

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W.,)
) Cause No.
 Plaintiff,) 3:18-CV-00037-WTL-MPB
) Evansville, Indiana
 vs.) **July 20, 2018**
) 8:47 a.m.
 EVANSVILLE VANDERBURGH,)
)
 Defendant.)

**Before the Honorable
WILLIAM T. LAWRENCE**

OFFICIAL REPORTER'S TRANSCRIPT OF
PRELIMINARY INJUNCTION HEARING

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101 NW Martin Luther King Blvd.
Evansville, Indiana 47708

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
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1 (In open court.)

2 THE CLERK: Please rise.

3 THE COURT: Be seated, please. Good morning. We
4 are on the record in cause number 3:18-CV-37, J.A.W. a minor
5 child, plaintiff versus the Evansville Vanderburgh School
6 Corporation. We are here for a hearing on a preliminary
7 injunction requested by the plaintiff in this case. Good
8 morning, Mr. Falk. How are you?

9 MR. FALK: Fine, thank you.

10 THE COURT: Will you introduce who's at counsel
11 table with you?

12 MR. FALK: Co-counsel Gavin Rose, co-counsel Jan
13 Mensz and plaintiff J.A.W.

14 THE COURT: Good morning. Mr. Shoulders, good
15 morning.

16 MR. SHOULDERS: Good morning, Your Honor.

17 THE COURT: And would you introduce who's at counsel
18 table.

19 MR. SHOULDERS: I'd be happy to. Next to me seated
20 is my partner Jean Blanton, who will be doing some of the
21 questioning. To her left is Dr. Smith, superintendent for
22 Evansville Vanderburgh School Corporation; and for the record,
23 you will hear us say EVSC. To Dr. Smith's left is Katie
24 Boren, a relatively newcomer to my law firm of Ziemer Stayman
25 Weitzel Shoulders.

1 THE COURT: Good morning.

2 Mr. Falk, is there anything preliminarily from the
3 plaintiff that the Court should review?

4 MR. FALK: Your Honor, as a preliminary matter, we
5 would move to separate witnesses.

6 THE COURT: Very well. That would be granted.
7 Mr. Shoulders, do you have any witnesses in the courtroom?

8 MR. SHOULDERS: I believe we have separated them and
9 those witnesses who will testify, other than Dr. Smith, are
10 already out in the hall.

11 THE COURT: Very well. Anything else, Mr. Falk?

12 MR. FALK: No, Your Honor.

13 THE COURT: Mr. Shoulders, preliminarily?

14 MR. SHOULDERS: Two matters, Your Honor, quite
15 briefly. No. 1, for the record, we object to these
16 proceedings being held this morning on the ground that we've
17 previously made, argued and the Court has rendered a
18 preliminary decision, that this case cannot proceed under the
19 Federal Rules of Civil Procedure, Rule 17, in that the
20 plaintiff J.A.W. is an unemancipated minor and can only
21 proceed in Federal Court by a next friend or a guardian.

22 Plaintiff's guardian seems to rest upon *Whitaker v.*
23 *Kenosha Unified School District* at 858 F.3d 1034. At page
24 1040, footnote 3, it states, "Because Ash is a minor without a
25 duly appointed representative, pursuant to Rule 17 of the

1 Federal Rules of Civil Procedure, he may assert these claims
2 only through a next friend or guardian ad litem." We'd like
3 the record to show that objection.

4 THE COURT: Very well. Any response to that,
5 Mr. Falk?

6 MR. FALK: Your Honor, the only response is the one
7 we already gave in our filing in opposition to the motion to
8 dismiss, is under Indiana law, it's clear that a minor can
9 proceed without a next friend, and the Federal Rules of Civil
10 Procedure, Rule 17 specifically, refer to what is allowed in
11 the jurisdiction in the state.

12 THE COURT: A minor can be sued and sue in the State
13 of Indiana. Is that correct?

14 MR. FALK: That is correct, Your Honor. And we have
15 previously cited both the rule and the case law to the Court
16 to that effect.

17 THE COURT: That is not the case in the State of
18 Wisconsin?

19 MR. FALK: That is correct, Your Honor.

20 THE COURT: That's my understanding. Very well.
21 The Court will stand by its previous ruling.

22 Anything further, Mr. Shoulders?

23 MR. SHOULDERS: And finally, again, just for the
24 record, throughout the course of these proceedings, we are
25 more than willing, out of deference and respect, to refer to

1 the plaintiff J.A.W. as he, him, the masculine pronouns. We
2 do not want those statements of counsel or any witness to
3 constitute an admission against interest on behalf of the
4 Evansville Vanderburgh School Corporation, that we believe the
5 plaintiff's sex, as that term is used under Title IX or in
6 terms of scrutiny under the 14th Amendment, is an admission on
7 our part that sex encompasses transgender rights. Having said
8 that, we're happy to refer to the plaintiff as he has asked
9 his teachers to do as he, him in that masculine gender.

10 THE COURT: Fair enough. All right. Generally we
11 would have opening statements preliminary to the submission of
12 this matter. Any necessity for opening statements, Mr. Falk?

13 MR. FALK: No, Your Honor. Plaintiff will waive
14 opening.

15 THE COURT: Mr. Shoulders?

16 MR. SHOULDERS: Since they did, I feel duty-bound,
17 Your Honor.

18 THE COURT: Very well. All right. Mr. Falk, how do
19 you wish to proceed?

20 MR. FALK: Your Honor, we have no live testimony to
21 present. We would at this point move to introduce the
22 evidence that we are using to support our preliminary
23 injunction request. We have provided already to opposing
24 counsel binders, and we have binders for the Court and the
25 court reporter, but I would like to read into the record, if I

1 could, what the evidence is. It is the evidence that we've
2 already submitted with our materials but just so we have it in
3 one form for the Court's permission.

4 THE COURT: Very well.

5 MR. ROSE: May I, Judge?

6 THE COURT: You may.

7 MR. FALK: Your Honor, in this exhibit binder, tab 1
8 is the declaration of J.A.W, which is document 17-2. Tab 2
9 is the declaration of Wyatt Squires at docket 17-2 -- I'm
10 sorry. The J.A.W. was 17-1. I apologize. Squires is 17-2.
11 The deposition of J.A.W. is at docket 50-1 with selected
12 exhibits, some of which we have moved to seal, and we have
13 designated those in the exhibit binder.

14 The deposition of David Smith at docket 50-2 with
15 selected exhibits, one of which we have moved to seal. That
16 is so noted. The supplemental declaration of J.A.W. at docket
17 50-3. The deposition of Tammy Work, J.A.W.'s mother, at
18 docket 50-4. The declaration of Dr. Randi Etner at docket
19 50-5. The declaration of James D. Fortenberry at docket 50-6.
20 The declaration of Dr. Janine Fogel, F-O-G-E-L, at 50-7. The
21 declaration of Judy Chiasson, C-H-I-A-S-S-O-N, at 50-8. The
22 declaration of Zachary Mulholland, M-U-L-H-O-L-L-A-N-D, at
23 docket 50-9. The declaration of Aleczander,
24 A-L-E-C-Z-A-N-D-E-R, Dean at docket 50-10.

25 That comprises the binders that we presented as

1 evidence.

2 Additionally, as noted in our reply memorandum in
3 support of our motion for preliminary injunction, there are
4 certain state and local policies and rules that we would ask
5 the Court to take judicial notice of, and those are contained
6 in the appendices to that document, which is document 54-1 and
7 54-2. And finally, we ask the Court to take notice of an
8 Indianapolis Star newspaper article that is at docket 54 at
9 page 13, note 13.

10 That comprises the evidence that we believe is
11 before the Court. We would move that into evidence and we
12 would then rest at this point.

13 THE COURT: In regards to those exhibits, I know,
14 Mr. Shoulders, that the defendant has made some preliminary
15 objections to those exhibits. The Court has reviewed that and
16 rendered a decision as to the admissibility of those exhibits.
17 Do you wish to be heard in addition to any previously offered
18 objection?

19 MR. SHOULDERS: No. The Court was kind enough to
20 allow us to state in writing our objections to those very
21 exhibits. We have stated those and we will rest upon those
22 objections.

23 THE COURT: Very well. The only thing I have to say
24 is I think in regards to that Indianapolis Star article, I
25 thought that might be a little too clever by half. So I think

1 I would be sustaining the objection to that exhibit. It is
2 part of the binder, is it not, though?

3 MR. FALK: It is not, Your Honor.

4 THE COURT: It is not.

5 MR. FALK: We did not put that in nor did we put in
6 all the policies from the state -- other states and other
7 localities, as well as Indiana, that would refer in appendix 1
8 and appendix 2 in our reply.

9 THE COURT: With that, plaintiff rests?

10 MR. FALK: Yes, Your Honor.

11 THE COURT: Thank you, Mr. Falk. Mr. Shoulders.

12 MR. SHOULDERS: Thank you. We would call as our
13 first witness the plaintiff J.A.W.

14 MR. ROSE: Judge, may I remove the binders?

15 THE COURT: Probably. Raise your right-hand.

16 (Witness sworn in at this time.)

17 THE COURT: Be seated. Mr. Shoulders, you may
18 inquire.

19 MR. SHOULDERS: Thank you, Your Honor.

20 **J.A.W., DEFENDANT'S WITNESS, SWORN**

21 **DIRECT EXAMINATION**

22 BY MR. SHOULDERS:

23 Q I won't ask you to state your name but you are in this
24 case going by J.A.W. Is that correct?

25 A Yes.

1 Q And you are one and the same J.A.W. who has filed this
2 lawsuit?

3 A Yes.

4 Q You have not brought this lawsuit by a parent or next
5 friend, have you?

6 A No.

7 Q You are currently 17 years old?

8 A Yes.

9 Q So you are an unemancipated minor, are you not?

10 A Yes.

11 Q Now, when I came into the courtroom -- or the courthouse
12 today, I was required to show identification. Were you?

13 A I forgot my ID but my lawyer vouched for me.

14 Q If you had had identification with you, what would it have
15 been?

16 A It would have stated everything.

17 Q And it would have been your driver's license?

18 A Yes.

19 Q And you have a validly issued driver's license by the
20 State of Indiana, don't you?

21 A Yes.

22 Q It was issued last October, just October of '17, as I
23 recall?

24 A Yes.

25 Q And the name on that driver's license is not J.A.W., is

1 it?

2 A No.

3 Q And on that driver's license it designates sex, doesn't

4 it?

5 A Yes.

6 Q And in October of '17, when you applied for that driver's

7 license, what sex was designated?

8 A Female.

9 Q Do you have any document issued by any government or
10 political subdivision which designates your sex as anything

11 but female?

12 A No.

13 Q J.A.W., have you taken any steps to legally change your
14 name, as the plaintiff did in the *Whitaker* case?

15 A I plan to. I have not yet, no.

16 Q I'm sorry?

17 A I plan to.

18 Q The question is, have you?

19 A No.

20 Q Have you taken any steps to change your birth certificate?

21 A No.

22 Q Have you taken any steps to change your Social Security
23 card?

24 A No.

25 Q Do you have a passport?

1 A No.

2 Q So it would again be the fact that every governmental
3 entity, including the records at the school corporation, that
4 designates sex for you, mark you as a female, correct?

5 A Yes.

6 Q You've completed three full years of high school with the
7 Evansville Vanderburgh School Corporation?

8 A Yes.

9 Q You intend to graduate in December of this year, don't
10 you?

11 A Yes.

12 Q So you'll only be a student for another four months?

13 A Yes.

14 Q And is it a fact that every request you've made, in terms
15 of an accommodation for your gender identity, has been granted
16 by the EVSC, other than bathroom usage?

17 A Yes.

18 Q They allow you, of course, to dress and wear your hair as
19 you choose, correct?

20 A Yes.

21 Q You've instructed teachers to refer to you by your chosen
22 name?

23 A Yes.

24 Q When you were required to take gym class as a freshman,
25 you were provided with an alternative dressing room, correct?

1 A Yes.

2 Q And you've been told that there are gender neutral
3 bathrooms available for your use in the high school, haven't
4 you?

5 A Which high school?

6 Q Both Harrison and North.

7 A I wasn't told for Harrison.

8 Q Were you aware that there was a bathroom in the nurse's
9 office you could use?

10 A I am now.

11 Q Well, in fact, in your deposition you said you never tried
12 to use it, did you?

13 A I didn't.

14 Q Excuse me?

15 A I didn't try to.

16 Q That's right. And at North -- and that's where you will
17 be in the fall, am I correct?

18 A Yes.

19 Q They've made available to you a gender neutral bathroom?

20 A Yes.

21 Q You've been allowed to organize and, in fact, are
22 president of clubs relating to LGBTQ issues, have you not?

23 A Yes.

24 Q Now, you agree with me, do you not, J.A.W., that
25 transitioning is a process?

1 A Yes.

2 Q And in fact, I think you educated all of us in your
3 deposition that it's a five-year process for some people?

4 A Yes.

5 Q And you haven't completed the transitioning process, have
6 you?

7 A No, I haven't completed it.

8 Q You are only, actually, in hormone therapy wise maybe year
9 two?

10 A I'm on year one.

11 Q You're in year one?

12 A Yes.

13 Q Of what can be a five-year process?

14 A Yes.

15 Q Now, at the time your law firm, the America Civil
16 Liberties here, wrote a letter to the school corporation
17 demanding that you be allowed to use a restroom corresponding
18 to your gender identity, that was in January 2018, correct?

19 A Yes.

20 Q And suit was then filed in February of 2018, am I correct
21 on that?

22 A Yes.

23 Q As of January 2018 or February 2018, had you provided the
24 Evansville Vanderburgh School Corporation with any
25 documentation confirming your diagnosis?

1 A No.

2 Q Had you provided the Evansville Vanderburgh School
3 Corporation with any records from a counselor or therapist?

4 A No.

5 Q Did you or your parent provide the Evansville Vanderburgh
6 School Corporation with records from a doctor documenting a
7 gender dysphoria diagnosis?

8 A No. We didn't think we had to prove it.

9 Q Excuse me?

10 A We didn't think we would have to.

11 Q Well, you don't know, though, do you?

12 A Right.

13 Q So it is a fact that all the Evansville Vanderburgh School
14 Corporation had, when this lawsuit was filed, was your demand
15 expressed by you and your attorneys that you be allowed to use
16 the male restroom?

17 A Yes.

18 Q In your junior year, when this demand was made, did your
19 mother make the demand that you be allowed to use the male
20 restroom?

21 A No.

22 Q Did any adult on your behalf make that demand, other than
23 your lawyers?

24 A No.

25 Q If you had provided the school corporation with counseling

1 records or medical records, would any of them have stated that
2 use of a male bathroom is important to your transition?

3 A Could you repeat the question? I'm sorry.

4 Q You've seen your counselor's record, haven't you?

5 A Yes.

6 Q You've seen your medical records, haven't you?

7 A Yes.

8 Q Do either one of them say you should be allowed to use a
9 male restroom to assist your transition?

10 A No; but it's -- it wasn't related to that specifically.

11 Q So the answer is no medical provider has counseled the
12 EVSC that you should be allowed to use male restrooms?

13 A Correct.

14 Q Now happily, unlike the plaintiff in Ash -- or *Whitaker*,
15 you -- and I sincerely mean this -- have never expressed
16 suicidal ideation related to these issues, have you?

17 A No.

18 Q While you've had anxiety and stress in your own home
19 relating to the acceptance by, I think, your stepfather of
20 your gender identity, the school problems have never -- or
21 school issues have never required you to visit a counselor
22 seeking help for anxiety related to the bathroom choices, have
23 they?

24 A I mean, I didn't specifically go to counseling for that
25 but that was related to it.

1 Q You've never expressed that to any counselor at school,
2 have you?

3 A No.

4 Q And in fact, it's your position that you should not have
5 to provide the school corporation with any documentation.

6 That, in fact, you believe the law should be that if you say
7 you identify as male, this should allow you to use the male
8 restroom. Is that right?

9 A Right.

10 Q In fact, according to your deposition, all you should have
11 to do is say it and they should accept it. Did I quote you
12 correctly?

13 A Yes.

14 Q And you said hypothetically that that should even apply to
15 a third grader who identifies as a male or female, correct?

16 A Right.

17 Q What?

18 A Yes.

19 Q Finally, as it relates to safety, J.A.W., you were asked
20 about when you use bathrooms in public places, one of the
21 considerations that you think about, when making that choice,
22 is safety, right?

23 A Right.

24 Q Transgender people face safety issues based upon bathroom
25 choices, don't they?

1 A Yes.

2 Q And in fact, quoting you, you feel more safe using a
3 single stall restroom?

4 A Using a single stall, yes.

5 MR. SHOULDERS: That's all I have. Thank you.

6 THE COURT: Your witness, Mr. Falk.

7 MR. FALK: Thank you.

8 **CROSS-EXAMINATION**

9 BY MR. FALK:

10 Q You were asked some questions about transitioning?

11 A Yes.

12 Q What does that mean? What is transitioning for a
13 transgender person?

14 A It can be a range of various things like using hormones or
15 surgeries to further affirm your gender identity.

16 Q And does it involve social transitioning as well?

17 A Yes.

18 Q What is social transitioning?

19 A Social transitioning can consist of changing -- going by a
20 different name than your birth name, going by different
21 pronouns, and just requesting to be acknowledged by the gender
22 that you identify with by your peers.

23 Q And how do bathrooms play a role in social transitioning?

24 A It plays a big role because if I identify as male, then if
25 I'm having to go to a female restroom, then that contradicts

1 what I am projecting to the world of what I identify as.

2 Q Even if no one knows?

3 A Yes.

4 Q And how does it make you feel? Personally, how has it
5 made you feel to have to continue to use female restrooms?

6 A Words of anxiety and depression have been used but they
7 really do apply. I feel ostracized from my peers. It's
8 extremely upsetting.

9 Q Now, you were asked about how long transitioning takes.
10 For you, you started transition early. Is that correct?

11 A Yes.

12 Q You started to identify and ask people to identify you as
13 male in middle school, I believe?

14 A Yes.

15 Q You were asked some questions about whether you would have
16 to prove to EVSC that you were transgender and suffering
17 gender dysphoria. Do you remember those questions?

18 A Yes.

19 Q You told staff persons, administrative persons early on in
20 your career as a freshman that you were transgender. Is that
21 correct?

22 A Yes.

23 Q That's when you were allowed to use a different locker
24 room?

25 A Yes.

1 Q Although it's supposed to be an unused women's locker room
2 but it was for you and another transgender student, right?

3 A Yes.

4 Q Did anyone from EVSC ask you to prove you were
5 transgender?

6 A No.

7 Q Did they ever ask to see the medical evidence?

8 A No, sir.

9 Q You know they have the medical evidence in this case?

10 A Yes.

11 Q As discovery in this case both they and our records --
12 your records?

13 A Yes.

14 Q You're not aware of any other records out there?

15 A No, not that I know.

16 Q EVSC has everything they need about your medical records
17 and your transgender?

18 A Yes.

19 Q You were asked some questions about Harrison High School.
20 Do you remember those questions?

21 A Yes.

22 Q And it's my understanding that at least last year, you
23 were in a joint program at both Harrison and another high
24 school?

25 A Yes.

1 Q And what was that other high school?

2 A North High School.

3 Q So did anyone from Harrison ever tell you that there was a
4 gender neutral bathroom that you could use?

5 A No.

6 Q But you had previously been told at North that you could
7 use the nurse's restroom?

8 A Yes.

9 Q You were asked about safety issues?

10 A Yes.

11 Q Is there a concern now, if you use a women's restroom at
12 the high school, about your safety?

13 A Yes.

14 Q Why is that?

15 A It outs me. It makes people, you know, very, very aware
16 that I am transgender; and now that I appear male, it's very
17 uncomfortable. You know, female peers have expressed
18 discomfort with me using that restroom because of what I
19 appear.

20 Q You were asked a question, both in your deposition and
21 just now, about third graders and transgender status?

22 A Yes.

23 Q Is that something you have any expertise in?

24 A No.

25 MR. FALK: I have nothing further.

1 THE COURT: On those issues, Mr. Shoulders?

2 MR. SHOULDERS: I'm sorry. On those issues, yes.

3 **REDIRECT EXAMINATION**

4 BY MR. SHOULDERS:

5 Q So you have no expertise on those transgender issues. Is
6 that what I just heard you say?

7 MR. FALK: Your Honor, just to complete the
8 sentence. It was as to third graders, Your Honor.

9 BY MR. SHOULDERS:

10 Q As to third graders.

11 A Yes.

12 Q But the only request that the EVSC ever got related to
13 bathroom usage had to rely upon your expertise relating to
14 transgender issues, correct?

15 A Yes.

16 Q And in fact, when the EVSC, through, for instance,
17 Dr. Dionne Blue, emailed you to say we're, EVSC, does not have
18 an official policy -- this is at tab 4 in your exhibits, page
19 73. Does not have an official policy on transgender student
20 bathroom/locker room access, we are still asking the students
21 use the nurse's office, depending upon the facilities,
22 allowing schools to take other needs on a case-by-case basis.
23 We're hoping for future guidance to come through state and
24 federal regulation. Let us know.

25 Did you ever contact Dr. Blue in response?

1 A I don't think so, no.

2 MR. SHOULDERS: That's all.

3 THE COURT: Anything further, Mr. Falk?

4 MR. FALK: Yes, Your Honor.

5 **RECROSS-EXAMINATION**

6 BY MR. FALK:

7 Q Did you present a copy of the "Dear colleagues" letter,
8 which is one of our exhibits, during the Obama Administration
9 that dealt with bathroom access by transgender students? Did
10 you present that to Principal Skinner?

11 A Yes.

12 Q And Principal Skinner was the principal of what high
13 school?

14 A North High School.

15 Q Had you hopefully annotated the parts of it that talked
16 about bathroom usage?

17 A Yes.

18 Q Did you have any response?

19 A Not really. I mean, he ended up talking to my mom about
20 it but --

21 Q Were you allowed usage of the male restrooms?

22 A No.

23 Q You've never been allowed usage of the male restrooms?

24 A Correct.

25 MR. FALK: Thank you, Your Honor.

1 MR. SHOULDERS: Nothing further.

2 THE COURT: You may step down. Thank you.

3 Defendant, you may call your next witness.

4 MR. SHOULDERS: We call Dr. David Smith.

5 (The witness was sworn in.)

6 THE COURT: Mr. Shoulders, you may inquire.

7 MR. SHOULDERS: Thank you, Your Honor.

8 **DR. DAVID SMITH, DEFENDANT'S WITNESS, SWORN**

9 **DIRECT EXAMINATION**

10 BY MR. SHOULDERS:

11 Q State your name for the record, sir.

12 A David Smith.

13 Q And Dr. Smith, tell us how you're employed.

14 A I'm the superintendent of the Evansville Vanderburgh
15 School Corporation.

16 Q How long have you held that position?

17 A This is starting my eighth year.

18 Q Prior to being superintendent, just talk generally about
19 your career in education.

20 A Within the EVSC, I've been a teacher for 19 years,
21 building level administrator for five years. I was a high
22 school teacher for 17 years, middle school teacher for two
23 years, middle school administrator for five years, central
24 office administrator in various capacities since 2016, and I'm
25 beginning, I think, my 37th year with the district.

1 Q In terms of your education, sir, briefly talk about your
2 education and level of attainment of your doctorate.

3 A I have a bachelors and a master degree from the University
4 of Evansville. I have an administrative certification from
5 Indiana State. I have my EDS degree from Indiana State. I
6 have my doctor in educational leadership. I also have a
7 master's of business and operational businesses from Ohio
8 State. I have my black belt in Six Sigma.

9 Q What are your job duties as superintendent of the
10 Evansville Vanderburgh School Corporation?

11 A Simply put, to oversee the day-to-day operations of our
12 school district.

13 Q In fact, as we intended to call four or five witnesses,
14 both principals, etcetera, I'm not sure after J.A.W.'s quite
15 honest testimony here, that maybe we don't need to do that.
16 Let's just cut to the chase. You have reviewed, since the
17 EVSC got sued, the facts here, have you not?

18 A Correct.

19 Q And would you agree, based upon your review of the
20 documents and witnesses, etcetera, in this case, that at no
21 time prior to the --

22 MR. FALK: Your Honor, I'm sorry. I'm going to
23 object as to leading.

24 THE COURT: I'm going to allow some latitude.

25 MR. SHOULDERS: I'm sorry?

1 THE COURT: Let's rephrase, please.

2 MR. SHOULDERS: I will rephrase.

3 BY MR. SHOULDERS:

4 Q At any time during the last school year, did the EVSC
5 receive a request from J.A.W.'s mother as it relates to his
6 bathroom usage?

7 A No.

8 Q At any time has the Evansville Vanderburgh School
9 Corporation ever received a document from a medical provider
10 relating to J.A.W.'s condition?

11 A No.

12 Q At any time has the Evansville Vanderburgh School
13 Corporation ever received a document, therapy record of any
14 kind, relating to psychological evaluations of J.A.W.?

15 A No.

16 Q Prior to the lawsuit?

17 A Not prior to the lawsuit, no.

18 Q To your knowledge, was J.A.W. ever refused the usage of a
19 gender neutral bathroom at Harrison High School or North High
20 School?

21 A No.

22 Q Were both bathrooms made available to him?

23 A Yes.

24 Q Was there ever a request from J.A.W. or his mother that
25 his schedule be modified or that the bathroom situation be

1 modified during this past school year?

2 A No.

3 Q We've learned through discovery that J.A.W. has a
4 diagnosis from one provider of gender dysphoria. Was that
5 news to you?

6 A Yes.

7 Q When the school corporation, based upon your 35 plus years
8 of experience in school administration, receives a medical
9 diagnosis, what, if anything, does that trigger in the world
10 of school administration?

11 A Typically a medical diagnosis of a medical condition would
12 trigger a 504 conference.

13 Q What does 504 refer to?

14 A It is a federal statute.

15 Q Relating to students with medical conditions?

16 A Correct.

17 Q And when a 504 or a diagnosis is received in a special
18 situation, what does the school do in general?

19 A In general, we would convene a conference that would
20 include parent, medical professions.

21 Q Teachers?

22 A Teachers.

23 Q Counselors?

24 A Correct.

25 Q Has that been done here?

1 A It has not.

2 Q Has anyone requested us to do that here?

3 A No.

4 Q All we got was a lawsuit?

5 A Correct.

6 Q Indiana has a lot of laws about parental involvement in a
7 student's education, doesn't it?

8 A Yes.

9 Q Let me direct your attention to a law that went into
10 effect July 1 of this year, 2018, IC 20-30-5-17, instruction
11 on human sexuality. Are you familiar with this new law?

12 A I am.

13 Q What does it provide?

14 A It requires the school corporation to notify parents about
15 what will be taught in the course and then it provides a
16 parent to opt out. There is no longer an opt in, an automatic
17 opt-in policy. Parents have to stipulate if they approve or
18 disapprove.

19 Q Schools have been provided with something called a consent
20 form for classroom instruction on human sexuality?

21 A Correct.

22 Q So would it be an accurate statement that the EVSC cannot
23 even instruct J.A.W. next year -- in this coming school year
24 on human sexuality without his mother's permission?

25 A Correct.

1 Q Yet you have never heard from his mother relating to the
2 issue that brings us to Federal Court?

3 A Correct.

4 Q Upon what document do you enroll students at the EVSC?

5 A Primarily health -- I'm sorry, the birth certificate or
6 some congruent legal document.

7 Q Once again, provided under the rules and regulations state
8 law?

9 A Absolutely.

10 Q To your knowledge, does that document include a box that
11 is checked for sex?

12 A It does.

13 Q So that determination -- try and not to lead but I'm also
14 try to speed up. So the determination as it relates to sex is
15 made before the student gets to your school?

16 A Absolutely. EVSC utilizes the sex that's listed on the
17 birth certificate.

18 Q And if J.A.W. were to present you with a birth certificate
19 that says male, would you honor that today?

20 A If J.A.W. presents us with a birth certificate that says
21 male, we honor that. A birth certificate that says female, we
22 honor that.

23 Q As an administrator, superintendent for seven, eight
24 years, talk about, if you will, your role in maintaining order
25 and safety in your buildings.

1 A That is a primary function, certainly, that we have. You
2 know, the best way that we do that is really through very
3 objective means. I mean, I'm responsible for 23,000 students,
4 3,400 employees and there needs to be very objective and clear
5 lines for operational effectiveness and efficiency.

6 Q And is one of those lines that you have used in our
7 schools the assignment of bathrooms based upon biological sex?

8 A Yes.

9 Q Do building codes require you to provide male and female
10 bathrooms?

11 A Yes.

12 Q Title IX requires separate but equal male and female
13 facilities, correct?

14 A Correct.

15 Q Can you govern a school of 23,000 students based upon a
16 subjective idea about sex?

17 A I think that would result in chaos.

18 Q Will you elaborate on that? What kind of problems would
19 it cause for you, for instance, in competition in IHSAA?

20 A IHSAA has very objective requirements that have to be met.
21 Interesting, Title IX, I think, was created to provide an
22 equal platform for females. It appears as though now it's
23 being used to create an unequal platform or to take that right
24 away, but there -- simply put, this -- there are lots of
25 issues that surround this, if I may.

1 Q Please.

2 A Clearly, safety, as was evidenced in earlier testimony in
3 this courtroom, disruption of the educational process, making
4 certain that we respect parental control. There's also the
5 age and developmentally appropriateness of these things, not
6 only as it relates to cognitive development but social and
7 emotional development, and there are privacy concerns. This
8 is not just about restroom usage. This is locker room, who
9 can undress around whom, who can shower with whom.

10 Q Overnight field trips?

11 A Overnight field trips, sports, as we mentioned earlier.

12 Q Have you been given any guidance by the Indiana Department
13 of Education as relates to transgender issues?

14 A No. They have basically stated it's a local control
15 issue.

16 Q In your -- not in your opinion. Is it a fact that the
17 Evansville Vanderburgh School Corporation complies with every
18 state law and regulation as it relates to bathroom usage in
19 the public schools?

20 A We do.

21 Q Do any of them -- any of those laws state that a student
22 should be allowed to declare gender identity and thus be, by
23 law, allowed to use the bathroom of their choice?

24 A No.

25 Q Is there any federal statute of which you are aware that

1 changes that?

2 MR. FALK: I'm going to object, Your Honor. It goes
3 beyond his expertise. *Whitaker* has told us what Title IX
4 says. They obviously don't agree with *Whitaker* but I don't
5 believe he is competent to tell.

6 MR. SHOULDERS: The facts don't agree with *Whitaker*.
7 I'm asking him as an administrator of 23,000 students, that
8 we're here because we accept federal funds, I think he has to
9 know whether we comply with federal law.

10 THE COURT: I think it's fair game. Overruled. You
11 may answer.

12 BY MR. SHOULDERS:

13 Q Is there is a federal statute, that you're aware of, that
14 requires us to honor transgender requests to use a bathroom
15 that does not correspond with their biological sex?

16 A No, there is not. And in our Title IX audit, there is no
17 finding as such.

18 Q Is there any federal regulation pertaining out of the
19 Department of Education, of which you are aware, that changes
20 the equation?

21 A No.

22 Q There was reference in the cross -- in the examination of
23 J.A.W. of the Obama Administration's guidance letter from the
24 Department of Justice. Did you hear that question?

25 A I did.

1 Q What is your understanding of the continued viability of
2 that guidance letter?

3 A That was rescinded.

4 Q We've had, I think -- or maybe we haven't. Have there
5 been any complaints on your watch concerning -- from your
6 parents, your student body as it relates to bathroom usage in
7 transgender?

8 A Yes.

9 Q Tell us about that.

10 A Well, as recently as last month, in speaking to an
11 administrator at -- the day after the Monday after I was
12 deposed, she referenced two situations that had occurred in
13 the building where she is principal; had a parent, a mother,
14 that called that was extremely upset because the daughter had
15 been exposed to a transgender man that had gone into the
16 restroom and she felt very -- I think the words were scared,
17 vulnerable and terrified.

18 Q As a 38-year administrator with a PhD in educational
19 issues, do you have an opinion as to whether or not there
20 would be a disruption in your schools if children were allowed
21 to simply choose bathrooms based upon their subjective gender
22 identity?

23 A Yes. I believe there would be substantial disruption.

24 Q Do you believe it would pose a safety concern in the
25 schools?

1 A I do.

2 Q Do you believe that your parents, who have a large role to
3 play in education, the parent body, would object?

4 A I know that for a fact.

5 Q Finally, accommodations were made in this very case, were
6 they not?

7 A Correct.

8 Q You have never required J.A.W. to dress, wear his hair in
9 any way different from what he chooses, have you?

10 A Correct.

11 Q Have the faculty been advised to address him by the name
12 he chooses?

13 A They have.

14 Q Under Indiana regulations, can we change his permanent
15 educational record from his birth certificate name?

16 A We cannot.

17 Q But we do have a little experience here; and when he walks
18 across the stage at graduation, will we refer to him by the
19 name he requests?

20 A According to our practice, we would refer to him as the
21 name he requests. However, his diploma would be his -- the
22 name on the birth certificate.

23 Q We didn't require him to dress with the girls even in his
24 freshman year, did we?

25 A Correct.

1 Q We've never required him to use the female restrooms at
2 our schools, have we?

3 A Correct.

4 Q And we're not going to at his final one semester, are we?

5 A No, we're not.

6 Q What have we done to accommodate even the bathroom
7 request?

8 A Provided access to a gender neutral restroom or private
9 restroom.

10 Q Have we ever had a complaint from his mother about that?

11 A No.

12 Q Have we ever, in any of our buildings, heard that J.A.W.
13 has complained about that?

14 A No.

15 Q Have we ever heard that the bathroom was locked and he
16 couldn't use it?

17 A No.

18 Q Have we ever been told that he suffers from some kind of
19 physical condition, as was the case in *Whitaker*, that holding
20 urine all day has caused a problem?

21 A No.

22 Q Do you feel, as J.A.W. feels, that it is safest for him to
23 use a single stall?

24 A I agree with J.A.W. on that point.

25 MR. SHOULDERS: That's all.

1 THE COURT: Your witness, Mr. Falk.

2 MR. FALK: Thank you.

3 **CROSS-EXAMINATION**

4 BY MR. FALK:

5 Q Superintendent, during your testimony you mentioned 504.
6 504 refers to accommodating persons with a disability. Is
7 that correct?

8 A No.

9 Q What does it refer to?

10 A Not only that, with a medical condition.

11 Q A medical condition that needs to be accommodated in a
12 medical way. Is that correct?

13 A I would not say that, no.

14 Q Now, you are aware that J.A.W. is transgender. You're
15 aware that he has gender dysphoria. Is that correct?

16 A I was made aware of gender dysphoria.

17 Q You're aware of it now?

18 A June 15, 2018, correct.

19 Q You're aware that he's taking the male hormone
20 testosterone?

21 A I was made aware of that June 2018, correct.

22 Q You're certainly aware that I, on his behalf, asked that
23 he be allowed to use male restrooms and that was refused by
24 your attorney in February. Is that correct?

25 A I am aware of the letter, correct.

1 Q And during your deposition, you testified on June 22 that
2 if J.A.W. used male restrooms in the future, he would be
3 subject to discipline, which would lead to suspension if he
4 persisted. Is that correct?

5 A I testified that he should use male restroom and refusal
6 to do so -- I'm sorry. I testified he should use the female
7 restroom. If he used the male restroom, that would be subject
8 to basically defiance issues.

9 Q He could -- he would be subject to discipline?

10 A Yes.

11 Q And you are aware that in November of 2016, he sent an
12 email to Dr. Blue identifying himself as transgender and
13 asking about the bathroom policy, and was told there was none;
14 he should continue to use a single-person restroom or the
15 female restrooms?

16 A That is correct.

17 Q And Dr. Blue is the administrator in charge of diversity,
18 which would include LGBT issues. Is that correct?

19 A That is correct.

20 Q Now, EVSC has no written policy governing access of
21 restrooms by transgender persons. Is that correct?

22 A Correct.

23 Q And I'm showing you part of your deposition. I'm trying
24 to show you part of your deposition. I'm an old guy. Can you
25 see that okay?

1 A Yes.

2 Q So in the first part I bracketed, I asked you about the
3 policy at EVSC is that persons who were born anatomically male
4 must use the male bathrooms and the same for female using the
5 female bathroom. You said: Is that the policy? I said:
6 Yes. And you said: Yes, that is the policy.

7 Is that correct?

8 A That's what I see.

9 Q And that's correct. Is that right?

10 A I don't know that I would say policy as much as practice.

11 Q Okay. Because there's no formal policy?

12 A Correct.

13 Q And then I asked you again in the bracketed part
14 concerning J.A.W., based on his testimony that he's shaving,
15 his periods have stopped, he's lost weight, his weight is
16 redistributed in a masculine way, assuming that's true, none
17 of that makes a difference because he does not have a penis.
18 Is that correct?

19 And you said: When it comes to using a restroom?
20 And I said: Yes, I'm sorry. And you said: Yes.

21 Is that correct, your testimony?

22 A Yes, specific to the restroom.

23 Q And that's still -- that's still the case. Is that
24 correct?

25 A Specific to the restroom, yes.

1 Q Is it different for something else?

2 A It would be different for showering. It would be
3 different for locker room use.

4 Q I'm confused. How would it be different?

5 A Maybe I don't understand your question.

6 Q I'm sorry. I took it away too fast.

7 A So in other words, his biological sex is the determining
8 factor.

9 Q Okay. And actually, it's a nice lead-in to this part of
10 your testimony where I ask: Okay. And why is J.A.W. not able
11 to use the male restrooms? And you said: Because he's --
12 because biologically he's a female.

13 A Correct.

14 Q And that is -- that is the motivation for the position of
15 EVSC that J.A.W. cannot use the male restroom because
16 biologically he's a female?

17 A Biologically J.A.W. is a female.

18 Q Now, during your testimony just now you talked about how
19 if J.A.W.'s birth certificate changed to female, that that
20 might make a difference regarding bathroom access. Do you
21 remember that testimony?

22 A I do.

23 Q So if J.A.W.'s birth certificate changed to female --
24 excuse me, changed to male but he had no surgery and he still
25 had female anatomy, birth certificate changes to male, would

1 he be able to use the male restrooms?

2 A In order for one to obtain a birth certificate, there's
3 certain requirements that must be met. I don't want to be in
4 the position of picking who goes to what restroom. We need an
5 objective standard. A birth certificate is an objective
6 standard.

7 Q Well, let me tell you hypothetically, and I think it's
8 true, but for our discussion it can be hypothetical. Let's
9 say Indiana -- and I realize that J.A.W. wasn't born in
10 Indiana. But let's say Indiana -- there's an Indiana Court of
11 Appeals case that says a transgender person can have his or
12 her birth certificate changed, gender marker changed without
13 surgery at all. So that anatomically -- let's talk about a
14 male. Anatomically a male person who is transgender, female
15 anatomically, that person will still be male but their birth
16 certificate will say female. Would EVSC allow that person to
17 use --

18 A Could you repeat that again?

19 Q Probably not. Let's try again. Let's stick with J.A.W.
20 Let's say J.A.W. was able to change his birth certificate
21 today.

22 A Okay.

23 Q So it would say male. Okay?

24 A Mm-hmm.

25 Q But he hasn't had surgery. The testimony in his

1 deposition is clear. But he has a piece of paper now from the
2 State that says male. Would EVSC allow J.A.W. to use the male
3 restrooms?

4 A Like --

5 Q It's a yes or no question. Would it be allowed? Yes or
6 no.

7 A Yes.

8 Q So your comment about disruption of a transgender man
9 entering a female restroom, that transgender man might have
10 had a birth certificate that said he was a female. So it
11 should be a she. So what's the disruption problem? What's
12 the fear?

13 A The issue at hand is that the State has legal requirements
14 for changing legal documents. So we would abide by that.

15 Q Yes, but --

16 A So there could also be disruption based upon -- and I
17 would think there would be disruption based upon someone using
18 a shower room that biologically is different than everyone
19 else in the shower room. I think I answered your question.
20 Would we allow that? Yes. Would it cause disruption? Yes.

21 Q Okay. So if a piece of paper magically changes today --

22 A I don't think pieces of paper can magically change.

23 Q If a piece of paper changes today that says that J.A.W. is
24 male and nothing else changes, that he would be able to use
25 the male restrooms, the male locker rooms and go on trips as a

1 male according to you speaking for EVSC. Is that correct?

2 A We follow very objective standards.

3 Q Just a yes or no. It's a yes or no question. Is the
4 answer yes?

5 A I answered yes, sir.

6 Q Now, if you have a person -- and I would, as we've argued
7 to the Court, like J.A.W. who's a boy in a state that doesn't
8 allow a person to change their birth certificate without
9 surgery and that person's going to be treated then differently
10 than an Indiana person who can change without changing
11 anatomically, that would be okay. You would go by the piece
12 of paper. Is that correct?

13 A We would go by an objective standard, yes.

14 Q You attempt to follow the law, correct?

15 A Yes.

16 Q Whatever that law is. And I'm sure there are a lot of
17 laws governing the education of children?

18 A Just a few.

19 Q In your deposition I asked you if you had heard of the
20 *Whitaker* case. Do you remember those questions?

21 A Yes.

22 Q And you had heard of the case?

23 A I have.

24 Q And you're familiar with the case?

25 A Yes.

1 Q I'm showing you a quote from the case. And in that case
2 the Court says, "A policy that requires an individual to use a
3 bathroom that does not conform with his or her gender identity
4 punishes that individual for his or her gender nonconformance
5 which, in turn, violates Title IX."

6 Now, your policy, whatever it is, is that results in
7 punishing J.A.W. at this point or results in not allowing him
8 to conform with his gender identity. Is that correct?

9 A We have a practice.

10 Q Practice. The practice that you have does not allow him
11 to conform to his gender identity. Is that correct? You told
12 me he can't go to the male restroom.

13 A Yes. We have a practice that would provide a unisex
14 bathroom.

15 Q The practice would be you can't go because you are
16 biologically not of that gender or because we don't have a
17 birth certificate. That's not written down anywhere. We've
18 established that. Is that correct?

19 A I think that's based upon reason.

20 Q Okay. Your reason. And in fact --

21 A Actually, it would be the school board's reason.

22 Q In fact -- well, speaking of EVSC. In fact, when J.A.W.
23 was asking about bathroom usage, he was never told about any
24 practice concerning birth certificates, is that correct, that
25 you're aware of?

1 A I don't think that topic led to that discussion.

2 Q During the course of our deposition, you never talked
3 about birth certificates. I searched the index. It doesn't
4 look like birth certificate was mentioned anywhere.

5 A That's correct.

6 Q We talked about the fact that he was not biologically
7 male.

8 A Correct.

9 Q So we have the Court saying that a policy that does
10 what -- which agreed EVSC does, that requires an individual to
11 use a bathroom that does not conform with his or her gender
12 identity, punishes the individual and violates Title IX, and
13 the school district's policy also subjects Ash, the plaintiff
14 there, to different rules, sanctions and treatment than
15 nontransgender students in violation of Title IX.

16 And that's what's happening to J.A.W. He is being
17 subjected to different rules and sanctions and treatment than
18 nontransgender students to the extent that he is not able to
19 go to a bathroom that conforms to his gender identity. Is
20 that correct?

21 A I think there are distinguishable facts here in that
22 *Whitaker*, Ash was only transgender students could use the
23 gender neutral restroom. That's not EVSC's policy or
24 practice.

25 Q There are gender neutral restrooms. That's correct?

1 A All students may use them.

2 Q And J.A.W., like Ash, was offered the use the nurse's
3 office. Is that correct?

4 A That is correct.

5 Q And that is not what we discussed in our deposition where
6 most children in school go to the bathroom. They go to the
7 larger common male or female and -- excuse me, female
8 restrooms that are present in the school. Is that correct?

9 A Correct. That's not where most but it is available for
10 all.

11 Q And in fact, in *Whitaker* the Court says that providing a
12 gender neutral alternative is not sufficient as it is the
13 policy itself which violates the act, and here they talk about
14 the fact that the bathroom was not a true alternative because
15 of distance, location and increased stigmatization.

16 Now, you talked about following the law. If the
17 Court here finds that *Whitaker* is the law, that is something
18 that EVSC has to follow, is that correct, if the Court
19 finds --

20 A If I may. I think the significant portions that you
21 referenced was because only transgender were --

22 Q Please answer the question. If the Court finds that
23 *Whitaker* is the law, then EVSC has to follow it, correct?

24 A Clearly we will follow the law.

25 Q Thank you. And you're aware also -- strike that. The

1 part of the law that EVSC complies with, of course, is the
2 constitution of the United States. Is that correct?

3 A Yes.

4 Q And you're aware in *Whitaker* that the Court there
5 concluded that Ash's equal protection rights were being
6 violated. Are you aware of that?

7 A I believe that was.

8 Q Again, if the Court here considers that to be the law,
9 that's something that EVSC has to comply with. Is that
10 correct?

11 A Sure.

12 Q Now, following *Whitaker*, you saw no need to reevaluate
13 your practice concerning access to bathrooms by transgender
14 students. Is that correct?

15 A Could you repeat that, please?

16 Q Following *Whitaker*, EVSC did not reconsider its practice
17 concerning access of youth -- transgender youth to bathrooms.
18 Is that correct?

19 A No.

20 Q My fault. Did you reconsider your practice that you've
21 talked about today following *Whitaker*?

22 A Yes.

23 Q And how did you reconsider it following *Whitaker*?

24 A Upon consultation with legal counsel.

25 Q And what did you do? What did you do differently?

1 A Follow the advice of legal counsel, which is not a
2 difference.

3 Q So you kept things the same. You talked to legal counsel
4 and you maintained the same practice?

5 A Correct.

6 Q That's what you said in your deposition. That's why I was
7 confused. I'm sorry.

8 And that practice means that J.A.W. is not able to
9 use the male restrooms because at the current time, he, in
10 your estimation, is biologically a female?

11 A And in the estimation of the State.

12 Q Because he carries a --

13 A A driver's license, a birth certificate, every document,
14 every legal document that he carries lists J.A.W. as a female.

15 Q But your testimony also is that despite talking about
16 disruption and problems that might occur in school, you would
17 accept all that if J.A.W. had a birth certificate which said
18 he was a male, even though he has not had any surgery to do
19 that?

20 A That's what I've stated.

21 Q And that's true?

22 A That's what I've stated.

23 Q And that's true. Is that correct?

24 A It's true that's what I've stated.

25 Q So am I -- is that not true? If --

1 A I don't want to make the assumption that the school board
2 would enact a policy based upon my statement.

3 Q Okay. So if J.A.W. presents a birth certificate tomorrow
4 or on the first day of school, whenever that is -- and when is
5 the first day of school?

6 A August the 8th.

7 Q On August the 8th, presents a birth certificate saying: I
8 am, with his name, male gender marker and proceeds to walk
9 into the male restrooms, that would be acceptable to EVSC or
10 you don't know?

11 A Under current practice, yes.

12 Q Would it be acceptable to EVSC, yes or no?

13 A Yes, under current practice.

14 Q Well, would that practice change?

15 A I don't change policy.

16 Q Has that ever happened? Have you ever had a transgender
17 student come to you -- come to EVSC saying -- besides J.A.W.,
18 saying: I am not of the gender of my birth; this is my
19 identified gender and I want to use the restroom of that
20 identified gender. Has that ever happened besides with
21 J.A.W., that you're aware of?

22 A I don't know if that specifically has happened.

23 Q So you're not aware of any other transgender student
24 within the school system who has presented the question of
25 bathroom access?

1 A That's not correct.

2 Q Well, tell me what is correct.

3 A I think there was a student -- elementary student that had
4 questioned their principal.

5 Q And was that student told that they had to use the
6 bathroom of their assigned gender at birth?

7 A That's why I answered your previous question evasively
8 because I'm not sure what the conference was or the request
9 made.

10 Q There might have been one other situation?

11 A Yes.

12 Q But to the best of your knowledge, there might have only
13 been one?

14 A Yes, sir.

15 Q So when we're talking about what is the practice of EVSC,
16 that's a practice that's never been implemented?

17 A What's your question?

18 Q That's my question. You're talking about --

19 A What practice are you asking?

20 Q Bathroom usage by transgender students. That's never been
21 implemented, correct?

22 A What practice are you asking?

23 Q The practice that you said --

24 A What part of the practice? I'm sorry.

25 Q Concerning the ability of someone in J.A.W.'s position to

1 access a bathroom of their gender identity, a practice that's
2 never been implemented.

3 A Transgender, transsexual, gender identity as a whole is
4 very fluid, gender fluid. So that's why we require, as a
5 matter of practice, a very objective standard. That's why
6 it -- transgender or not is not the issue here, in my opinion,
7 for the question that you're asking. The practice would be
8 and would remain use the restroom that is on the birth
9 certificate or some comparable legal document.

10 Q I will ask you again for the third or fourth time. You've
11 never had to implement that practice with regard to a
12 transgender student?

13 A I'm sorry. Now I understand. Not to my knowledge, no.

14 Q And in fact, to the extent that you're now relying on a
15 birth certificate, that was not mentioned at all in your
16 deposition, maybe because you never had to implement the
17 practice before. I don't know. But that was not mentioned.
18 Is that correct?

19 A You're correct; because frankly, that -- when you divide
20 the sexes, you have to have some basis for doing that and that
21 is why we use a birth certificate that's supplied by the
22 parent.

23 Q But again, just to go back to your deposition, and I sort
24 of -- I've summarized -- I quoted directly from four different
25 places. So we have -- so we have on page 26: Why is J.A.W.

1 not able to use the male restroom?

2 Answer: Because biologically he's a female.

3 Page 27, as you just said, I asked: What is the
4 basis for the policy?

5 Basically Indiana law. We do group our students
6 according to sex.

7 And sex, in your mind, is defined as gender at
8 birth -- gender at birth, sex at birth. Is that correct?

9 A That is clearly my testimony.

10 Q You still agree with it?

11 A I think Indiana law -- birth certificates are formulated,
12 predicated upon Indiana law. So yes, that is my testimony.

13 Q But I think you testify in your deposition, I don't know
14 if you did today, you're not aware of anything in Indiana law
15 that specifically addresses transgender access to bathrooms.
16 Is that correct?

17 A Correct.

18 Q And then the questions I asked before on page 28 and 32,
19 that basically the policy is that anatomically male must use
20 male restrooms and the same for females, page 32. Is that
21 correct?

22 A That would be correct.

23 Q But now you're appending onto that but if you have a
24 change of gender marker in your birth certificate, that's
25 okay?

1 A And as you had posited before, I don't think we've dealt
2 with this -- with a transgender student. So that's why I
3 responded as I did.

4 Q That's perfectly fine and understandable. If J.A.W. got a
5 birth certificate changed so it said male and he walks into a
6 female restroom today or August 8th, picture that, and picture
7 J.A.W. today or August 8th not having the change in his birth
8 certificate and walking into the female restroom, that's the
9 exact same thing. The only difference is the gender marker
10 on the birth certificate. Is that correct?

11 A I think you've lifted up why it is very subjective and why
12 we need an objective measurement or objective basis.

13 Q But as far as J.A.W. is concerned, or the young women in
14 the restroom, it's the exact same situation regardless of
15 whether he obtains a change in his gender marker. Is that
16 correct?

17 A I think there's several questions there. People at North
18 High School, I think, also know J.A.W. as a female. So
19 that's --

20 Q But I'm being obtuse and I apologize. You say there's a
21 question of disruption and school safety and all those
22 concerns which are completely valid concerns in all respects
23 for school supervisors?

24 A Yes.

25 Q And what I'm saying is that those -- whatever those

1 concerns are, whether they're minimal or maximal, they stay
2 the same regardless of whether J.A.W. has a change in his
3 birth certificate or not. If he walks into the girls restroom
4 on August 8th, he is there as a person who you would say is
5 still biologically female. Is that correct?

6 A Could you repeat the question?

7 Q No. No, because I think now you're not -- you're not
8 responding because you don't like my question.

9 A No.

10 Q How is it different? How is it different whether or not
11 he obtains a birth certificate? How is it different for your
12 fear of disruption?

13 A I would agree that it's not, but you're asking me about
14 which restroom they can use. Then if disruption occurs, then
15 we deal with that. I'm not saying that they're mutually --

16 Q Let's say then he gets a change in birth certificate and
17 there's, quote unquote, a disruption in the male -- excuse me,
18 in the male restroom, okay. Let's say -- let's step back. He
19 now is -- has a male marker on his birth certificate.

20 A Okay.

21 Q It's the first day of school.

22 A Okay.

23 Q He walks into the male restrooms.

24 A Yes, sir.

25 Q It makes no difference at that point to the persons in the

1 restroom what his birth certificate says. Is that correct?

2 If there's going to be a disruption, there's going to be a
3 disruption?

4 A I don't know how you want me to answer that hypothetical.

5 What I'll tell you is J.A.W. can use the restroom that is
6 indicated on the birth certificate. Then if that creates
7 disruption, then we deal with the disruption. I think I'm
8 pretty clear on that.

9 Q Let's say it creates a disruption.

10 A Then we deal with the disruption.

11 Q What does that mean? You ban him from the male restroom?

12 A We make accommodations.

13 Q Does that mean that you reserve the right to ban him from
14 the male restroom, even if he changes the gender marker on his
15 birth certificate?

16 A It means we make accommodations.

17 Q No, no, please. Could one of those accommodations be that
18 he is not allowed to go into the male restroom?

19 A That could be one of the accommodations, yes.

20 Q So when you're telling us that you have a practice that's
21 never been used before of allowing transgender students who
22 get a change in their birth certificate to use the bathroom of
23 their gender identity, that could still result in them not
24 being able to use that bathroom if there's a disruption?

25 A For -- if there's a disruption, yes.

1 Q And in terms of disruption that you talked about, in our
2 deposition you refer to an incident back when you were a
3 teacher, which was 30 plus years ago, and you just told the
4 Court about the one incident you heard about when a mother
5 contacted a school after our deposition. Those are the two
6 incidents that you're aware of?

7 A No, sir. Those are the two -- you did not follow the line
8 of questioning in my deposition. You gave me an opportunity
9 to say one thing and then you moved on to other questions.

10 Q So there are other incidents that you're aware of?

11 A Yes.

12 Q What are those incidents? Do they involve transgender
13 persons?

14 A They, I think, involve a myriad of issues, including
15 transgender, yes.

16 Q What instances are you aware of involving transgender
17 students?

18 A I don't have that list in front of me.

19 Q Bottom line, today or August 8th, is that J.A.W. cannot
20 use the male restrooms at EVSC because he is not deemed to be
21 male?

22 A We follow the birth certificate. I mean --

23 Q And because of that, he's not deemed to be male. Is that
24 correct?

25 A That is correct.

1 MR. FALK: Could I have one moment, Your Honor, to
2 consult?

3 THE COURT: You may.

4 (Off the record.)

5 MR. FALK: I have no further questions.

6 THE COURT: Very well.

7 MR. SHOULDERS: Just a few, Your Honor.

8 THE COURT: Redirect, Mr. Shoulders.

9 MR. SHOULDERS: Thank you.

10 **REDIRECT EXAMINATION**

11 BY MR. SHOULDERS:

12 Q I think you've made the point, Dr. Smith, but basically
13 you're simply saying you need an objective rule in order to
14 govern your 23,000 students?

15 A Absolutely.

16 Q The Bureau of Motor Vehicles recognizes J.A.W. as a
17 female, correct?

18 A Correct.

19 Q Yet they haven't sued the Bureau of Motor Vehicles, to
20 your knowledge?

21 A Not to my knowledge.

22 Q If J.A.W. commits a crime today, he'll be assigned to a
23 women's prison, won't he?

24 A Yes.

25 Q The health department in this birth certificate assigned

1 to him sex as a female. He can't just walk into the health
2 department and say: I'd like that changed, without anything
3 else and get it changed, can he?

4 A I would think they would have objective standards, too.

5 Q And you don't want your school corporation placed in the
6 position of having to judge?

7 A No, sir.

8 Q Are there, in your 23,000 students, boys in high school
9 who perhaps are homosexual and dress effeminately?

10 A Yes.

11 Q Have they made a request to go into the girls bathroom?

12 A No.

13 Q So you can't really pick and choose bathroom assignment
14 based upon the way somebody looks, can you?

15 A We cannot.

16 Q I'm interested in this question directed to you about
17 *Whitaker*. *Whitaker* was a preliminary injunction decision,
18 wasn't it?

19 A It was.

20 Q It never became a final judgment, did it?

21 A No.

22 Q It was appealed to the Seventh Circuit and then a writ of
23 certiorari was taken and the case was settled?

24 A Correct.

25 Q And we haven't found where the Seventh Circuit has spoken

1 on the issue again, have we?

2 A Correct.

3 Q It was decided roughly at the same time that the
4 Department of Justice withdrew the Obama guidelines?

5 A Correct.

6 Q And in terms of distinguishing *Whitaker* on the facts,
7 *Whitaker* -- Ash Whitaker's parents took him to the Court and
8 got a name change, didn't they?

9 A Correct.

10 Q They went to another civil authority and had a change
11 instituted under Wisconsin law and brought it back to the
12 school?

13 A Correct.

14 Q *Whitaker* says the harms identified by -- whereas the harms
15 to Ash are well documented and supported by the record. Have
16 you been made aware, from any of your principals or teachers,
17 of any harm that Ash is suffering?

18 A None.

19 Q *Whitaker* says Ash and his mother met with his guidance
20 counselor on several occasions to request that Ash be
21 permitted to use the boys restrooms. Has J.A.W. and his
22 mother met with our guidance counselors on one occasion?

23 A No.

24 Q Restricting water in-take was problematic for Ash, who has
25 been diagnosed with vasovagal syncope, which renders Ash to

1 fainting and/or seizures if dehydrated. Have you been made
2 aware that J.A.W. has that condition?

3 A No.

4 Q *Whitaker* says, and I quote, "Two letters submitted by
5 Ash's pediatrician identifying him as a transgender boy and
6 recommending that he be allowed to use male designated
7 facilities at school." Have you been presented with any
8 document from a doctor of J.A.W.'s recommendation that he be
9 allowed to use male designated facilities?

10 A No.

11 Q Ash proffered reports from two different experts regarding
12 the harm caused to him by the school. Do you have any such
13 reports?

14 A None.

15 Q One of those experts reported that Ash has current
16 thoughts of suicide and that his depression worsened each time
17 he had to meet with school officials regarding bathroom usage.
18 Have you been made aware of any anxiety or suicidal ideation
19 that J.A.W. suffers from?

20 A Fortunately, no.

21 Q That sounds like irreparable harm, doesn't it?

22 A It does.

23 Q But we don't have that here, do we?

24 A We do not.

25 MR. FALK: Your Honor.

1 Q Finally, let's just distinguish -- let's just end here.
2 Let's distinguish *Whitaker* with this statement, and I quote
3 the Seventh Circuit, "This is not a case where a student has
4 merely announced that he is a different gender." Let's
5 compare that to this case.

6 Do you have anything, prior to being sued, other
7 than an announcement by J.A.W. that he is of a different
8 gender?

9 A We do not.

10 MR. SHOULDERS: That's all I have.

11 THE COURT: Recross, Mr. Falk?

12 MR. FALK: Thank you.

13 **RECROSS-EXAMINATION**

14 BY MR. FALK:

15 Q You know that back in middle school J.A.W. started asking
16 teachers and staff to call him by a male name. Is that
17 correct?

18 A Could you repeat the question?

19 Q You know that in middle school J.A.W. started asking
20 teachers and staff to call him by a male name?

21 A I'm not certain of that. I do know freshman year.

22 Q So in freshman year is where he indicated he was not
23 comfortable changing in the female restroom -- locker room.
24 Is that correct?

25 A And we made an accommodation.

1 Q Right. Right. So you know that he was enunciating a
2 transgender status early on in his at least high school
3 career. Is that correct?

4 A We have J.A.W.'s statement and that was all we had.

5 Q And you accommodated it?

6 A And we did.

7 Q So you know that he was saying to you: I'm transgender
8 and I would like some accommodation and you provided it,
9 correct?

10 A Yes.

11 Q And you know that J.A.W.'s mental health counselor
12 indicated he had gender dysphoria and that he should receive
13 hormonal therapy. You've seen that letter. Is that correct?

14 A I want to get the timeline correct here, if I may. So his
15 freshman year we acquiesced to his request with no
16 verification; and then one month ago, I received the documents
17 that you indicated, yes.

18 Q And you never asked for the verification. You never asked
19 for verification. Is that correct?

20 A I think through the legal process we did.

21 Q Well -- and then you got it. But prior to that, you never
22 asked. Is that right?

23 A That is correct.

24 Q And when you got the verification, you saw, as I said,
25 that the counselor had identified and diagnosed him as gender

1 dysphoria and that his medical doctors accepted that
2 diagnosis. So there were two professionals, a mental health
3 professional and a medical doctor, who agreed that he had
4 gender dysphoria of an adolescent, correct?

5 A I do recall that. I do not recall anything about
6 requirement to use restrooms.

7 Q I didn't ask you that, sir. Please answer the question.
8 Okay?

9 A I did.

10 Q So there were two, a mental health professional and a
11 doctor, who concurred, who found that he had gender dysphoria
12 and that is why he got the hormones that he's now on. Is that
13 your understanding from the medical records?

14 A No. I don't know that there's -- I don't know what the
15 counselor had in terms of a background. I think they were a
16 social worker but I could be wrong.

17 Q Okay. So you're questioning the mental health records at
18 this point?

19 A No, I'm not. I'm answering your question as you've asked.

20 Q And if J.A.W. walked in on August 8 with a name change, a
21 piece of paper from the State of Indiana saying his name is
22 now J.A.W., but without a change in his birth certificate, he
23 still wouldn't be able to use the male restrooms. Is that
24 correct?

25 A Correct.

1 Q Okay. Have you reviewed the affidavits from the doctors
2 and psychologists that we submitted in this case, the
3 declarations?

4 A I have read them.

5 Q And they all talk about the emotional problems, the
6 anxiety and depression that can occur when social
7 transitioning for transgender persons generally is thwarted
8 and when bathroom access specifically is thwarted. Do you
9 remember reading that?

10 MR. SHOULDERS: Your Honor, I think I'm going to
11 object to this line. First, this is the first we've had --
12 I'm going to object to this line of questioning. It's new.
13 We haven't been over this ground yet.

14 Secondly, we've objected to all of those affidavits.
15 Not one of those people has examined J.A.W. They talk in
16 general terms about transgender issues, and Dr. Smith has
17 never been qualified as an expert on health and psychological
18 matters and therefore, it's irrelevant.

19 THE COURT: Response?

20 MR. FALK: Your Honor, the witness was asked about:
21 Did you see this type of harm? The experts say the type of
22 harm that a transgender student will -- transgender person
23 will suffer when thwarted from social transition and bathrooms
24 is depression, anxiety. J.A.W. talked about how he feels when
25 he can't use the bathrooms. I was merely going to ask if he

1 saw that the experts confirm that that is the type of reaction
2 that a transgender person will have. He is the one who
3 answered the question that he saw no reports or any sight of
4 any harm.

5 MR. SHOULDERS: Again, both sides have tendered
6 information. The experts don't agree. We've tendered
7 articles why transgender kids should wait. There is great
8 confusion in the area. In fact, nobody agrees on what gender
9 dysphoria is. It's just not fair to cross-examine this
10 professional in education about psychological and medical
11 issues.

12 THE COURT: Well, I think limited questions probably
13 are all right in this particular case. Mr. Falk.

14 MR. FALK: I'll be brief.

15 THE COURT: I'm not sure increased or additional
16 questioning may be appropriate. The Court has already ruled
17 in regards to the admissibility of those particular documents
18 and will still retain the right and the opportunity to take
19 them for what they're worth in rendering my decision. So you
20 may finish this question.

21 MR. FALK: I do not want to concede that I agree
22 with Mr. Shoulders in any way but I will withdraw the question
23 and I will cease.

24 THE COURT: Very well.

25 MR. SHOULDERS: No further questions.

1 THE COURT: Very well. You may step down. Thank
2 you.

3 MR. FALK: Thank you, sir.

4 MR. SHOULDERS: Defendant rests, Your Honor.

5 THE COURT: Will there be rebuttal witnesses from
6 the plaintiff?

7 MR. FALK: No, Your Honor.

8 THE COURT: In regards to the exhibits that the
9 defendant wishes the Court to review, I have accepted those
10 from the plaintiff. Do you have additional exhibits that you
11 wish?

12 MS. BLANTON: Your Honor, we would ask the Court
13 take notice of all exhibits that have been submitted with the
14 materials, which would include the appendix we extended in 42.
15 Aside from that, we have no additional exhibits to offer
16 during the hearing.

17 THE COURT: Ms. Blanton, I think what I would ask
18 you to do, just as I did from Mr. Falk, let's -- if you would
19 announce those exhibits just so we have them on the record. I
20 think it is the --

21 MS. BLANTON: I believe it's docket 42 and there are
22 a plethora of exhibits attached. If you give us one moment.

23 THE COURT: I think I note there are ten of them.

24 MS. BLANTON: That is correct, Exhibits A through J.
25 Beginning with Exhibit A, which is change of birth

1 certificate. Exhibit B, which is 140 IAC 7-1.2-3. Exhibit C,
2 gender designation change on passport. Exhibit D, Social
3 Security documents. Exhibit E, Medicare and the National
4 Center for Transgender Equality. Exhibit F, is IHSAA
5 Executive Committee meeting minutes dated 6-22-2017. Exhibit
6 G, USCIS documents. Exhibit H, Transgender Offender Manual
7 Change Notice. Exhibit I, DOD instruction 1300.28; and
8 Exhibit J, When Children Say They're Trans by the Atlantic,
9 July/August 2018. That is the final exhibit.

10 THE COURT: Thank you. All right.

11 MR. FALK: Your Honor, may I be heard?

12 THE COURT: You may.

13 MR. FALK: None of these were listed on their
14 witness list -- exhibit list, Your Honor, but specifically
15 Exhibit J, which we do mention in our reply. It's an article
16 from a magazine. You heard Mr. Shoulders attempt to use it
17 for purposes of presenting different views about transgender,
18 which is clearly a matter of expertise. It's hearsay, as much
19 as the Indianapolis Star was, plus it has the added problem of
20 not in any way complying with Rule 702 of the Federal Rules of
21 Evidence. We would object to Exhibit J.

22 The other ones the Court can take judicial notice
23 of, if the Court wishes to. We comment on them in our brief
24 but Exhibit J clearly is inadmissible.

25 THE COURT: Mrs. Blanton.

1 MS. BLANTON: Your Honor, same response. We
2 actually were requesting that you take judicial notice of
3 those exhibits in submission of the brief and the appropriate
4 weight as determined by the Court.

5 THE COURT: Specifically in regard to Exhibit J.

6 MS. BLANTON: Your Honor, again, I think in terms of
7 being admissible for purposes of the hearing, similar to the
8 ruling you made with the Indianapolis Star article, it's
9 appropriate and simply a resource of which you could take
10 judicial notice.

11 THE COURT: Very well. All right. The Court will
12 accept those exhibits and again, take them for what they're
13 worth as previously noted. Again, some skepticism in regards
14 to Exhibit J, similar to the skepticism the Court had to
15 plaintiff's Exhibit S to the Indianapolis Star article.

16 All right. The Court would otherwise be accepting
17 final argument, but I will advise counsel that it will be
18 requesting findings of fact ,conclusions of law to be
19 presented. In that regard, I don't mind if you would rather
20 do that in lieu of final argument. Mr. Falk, comment?

21 MR. FALK: I think we -- as we discussed beforehand,
22 we would accept the ability to file proposed findings,
23 conclusions at this point in lieu of a final argument.

24 MR. SHOULDERS: Introduced as a person who never met
25 a microphone I didn't like, it's difficult for me to waive,

1 but I believe we'll submit briefs and findings. Probably wise
2 and leave it right here.

3 THE COURT: Very well. Let's talk for a moment --
4 and I heard Dr. Smith comment that school would be starting on
5 August the 8th.

6 MR. SHOULDERS: Yes, sir.

7 THE COURT: I would like to have those proposed
8 findings and conclusions -- I'm saying as quickly as possible,
9 acknowledging we have a school date coming up. Today being
10 the 20th, would I be burdening counsel if I asked that those
11 be presented by the 27th?

12 MR. FALK: Not at all, Your Honor.

13 THE COURT: From the defendant?

14 MR. SHOULDERS: That's fine, Your Honor.

15 THE COURT: Very well. I would ask that those
16 submissions be made on or about July the 27th. Anything
17 further from the plaintiff this morning, Mr. Falk?

18 MR. FALK: Nothing from plaintiff. Thank you very
19 much.

20 THE COURT: From the defendant, Mr. Shoulders?

21 MR. SHOULDERS: No, sir.

22 THE COURT: Thank you very much.

23 THE CLERK: Please rise. Court is adjourned.
24
25

