.016 and Fla. Admin. Code r. 64V-1.003]). However, the authority provided by EVSC does not stand for this proposition and this does not appear to be the case.

92. The Florida statute cited by EVSC only pertains to a change in the child's name on his or her birth certificate (which may be accomplished prior to his or her first birthday), to a change in the child's surname in the event that paternity is established after birth, or to a change in the father's name under certain circumstances. Fla Stat. § 382.016(1). It does not allow for a change to the gender marker on an individual's birth certificate, and certainly does not mention "presentation of a physician letter confirming clinical treatment for gender transition."

93. The regulation cited by EVSC only allows for a change to the sex listed on an individual's birth certificate under three circumstances: (a) if the sex was left blank on the birth certificate (subsection (1)(g)); (b) if the sex as recorded is "clearly in conflict with given names as recorded" (subsection (1)(g)); or (c) if supporting documentation for the change was "established within 7 years of the date of birth" (subsection (2)(c)). See Fla. Admin. Code r. 64V-1.003. Florida case law appears to make clear that the statutorily described circumstances under which a birth certificate may be changed represent an exhaustive list. See, e.g., *Coolidge v. Ulbrich*, 733 So.2d 1092, 1094 (Fla. Ct. App. 1999) ("We reverse that portion of the order requiring that the name on

Nicole's birth certificate be amended. At the time of Nicole's birth, the designation of her name complied with [Florida law]. This case does not fall within [the statutes] regarding the preparation of a new birth certificate or amendments to records.”).

94. Moreover, even if changing the Florida birth certificate was a legal possibility, the Court acknowledges that it would be burdensome and unrealistic for a minor like J.A.W. to attempt to accomplish this.

95. J.A.W. is the only transgender EVSC student that the Superintendent is certain of who has sought to use a bathroom consistent with the student's gender identity. (Tr. at 48 [l. 16]- 50 [l. 13]).

96. It is the position of EVSC that the only bathroom accommodation it will make to J.A.W. is to provide him with a unisex bathroom. (Tr. at 43 [ll. 10-14]).

97. The Court therefore finds that EVSC has no policy or practice that would guarantee J.A.W. access to a bathroom consistent with his gender identity, *i.e.*, male restrooms.

98. EVSC asserts that it is attempting to tie bathroom usage to “objective” factors. However, as noted above the objective facts, all of which EVSC is cognizant of, demonstrate that J.A.W. has presented as male since before his high school career, is transgender, has a diagnosis of gender dysphoria, and is receiving male hormones.

99. There is no evidence that J.A.W.'s classmates do not accept him as male. (Dkt. 50-2 at 39 [ll. 19-22]).

100. The bottom line is that J.A.W. is not allowed by EVSC to use bathrooms consistent with his gender identity because he is not considered to be male. (Tr. at 39 [ll. 7-17]).

The harms being suffered by J.A.W. because he is not allowed access to bathrooms consistent with his gender identity

101. As noted, the only bathroom accommodation provided to J.A.W. by EVSC, other than the use of female restrooms, is the use of the nurse's restroom in one high school. EVSC indicated

that he could have used the nurse's restroom in the second high school that he attended in his junior year, but this was never presented to him as an option. (Dkt. 50-2 at 24 [ll. 5-9]; Dkt. 50-3 ¶¶ 3-4; Tr. at 21 [ll. 3-5])

102. It is uncontested that, as noted above, the one nurse's bathroom of which J.A.W. is aware was not physically proximate to his classes and was locked on the few occasions he attempted to use it.

103. The need for social transitioning 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; Dkt. 50-1 at 112 [ll. 4-17]).

104. It is not acceptable that J.A.W. be relegated to a unisex bathroom single-user bathroom, like that in the nurse's office, if other students are allowed to go to male restrooms and use these restrooms the vast majority of the time, as this does not acknowledge that he is male. (Dkt. 50-1 at 84 [ll. 4-9]; Dkt. 50-2 at 21 [ll. 16-19]).

105. To avoid having to use restrooms at school, J.A.W. severely restricts his fluid intake in an attempt to prevent himself from having to go the bathroom while at school. (Dkt. 17-1 ¶ 26). This causes him pain and discomfort. (*Id.* ¶ 27).

106. On the few occasions in the past that J.A.W. could not wait he used the female restrooms at school as he did not want to be disciplined by EVSC. (*Id.* ¶ 28). This makes him uncomfortable and causes anxiety and depression and other emotional difficulties as he is not female—he is male and belongs in a male restroom. (*Id.* ¶ 28; Dkt. 50-1 at 84 [ll. 6-9]; Tr. at 19 [ll. 4-8]). It contradicts what he is attempting to project to the world as to his identity. (Tr. at 18 [l. 24] – 19 [l. 3]). It makes him feel ostracized from his peers. (Tr. at 19 [l. 6-8]). It is also uncomfortable for females in the restroom as he is now perceived as male. (Dkt. 50-1 at 86 (ll. 11-22); Tr. at 21 [ll. 17-19]).

107. J.A.W. presents as male, so he belongs in a male restroom. (Dkt. 50-1 at 84 [ll. 24-25])

108. The failure to allow J.A.W. to use male restrooms undermines his transition, and is forcing him to deny who he is and continues to make him feel different, causing stress, depression and psychological harm. (Dkt. 17-1 ¶¶ 24, 34).

109. J.A.W.'s mother, who is his legal guardian, is fully aware of his efforts to obtain access to the male restrooms through this litigation and supports his efforts. (Dkt. 17- ¶ 35; Dkt. 50-4 ¶¶ 2-3).

110. The mental and physical injuries that J.A.W. is suffering because of the inability to use the bathrooms corresponding to his gender identity are as described by plaintiff's experts and, although J.A.W. has, fortunately, not become suicidal at any point, the Court finds that he is suffering both physical and emotional injury and harm because of the inability to use the male restrooms within EVSC.

The experience of other jurisdictions and other school systems

111. Given that EVSC has argued that allowing J.A.W. to access restrooms consistent with his gender identity would be disruptive or otherwise problematic, the frequency with which other school systems allow such access and the results of allowing such access is relevant.

112. The Los Angeles United School District is the second largest school district in the country and 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. (Dkt. 50-8 ¶¶ 9-13; Exhibit B to Dkt. 50-8 at 5-6). 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. (Dkt. 50-8 ¶ 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).

113. Since 2013, California law has required that all students must be allowed to use facilities that match their gender identities. (*Id.* ¶18).

114. Dr. Chiasson, the Program Coordinator for the Office of Human Relations, Diversity and Equity for the Los Angeles Unified School District 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.* ¶¶ 1, 18)

115. Indianapolis Public Schools (“IPS”) has adopted a policy that prohibits discrimination on the grounds of sex, which includes sexual orientation or gender identity. (Dkt. 50-9 ¶ 6; Exhibit 1 to Dkt. 50-9 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 their gender identities. (Dkt. 50-9 ¶ 7; Exhibit 2 to Dkt. 50-9 at ¶ 5). This guideline has apparently not caused disruptions or incidents. (Dkt. 50-9 ¶ 8).

116. 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. (Dkt. 50-10 ¶¶ 4-6). 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).

117. All schools in the following jurisdictions require that transgender students be allowed to use bathrooms consistent with their gender identities: California, Colorado, Connecticut, the District of Columbia, New Jersey, and Washington. (Dkt. 54-1).

118. In other jurisdictions, including Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New York, Rhode Island, and Vermont, state departments of education or

other state offices recommend that local schools allow transgender students to utilize the restrooms consistent with their gender identities. (*Id.*).

119. Similar policies or recommendations are present in many cities' school systems, including Boston, Chicago, Milwaukee, Minneapolis, and New York City, for example. (*Id.*).

120. Although EVSC's policies do not prohibit discrimination against students because of their gender identity (Dkt. 50-2 at 33 [l. 25] – 35 [l. 25]; Ex. 10 to Dkt. 50-2), 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. (Dkt. 54-2).

121. Therefore, J.A.W.'s request to be able to use a bathroom consistent with his gender identity is not unusual or inconsistent with general practice.

Miscellaneous

122. EVSC receives federal funding and is subject to Title IX. (Dkt. 1 ¶ 37 as admitted by Dkt. 34 ¶ 37); (Tr. at 32 [ll. 6-9] [admission of EVSC's counsel]; Tr. at 32 [l. 16] [referring to "Title IX audit"]).

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123. Any finding of fact is deemed to be a conclusion of law to the extent necessary.

CONCLUSIONS OF LAW

The preliminary injunction standard

1. In order to determine whether a preliminary injunction should be granted, the Court must weigh several factors:

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

See, e.g., Baja Contractors, Inc. v. City of Chicago, 830 F.2d 667, 675 (7th Cir. 1987).

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

J.A.W. may proceed in this action without a next friend

3. EVSC has renewed the arguments it made in its motion to dismiss concerning what it considers the lack of capacity of J.A.W. to proceed in this action. (*See* Dkt. 13).

4. For the reasons noted by the Court in its Entry of June 5, 2018 (Dkt. 33), J.A.W. may proceed in this case without a next friend or other representative and EVSC's arguments to the contrary are not well-taken.

J.A.W. will prevail on the merits of this case

This case is indistinguishable on its facts from *Whitaker*

5. Although EVSC argues to the contrary, the Court concludes that the law in this case was established in *Whitaker by Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed*, ___ U.S. ___, 138 S. Ct. 1260 (2018), and the law clearly demonstrates that J.A.W. will prevail on the merits of his claim.

6. As a preliminary matter, the Court does not doubt that, under appropriate circumstances, controlling case law may be distinguished on its facts. However, as noted in more detail below, the Seventh Circuit in *Whitaker* decided an issue of law: a school district in Indiana, Illinois, or Wisconsin may not prohibit a transgender student from using the restroom that corresponds with the student's gender identity without running afoul of Title IX and equal protection. Given that it is undisputed that J.A.W. is a transgender male and he is being prohibited from using male restrooms, that should be the end of the case.

7. In any event, the factual similarities between this case and *Whitaker* are striking:

- In *Whitaker* the school district had an unwritten policy that prohibited the transgender male student (“Ash”) from using male restrooms because he was born female and was deemed to still be female. *Id.* at 1041. Here, EVSC has an unwritten policy that, results in J.A.W. from using the male restrooms because he is deemed to be female. (Dkt. 50-2 at 26 [l. 20]).
- 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. (Dkt. 50-1 at 23 [ll. 4-19]; 34 [ll. 18-23]; 77 [l. 10-

14]). Indeed, J.A.W. has consistently and openly presented as male for a longer period of time than did the student in *Whitaker*.

- 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 same is true here. (Dkt. 17-1 ¶¶ 24, 34).
- The young man in *Whitaker* found that 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. J.A.W. has reacted to having to use the female restrooms or the “special” unisex bathroom by restricting his fluid intake so he can attempt to make it through the day without using any bathroom, which causes him pain and discomfort. (Dkt. 17-1 ¶¶ 26-27). And, he 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. (Dkt. 50-1 at 84 [ll. 4-8]).
- And, like the student in *Whitaker*, 858 F.3d at 1041, the experience of being denied the bathroom associated with his gender identity causes J.A.W. discomfort, embarrassment, and depression. (*Id.* ¶ 28; Dkt. 50-1 at 72 [ll. 8-14]); 84 [l. 18] – 85 [l. 1]; 86 [ll. 8-10]; 112 [ll. 14-21]).
- In *Whitaker* the school district created a new, unwritten policy, specifically in response to the student’s request, that there would have to be a change in his legal documents designating his gender in order to use the male restrooms. 858 F.3d at 1041. As noted, EVSC has also come up with a new unwritten policy that J.A.W. must change his legal documentation—specifically his birth certificate. *Supra*.

The fact that J.A.W. has not sought a name change or a change in gender marker on his birth certificate and has accepted a gender marker of female on his driver’s license is not relevant and does not distinguish *Whitaker*

8. EVSC argues that it is significant that J.A.W. has not sought a name change, has not changed his gender on his birth certificate, and has accepted a gender marker of female on documents such as his license and that this serves to distinguish *Whitaker*. This is not the case as the relevant fact is that EVSC concedes that J.A.W. has consistently identified as transgender and that he both has gender dysphoria and is taking male hormones. Moreover, as in *Whitaker*, J.A.W. is not able to use male restrooms because he is not considered to be male.

9. Although in Indiana a transgender person may effect a change in the gender marker on the person's birth certificate without sex reassignment surgery, see *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707, 710 (Ind. Ct. App. 2017) (allowing a transgender person to change the gender marker on a birth certificate upon petition if "the petition is made in good faith and not for fraudulent or unlawful purpose," although in that case the petitioner had had sex-reassignment surgery). But, as noted above, J.A.W. was born in Florida and there does not appear to be a mechanism for changing the gender marker on his birth certificate. Moreover, even if he could effect such a change it is clear that this would not necessarily guarantee his ability to use male restrooms within EVSC as EVSC reserves the right to continue to deny rest-room access if it deems it disruptive.

10. The Seventh Circuit noted in *Whitaker* that the student could not obtain a change in his birth certificate without surgical reassignment surgery, 858 F.3d at 1053, and there is no indication in the opinion that the student had undergone such surgery.

11. The fact that J.A.W. has not sought a legal name change is also not relevant as even if he did he would still be considered female by EVSC and precluded from using male restrooms.

12. The fact that J.A.W.'s gender marker on his license is irrelevant inasmuch as it does not appear that changing that would give him access to male restrooms within EVSC and the illegal and unconstitutional actions of EVSC are not excused by the actions of another government agency.

13. EVSC has argued that it needs the "objective" measure of the sex marker on a birth certificate. to be able to determine whether or not J.A.W. should be able to use the male restrooms. As noted this appears to be a *post hoc* policy created for litigation purposes only that the Court does not credit. Regardless, EVSC has ignored the objective facts that like the student in *Whitaker*,

J.A.W. has consistently presented himself as male for years, he is diagnosed with gender dysphoria, and continues to take male hormones. Moreover, the Seventh Circuit noted in *Whitaker*:

Further, 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. The marker does not take into account an individual's chromosomal makeup, which is also a key component of one's biological sex. Therefore, one's birth certificate could reflect a male sex, while the individual's chromosomal makeup reflects another. It is also unclear what would happen if an individual is born with the external genitalia of two sexes, or genitalia that is ambiguous in nature. In those cases, it is clear that the marker on the birth certificate would not adequately account for or reflect one's biological sex, which would have to be determined by considering more than what was listed on the paper.

858 F.3d at 1053. And, as the court indicated in *Whitaker*, in language apposite here, “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.” *Id.* at 1050.

14. Moreover, there are obviously problems with EVSC’s “objective measure” argument. If there was an error on a birth certificate so that a cisgender male student was listed as female, the Court doubts that that EVSC would require such a student to use the restroom associated with the gender listed on his birth certificate, even though its “objective measure” standard would require it to do so.

Whitaker cannot be distinguished by arguing that somehow J.A.W. was not aggressive in advocating to use the male restrooms

15. EVSC appears to argue that the plaintiff in *Whitaker* was more aggressive than J.A.W. in seeking to use the male restrooms. This is not true as a matter of fact inasmuch as this was an issue that J.A.W. pursued as a freshman, sophomore, and junior, only to be met by refusal.

16. While it is true that the student's mother in *Whitaker* pursued the case as his next friend, this is simply not significant, especially inasmuch as J.A.W.'s mother has attested to the fact that she fully supports his efforts in this litigation.

17. During the course of his testimony the Superintendent appeared to indicate that if EVSC had known of J.A.W.'s diagnosis of gender dysphoria it could have determined if J.A.W. was entitled to an accommodation under Section 504, *see* 29 U.S.C. § 794, insofar Superintendent Smith believes Section 504 to apply to students with any "medical condition." (Tr. at 27 [l. 7] -28 [l. 1]).

18. EVSC has advanced no similar argument in briefing, and the point of the Superintendent's testimony is therefore not clear—it certainly is aware of J.A.W.'s diagnosis now and has offered no acceptable accommodation for his bathroom usage. Regardless, the Superintendent is incorrect. Section 504 protects only "qualified individual[s] with a *disability*." 29 U.S.C. § 794(a) (emphasis added); *see also* 34 C.F.R. § 104.3(j)(1). The definition of a disability under Section 504 is co-extensive with the similar definition under the Americans with Disabilities Act of 1990, *see* 29 U.S.C. § 705(20)(B), and generally requires that a person be substantially limited in one or more "major life activity" such as walking, thinking, or communicating. *See* 42 U.S.C. § 12102(1), (2); 34 C.F.R. § 104.3(j).

19. In fact, the U.S. Department of Education has developed guidance concerning schools' obligations under Section 504, which indicates as follows:

24. Does a medical diagnosis of an illness automatically mean a student can receive services under Section 504?

No. A medical diagnosis of an illness does not automatically mean a student can receive services under Section 504. The illness must cause a substantial limitation on the student's ability to learn or another major life activity. For example, a student who has a physical or mental impairment would not be considered a student in need of services under Section 504 if the impairment does not in any way limit

the student’s ability to learn or other major life activity, or only results in some minor limitation in that regard.

U.S. Dep’t of Education, Office for Civil Rights, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, at <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.

20. There is no indication that J.A.W. has a disability within the meaning of Section 504, and the Court finds the Superintendent’s suggestion to be off-base. In any event, EVSC does not appear to have offered any such services to J.A.W.—and certainly has not offered him access to the male restrooms—despite its awareness for several years that J.A.W. identifies as a male.

21. The point is that it is not up to J.A.W. to ask for special accommodations. It is up to EVSC, when it knows a student is transgender, to allow the student to use bathrooms consistent with his or her gender identity.

Whitaker establishes that failing to allow J.A.W. to use mail restrooms violates Title IX

22. Title IX provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

23. A covered institution may not, among other things:

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

34 C.F.R. § 106.31(b)(1)-(4).

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

25. In concluding that the plaintiff in *Whitaker* had demonstrated a probability of success on his Title IX claim the court looked first at the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality), where a four-judge plurality held Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibiting, among other things, sex discrimination in employment, was “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotype.” 490 U.S. at 251. (internal quotations and citations omitted).

26. Therefore, the Seventh Circuit noted that “[f]ollowing *Price Waterhouse*, this court and others have recognized a cause of action under Title VII when an adverse action is taken because of an employee’s failure to conform to sex stereotypes.” *Whitaker*, 858 F.3d at 1048 (citing cases). “Our most recent application occurred when, sitting *en banc*, we held that a homosexual plaintiff can state a Title VII claim of sex discrimination based upon a theory of sex-stereotyping.” *Id.* at 1048 (citing *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017) (*en banc*)).

27. The court in *Whitaker* noted that “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth,” *Whitaker*, 858 F.3d at 1048. The court stated that it “look[s] to Title VII when construing Title IX,” *id.* at 1047, and that, therefore, a “transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping theory,” *id.* at 1049.

28. The court concluded that:

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

Id. at 1049-50.

29. As in *Whitaker*, the EVSC policy requires J.A.W. to use a bathroom that is not consistent with his gender identity, thus punishing him for his gender non-conformance, and this violates Title IX. *Id.* at 1049.

30. Moreover, as in *Whitaker*, the gender-neutral alternative provided to J.A.W. is not sufficient as it does not alter the fact that the policy of denying him access to bathrooms consistent with his gender identity violates the act and the gender-neutral alternative, the nurse's bathroom, is not a true alternative because it was far away from his classes, it was locked and therefore not accessible, and it increased J.A.W.'s stigmatization.

31. It is true that in *Whitaker* the court noted that only Ash Whitaker had access to the gender-neutral bathroom, 858 F.3d at 1040 and here other students besides J.A.W. could use the nurse's restroom. This is not legally significant as J.A.W., unlike cisgender students, is absolutely, and uniquely, denied the ability to use the bathrooms that correspond to his gender identity. The evidence is undisputed that this is stigmatizing and damaging to J.A.W. and *Whitaker* is clear that this denial violates Title IX. *Id.* at 1049-50.

32. Therefore, it is clear that *Whitaker*, which, of course, is binding precedent on this Court, compels a conclusion that J.A.W. is likely to prevail on his claim that EVSC's policy violates Title IX.

33. Although it is not necessary to cite any case other than *Whitaker*, it is clear that many other cases that have 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 have 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). *Contra*, *Johnston v. Univ. of Pittsburgh of the Commonwealth System of Higher Education*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), *appeal dismissed*, disagreed with by *Whitaker*, 858 F.3d at 1047-50. In the recent case of *Doe v. Boyerton Area School Dist.*, 893 F.3d 179 (3rd Cir. 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 such a policy was neither unlawful or unconstitutional and that the district court did not err in concluding “that the 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.” *Id.* at 200. Similarly, in *Parents for Privacy v. Dallas Sch. Dist. No. 2*, ___F. Supp. 3d ___, No. 3:17-cv-01813-HZ, 2018 WL 3550267 (D. Ore. July 24, 2018), the court denied a preliminary injunction that was sought to enjoin the school policy of allowing transgender students to use restrooms, locker rooms, and showers consistent with their gender identity concluding, among other things, that denying this ability to transgender students would violate Title IX as it “would punish transgender students for their gender nonconformity and constitute a form of sex-stereotyping.” 2018 WL 3550267, at *23 (citing *Whitaker*, 858 F.3d at 1048-50).

34. J.A.W. is therefore likely to prevail on his Title IX claim.

J.A.W. is likely to prevail on his equal protection claim

35. In *Whitaker* the court concluded that the transgender student was discriminated against on the grounds of sex because “the School District’s policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate.” 858 F.3d at 1051.

36. The school district argued, similar to EVSC’s arguments here, that it did not engage in sex discrimination inasmuch as it treated

all boys and girls the same . . . This is untrue. Rather, the School District treats transgender students like Ash, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. These students are disciplined under the School District’s bathroom policy if they choose to use a bathroom that conforms to their gender identity.

Id. at 1049.

37. The discrimination is subject to elevated scrutiny as “when a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is ‘exceedingly persuasive.’” *Id.* at 1050 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

38. Given that the Seventh Circuit concluded that the student was subjected to sex-based discrimination it had no need “to reach the question of whether transgender status is per se entitled to heightened scrutiny.” *Id.* at 1051.

39. However, the Supreme Court has noted that heightened scrutiny is applied to groups that have “experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks and citation omitted). The Supreme Court has also noted that it must be considered whether the group in question has been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Id.* (internal quotation marks and citation omitted). Finally, the Court looks to whether the group “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group.” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

40. Based on this, a number of courts have recognized that discrimination against transgender individuals is entitled to heightened scrutiny. *See, e.g., F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Evancho.*, 237 F. Supp. 3d at 289; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). In light of the court’s decision in *Whitaker*—recognizing the discrimination here as based on sex—there is no need at this point to explore further the issue of whether transgender discrimination is subject to elevated scrutiny, regardless of whether it represents sex discrimination.

41. In *Whitaker* the Seventh Circuit rejected the school district's argument that prohibiting the transgender student from male bathrooms was necessitated, and the required elevated scrutiny was met, by the need to protect the privacy rights of all students. Specifically, the court noted that this argument was "based upon sheer conjecture and abstraction." 858 F.3d at 1052.

42. Similarly, the concerns of EVSC here that allowing J.A.W., who presents as male and has consistently for years and who now, after less than a year of receiving hormones, looks male in appearance, will create disruption or endanger students is similarly "based upon sheer conjecture and abstraction." As noted, to support this argument, EVSC presents, at best, two examples in more than 30 years of what it deems problems caused by bathroom usage; one of them did not even involve a transgender person and it appears that the other one may have involved a transgender person entering the bathroom of his birth sex. This fails to meet even a minimal evidentiary standard, let alone one requiring "exceedingly persuasive" evidence.

43. Moreover, the evidence is clear that if J.A.W. enters a *female* restroom there will be disruption and concern because J.A.W. is reasonably perceived as male. It is true that when J.A.W. was in 8th grade, before his transition, he was concerned about using male restrooms in public areas away from school. (Dkt. 50-1 at 23 [l. 18] – 24 [l. 20]). However, he is now male and the risk of disruption and harm will occur if he uses female, not male, restrooms.

44. As noted, during the Superintendent's testimony he announced an apparently newly minted and unwritten and never used practice that if J.A.W. was able to change the gender marker on his birth certificate EVSC would consider allowing him to use the male restrooms, even if he did not have sex-reassignment surgery. This is a concession that transgender persons, even ones who have not had sex-reassignment surgery, may be able to use the bathrooms consistent with their gender identities, without disruption or danger. This completely undercuts EVSC's rationale that if J.A.W.

uses male restrooms there will be inevitable disruption and danger. After all, the risk of any disruption is not altered with the reprinting of a transgender person's birth certificate.

45. In *Whitaker*, where the school district sought to claim reliance on a birth certificate's gender marker to determine bathroom usage, the court noted that in some states, but not all, persons could have the gender marker changed without sex-reassignment surgery. 858 F.3d at 1053-54. Therefore, noted the court, "the School District's reliance upon a birth certificate's sex-marker demonstrates the arbitrary nature of the policy; so, Ash has met the low threshold of demonstrating a probability of success on his Equal Protection Claims." *Id.* at 1054.

46. The same is true here. EVSC policy of not allowing J.A.W. to use bathrooms consistent with his male gender identity represents sex discrimination and is unconstitutional and J.A.W. has demonstrated a probability of success on his equal protection claim under the heightened scrutiny standard required by *Whitaker*.

47. However, even if a mere rationality standard was utilized here the actions of EVSC would still violate equal protection as it is barring from male restrooms a person who is male in appearance and who has identified as male for years and it has presented no evidence that allowing J.A.W. to use the male restrooms would be problematic in any way.

The other factors for the grant of a preliminary injunction are met here

48. As noted above, the more likely [the preliminary injunction movant] is to win, the less the balance of harms must weigh in his favor." *Turnell*, 796 F.3d at 662. Given the fact that *Whitaker* pre-ordains J.A.W.'s success on the merits of his claim, the balance of harms analysis becomes largely unnecessary. However, regardless of the merits, the balance of harms favors the issuance of an injunction.

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

49. EVSC argues that any harm that J.A.W. is suffering is not irreparable because he has delayed in filing this case.

50. The case law that discusses delay as affecting a finding of irreparable harm does not appear to consider constitutional harm. Harm flowing from a denial of equal protection 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).

51. In any event, in assessing whether delay in seeking a preliminary injunction undercuts a claim of irreparable harm the question is 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).

52. Moreover, delay is excused where a plaintiff believes that the matter might be resolved through negotiations. *See, e.g., Lanin v. Borough of Tenafly*, 515 F. Appx. 114, 118 (3d Cir. 2013).

53. The bathroom issue is one that J.A.W. brought up with school administrators in his freshman, sophomore, and junior years. It obviously makes sense for a student to hesitate before suing his school system and the fact that J.A.W. was hoping that EVSC would eventually be willing to allow him access to male restrooms shows prudence and patience rather than excessive tardiness. And, it is clear that EVSC was not lulled into a false sense of security or that it relied in any way on J.A.W.’s delay in litigating this matter.

54. Within a few months of beginning hormone therapy, J.A.W., 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.

55. 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).

56. J.A.W. is suffering real harm here for which he needs injunctive relief.

57. 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).

58. Moreover, his inability to use the bathroom associated with his gender identity makes him feel different, which causes stress, depression, discomfort and psychological harm. (*Id.* ¶ 34).

59. The injuries that he is suffering are entirely consistent with the injuries that transgender persons in a similar situation will suffer. Thus, 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. (Dkt. 50-5 ¶¶ 24-26, 30; Dkt. 50-6 ¶¶ 30-31; Dkt. 50-7 ¶ 30).

60. 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).

61. As noted in *Whitaker*, this harm is not mitigated by making a gender-neutral bathroom available.

This action further stigmatized Ash, indicating that he was ‘different’ because he was a transgender boy.

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

858 F. 3d at 1045.

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

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

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

63. J.A.W. is therefore suffering irreparable harm.

64. And, it is clear that he has no satisfactory remedy at law to compensate for the future harm that he will suffer if he is not allowed to use male restrooms during the upcoming school year, set to begin on August 8, 2018.

65. J.A.W. faces the prospect of both physical and psychological harm in the absence of a preliminary injunction and therefore he has no adequate remedy at law. *See, e.g., Whitaker*, 858 F.3d at 1046. (“Nor is there an adequate remedy for preventable ‘life-long diminished well-being and life-functioning.’”).

66. In the absence of the grant of a preliminary injunction J.A.W. will suffer irreparable harm for which there is no adequate remedy law.

The balance of harms favors the issuance of a preliminary injunction

67. EVSC has not attempted to establish that it will be harmed in any way by allowing J.A.W., who has presented himself as male for his entire high school career and who appears to be, and is, male, to use male restrooms.

68. Instead, it argues that allowing the bathroom access will interfere with the parental rights of J.A.W.'s mother. However, J.A.W.'s mother has noted that she supports her child's decision to use male restrooms. In *Whitaker* the school district attempted a similar argument and it was quickly dismissed by the court. "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." 858 F.3d at 1054.

69. Inasmuch as J.A.W. has established a substantial likelihood of success on the merits of his claim, "no substantial harm to others can be said to inhere in its enjoinder." *See, e.g., Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

70. An injunction will only force EVSC to conform its conduct to legal norms and the requirements of the United States Constitution and federal law. And, a defendant cannot claim that requiring it to comply with the Constitution and federal law is harmful. *See, e.g., Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (holding that if a governmental entity "is applying [a] policy in a manner that violates [the plaintiff's] First Amendment rights . . . then [the] claimed harm is no harm at all").

The public interest favors the issuance of an injunction

71. The public interest is also furthered by the injunction here inasmuch as an injunction in favor of constitutional rights and the rights secured by Title IX is always in the public interest. *See, e.g., Dodds v. United States Department of Education*, 845 F.3d 217, 222 (6th Cir. 2016)

(denying a stay pending appeal of an injunction requiring a school district to allow a transgender student to use the female restrooms and noting that the “public interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe’s constitutional and civil rights, a purpose that is always in the public interest.”); *Déjà vu of Nashville*, 274 F.3d at 400 (it is “always in the public interest to prevent violation of a party’s constitutional rights) (internal quotation marks and citation omitted); *Cohen v. Brown University*, 991 F.2d 888, 906 (1st Cir. 1993) (noting that the district court did not err in concluding “that the overriding public interest lay in the firm enforcement of Title IX”).

72. Moreover, the public interest favors the issuance of a preliminary injunction here as the injunction will improve the educational experience of both J.A.W. and his fellow students. 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).

73. The Seventh Circuit reached a similar conclusion in *Whitaker*:

We are further convinced that the district court did not err in finding that this balance weighed in favor of granting the injunction when considering the statements made by *amici*, who are school administrators from twenty-one states and the District of Columbia. Together, these administrators are responsible for educating approximately 1.4 million students. Each administrator has experience implementing inclusive bathroom policies in their respective schools, and each has grappled with the same privacy concerns that the School District raises here. These administrators uniformly agree that the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in their combined experience, all students' needs are best served when students are treated equally.

858 F.3d at 1054-55.

74. The public interest favors the issuance of the preliminary injunction.

No bond will be required for the preliminary injunction

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

CONCLUSION

76. For the foregoing reasons the motion for preliminary injunction will be granted, without bond.

77. Any conclusion of law shall be deemed to be a finding of fact to the extent necessary.

Preliminary Injunction

IT IS THEREFORE ORDERED that plaintiff's motion for preliminary injunction is granted, without bond, and defendant Evansville Vanderburgh School Corporation is enjoined from preventing, punishing, or in any other way impeding plaintiff from using male restrooms within the Evansville Vanderburgh School Corporation.

s/ Kenneth J. Falk

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s/ Gavin M. Rose

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Certificate of Service

I hereby certify that on this 27th 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:

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