

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

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

**Notice of Submission of Proposed Findings of Fact and Conclusions of Law**

Defendant, by counsel, submits its proposed findings of fact and conclusions of law on Plaintiff's motion for preliminary injunction.

WHEREFORE, defendant submits this proposal.

## **I. FINDINGS OF FACT**

### **A. Introduction**

1. On February 22, 2018, Plaintiff filed this action against the Evansville-Vanderburgh School Corporation (“EVSC”). Dkt. No. 1.
2. In the complaint, Plaintiff asserts that he is a transgender student attending EVSC high schools and that EVSC’s refusal to allow him access to restrooms consistent with his gender identity violates Title IX, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. Dkt. No. 1.
3. On April 10, 2018, Plaintiff filed a motion for preliminary injunction asking this court to order EVSC to permit him to access the boys’ restrooms within EVSC schools during the pendency of this litigation. Dkt. No. 19.
4. The motion for preliminary injunction was fully briefed by July 19, 2018. Dkt. Nos. 19, 20, 41, 54, 59.
5. A hearing on the motion for preliminary injunction was held on July 20, 2018, at which Plaintiff presented documentary evidence only and EVSC presented the testimony of Plaintiff and EVSC Superintendent Dr. David Smith in addition to documentary evidence. Dkt. No. 60; Transcript of Preliminary Injunction Hearing (hereinafter, “Transcript”).
6. For the reasons set forth below, Plaintiff’s motion for preliminary injunction is denied.

### **B. Factual Background**

7. EVSC is a public school corporation and a recipient of federal funding for the purpose of Title IX. Dkt. No. 20 at 6.
8. Plaintiff is a seventeen-year-old unemancipated minor. Transcript at 10.

9. Plaintiff's mother, Tammy Work, is his sole legal and physical custodian. Dkt. No. 17-1; Dkt. No. 50-1 at 28.

10. Plaintiff has attended EVSC schools since kindergarten. Dkt. No. 50-1 at 15.

11. Plaintiff has completed his freshman, sophomore, and junior years at EVSC high schools. Transcript at 12; Dkt. No. 50-2 at 7.

12. On August 8, 2018, Plaintiff will begin his senior year at EVSC's North High School. Transcript at 48; Dkt. No. 50-2 at 7.

13. Plaintiff is scheduled to graduate a semester early, in December 2018. Transcript at 12.

14. Plaintiff's biological and anatomical sex is female. Dkt. No. 50-1 at 14, 30.

15. Parents enrolling their children in EVSC schools must present the child's birth certificate. Transcript at 29.

16. The sex marker on the birth certificate presented to EVSC upon Plaintiff's enrollment indicates that Plaintiff is female. Transcript at 11.

17. Plaintiff has identified as a transgender male since early adolescence. Dkt. No. 17-1 at ¶¶ 7, 8.

18. According to Plaintiff, his mother is "on and off supportive" of his gender transition. Dkt. 50-1 at 67.

19. In eighth grade, Plaintiff began to present himself in a masculine way by cutting his hair short and wearing masculine clothing. Dkt. No. 50-1 at 23.

20. Plaintiff did not request to use the boys' restrooms at school while in elementary or middle school. Dkt. No. 50-1 at 23-24.

## **B. Freshman Year**

21. During his freshman year, which began in the fall of 2015, Plaintiff went to North High School and also attended programming at EVSC's Central High School for part of the day. Dkt. No. 50-2 at 24.

22. By freshman year, Plaintiff had begun asking teachers to address him as J.A.W., his chosen masculine name, and to refer to him using masculine pronouns. Dkt. No. 50-1 at 23.

23. Although Plaintiff had not legally changed his name, school personnel accommodated these requests. Transcript at 12.

24. During Plaintiff's freshman year, he was required to take physical education at North High School. Dkt. No. 17-1 at ¶ 17.

25. Plaintiff did not feel comfortable changing in the girls' locker room, so he and another transgender student began using a boys' restroom to change clothes for physical education without permission. Dkt. No. 50-1 at 37-39.

26. School administrators at North became aware that Plaintiff was using a boys' bathroom for this purpose when a parent called to complain that there were "two girls" using the boys' restroom. Dkt. No. 50-1 at 39.

27. At that time, Plaintiff was instructed not to use the boys' restrooms for changing anymore. Dkt. No. 50-1 at 39.

28. As an alternative, Plaintiff and the other transgender student were allowed to use a separate, otherwise unused girls' locker room to change for gym. Dkt. No. 50-1 at 41; Transcript at 19-20.

29. As for restroom use, North High permitted Plaintiff to use the girls' restrooms or a gender-neutral, single-user restroom in the nurse's office. Dkt. No. 50-1 at 110; Dkt. No. 17-1 at ¶ 12.

30. Plaintiff used the girls' restrooms without incident during his freshman year. Dkt. 50-1 at 37.

31. Plaintiff asserts that the bathroom in the nurse's office at North High was not a viable alternative because it was far from his classes and often locked, but he never brought this issue to the attention of anyone at EVSC prior to initiating this litigation. Dkt. No. 17-1 at ¶¶ 12, 14; Dkt. No. 50-2, Ex. 8; Transcript at 35.

32. Plaintiff made no separate request to use the boys' restrooms at Central High.

33. During Plaintiff's freshman year, Plaintiff's mother never contacted anyone at EVSC to request that Plaintiff be permitted access to the boys' restrooms. Transcript at 29.

34. During freshman year, Plaintiff was not in counseling, he had no diagnosis of gender dysphoria, and he did not receive medical treatment of any kind related to his gender transition. Dkt. No. 50-1 at 35, 60, 65.

### **C. Sophomore Year**

35. During his sophomore year, which began in the fall of 2016, Plaintiff attended North High School and spent part of the day attending programming at EVSC's Harrison High School. Dkt. No. 50-1 at 51.

36. That year, Plaintiff's teachers at both North and Harrison addressed him as J.A.W. and referred to him using masculine pronouns. Transcript at 12.

37. Early in the 2016-17 school year, Plaintiff approached the principal of North High school with the "Dear Colleague" letter jointly issued on May 13, 2016, by the U.S. Department of Justice, Civil Rights Division, and the U.S. Department of Education, Office for Civil Rights. Transcript at 23; Dkt. No. 50-1 at 57-58, 110.

38. Based on the guidance provided in the Dear Colleague letter, Plaintiff believed he was entitled to access the boys' restrooms. Dkt. No. 50-1 at 57-58.

39. EVSC personnel reviewed the Dear Colleague letter and consulted with counsel, but ultimately denied Plaintiff's request to access the boys' restrooms. Dkt. No. 50-2 at 32.

40. Plaintiff made no separate request to access the boys' restrooms at Harrison during his sophomore year. Dkt. No. 50-1 at 51.

41. In addition to the girls' restrooms, EVSC continued to make a gender-neutral, single-occupancy restroom in the nurse's office available to Plaintiff at both North and Harrison. Transcript at 13; Dkt. No. 50-1 at 45.

42. Plaintiff used the girls' restrooms without incident during his sophomore year. Dkt. 50-1 at 42.

43. During sophomore year, Plaintiff was again allowed to use a separate girls' locker room to change for gym at North. Dkt. No. 17-1 at ¶ 19.

44. In November 2016, Plaintiff sent an email to Dr. Dionne Blue, EVSC Chief Diversity Officer, informing Dr. Blue that he is a transgender student attending North High and inquiring into EVSC's policy on transgender students and access to restrooms and locker rooms. Dkt. 50-2, Ex. 11.

45. Dr. Blue responded that EVSC did not have an official policy but that transgender students could use the nurse's office or other gender-neutral restrooms depending on the facilities available in the building. Dkt. 50-2, Ex. 11.

46. Dr. Blue further stated that schools would address any other needs on a case-by-case basis. Dkt. 50-2, Ex. 11.

47. Plaintiff did not follow up with Dr. Blue or make any requests of her. Transcript at 22-23.

48. The May 13, 2016 Dear Colleague letter was rescinded by the Department of Justice and the Department of Education on February 22, 2017. Dkt. No. 50-2, Ex. 12.

49. In September 2016, Plaintiff began counseling for the purpose of obtaining a diagnosis of gender dysphoria, which would allow him to begin hormone replacement therapy. Dkt. No. 50-1 at 60-64.

50. Plaintiff's participation in counseling was sporadic. He attended a total of four sessions between September 2016 and May 2017 before discontinuing counseling altogether. Dkt. No. 50-1 at 71-72; Dkt. No. 51-1.

51. Plaintiff never told his counselor that he experienced any distress relating to EVSC's bathroom policy. Dkt. No. 50-1 at 71-72; Dkt. No. 51-1. In fact, Plaintiff told his counselor that his school had been supportive. Dkt. No. 51-1 (notes from September 28, 2106 session).

52. Plaintiff never communicated any suicidal ideation or thoughts of self-harm to his counselor, and he denies ever having experienced such feelings. Dkt. No. 50-1 at 12, 69; Dkt. No. 51-1; Transcript at 16

53. During Plaintiff's sophomore year, Plaintiff's mother never contacted anyone at EVSC to request that Plaintiff be permitted access to the boys' restrooms. Transcript at 58

54. During Plaintiff's sophomore year, Plaintiff did not complain to anyone at EVSC that the gender-neutral restrooms made available to him were inaccessible or otherwise unsatisfactory. Transcript at 35

55. During Plaintiff's sophomore year, Plaintiff never informed EVSC that he had been diagnosed with gender dysphoria. Transcript at 14.

56. During Plaintiff's sophomore year, Plaintiff did not undergo hormone replacement therapy or any other medical treatment related to his gender transition. *See* Dkt. No. 51-3.

#### **D. Junior Year**

57. During his junior year, which began in the fall of 2017, Plaintiff continued to attend both North High and Harrison High. Dkt. No. 50-1 at 52.

58. During his junior year, Plaintiff's teachers continued to address him by his preferred name and masculine pronouns. Dkt. No. 50-1 at 56.

59. During Plaintiff's junior year, in addition to the girls' restrooms, EVSC continued to make a gender-neutral, single-occupancy restroom in the nurse's office available to Plaintiff at both North and Harrison. Transcript at 13, 26, 35.

60. At the beginning of his junior year, Plaintiff sought to begin hormone replacement therapy. After presenting his physician with a letter from his counselor, Plaintiff was prescribed testosterone injections. Dkt. No. 51-2; Dkt. No. 51-3.

61. Plaintiff did not inform EVSC of his diagnosis or treatment. Dkt. No. 50-1 at 100.

62. It can take up to five years for transgender males to attain the full benefit of hormone replacement therapy. Transcript at 14; Dkt. No. 50-1 at 102; Dkt. No. 51-3. Plaintiff is in the first year of this process. Transcript at 14.

63. Since beginning hormone replacement therapy, Plaintiff's gender dysphoria has abated to the point that he no longer feels counseling is necessary. Dkt. No. 50-1 at 74.

64. During the first semester of his junior year, Plaintiff made no request to be permitted to use the boys' restrooms at school. Dkt. No. 50-1 at 99-100.

65. On January 21, 2018, EVSC's general counsel received a letter from Plaintiff's attorney. Dkt. No. 50-2, Ex. 1.

66. In the letter, Plaintiff's counsel opined that under the Seventh Circuit's recent decision in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed*, Plaintiff was entitled to use the boys' restrooms at school. Dkt. No. 50-2, Ex. 1. Counsel sought an assurance that Plaintiff would be permitted to do so without risk of discipline and indicated that if none were forthcoming, litigation might ensue. Dkt. No. 50-2, Ex. 1.

67. Plaintiff's mother was not a signatory to this letter and her wishes were not mentioned. Dkt. No. 50-2, Ex. 1.

68. In a response dated February 5, 2018, EVSC's general counsel opined that *Whitaker* was distinguishable on its facts and, further, that it did not appear to represent the state of the law across the United States. Dkt. No. 50-2, Ex. 8. Counsel indicated that EVSC would continue to make a gender-neutral restroom available to Plaintiff, but he would not be permitted to use the boys' restrooms. *Id.*

69. On February 22, 2018, Plaintiff instituted the current litigation. Dkt. No. 1.

70. Plaintiff's mother did not file suit on Plaintiff's behalf as his next friend. Dkt. No. 1.

71. Instead, this action was originally brought by Wyatt Squires as Plaintiff's next friend. Mr. Squires is a transgender male adult who met Plaintiff through his participation in a local group for transgender people. Dkt. No. 17-2.

72. Pursuant to this court's order, Mr. Squires has been removed as Plaintiff's next friend, and Plaintiff has proceeded in his own name, without a next friend or guardian ad litem. Dkt. No. 33.

73. Prior to the institution of these proceedings, EVSC had never been made aware that Plaintiff had been diagnosed with gender dysphoria, that he was undergoing hormone replacement therapy, or that he had any complaints regarding the proximity and accessibility of the gender-neutral restroom EVSC had made available to him. Transcript at 36; Dkt. No. 50-1 at 53-54, 89-90; Dkt. No. 50-2 at 27-28; Dkt. No. 50-2, Ex. 8.

#### **E. Senior Year**

74. Plaintiff will begin his senior year on August 8, 2018. Transcript at 48.

75. In the coming school year, Plaintiff will be attending North High School only. Transcript at 13

76. Plaintiff will graduate in December 2018. Transcript at 12.

78. Thus, in less than five months, Plaintiff will no longer be an EVSC student. Transcript at 12.

79. Plaintiff wishes to be permitted to use the boys' restrooms at school during the coming academic year. *See generally* Dkt. No. 20.

80. EVSC has indicated that at this time, it will not permit Plaintiff to use the boys' restrooms at school. Dkt. No. 50-2, Ex. 8. EVSC plans to continue to offer Plaintiff the option of using either the girls' restrooms or the gender-neutral option in the nurse's office. *Id.*

81. EVSC has no written policy relating to transgender students' access to restrooms, locker rooms, and other sex-segregated spaces. Transcript at 37.

82. Dr. Smith testified that if Plaintiff presents a birth certificate or other comparable government-issued document identifying him as male, he will be permitted to use the boys' restrooms. Transcript at 29, 50.

83. Dr. Smith emphasized the importance of objective criteria in determining whether a particular student should be permitted access to sex-segregated spaces like restrooms, locker rooms, and shower rooms. Transcript at 40. The objective basis on which EVSC relies is the birth certificate presented to the school by the student's parents. *Id.* According to Dr. Smith, if EVSC is required to rely on each of its 23,000 students' subjective, internal sense of gender identity in making such judgments, the result would be "chaos." *Id.* at 30.

84. Dr. Smith also testified concerning the process that is generally undertaken when a student has a medical condition that requires accommodations. Transcript at 27-28. Dr. Smith testified that EVSC has not received any request that Plaintiff be provided any such accommodation. *Id.*

85. Through the discovery process in this litigation, EVSC has been presented with all of Plaintiff's medical and counseling records concerning his gender dysphoria diagnosis and treatment. Transcript at 27. None of these records indicate that access to the boys' restrooms at school is a medically necessary part of Plaintiff's treatment for that condition. Transcript at 15-16.

86. Dr. Smith also testified that allowing Plaintiff access to the boys' restrooms could result in disruption and opined that the gender-neutral restroom was the safest option for Plaintiff. Transcript at 33, 35

87. Dr. Smith testified further that Plaintiff's mother has never reached out to anyone at EVSC to seek any sort of accommodation relating to Plaintiff's transgender status or to

register any complaint regarding EVSC's handling of Plaintiff's requests. Transcript at 26-27, 35.

88. Plaintiff testified that he has not legally changed his name to J.A.W. and that every government-issued identifying document, including his driver's license and birth certificate, lists his sex as female. Transcript at 11-12.

89. Plaintiff testified that aside from his request to use the boys' restrooms, EVSC has granted every other request he has made for accommodations relating to his transgender status. Transcript at 12.

90. Plaintiff testified that he has not completed the process of gender transition. According to Plaintiff, the process can take up to five years. Plaintiff testified that he is in the first year of that process. Transcript at 13-14.

91. Plaintiff testified that prior to filing suit, he never provided EVSC with any documentation reflecting a diagnosis of gender dysphoria. Transcript at 14-15.

92. Plaintiff testified that prior to filing suit, neither his mother nor any other adult had made any demand on his behalf to EVSC that he be allowed access to the boys' restrooms. Transcript at 15.

93. Plaintiff admitted that to date, he has not presented EVSC with any medical documentation indicating that access to the boys' bathrooms is a necessary part of his treatment for gender dysphoria. Transcript at 16.

94. Plaintiff testified that he should not be required to present any such evidence. According to Plaintiff, his announcement that his gender identity is male is sufficient to entitle him to access the boys' restrooms and locker rooms. Transcript at 17.

95. Plaintiff stated in general terms that his inability to use the boys' restrooms at school has caused him to feel anxious, depressed, and ostracized, but he never communicated these feelings to his counselor or physician. Plaintiff denied ever feeling suicidal as a result. Transcript at 16, 19.

96. Plaintiff presented the declarations of three experts in the treatment of transgender individuals. All three experts spoke in general terms concerning the issues faced by transgender people and the harms they can suffer if denied access to restrooms aligned with their gender identity. Dkt. Nos. 50-5, 50-6, 50-7.

97. None of the experts have ever examined or treated Plaintiff personally, so they can offer no opinions as to the extent of psychological harm, if any, Plaintiff has suffered as a result of the EVSC restroom policy. Dkt. Nos. 50-5, 50-6, 50-7.

98. Plaintiff testified that transgender people sometimes face safety issues in public restrooms and that he feels safer using single-occupancy restrooms. Transcript at 17-18.

99. Plaintiff's mother has chosen not to participate in this litigation. Dkt. No. 17-1 at ¶ 36. The only statement from Plaintiff's mother appearing in the record is a one-page declaration, executed two days after EVSC filed its response in opposition to Plaintiff's motion for preliminary injunction. In the declaration, she states that she is Plaintiff's mother, that she is aware of the litigation, and that she supports Plaintiff's efforts to gain access to the boys' restrooms at school. Dkt. No. 50-4.

## **II. CONCLUSIONS OF LAW**

### **A. The preliminary injunction standard**

1. "A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need." *Turnell v. Centimark Corp.*, 796 F.3d 656, 661 (7th

Cir. 2015). *See also Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376 (2008) (“A preliminary injunction is an extraordinary remedy never awarded as of right.”).

2. In determining whether such relief is warranted, a district court engages in a two-step analysis. *Id.* In the first phase of the inquiry, the movant “must make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits.” *Turnell*, 796 F.3d at 662. If the movant makes the necessary threshold showing, the district court will move the second phase, in which it considers: “(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the “public interest”).” *Id.* The balance of harms is assessed on a “sliding scale” against the movant’s likelihood of success; that is, the more likely the movant is to prevail on his claims, the less the balance of harms must weigh in his favor (and vice versa). *Id.*

3. Moreover, the primary function of a preliminary injunction is to maintain the status quo. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834 (1981) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”). In light of the limited purpose of a preliminary injunction, as well as the expedited basis on which motions must often be considered, “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Id.* Where, as here, a movant seeks a preliminary injunction that would disturb the status quo, the request must be viewed with caution. *See Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978) (explaining that preliminary injunctions that

grant mandatory relief rather than maintain the status quo are “ordinarily cautiously viewed and sparingly issued”).

**B. Plaintiff has not shown that he is likely to suffer irreparable harm**

4. A showing of irreparable harm is “[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction[.]” Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2948.1 (2013).

5. To make the necessary threshold showing, Plaintiff must show a likelihood—not a mere possibility—that he will suffer irreparable harm in the absence of preliminary relief. *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 375 (2008) (“Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.” (emphasis in original)); *Michigan v. United States Army Corps of Eng’rs*, 667 F.3d 765, 788 (7th Cir. 2011) (“there must be more than a mere possibility that the harm will come to pass”).

6. Harm is “irreparable” when it cannot be prevented or fully rectified by a final judgment after trial. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of Am. Inc.*, 549 F.3d 1079, 1089 (7th Cir. 2008). Irreparable harms are those that are “difficult—if not impossible—to reverse.” *Michigan*, 667 F.3d at 788.

7. Plaintiff asserts that he suffers “stress, depression, and psychological harm” as a result of EVSC’s refusal to permit him to use the boys’ restrooms. Dkt. No. 17-1 at ¶ 34. Plaintiff argues that his emotional distress rises to the level of irreparable harm. Dkt. No. 53 at 19.

8. Emotional harm may, under certain circumstances, rise to the level of irreparable harm. *See Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 511 (2d Cir. 2005). But

emotional harms are routinely compensated by monetary awards. The mere fact that Plaintiff's alleged harm is non-pecuniary in nature is insufficient to establish its irreparability.

9. In support of his argument that his emotional distress constitutes irreparable harm, Plaintiff relies on *Whitaker*, 858 F.3d at 1045. In that case, the Seventh Circuit held that a transgender student who was denied access to restrooms consistent with his gender identity had made an adequate showing of irreparable harm based on his emotional distress.

10. In *Whitaker*, the plaintiff presented two different expert reports opining that access to the boys' bathroom was integral to the plaintiff's transition and emotional well-being. One expert explained that being denied such access was causing the plaintiff significant psychological distress and placing him at risk for experiencing "life-long diminished well-being and life-functioning." 858 F.3d at 1045. Further, the plaintiff asserted that the policy had caused him to contemplate suicide. *Id.* at 1046.

11. In this case, the evidence of Plaintiff's emotional distress falls far below that presented in *Whitaker* in terms of both quality and quantity. The only evidence Plaintiff has presented of his emotional distress are his own statements, made in general terms, that being excluded from the boys' restrooms makes him feel "ostracized" and causes him to experience "anxiety and depression." Transcript at 19.

12. Plaintiff has chosen to discontinue counseling because he feels it is no longer "as much of a necessity" since he began receiving hormone replacement therapy. Dkt. No. 50-1 at 74. He denies ever experiencing suicidal ideation or thoughts of harming himself. Dkt. No. 50-1 at 12; Transcript at 16. There is no evidence before this court that Plaintiff is experiencing clinically significant levels of depression and anxiety as a result of EVSC's restroom policy.

13. The expert declarations Plaintiff has provided speak only in general terms as to the sorts of psychological harms transgender individuals may experience when denied access to restroom facilities consistent with their gender identity. None of the experts examined Plaintiff, and their declarations consequently shed no light on whether and to what extent Plaintiff will suffer irreparable harm in this case.

14. Plaintiff's unquantified claims of emotional distress, however genuine they might be, simply do not rise to the level of harm asserted in *Whitaker*.

15. Further, Plaintiff's delay in seeking relief undermines his claim of irreparable harm. *See Ty, Inc. v. Jones Grp. Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered.").

16. Plaintiff's claim that not being permitted to use the boys' restrooms at school "outs" him as transgender is unpersuasive under the circumstances of this case. *See* Transcript at 21. Plaintiff has attended EVSC schools since kindergarten. Before he began his gender transition, Plaintiff's classmates would have known him as a girl. In his deposition, Plaintiff testified that his classmates know he is transgender. Dkt. No. 50-1 at 57.

17. Plaintiff also argues that irreparable harm must be presumed because his constitutional rights are being violated, but the Seventh Circuit has held that "equitable relief depends on irreparable harm, even when constitutional rights are at stake." *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012).

18. In any event, as will be explained further below, Plaintiff has not adequately established that EVSC's bathroom policy violates his constitutional rights.

19. For the foregoing reasons, Plaintiff has not established that he will suffer irreparable harm in the absence of preliminary relief. This finding standing alone mandates denial of his motion for preliminary injunction. *Girl Scouts*, 549 F.3d at 1086 (explaining that when a moving party fails to demonstrate any one of the three threshold requirements for a preliminary injunction, relief must be denied).

**C. Plaintiff has not shown that his remedies at law are inadequate**

20. Plaintiff must also establish that his remedies at law, i.e., money damages, will be inadequate. *Girl Scouts*, 549 F.3d at 1095. “A damages remedy need be ‘seriously deficient,’ but not ‘wholly ineffectual.’” *Id.* (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). A showing of irreparable harm is “[p]robably the most common method of demonstrating that there is no adequate legal remedy[.]” Wright et al., *supra*, at § 2944.

21. Plaintiff has not developed any argument relating to this threshold requirement for a preliminary injunction.

22. As explained above, Plaintiff has not established that the harm he faces is so severe it cannot be compensated by a monetary award.

23. Thus, Plaintiff has not carried his burden to show he has no adequate remedy at law.

24. Accordingly, Plaintiff’s motion for preliminary injunction must be denied.

**D. Plaintiff has not shown a likelihood of success on the merits of his claims**

25. To make the requisite showing of likelihood of success on the merits, Plaintiff must establish that his chance of success on the merits of at least one of his claims is better than negligible. *Girl Scouts*, 549 F.3d at 1096. This is an admittedly low bar. *Id.*

26. Plaintiff's argument that he is likely to succeed on the merits of his claims is premised entirely on *Whitaker*, a case he claims is "on all fours" and "virtually identical" to this one. Dkt. No. 20 at 1, 6. It is not.

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

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

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

that Ash would have to complete surgical transition to be permitted access to the boys' restrooms. *Id.*

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

31. *Whitaker* stands for the proposition that a school policy prohibiting transgender students from accessing sex-segregated spaces consistent with their gender identity *may* under certain circumstances violate Title IX and the Equal Protection Clause of the Fourteenth Amendment.

32. *Whitaker* was not, however, a mandate requiring school corporations to allow unemancipated minors who profess to be transgender access to the restrooms of their choosing on the strength of nothing more than their own demands. The *Whitaker* court rejected the school district's argument that Ash could not "unilaterally declare" his gender—not because its premise was flawed, but because the argument "misrepresent[ed] Ash's claims and dismis[s]e[d] his transgender status." 858 F.3d at 1050. The court explained further, "[t]his is not a case where a student has merely announced that he is a different gender." *Id.* Thus, the Seventh Circuit has recognized that some threshold showing is required to trigger the protections for transgender

students discussed in *Whitaker*, and a mere “announcement” of one’s transgender status is insufficient.

33. The *Whitaker* court did not hold that schools are prohibited from requiring a parental request prior to allowing transgender students to access restrooms in alignment with their gender identity.

34. Nor did the *Whitaker* court hold that schools are prohibited from requiring some evidence that access to such facilities is medically, psychologically, and developmentally necessary and appropriate for the individual student.

35. In this case, Plaintiff never provided any medical evidence of his transgender status to EVSC prior to initiating this lawsuit. Through the process of discovery, EVSC has now obtained Plaintiff’s counseling and medical records relating to his treatment for gender dysphoria. These records are silent on the question of whether access to the boys’ restrooms is necessary or appropriate at this stage of Plaintiff’s gender transition.

36. Further, Plaintiff’s gender transition is not complete. Plaintiff’s testimony and his medical records indicate that it may take up to five years for him to attain the full benefit of hormone replacement therapy. He has been receiving hormone replacement therapy for less than a year.

37. Moreover, Plaintiff’s mother has never contacted anyone at EVSC to request that he be permitted to access the boys’ restrooms and she has declined to participate in this litigation. In fact, until Plaintiff produced a one-page declaration on July 5, 2018—two days *after* EVSC filed its response in opposition to his motion for preliminary injunction—EVSC had no indication from Plaintiff’s mother that she supported Plaintiff’s efforts to obtain access to the boys’ restrooms. The declaration states that Plaintiff’s mother is aware of the litigation and

supports Plaintiff's efforts to obtain access to the boys' restrooms at school. This court attributes minimal weight to this eleventh-hour declaration of lukewarm support.

38. In this case, Plaintiff has merely announced to EVSC that he is male and demanded access to facilities inconsistent with the gender marker appearing on the birth certificate his mother provided to EVSC at the time of his enrollment. This is insufficient to establish a likelihood of success under *Whitaker*.

39. As EVSC has noted, an approach requiring some objective proof that a student's gender has changed—in the form of a birth certificate or other comparable government-issued identifying document—is consistent with the approach taken by virtually every governmental body that draws distinctions based on sex. *See generally* Dkt. 42 (setting forth processes necessary for transgender persons to change driver's licenses, birth certificates, passports, social security cards, and so on). Schools have no less right than any other government agency to require such evidence.

40. Further, neither the Indiana legislature, nor the Indiana Department of Education, nor the United States Congress, nor the U.S. Department of Education, nor the U.S. Department of Justice have legislatively or administratively required EVSC to accede to Plaintiff's unilateral demand to use the boys' restrooms.

41. Consequently, Plaintiff has not established a likelihood of success on the merits of his claims.

#### **E. The balance of harms favors EVSC**

42. Because Plaintiff has made none of the necessary threshold showings, this court need go no further. Nevertheless, the court will briefly discuss the balance of harms.

43. The potential harm to Plaintiff has already been discussed—he asserts that he will experience emotional and psychological distress by being prevented from using the boys’ restrooms at school.

44. EVSC has identified a number of potential harms it may suffer if the preliminary injunction is granted.

45. Dr. Smith’s testimony concerning EVSC’s need to make restroom assignments based on objective criteria, such as birth certificates, is well taken. A policy that would allow students to simply declare their gender regardless of the information their parents have provided to the school on that subject would be unworkable and could potentially place schools at cross-purposes with parents.

46. EVSC also has legitimate concerns regarding the safety and privacy of all of its students, including Plaintiff, in locker rooms and restrooms. Indeed, even Plaintiff testified that he feels safer using a single-occupancy restroom. Transcript at 18.

47. The potential harms to EVSC in terms of its operational efficiency and ability to maintain a safe and appropriate learning environment for all 23,000 of its students outweigh Plaintiff’s claim of unquantified emotional distress.

**F. A preliminary injunction is not in the public interest**

48. In determining whether a preliminary injunction is warranted, “courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S. Ct. 1798, 1803 (1982)).

49. In considering the public interest in this case, the court considers the effect its decision will have not only on EVSC schools, but schools across the state and nation.

50. The law regarding the rights of transgender students in public schools and transgender people in general is rapidly developing, and neither the U.S. Supreme Court nor the United States Congress spoken on the issue. School districts are left in the unenviable position of attempting to adopt policies to best serve all of their students in the absence of clear guidance on what the law requires.

51. Additionally, as Dr. Smith testified, the questions presented in these cases do not end with restroom access. Transcript at 31. Schools must also respond to transgender students' requests to access locker rooms, changing facilities, and shower rooms consistent with their gender identities, and navigate difficult questions with respect participation in athletics and overnight accommodations on school trips.

52. In light of the facts of this case, a decision to grant Plaintiff's motion for preliminary injunction would be a marked expansion of even the broadest interpretations of Title IX and the Equal Protection Clause to date.

53. Such a decision would complicate matters even further for school districts across the country already struggling with these complex and often highly divisive issues.

54. For these reasons, a preliminary injunction would be harmful to the public at large. A decision with the potential for such broad-reaching results is best reached after a full trial on the merits.

**IT IS THEREFORE ORDERED** that Plaintiff's Motion for Preliminary Injunction is **DENIED**.

Respectfully submitted,

*s/ Patrick A. Shoulders*

Patrick A. Shoulders #308-82

Robert L. Burkart #16664-82

Jean M. Blanton #24840-82

ZIEMER STAYMAN WEITZEL & SHOULDERS, LLP

20 N. W. First Street

P. O. Box 916

Evansville, IN 47706

Tel. No. (812) 424-7575

Fax No. (812) 421-5089

Email: [pshoulders@zsws.com](mailto:pshoulders@zsws.com)

[rburkart@zsws.com](mailto:rburkart@zsws.com)

[jblanton@zsws.com](mailto:jblanton@zsws.com)

Attorneys for the Defendant.

### **CERTIFICATE OF SERVICE**

I certify that on the 27th day of July, 2018, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Kenneth J. Falk

[kfalk@aclu-in.org](mailto:kfalk@aclu-in.org)

Gavin M. Rose

[grose@aclu-in.org](mailto:grose@aclu-in.org)

Jan P. Mensz

[jmensz@aclu-in.org](mailto:jmensz@aclu-in.org)

*s/ Patrick A. Shoulders*

Patrick A. Shoulders