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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 6:18-cv-102

.
JOHN DOE, a minor, by his :
parents and next friends, :
Susan and Jack Doe, :
:
Plaintiffs, : Orlando, Florida
:
v. : April 3, 2018
:
VOLUSIA COUNTY SCHOOL BOARD, : 1:31 p.m.
:
Defendant. :
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROY B. DALTON, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Lauren Lisette Valiente
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Proceedings recorded by mechanical stenography.
Transcript produced by Computer-Aided Transcription.

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P R O C E E D I N G S

THE DEPUTY CLERK: Case Number
6:18-cv-102-ORL-37GJK, John Doe versus Volusia County
School Board.

Counsel, please state your appearance for the
record.

MR. ORR: Your Honor, Asaf Orr, for Plaintiff John
Doe.

THE COURT: Welcome.

MS. VALIENTE: Good afternoon, Your Honor. Lauren
Valiente, Foley & Lardner, for Plaintiff John Doe.

THE COURT: Welcome.

MR. GONZALEZ: Your Honor, Thomas Gonzalez for
defendant.

MR. PAULICH: Nathan Paulich for the defendant.

MS. WRENN: And Anne Marie Wrenn for Volusia
County Schools.

THE COURT: All right. Welcome.

And we're here on -- we also have, I think, the
Plaintiff Doe and maybe another counsel on the telephone.

Can you all hear me? And if so, can you all
report in, please?

MR. BAXA: Yes, Your Honor. It's Ed Baxa,
B-A-X-A, attorney with John Doe and Mr. and Mrs. Doe.

1 Thank you for the opportunity to appear by phone,
2 Your Honor.

3 THE COURT: You're welcome.

4 We're going to go directly into presentation from
5 the plaintiff on the petition for preliminary injunction.
6 I've had an opportunity to review all of your papers. And
7 I'm reasonably well versed on the issues.

8 So let me hear from the plaintiff as to why you
9 think a preliminary injunction should issue.

10 MR. ORR: Thank you, Your Honor. Good afternoon.
11 Asaf Orr, attorney for the plaintiff, John Doe.

12 With the Court's permission, I'd like to reserve
13 five minutes for rebuttal.

14 THE COURT: Okay. I don't have you on the clock.
15 We'll see if we can get through the bulk of your
16 substantive argument. And then I'll give you an
17 opportunity to respond when either Mr. Gonzalez or his
18 colleagues have finished making a presentation on behalf of
19 the school board.

20 MR. ORR: Thank you, Your Honor.

21 Before I begin, I'd also like to thank the Court
22 for allowing John and his parents to be present at the
23 hearing today by telephone.

24 John is a 15-year-old transgender boy who wants to
25 be treated like all other boys. He lives every aspect of

1 his life as male with one glaring exception, and that's
2 with the sex-separated facilities at school.

3 Unfortunately for John, that exception singles him
4 out as different and causes him serious harm, threatening
5 his mental health and well-being as well as his future.

6 The Volusia County School Board's refusal to treat
7 John like all the other boys by allowing him to use the
8 boys' restroom and the boys' locker room causes John
9 serious, ongoing harm.

10 John's mental health has suffered significantly.
11 He cannot use the restroom without serious stress or
12 anxiety about being ostracized either by his peers for
13 using a restroom not typically used by the students or by
14 school staff for using the boys' restroom when he's not
15 supposed to.

16 He's not taking physical education this year, a
17 class he really enjoys, because of the thought of not being
18 allowed to change in the boys' restroom -- excuse me -- the
19 boys' locker room like all the other boys throughout the
20 year was too much for him to handle.

21 His physical health has suffered, too. John
22 intentionally dehydrates himself to avoid needing to use
23 the restroom. Despite knowing that he should be drinking
24 more water throughout the day, he can't bring himself to do
25 it because he knows that means he'll need to use the

1 restroom more, even though his dehydrating himself means
2 that he's going to experience symptoms of urinary tract
3 infections. And for him, the physical pain of those
4 symptoms is more bearable than the emotional pain of having
5 to use the restroom at school.

6 Not surprisingly, John's academic performance has
7 suffered as well. Like his peers, John should be focused
8 on doing his best and planning for his future.

9 But instead, all the attention John dedicates to
10 denying himself use of the restroom and avoiding having to
11 use the restroom and the stress and anxiety that come with
12 it result in him missing a significant amount of
13 instructional time every day.

14 And just before the filing of this motion, John
15 was notified that he was in danger of failing his sophomore
16 year and having to repeat the grade. Despite his desire to
17 go to college, his opportunities to do so are diminishing
18 rapidly and are not something that he can get back.

19 Under controlling precedent, Title IX of the Equal
20 Protection Clause prohibits schools from limiting a
21 transgender student's access to equal educational
22 opportunity simply because he's transgender, a sex-based
23 characteristic.

24 As outlined in our papers, that's exactly what the
25 VCSB is doing here.

1 John's request satisfies each of the criteria of
2 the preliminary injunction. And I'll address each of those
3 in turn.

4 John has a strong likelihood of success with his
5 Title IX claim. The purpose of Title IX is to ensure that
6 all students have access to equal educational opportunity,
7 free from discrimination based on sex.

8 When interpreting Title IX, the Supreme Court
9 instructed federal courts to give Title IX a sweep as broad
10 as its language.

11 In line with that precedent, federal courts have
12 overwhelmingly held that discriminating against a
13 transgender student by denying them access to facilities
14 and educational opportunity is sex discrimination.

15 Those holdings rest on the foundation of decades
16 of precedent on a broad scope of sex discrimination across
17 federal law.

18 The Eleventh Circuit and other circuits from
19 around the country have repeatedly held that discrimination
20 against transgender people is a form of sex discrimination.
21 In *Glenn v. Brumby*, the Eleventh Circuit concluded that
22 discriminating against a transgender person is inherently
23 sex-based.

24 John's Title IX claim is no different, and that
25 precedent is binding here.

1 VCSB's discriminatory treatment of John is causing
2 him ongoing harm to his health and denies him equal
3 educational opportunity.

4 John is relegated to single-user restrooms that no
5 other student is required to use, at least one of which is
6 locked throughout various times of the day. In fact, the
7 door to the media center restroom even had a sign on it
8 prohibiting students from using it, a sign that was not
9 removed until Ms. Doe complained to the district.

10 Using the restroom is so humiliating and
11 anxiety-producing that John restricts his fluids in
12 throughout the day to avoid using the restroom until he
13 gets home around 3:30, which is about nine hours after he
14 leaves for school.

15 This also forces John to compromise on his
16 schoolwork because he can't fully attend in class and also
17 compromises his physical health, suffering dehydration and
18 the symptoms of urinary tract infections.

19 John has also been denied equal opportunity to
20 fully participate in physical education. The stigma of
21 having to change for class apart from his peers and, as a
22 result, being chronically late zapped the joy out of the
23 class that John really likes.

24 On many days, John can't even bring himself to
25 change out for gym, causing him to nearly fail the class.

1 On other days, John rushed to change in the media
2 center to avoid being locked out of the gym and having to
3 suffer the indignity of banging on the door to get into
4 class.

5 Because of that experience, John could not take
6 physical education this year. And -- but he would like to
7 take that class for his junior and senior years.

8 If the Court doesn't have any questions about
9 John's Title IX claims, I'm happy to move on to equal
10 protection.

11 THE COURT: Well, I think you should cover all of
12 the claims. I want you to focus your comments, once you've
13 had a chance to give me a brief overview on the Title IX
14 and equal protection aspects of the claim, to drill down on
15 the criteria for preliminary injunction.

16 I don't need to remind the lawyers, I'm sure, of
17 the procedural posture of the case. Preliminary injunction
18 is extraordinary relief. The burden is quite high. And
19 it's not a determination on the merits.

20 I need to make sure that Mr. Doe and his parents
21 -- I'm sure they are aware of that through their counsel,
22 but they need to hear it from me.

23 We're here at a very early stage. And this is a
24 very consequential claim. It's a consequential claim not
25 only for the Doe family, but it's a consequential claim for

1 the school board. And it's a claim that has consequences
2 that transcend this particular plaintiff.

3 So I think it's important to make sure we remember
4 where we are procedurally, that we're at the preliminary
5 injunction stage where the plaintiff has to demonstrate to
6 the Court that he has got a substantial likelihood of
7 succeeding on the merits and that he's going to suffer
8 irreparable harm if injunctive relief is not effectuated by
9 order of the Court, and as well as the harm to the
10 defendant potentially and the general public policy
11 standard.

12 So I am very interested in hearing your overview
13 of Mr. Doe's situation. As I said, I've read the papers.
14 I'm very familiar with what your factual arguments are.
15 I'm also familiar with the legal arguments that you make.

16 But I very much want you to focus on why it is
17 that you think at this stage of the game that the Court
18 should enjoin the school board with respect to the policy
19 that it has in place at the moment.

20 This is not a case where you're asking me to
21 maintain the status quo. You're asking me to upset the
22 status quo.

23 MR. ORR: And, Your Honor, I think the request
24 here, the injunction that John seeks is the quintessential
25 preliminary injunction in that it's an order that requires

1 a government entity to stop a discriminatory conduct or
2 practice or policy.

3 It really fits within sort of the standard
4 preliminary injunction elements, which are, as the Court
5 just laid out, the substantial likelihood of success,
6 irreparable harm, the balance of harms, and the public
7 interest.

8 THE COURT: So the question I have for you now,
9 Mr. Orr, is: Why is it that today, in 2018 and on April
10 the 3rd, Mr. Doe's circumstances are such that he's
11 exposed to possibly irreparable harm if the Court doesn't
12 do something to alter the status quo of Volusia County
13 School Board since this situation has been going on -- I've
14 been looking at records related to Mr. Doe back, I think,
15 to 2009.

16 So why is it -- what is it about his current
17 circumstances that has changed such that this extraordinary
18 relief is now being sought as opposed to a more deliberate
19 and thoughtful prosecution of the claim on its merits?

20 MR. ORR: Thank you, Your Honor. I'm happy to
21 address that.

22 And I think, Your Honor, there has not really --
23 there has not been any delay in seeking relief. There's
24 been a significant change in the status of John Doe's
25 health and well-being which reciprocated not only filing

1 this lawsuit but also the filing of the motion that we're
2 currently here before the Court on.

3 In the week after Thanksgiving in 2017, John
4 underwent chest reconstructive surgery. And at the
5 beginning of high school, John had a lot of hope that when
6 he returned from that surgery, from recovering from that
7 surgery, that that would finally convince his school
8 district that they should be treating him like all other
9 boys.

10 And, unfortunately, that did not happen. He
11 continued to be required to use single-user restrooms. He
12 was not allowed to use the communal restrooms.

13 And that caused John to lose hope that the school
14 district would ever resolve this matter without -- would
15 stop discriminating against him without intervention from
16 the Court.

17 Unfortunately for John --

18 THE COURT: So you're saying essentially that --
19 and I don't mean to be dismissive as an explanation at all.

20 But essentially what you're saying is that he's
21 worn out. I mean, they've worn him out in terms of hoping
22 for some bureaucratic administrative or other quasi --
23 maybe even quasi-judicial relief.

24 Is that what you're telling me that the change of
25 circumstance is that warrants the extraordinary relief of

1 the preliminary injunction?

2 MR. ORR: Yes, Your Honor. And it's more than
3 just --

4 THE COURT: Exhaustion.

5 MR. ORR: It's more than just exhaustion or worn
6 out. His mental health is deteriorating significantly as
7 detailed in the declaration submitted by Cynthia Fisher,
8 Mr. Doe's therapist. Both attest to the very serious harms
9 that John is experiencing currently.

10 And it also talks about the very serious harms
11 that John will experience if the Court doesn't act and
12 enjoin the district from continuing to treat him
13 differently than all other boys.

14 And I think that applies not only to his mental
15 health but also to his academics.

16 As I indicated in my opening comments, a few weeks
17 before we filed this motion, John was informed that he was
18 at risk of failing his sophomore year and possibly
19 repeating a grade. And that, too, has very significant
20 consequences for his future.

21 John is only in high school once. And he needs to
22 make sure -- it's critical that he have an equal
23 opportunity to succeed. He doesn't currently have that.

24 He's spending a significant portion of each class
25 time focused on whether or not he needs to go to the

1 bathroom and figuring out, if he can't avoid going to the
2 bathroom, how to do that in a way that limits the amount of
3 stress and anxiety it's going to cause him.

4 And so these are the very types of irreparable
5 harm that this district in cases such as Ray v. School
6 Board DeSoto County and Daniels v. School Board of Brevard
7 County have held.

8 The educational harms, by their very nature, are
9 irreparable, because in each of those cases, the students
10 are going to be losing out on social, educational or
11 athletic opportunities that they can't get back.

12 And similarly on the locker room issue, right now
13 is when John is starting to plan for his next school year
14 and figuring out what classes he's going to take or classes
15 he needs to take.

16 And so having the injunction in place that would
17 allow him to use the boys' locker room would be sure that
18 he could take physical education next year, which is
19 something he really wants to do, without any disruption to
20 his schedule.

21 THE COURT: What's your view of an appropriate
22 scope for the injunctive relief, assuming that the Court
23 were inclined to grant it?

24 What would the order look like? What would the
25 school board be enjoined from doing and what would they be

1 compelled to do that they are not doing now?

2 MR. ORR: Well, all the school district would be
3 required to do with the injunction is to treat John like
4 they treat all other boys.

5 THE COURT: What does that mean?

6 MR. ORR: Meaning that he would be allowed to use
7 the communal boys' restrooms on the same terms as all other
8 boys are allowed to use them. And he would be allowed to
9 change for physical education and use the boys' locker
10 room, again, under the same terms as any other male student
11 would be allowed to do.

12 The injunction we're requesting from this Court is
13 very limited to John Doe. It would not apply to any other
14 students in the district if there were other students,
15 transgender students in the district.

16 This is very limited to John Doe, the unique harms
17 that he's experiencing, the social, academic, and emotional
18 harms that he's experiencing as a result of this
19 discriminatory conduct.

20 THE COURT: All right. So you said use the
21 communal boys' restroom and use the boys' locker room.

22 What else?

23 MR. ORR: Correct. The only other thing that John
24 Doe, that we mentioned in the motion is John Doe would like
25 to be able to try out for the boys' basketball team. But

1 he needs to bring up his grades in order to do that. So
2 presuming that he can do that, he would also like to be
3 able to try out for the boys' basketball team.

4 But that is the -- the Florida State High School
5 Athletic Association already permits transgender students
6 to compete consistent with their gender identity. So that
7 is not a barrier.

8 The real barrier for John was the fact that he
9 could not use the boys' locker room if he was -- if he was
10 a player on the team.

11 THE COURT: Is the Volusia County School Board
12 presently precluding him from trying out for the boys'
13 sports team, assuming he's otherwise academically
14 qualified?

15 MR. ORR: No. It would just be the locker rooms.

16 THE COURT: Okay. So let's not list it if it's
17 something that he's not being prohibited from doing. If
18 he's being permitted to do that, it's not something that's
19 appropriate for me to enjoin, correct?

20 MR. ORR: Correct. All we would be asking
21 Your Honor to enjoin is his access -- or require them --
22 enjoin them from prohibiting him to access the boys' locker
23 room.

24 THE COURT: I got the locker room part. You
25 mentioned trying out for the team. I didn't see anywhere

1 in the record he was precluded from doing that at the
2 moment. So I just wanted to make sure it was not something
3 I overlooked.

4 MR. ORR: No, Your Honor.

5 If I may continue, then?

6 THE COURT: Yes.

7 MR. ORR: I'd like to take a step back to equal
8 protection. As Justice Ginsburg noted, the history of our
9 Constitution is the story of the extension of
10 constitutional rights and protections to those once ignored
11 or excluded.

12 And with that -- and that is what courts have
13 overwhelmingly done in cases involving transgender people
14 and students, transgender students in particular.

15 And as a result, we believe that John has a very
16 substantial likelihood of success on his equal protection
17 claim.

18 As this Court is well aware, this Court is bound
19 to apply intermediate scrutiny based on the Eleventh
20 Circuit's opinion in Glenn, which the school district
21 concedes is the minimum level of scrutiny that applies to
22 transgender people.

23 And as the courts have held time and again, school
24 policies that treat transgender students differently from
25 their peers cannot satisfy this high level of scrutiny.

1 The VCSB's sole justification for its
2 discriminatory conduct is the privacy rights of other
3 students. Many courts have held that this concern is based
4 on mere conjecture or speculation and, after closer
5 analysis, does not hold water.

6 VCSB has made no allegation or offer of any proof
7 that John would act inappropriately if permitted to use the
8 boys' facilities. And as numerous courts have also
9 concluded, simply sharing a restroom or a locker room with
10 a transgender student doesn't implicate the privacy rights
11 of other students.

12 In fact, in Glenn, the Eleventh Circuit noted that
13 the employer's concern that female employees would object
14 to Ms. Glenn using the women's restrooms was not a
15 justification that would satisfy heightened scrutiny.

16 The school district's claim is further undermined
17 by the fact that there are thousands of school districts
18 throughout the country, including in Florida -- Broward
19 County being one example that we included in our papers --
20 that implemented policies that allowed transgender students
21 to participate, excuse me, to use the restrooms and locker
22 rooms on the same grounds as all other students so that
23 transgender boys are treated like all other boys and
24 transgender girls are treated like all other girls.

25 Some of those school districts have been

1 implementing those policies for over a decade and have done
2 so without issue.

3 The school district has not and cannot identify a
4 justification for its conduct, its discriminatory conduct,
5 that would satisfy intermediate scrutiny because no such
6 justification exists.

7 Again, therefore, it's likely that John has a
8 substantial likelihood of success on the merits of his
9 equal protection claim.

10 A couple of other things I'd like to note,
11 Your Honor, on irreparable harm that I didn't mention
12 earlier. In addition to him not being able to pay
13 attention in class and the effect on his academics, I think
14 it is really important to focus on the emotional harms,
15 both in the short and long term, that he's going to
16 experience if this discrimination is allowed to continue.

17 As detailed in the declarations filed by John and
18 his mother and his therapist, the discriminatory conduct
19 John is experiencing has already caused him very serious
20 stress and anxiety. It's interfering with the treatment of
21 his gender dysphoria while preventing his full transition,
22 social transitioning.

23 Every day John goes to school, he feels the school
24 is personally attacking him for being who he is. That's
25 taking a toll on him.

1 As Ms. Fisher noted in her declaration, that is
2 likely to continue well after high school if immediate
3 action is not taken.

4 And all the relevant cases involving
5 discrimination against transgender students in school,
6 those harms are irreparable. As the Court noted in
7 Whitaker, for example, there's no adequate remedy for
8 preventable lifelong diminished well-being and life
9 functioning.

10 Regarding the third factor, Your Honor, the
11 balance of the harms, again, that factor also weighs
12 heavily in John's favor.

13 As demonstrated by the record before this Court,
14 John is being denied equal educational opportunity that
15 will directly impair his future opportunities for higher
16 education. And permitting the school district's conduct to
17 continue will cause John severe harm to his mental and
18 physical well-being both in the short and long term.

19 The school district cannot demonstrate any
20 countermanded harm it would experience as a result of this
21 Court prohibiting it from continuing its discrimination
22 against John.

23 Like other school districts who have been sued by
24 transgender students for discrimination, VCSB implies, for
25 example, the sky will fall if they're required to stop

1 discriminating against John. However, the school district
2 fails to show that anything will happen to the school
3 district if this injunction is granted.

4 All that will happen is that John, a student who
5 is treated as a boy by all of his peers and the school,
6 will start using the boys' restroom and locker room like
7 all other boys.

8 By contrast, denying this injunction will affect
9 John in very serious and negative ways for the rest of his
10 life.

11 And then finally, granting John Doe's motion for
12 preliminary injunction will further the public's interests
13 in ensuring that the laws are properly enforced. This
14 presumption applies with equal force to the Equal
15 Protection Clause and Title IX claims.

16 THE COURT: Thank you, Mr. Orr.

17 MR. ORR: Thank you, Your Honor.

18 THE COURT: Mr. Gonzalez?

19 MR. GONZALEZ: Thank you, Your Honor.

20 THE COURT: I have a couple questions for you,
21 Mr. Gonzalez, before you get underway, maybe just to help
22 you at least be aware of some of the things that are on my
23 mind.

24 So tell me, if the United States Supreme Court had
25 not withdrawn the cert writ in the Whitaker case and the

1 Whitaker case were the law of the land as opposed to being
2 the law of the Seventh Circuit, would the Volusia County
3 School Board's policy withstand muster?

4 MR. GONZALEZ: I don't think so, Judge. Assuming
5 those things, I don't think so.

6 THE COURT: And then the second question is, at
7 some point in your presentation, I assume there's no
8 dispute that the intermediate scrutiny applies to the equal
9 protection claims.

10 Do you agree with that?

11 MR. GONZALEZ: We do agree.

12 THE COURT: So at some point, articulate for me
13 what Volusia County School Board's governmental policies or
14 interest is that you think that survives intermediate
15 scrutiny with respect to its treatment of young John Doe.

16 And I'll let you do that whenever and however
17 you'd like.

18 MR. GONZALEZ: Yes, sir.

19 And, Judge, I'm just thinking -- I think I can go
20 off from those because I think as I go through here, the
21 fact that that opinion of the Seventh Circuit has been
22 withdrawn is sort of the heart of our argument today with
23 respect to preliminary injunction.

24 THE COURT: Okay.

25 MR. GONZALEZ: And I think that's what I'd like to

1 focus on.

2 And, secondly, with respect to the question of
3 what is the rational basis for the district's policy, it is
4 that. It is that the current state of what controls with
5 respect to the use of restrooms and locker rooms in the
6 context of high school education is currently not clear.

7 And the prevailing practice of making those
8 determinations based on biological sex is, in fact, what is
9 the law of the land and what has been accepted policy in
10 education. And the interest is -- essentially comes down
11 to physical privacy, based on the physiology as opposed to
12 the other factors that are now being debated all across
13 this country.

14 THE COURT: And in the course of your argument,
15 help me appreciate your view or at least your contention
16 with respect to why it is that the Seventh Circuit is wrong
17 about the privacy interest being too conjectural to support
18 an intermediate scrutiny analysis of the legitimate
19 government interest in terms of the discriminatory effect
20 of the policy.

21 So at some point in your argument, share with me
22 your views on that.

23 MR. GONZALEZ: Yes, sir. And, again, by way of
24 foreshadowing, it's going to come down to, I think, to the
25 extent that that determination -- and I think it's

1 demonstrated by these recent cases that involve cisgender
2 students bringing suits saying that they have a right not
3 to be in the restroom or locker room with a transgender.

4 It comes to the fore in that because I believe the
5 question of whether or not there is that privacy right
6 turns on the definition you make of sex.

7 So that it follows from the fact that if, in
8 fact -- if, in fact, transgender is included in the
9 definition of sex, then you are honoring that privacy by
10 saying that you have no privacy right not to have a
11 transgender, because the transgender is the same sex as
12 what we're talking about.

13 And, again, in the context, Judge, of the -- of
14 this case and where we are now -- because all those things,
15 I think, are absolutely valid questions.

16 And I would go so far as to concede that if we
17 were having a debating club, I don't know where the Court
18 would come down in the final analysis with respect to
19 what's right or wrong.

20 But at this juncture in terms of what needs to be
21 proven, I think the analysis needs to start with making
22 sure that everybody's on the same page with respect to the
23 question of irreparable harm. And I think that brings us,
24 first and foremost, to the timetable.

25 And I think that as the Court noted, the Court

1 talked about records in 2009. And that was, I think, a
2 great starting point because that was second grade. And
3 second grade is when Doe started acting as a male, for all
4 intents and purposes.

5 And there's no contention that the school district
6 didn't honor that and has not honored that, that
7 identification, since that time forward except for the
8 restrooms and the locker rooms we're talking about.

9 And in the -- in that year, 2009-2010 school year,
10 the school staff started calling him by his preferred name,
11 used male pronouns. And to the extent that was possible,
12 the documents were changed to identify him as a male and by
13 that name. And in the third grade when he changed his
14 legal name, the schools have called him by that name ever
15 since.

16 And that brings us, I think, to January 16th,
17 2013, which is the first time that the plaintiff files a
18 complaint with the Department of Education's Office of
19 Civil Rights.

20 And later in that year after doing an
21 investigation, they issued a determination that, quote,
22 there were no current allegations appropriate for further
23 complaint resolution, end quote.

24 The letter attacks specifically the restroom
25 policies. And the finding was that the school board did

1 not have to change its policy at that time.

2 Now, you fast-forward, Judge, I think to middle
3 school. And the beginning of middle school is 2013-2014.

4 And then in 2014-2015, which is the seventh-grade
5 year, the plaintiff is going to start taking a physical ed
6 course, which involves a locker, which involves a restroom.
7 And in that year, it is set that he would change in a
8 coach's single-user restroom, which is located in the boys'
9 locker room area. And that area would be made available to
10 all other students as well, but that's where he would do
11 it.

12 The mother requested after that that he be allowed
13 to change in the main area of the boys' locker room. And
14 the request was denied in accordance with the school
15 board's policy and the fact that we had the OCR
16 investigation.

17 And in that year, in the position of the school
18 district with respect to a motion for preliminary
19 injunction, that's when the status quo was established,
20 Judge. And we are here on a policy relating to restrooms
21 and locker rooms that hasn't changed since then and stays
22 exactly the way it was up to that time.

23 So for two years of middle school we're going with
24 the same use for restrooms and locker rooms.

25 And then we come to high school, which is

1 2016-2017. And it starts off with exactly the same
2 process, the same procedures, the same policies with
3 respect to restroom use as had been the case in middle
4 school and elementary.

5 And in October of that year, there's a meeting.
6 And the notes of the meeting and also an affidavit had been
7 submitted by the district. And at that meeting is the
8 plaintiff, his parents, his personal therapist, and also
9 the school guidance counselor and the director of equity
10 for the district. And there's a discussion of a lot of
11 things.

12 First and foremost was his grades, which were not
13 good already at that point. Secondly was his concern about
14 the locker room issue and his desire to have a different
15 arrangement. Nothing was talked about with respect to the
16 restrooms, apparently.

17 And the meeting concluded with the situation being
18 exactly as it was before except that there was a discussion
19 of alternatives for the changing.

20 And I should interject here that there was another
21 OCR complaint filed before high school. That was on
22 March 27, 2015. And that, too, was directed toward the
23 restroom and locker room policies.

24 And, Judge, that complaint remains unclosed to
25 this day. OCR has not proceeded any further on that and

1 has not issued any finding or determination. And certainly
2 there's been no requirement the school board changes
3 policy.

4 The meeting that I'm talking about --

5 THE COURT: Is that most likely a direct result of
6 the reversal in the administration with respect to the
7 issuance of letters, colleague letters or whatever the
8 proper nomenclature is?

9 MR. GONZALEZ: We presume so, Judge, although,
10 again, one of the things that's difficult with respect to
11 the law is, as to the particular agency involved -- I'm not
12 that good enough at politics to know what the exact reason
13 is. But for whatever reason, there has not been -- there
14 has not been a finding in that regard.

15 THE COURT: So the reason I asked the question,
16 not to get us off on a rabbit trail, because I want to come
17 back to the substance of your argument.

18 But as it relates to what I'll call a
19 non-pejorative sense, the bureaucratic machinations of the
20 administration versus the administrative agencies that are
21 required -- the various educational groups or organizations
22 that are called upon to try to figure out what the
23 regulations require -- what does Title IX mean? What does
24 it stand for? What are we being asked to do? What can we
25 not do? -- at some point, it seems to me that

1 constitutional rights vel non of the individual are what
2 are paramount, regardless of what the relative, whatever
3 the bureaucracy might, whatever the state of the
4 bureaucracy might be at any given point in time, whether
5 you happen to be in this camp or that camp.

6 It means to me that -- I was actually talking with
7 my clerk about this yesterday. And I'd be interested in
8 your views as well as Mr. Orr's. At the end of the day,
9 what difference does it make?

10 And it obviously makes some difference because we
11 know that -- we know that the United States Supreme Court
12 has actually sent a case back, remanded a case back for
13 further findings in light of the reversal of the Department
14 of Justice opinion or stance on -- Department of Education
15 stance on these letters to the colleagues, these colleague
16 letters.

17 But I guess my question is, so what, I guess. I
18 mean, what difference does it make at the end of the day in
19 terms of evaluating whether or not -- certainly not in the
20 equal protection world. Maybe in the Title IX world, those
21 colleague letters have more -- are more impactful.

22 But in the equal protection world, what difference
23 do they really make in evaluating whether or not an
24 individual such as young John Doe has a constitutional
25 right to select a bathroom based on his gender identity?

1 And a school board has no right to interfere with
2 that exercise of choice on his part by implementing rules
3 -- which, again, not your view, his view, not in my view,
4 but his view -- certainly that are arbitrary, capricious,
5 and they have no -- they don't support any governmental
6 interest, certainly not to the level that it would
7 withstand intermediate scrutiny.

8 That's a long and terrible question, but that's on
9 my mind. I'm interested in what you think the import or
10 impact of these colleague letters is ultimately anyway on
11 the outcome of the case.

12 MR. GONZALEZ: Judge, what I'd ask the Court to do
13 is -- I'd like to answer it. What I want the Court to do
14 is to say, stop, hold, I've had enough when I went too far
15 down in the rabbit hole.

16 Frankly, Judge, I have several things to talk
17 about with respect to that very point. And frankly, in my
18 world and in how I've looked at law, it begins with what
19 you think about Marbury versus Madison, frankly, in terms
20 of the, quote, legal basis for that decision that was
21 rendered in that case.

22 And from that, I go to the fact that in the final
23 analysis, in the resolution of this case with respect to
24 deciding that issue, I believe the answer is nothing. That
25 it really doesn't control.

1 But in the context of this proceeding and to a
2 certain extent to be considered in making the final
3 decision in this case is the fact that some of these cases
4 specifically talk about the Chevron deference argument with
5 respect to why they decided the way they did; and that was
6 that they were giving deference to administrative
7 determination as they are required to do under that
8 principle.

9 And the second thing is that, although in the
10 context of this case and the final analysis, it really
11 doesn't control. The fact of the matter is in the context
12 of this proceeding, which is the injunction stage, that is
13 very, very important because at that point I think it
14 requires you to guess what the Supreme Court would have
15 done as to making a decision as to whether or not they're
16 substantially likely to prevail on the merits.

17 THE COURT: So I guess you've gotten to the heart
18 of my question, which is if we look at -- if we look at
19 young John Doe's complaint and parse out the Article IX
20 claim versus the equal protection claim, it seems to me
21 that there may not be symmetry between the likelihood of
22 success in the merits in the present environment when you
23 look at the Title IX claim and the equal protection claim.

24 I'm interested to see whether you think that's
25 correct.

1 MR. GONZALEZ: I do think that's correct.

2 Absolutely.

3 And, Judge, there isn't symmetry when the context
4 of where we are procedurally with respect to preliminary
5 injunctive relief is what controls; is the current state is
6 what controls because that's when you have to do it.

7 And everything else, as I said, is prediction of
8 what would have happened. What would have happened if they
9 had filled that other Supreme Court slot, you know, in the
10 prior thing? And just on and on and on with all these
11 permutations in terms of trying to decide how they would
12 have done it.

13 THE COURT: So the plaintiffs' argument, which was
14 made by Mr. Orr which I'll try to summarize, hopefully not
15 to its detriment, but the plaintiffs' argument, at least on
16 the equal protection claim, is, look, Your Honor, Whitaker
17 is a well-reasoned, persuasive case. It's currently
18 authoritative in the Seventh Circuit.

19 If we were in the Seventh Circuit, we wouldn't
20 have any choice; you'd have to enjoin the school board
21 based on Whitaker.

22 And there's no reason to suspect that the Eleventh
23 Circuit wouldn't adopt the rationale of Whitaker and make
24 that the law of the Eleventh Circuit on at least the equal
25 protection claim.

1 So if we parse out the protection claim from the
2 Article IX -- I mean from the Title IX claim, if we take
3 the Title IX claim off the table, then we also take off the
4 table, it seems to me, a lot of this collateral noise, for
5 lack of a better term, about what's happening with respect
6 to the administration. Do these rules -- are they entitled
7 to some Chevron deference of some sort or another or not?
8 Are they impactful?

9 And that's -- so that's the reason I'm trying to
10 at least separate our conversation between -- I'm trying to
11 make a meaningful distinction between the Article IX claim
12 and the equal protection claim.

13 MR. GONZALEZ: Yes, sir. I absolutely understand.

14 And -- but with respect to that --

15 THE COURT: I keep saying "article." I don't know
16 why I've got that in my head. I mean Title IX.

17 MR. GONZALEZ: It's what they cause, Judge, when
18 they use Roman Numerals. It happens all the time. I get
19 it.

20 But in terms of the issue, that's -- I'm not
21 disagreeing with the Court.

22 But in the context of a preliminary injunction,
23 that is not a question of whether or not there's no reason
24 to believe the Eleventh Circuit wouldn't adopt it. What
25 the Court has to find for them to prevail is the odds are

1 on them adopting it.

2 And that's what I think makes it difficult, if not
3 impossible, to grant this injunction in the context of
4 where we are at this point.

5 And with respect to the final issue is that the
6 school district, if I could describe the position of the
7 school district, it has been, we want to know what the law
8 is too. We thought, frankly, we'd have known by now one
9 way or the other.

10 But in the context of making that decision, I
11 think the law and the -- and certainly the standard for
12 preliminary injunction that the Eleventh Circuit needs says
13 that that decision is not to be made in the heat of battle
14 unless there are these compelling reasons to do so in terms
15 of what's going on. And that's basically where we are.

16 And going back, Judge, to that meeting in October,
17 it, again, goes to this issue of why it shouldn't be done
18 now because we've had this status quo since the seventh
19 grade. And then we have this issue in October where
20 there's this meeting. And after that, there's no
21 complaint. There's nothing done.

22 And it's a year and nine months after that that
23 this lawsuit is filed. And it's a month after that that
24 this motion is filed.

25 And it comes down to even things that were argued

1 in the plaintiffs' argument with respect to what they
2 considered to be harm.

3 Judge, there was mention of the fact that the
4 plaintiff dehydrates. And I would beg to differ. But
5 there's at least a dispute with respect to this juncture.

6 But most importantly in the context of this
7 injunction, that the facts that are alleged and are
8 contained in the affidavit is that the directive from the
9 doctor to drink more water came at the beginning of the
10 freshman year, two full years ago.

11 And nothing was said or nothing was done to stop
12 this harm. And in the affidavits that have been submitted,
13 there's no contention that he suffered dehydration or a
14 urinary tract infection after that time.

15 And that's the issue that we think is the most
16 important thing about the current motion. And that is
17 that, as the Court has noted, the Eleventh Circuit is the
18 Eleventh Circuit with respect to preliminary injunctions.
19 And it recognizes having a higher standard than the
20 standard in Whitaker and all the other cases that have been
21 involved.

22 And most importantly, when the plaintiff argues a
23 Second Circuit case and says, see, a prohibited injunction
24 can alter the status quo, the Eleventh Circuit test doesn't
25 turn on whether it is prohibitive or mandatory. All

1 injunctions are obviously mandatory. It turns on whether
2 the status quo is changed.

3 And, Judge, in the context of this case, it is
4 undisputable that the status quo has not changed since 2007
5 and neither has the harm that's alleged with respect to the
6 issue that has been involved. Because the affidavits that
7 were submitted by the school board talk about a very, very
8 happy, very, very successful student in everything except
9 academics.

10 But with respect to socializing in terms of what's
11 going on, there was talk about -- there was talk about
12 ostracism. And there was I don't believe anything that's
13 in those affidavits that talks about ostracism.

14 In fact, the opinion of the counselor was that one
15 of the reasons he's sometimes late, not all the times late,
16 is he's a very social person. In the walk over from where
17 he changes, he's talking with his friends and so he get
18 there late.

19 But most importantly, with respect to the issues
20 that are involved, the affidavits talk about a period of
21 time when he was pulling out his eyebrows. And, in fact,
22 when you look at the case, that was a long time ago.

23 And in the motion, the statement is made that he's
24 overcome dysphoria. And that's not contained in the
25 affidavit that was first submitted in support of the

1 claims, which was an affidavit by a therapist and by an
2 expert who had not ever seen this child and says so, quite
3 frankly.

4 In the reply, after some issues were raised, the
5 plaintiff's own therapist did -- did, in fact, submit
6 something. And in response to the declarations from the
7 school staff who wrote that John was a happy person, the
8 therapist wrote:

9 None of these staff members has a therapeutic
10 relationship with John that could provide a basis for
11 evaluating his overall mental health.

12 While it is true that John has so far avoided the
13 most serious harms that are often associated with a
14 stigmatizing environment, that is a separate issue from
15 whether John has experienced significant stress and anxiety
16 that puts him in both immediate and long-term risk of harm.

17 John has several important protective factors
18 available to him, including an unconditionally affirming
19 family, access to transition-related care, regular and
20 ongoing psychotherapy, supportive friends, and his own
21 resilience.

22 He also meets biweekly with other transgender
23 teenagers. Although these protective factors have
24 mitigated the impact of the harm to some degree, John still
25 experiences serious harm as a result of the school's

1 policy, harm that is happening now, and harm that is highly
2 likely to have long-term negative health consequences.

3 John will only experience high school and
4 adolescence once. By stigmatizing John as different, the
5 district is harming John's mental health.

6 The full extent of that harm will not be apparent
7 until he reaches childhood (sic.) John's experiences could
8 negatively affect his mental health. If the source of
9 John's stress and anxiety was alleviated, he would be less
10 likely to need long-term psychotherapy.

11 And, Judge, under the standard of the Eleventh
12 Circuit, we don't believe enough has been shown at this
13 juncture.

14 And, of course, the nature of cases involving
15 injunctions is the only time when there has to be a showing
16 of irreparable injury is at this stage. It doesn't need
17 that for the final determination.

18 It won't be something that needs to be litigated
19 or proven; and, therefore, it's not something that can be
20 determined finally. It has to go on what's alleged now.

21 We don't believe that the plaintiff has alleged
22 irreparable injury based on how long it took for this case
23 to get here and for this motion to be filed, based on the
24 fact that there's nothing in the papers that suggests that
25 anything has gotten worse recently, there's anything that's

1 changed.

2 And with respect to exhaustion, Judge, there is a
3 record in this case of the parents talking to the school
4 district. And while they didn't agree, there's a history
5 of talking.

6 It's in these papers today in the form of a
7 contention that there was a faculty or an adult restroom
8 that he could use. And it had a sign saying no students.
9 And that was taken down immediately upon request.

10 And there's nothing with respect to the
11 contentions in here that, for instance, that the restrooms
12 he could use were locked; and, therefore, they weren't
13 available.

14 He says in his affidavit that he never told
15 anybody that. In fact, it's disputed that that was the
16 case.

17 And with respect to the whole issue of ostracism,
18 Judge, when you read these documents, I think what you see
19 is far from being ostracized and stigmatized by other
20 people.

21 There's, in fact, a case that's pled as if nobody
22 thinks of him as different. Because when he said that he
23 never asked a staff member to open the restroom for him, he
24 says he didn't do that because he didn't want to tell the
25 person why he needed the restroom, which indicates that he

1 thinks there's a large number of staff people that don't
2 know he's transgender.

3 When he talked about -- when he talked about his
4 change when he had surgery on his chest and that before he
5 had worn a hoodie in terms of that so he could hide his
6 body-type, then that bespeaks at least a feeling that
7 people don't know that he's transgender.

8 And, in fact, that, too, is disputed because the
9 counselor says that he continues to dress in layers and to
10 wear hoodies.

11 And with respect to the use of the restroom in the
12 media room, he says that -- he says that he has been asked
13 on occasion why he has to go there, which, again, indicates
14 the person doesn't know. And he says that he has said
15 because he had to go to the bathroom. And that apparently
16 has been sufficient to assuage the curiosity of these
17 people that are asking.

18 And, again, I don't for a minute, Judge, want to
19 denigrate -- number one, because I don't have the expertise
20 to do it; and, number two, because I have no inclination to
21 do it and the district certainly doesn't. I do not want to
22 denigrate anything with respect to the impacts of being
23 transgender or what he's going through.

24 But with respect to this proceeding, with respect
25 to a motion for preliminary injunction, we believe that in

1 the context of this case, it's incumbent upon the plaintiff
2 to clearly establish all four of the factors that are
3 involved in deciding whether or not injunctive relief is
4 appropriate. And if any one of those is lacking, then the
5 injunction cannot issue properly.

6 And while it's certainly up to the Court's
7 discretion, the Eleventh Circuit is pretty clear as to when
8 the Court should not exercise that discretion.

9 And we believe this is one of those cases.

10 THE COURT: Thank you, Mr. Gonzalez.

11 MR. GONZALEZ: Thank you, Judge.

12 THE COURT: Before you leave, let me ask you one
13 quick question.

14 What is your -- what are the equal protection
15 implications, if any, of the fact, I guess, based on what I
16 see in the papers, that counties throughout the state have
17 different policies with respect to transgender children?

18 In other words, if you're a -- if young John Doe
19 were to move to Broward County, he would be -- he would
20 have a certain set of rules, regulations, guidelines,
21 accommodations, however you want to describe it, that would
22 be more favorable to his view of how he ought to be
23 treated, at least as I see the papers, versus where he is
24 presently.

25 What are the equal protection implications of

1 that?

2 MR. GONZALEZ: Judge, again, let me give you too
3 long an answer.

4 Number one, I don't believe there are any.

5 Number two, there is obviously no relationship
6 between the districts as they are independently governing
7 and independently thinking with respect to --

8 THE COURT: Well, let me make it harder, then.
9 Let me make it harder.

10 MR. GONZALEZ: Okay.

11 THE COURT: Let's assume that both -- that both
12 governmental agencies proffer that the privacy of cisgender
13 students is the sine qua non of why they have their
14 policies in place and that they think that's the linchpin,
15 that's the reason, that's the justification for the
16 policies that they have in place.

17 Now tell me why it's not a problem.

18 MR. GONZALEZ: Judge, that goes directly -- that's
19 sort of what the situation was in the case that I meant to
20 tell you about with respect to the cisgender -- the
21 cisgender lawsuit that was brought.

22 And in this case, there was, in fact, a decision
23 by that school district, not Florida, but there was a
24 decision by that school district that they considered the
25 OCR dear colleagues letter to be the law of the land. And

1 that's exactly what they thought.

2 And, Judge, the reason I don't believe that it can
3 be taken as an equal protection issue is because that is
4 another district coming to grips with the same question
5 that Volusia County and every other district is coming to.

6 And that's another reason why an injunction
7 shouldn't issue because there are different sides. And we
8 don't know. And with respect to what another district
9 comes down to, it doesn't matter. But, Judge, it does
10 matter for this.

11 And this is what omitted --

12 THE COURT: The question I put to you is really
13 not -- and I probably should have -- it's for another day.
14 All right?

15 So I'm not suggesting it has anything to do with
16 my determination as to whether or not a preliminary
17 injunction ought or ought not issue based on the current
18 record. It's essentially for another day, food for
19 thought, for whatever value it might have.

20 I'm curious about that in the sense that if the
21 articulated reason of the governmental agency for whatever
22 policy it has in place as it relates to the equal
23 protection claim, not the Title IX claim, but the equal
24 protection claim, but if the articulated rationale is the
25 protection of the privacy interests of the other non-trans

1 students, then how can it be that attendance in school in
2 Broward County would entitle young John Doe to utilize the
3 facilities based on his gender identity; and yet if he were
4 to be in school in Volusia County, he would not be able to
5 do that?

6 MR. GONZALEZ: Because, Judge -- and, again, I
7 promise I was getting there. I'm obviously not doing a
8 very good job. But it really does go to --

9 THE COURT: I may not have enough patience. It
10 could be that.

11 MR. GONZALEZ: But in terms of -- in terms of the
12 case that I'm talking about, what was there was a district
13 decided that the law of the land was the transgenders could
14 go to the restroom that's consistent with their identity.

15 And the cisgender students said, we have a
16 constitutional right not to go, not to be in a restroom and
17 not to be in a locker room with transgender.

18 And what I thought was interesting was the Court
19 found that there is no constitutional right to privacy.
20 And, also, when they were deciding that issue, they noted
21 the fact -- and I think this goes to the scope of any
22 injunction, too, by the way.

23 They noted the fact that when the district put in
24 this policy, they said that any cisgender student who was
25 uncomfortable could go use the single-use facility. And

1 they were free to do that at their choice.

2 And, Judge, with respect to a constitutional
3 issue, the idea that in Brown versus Board of Education,
4 the Supreme Court had said, well, they have a right to go
5 to school. But, listen, if you're uncomfortable about
6 going to school with African-American children, then you're
7 free to go to this other school.

8 And that's not what a constitutional protection is
9 going to be. But it does go to the fact that we think,
10 Judge, that when we get to that final decision in this
11 case, clearly, I think the Court has to take into account
12 the decisions of other educators with respect to what they
13 do or don't do with respect to privacy.

14 But if you take, if you take those cases that talk
15 about how -- not having a constitutional right to privacy,
16 then I think what those cases say when you transfer it to
17 the employment side, for instance, and even in the
18 education side, I think what they're saying is, although
19 you're not required to do it, you could, in fact, have a
20 situation where you do away with an entire -- men's and
21 women's restrooms. Just say they have restrooms and they
22 all have stalls.

23 THE COURT: If you and I were to get on a plane
24 here in Orlando and go to New York for sure, Chicago for
25 sure, San Francisco for sure, L.A. for sure, absolutely for

1 sure if we went to Paris or León or to Amsterdam, we would
2 find almost all of the bathrooms, at least in restaurant
3 environments, unmarked.

4 Maybe not quite so much here in the United States,
5 but certainly European standards would be that a restroom
6 is a restroom facility. It doesn't matter male, female, or
7 somewhere in between.

8 MR. GONZALEZ: Judge, I think there was a time
9 when Europeans thought we were like idiots, because why do
10 you need more than one toilet in the house?

11 THE COURT: Right.

12 MR. GONZALEZ: Why do you need more than one? Why
13 do you need one for every bedroom and that kind of stuff?

14 But by the same token, there was a time when I was
15 always impressed by the fact that I could smoke in
16 elevators. And there are just different mores.

17 And I think that's what it really goes to because
18 when you get right down to it, I think, Judge, in terms of
19 how we treat physical differences, physical differences and
20 what we base privacy on, I think it's pretty clear that, at
21 least in the educational setting, we base it on physical
22 attributes.

23 And that could not -- that perhaps is not the law.
24 And I can't predict how it's going to turn out.

25 But in the context of what law is out there now,

1 in the context of having to prove the case now, I don't
2 think that the plaintiff can carry the heavy, heavy burden
3 of showing that they're entitled to have it decided at this
4 juncture.

5 THE COURT: Thank you, Mr. Gonzalez.

6 MR. GONZALEZ: Thank you, Judge.

7 THE COURT: Mr. Orr, let me give you a few moments
8 to respond to some of the things that Mr. Gonzalez has had
9 to say.

10 But just as I told him when he came to the podium,
11 we've exhausted most of our time. But I'd really like you
12 to -- I'd really like you to hone in on the Eleventh
13 Circuit standard for the issuance of a preliminary
14 injunction -- it is quite high -- and to maybe do the best
15 you can of giving me in bullet points what's your best case
16 for, first of all, irreparable harm, even though that's --
17 you know, I don't think there's any particular order of
18 these things. But certainly the cases generally turn
19 initially on substantial likelihood of success on the
20 merits.

21 But I'd like to focus on irreparable harm here,
22 first, and -- because if I were going to make your argument
23 for you, I would say, well, the Whitaker case is my best
24 case on substantial likelihood of success on the merits,
25 and why wouldn't the Eleventh Circuit go along with it.

1 It's well reasoned. It's persuasive.

2 And Mr. Gonzalez makes the point that's a tea leaf
3 reading exercise. You can't do that at a preliminary
4 injunction stage. So that part I think I've got a pretty
5 good handle on.

6 I'd really like you to focus again, bring me --
7 let me bring you back to this irreparable harm and tell me
8 what's different about today as contrasted with
9 weeks, months, perhaps even years in the rearview mirror.

10 MR. ORR: Well, thank you, Your Honor.

11 And I think the significant difference is, after
12 John had his surgery in late November of last year, we saw
13 a significant decline in his mental health, in his ability
14 to sort of withstand the daily mistreatment that he was
15 experiencing by being excluded from using the boys'
16 restroom. And that is --

17 THE COURT: So where in the record before me is
18 there a demonstrable statement of a causal connection
19 between this surgery that he had and a deterioration in his
20 mental health or his physical health associated with the
21 bathroom protocol, for lack of a better --

22 MR. ORR: Well, I think in his declarations, he
23 talks about how he just can't handle doing this for another
24 two years. He talks about -- for example, his grades are
25 another example.

1 THE COURT: That's not really responsive to my
2 question. Saying that in his affidavit he says, I can't do
3 this for another two years, that's not -- that's not
4 irreparable harm. That's, I need relief.

5 And that's where you are. You're in a United
6 States District Court, and he's ultimately going to get
7 a day in court. He's going to have an opportunity to
8 present his case on the merits. That's not the test.
9 That's not the question.

10 The question I asked you is -- and I don't mean to
11 be combative about this at all. I'm looking for help.

12 MR. ORR: Sure.

13 THE COURT: So where in the record -- help me find
14 something in the record that demonstrates a causal
15 connection between some recent deterioration in his mental
16 or physical well-being that is attributable to the bathroom
17 protocol.

18 MR. ORR: And I do think it's in the declarations.
19 For example, the declaration of Susan Doe talks about the
20 relief he experienced after having the surgery. But then
21 the return to school, sort of all the same problems had
22 continued. That he wasn't allowed to use the restroom,
23 that was very frustrating for him, again, causing him to
24 not be able to pay attention in class, the anxiety and the
25 stress about going to the bathroom.

1 Similarly, in the declaration for Ms. Fisher,
2 talking about, you know, that at this point we're at the
3 juncture where if this discrimination continues, that we
4 are concerned that it will affect his mental health for
5 the -- you know, for a substantial period of time into
6 adulthood.

7 And I think, again, the fact that it was after --
8 after the surgery that he was told by the school that he's
9 at risk of failing his sophomore year and having to repeat
10 that grade.

11 Although his grades have not been stellar -- he's
12 not someone who's gone from a straight-A student to a
13 student who's nearly failing -- the fact that he is now at
14 risk of failing an entire grade and having to repeat that
15 is significant, especially since John Doe is a kid who
16 wants to pursue higher education, the fact that his grades
17 are going to obviously limit those opportunities.

18 And the longer his inability to focus in class
19 continues because of the restrooms, the longer, the more
20 limited his options will be.

21 THE COURT: So we're at April 3rd now. When
22 is the school year over?

23 MR. ORR: I believe the school year ends in the
24 very beginning of June or the end of May. I don't recall.

25 THE COURT: Is there anything in the record that

1 tells me what the end of the school year is?

2 MR. ORR: If I remember correctly, I believe one
3 of the school -- the school district's brief may have
4 referred to it.

5 THE COURT: So the reason I'm asking the question
6 is that, is there anything in the record that would support
7 the notion, at least by implication you're raising here,
8 that if the Court were to act now on April the 3rd or
9 very shortly thereafter, that that would somehow provide an
10 opportunity for young John Doe to improve his grades to a
11 point where he would be successful where he's unsuccessful
12 now?

13 I mean, tell me, where is that other than you
14 saying it? Where is that in the record?

15 MR. ORR: In the discussion, Your Honor, in his
16 discussion in the declaration, he talks about -- I believe
17 in that same paragraph where he talks about being told that
18 he's at risk.

19 THE COURT: Well, I just -- I'll just tell you --
20 I want to be frank with you. I'm skeptical. I'm skeptical
21 that a change in the bathroom protocol just implemented in
22 the next couple of weeks or next even couple of days, I
23 don't know that there's anything in the record that I could
24 hang my hat on that would say that a change in the bathroom
25 protocol is going to have such an efficacious effect on

1 John Doe that it's going to alter his progression from this
2 grade to the next.

3 I mean, for instance, I don't know -- maybe it's
4 in the record and I missed it. I don't know precisely what
5 his grade point average is to this point. I don't know if
6 he knows.

7 I don't know -- how much peril is there that he's
8 not going to go from his current grade to the next grade?
9 Do I have any of that information?

10 MR. ORR: Your Honor, in the declaration he talks
11 about that he's working towards improving his grades.

12 THE COURT: I know. I get that. I get that.
13 And, again, I apologize. I'm not trying to be combative.

14 MR. ORR: Sure.

15 THE COURT: But you're going to have to give me --
16 it's your burden.

17 MR. ORR: Right. I understand.

18 THE COURT: It's your burden to demonstrate that
19 Mr. Doe, that young Master Doe is suffering irreparable
20 harm as a consequence of the bathroom protocol and that
21 only by the issuance of the extraordinary relief of a
22 preliminary injunction can that situation be improved or
23 ameliorated.

24 And so I'm asking you, tell me where it is in the
25 record that I know, for instance, how many days there are

1 left in school. If this bathroom policy would be changed,
2 how many tests does he have left? What possibility is
3 there that he could change his circumstances such that it's
4 going to make a difference in terms of what you're telling
5 me is the harm that he may have to repeat this grade?

6 I don't think that's anywhere in the record. If
7 it is, I overlooked it.

8 MR. ORR: Your Honor, I think, unfortunately, John
9 Doe doesn't know how many tests he has left or homework
10 assignments.

11 The one critical thing we can rely on is that if
12 he's allowed to use the boys' restroom like all other boys,
13 then that will reduce the amount of stress he experiences
14 in school significantly. And as a result --

15 THE COURT: I get that. And, again, I understand
16 that long-term relief. I mean, that that may be -- that if
17 he's successful on the merits, that that would certainly be
18 advantageous to him going forward.

19 But in order to preliminarily enjoin the school
20 board to change the status quo, you have to meet the burden
21 of demonstrating that that harm, that something's going to
22 happen right now that's going to change his outcome. It
23 can't be a hope or an aspiration.

24 MR. ORR: Well, certainly if he's allowed to use
25 the boys' restroom and, as a result of that, is able to

1 participate and attend in class, that is by -- will affect
2 his ability to succeed in school.

3 And I think that -- that would give him equal
4 access to his educational opportunity. I think that's on
5 the academic piece.

6 I think the other aspect of the irreparable harm
7 is, you know, with regards to the locker room, enjoining
8 the school district and, as a result, allowing him to use
9 the boys' locker room, meaning he can sign up and include
10 physical education in his schedule for next year. And that
11 is sort of an immediate and upcoming thing in terms of --
12 event in terms of irreparable harm.

13 And I think the other part is, you know, the
14 emotional stress that it's causing, in and of itself, is
15 irreparable harm.

16 Your Honor talked about Whitaker. And I think
17 that is a really important case for a number of reasons.
18 But on the irreparable harm piece, although the Seventh
19 Circuit did in that case suggest that there's a lower
20 burden in terms of the likelihood of success on the merits,
21 on the remaining three factors they apply the same tests
22 that the Eleventh Circuit does.

23 And they are held in favor of Ash Whitaker, the
24 plaintiff, on all three of those -- on all three of those
25 elements with substantially similar facts, you know, a

1 student who attests that he has difficulty participating in
2 class, has difficulty focusing on schoolwork as a result of
3 the fact that he has to navigate this discriminatory
4 restroom protocol and, you know, which is supported by
5 declarations from -- in his case, it was an expert who had
6 met with him; whereas, in our case, it's his treating
7 provider. And those are the irreparable harms.

8 I would also just quickly sort of contest the
9 school district's sort of characterization of these harms.
10 As counsel for the district noted, in Ms. Fisher's
11 declaration, she's very clear that, yeah, he can appear to
12 some as a happy kid and a social kid, but that does not
13 mean that he's not experiencing really significant
14 psychological distress. And that is, in fact, the case
15 here.

16 And also just to point out that this is a, you
17 know, a student that has asked the school district to treat
18 him as male for all purposes, and the school district has
19 consistently refused to do that.

20 So it doesn't really engender the kind of trust
21 that he would go to them and say, oh, yeah, sure, these are
22 all the problems that I'm having on a daily basis.

23 But it's certainly something that he has talked
24 about with his therapist on a weekly basis for the last
25 three years. And that's sort of the basis of what she

1 attests to.

2 THE COURT: Let me ask you this, Mr. Orr.

3 What do you think -- how much trial time would you
4 need to present your case on the merits?

5 MR. ORR: Off the top of my head, I can't imagine
6 it would take more than two days.

7 THE COURT: And how much time do you think you'd
8 need in order to try your case on the merits?

9 MR. ORR: Oh, you mean -- sorry. I meant two days
10 for us to try the case.

11 THE COURT: That's what I understood. That's what
12 I understood.

13 So now I'm asking you -- the next question is,
14 assuming I were to deny the request for preliminary
15 injunction and were to abbreviate the calendar such that I
16 were to accelerate the case for trial, how much time would
17 you need to be ready?

18 MR. ORR: I'd like an opportunity to sort of check
19 with co-counsel but --

20 THE COURT: This one?

21 MR. ORR: That's one of them, yes.

22 THE COURT: Yes, sure. Take a minute and confer.
23 Because I'd like to get a good read of what you all think
24 you would need in terms of time.

25 (Pause in proceedings.)

1 MR. ORR: Your Honor, given what we anticipate we
2 need in terms of discovery and other things, we anticipate
3 that we could be ready for trial in October of this year.
4 So approximately six months out.

5 THE COURT: All right. Thank you, Mr. Orr.

6 Mr. Gonzalez, same questions to you: What do you
7 think is a reasonable expectation of the trial time for the
8 case? And how long would it take you to get ready?

9 MR. GONZALEZ: Including damages, Judge?

10 THE COURT: Well, maybe I misread the complaint
11 here. I'm talking about the injunctive relief that's being
12 sought and the equitable relief.

13 MR. GONZALEZ: That's what I was going to ask you.
14 If you're just talking about that, Judge, I believe that's
15 something that's going to be decided on paper. I don't
16 know that there's a lot of disputed issues of fact.
17 Because I don't believe -- I don't believe that the harm --

18 THE COURT: Let me tell you this. I'm probably
19 not going to be inclined to resolve this on a dispositive
20 motion. I'm going to -- I'm inclined -- let me tell you
21 what I am going to do. Let me just go ahead and say it for
22 the record.

23 I'm not persuaded, Mr. Orr, that the plaintiff has
24 met his burden of establishing that the prongs that would
25 be required for the issuance of a preliminary injunction

1 have been met, specifically under the Eleventh Circuit
2 standard, which is a high bar.

3 Based on what I see before me, I'm concerned that
4 you failed to establish irreparable harm. And I also have
5 a serious question about the substantial likelihood of
6 success on the merits.

7 Certainly I think you have some likelihood of
8 success on the merits. Whether I would categorize it as
9 substantial or not, I don't know. I am persuaded that the
10 issue is too much in flux to predict what the Eleventh
11 Circuit would do on the merits.

12 And so I'm going to deny the request for
13 preliminary injunction, but I am inclined to accelerate the
14 case for trial and to give young Master Doe an opportunity
15 to put his case on and to persuade me that he is entitled
16 to relief.

17 I guess the question I have for you, Mr. Orr,
18 is -- you have to remind me what's in your papers. But are
19 you seeking -- are you seeking monetary damages in addition
20 to equitable relief?

21 MR. ORR: Yes, Your Honor.

22 THE COURT: Okay. That's going to complicate --
23 are you asking for a jury trial?

24 MR. ORR: No, Your Honor.

25 MR. GONZALEZ: Judge, would the plaintiff consider

1 a bifurcation of the damages?

2 THE COURT: I'm going to get there in just a
3 minute.

4 MR. GONZALEZ: I'm sorry.

5 THE COURT: So we're all in agreement that at
6 least the equitable relief, you're looking for a bench
7 trial, a bench resolution of this, right?

8 MR. ORR: Correct, Your Honor.

9 THE COURT: And would you be -- well, I may do it
10 whether you're amenable to it or not. But would you be
11 amenable to a bifurcation of the case and have me make a
12 determination of the entitlement of Master Doe to equitable
13 relief; and if you prevail on that, to have damages done at
14 a later time?

15 MR. ORR: Your Honor, just off the top of my head,
16 I think that -- you know, I don't know that there would be
17 significant gains in terms of time or in terms of our need
18 to prepare the case for trial, but -- I'm sorry. Thank
19 you -- by bifurcating; however, if the Court is inclined to
20 do that, we'll obviously proceed as the Court requires.

21 THE COURT: Do you anticipate there would be any
22 real meaningful discovery on the question of damages?

23 MR. GONZALEZ: No, sir. That's what I'm saying.
24 We're talking about not that many people. Certainly --
25 certainly, if they can do it in two days, Judge, I know we

1 can do it in that or less. And October is certainly not an
2 issue.

3 THE COURT: Okay.

4 (Counsel conferred.)

5 THE COURT: Well, a bench trial gives me a lot of
6 flexibility in terms of being able to move it around. I
7 certainly don't want to interrupt your presentation; but if
8 I had to interrupt you, I think that what I'm inclined to
9 do, Counsel, is to give you an accelerated trial setting
10 and to set you for trial in October.

11 I'm going to issue a short order.

12 Here's what I'm going to do, because I want to
13 consult with my folks here in terms of what else we have
14 pending and what those things look like.

15 But I anticipate what I'll do is issue a short
16 order that will deny the request for preliminary injunction
17 for the reasons that I've articulated in the record
18 already, accelerate the case for trial, and give you some
19 discovery cutoff date.

20 I can't imagine there's any real meaningful
21 discovery that needs to be done. But you all being
22 lawyers, I'm sure will find something that you need to do.

23 I'll give you a cutoff date for discovery. I'm
24 not going to entertain any dispositive motions.

25 What I'll do is I'll give you an opportunity to

1 present your case in -- somewhere between three and
2 four days. And you can submit for me a trial brief and
3 proposed findings of fact that will be -- essentially be
4 the equivalent of giving you the opportunity to make a
5 dispositive motion, presentation, argument.

6 And I'll set those dates out for you in my order.
7 And then we'll -- then I'm going to resolve the case in
8 accelerated fashion on the merits.

9 And I think my inclination is not to bifurcate it.
10 I'll let you put your whole case on. To the extent you
11 have damages testimony, my guess is -- I don't know this,
12 but my guess is it wouldn't be more than just a few extra
13 questions for each of your witnesses probably with respect
14 to what the impact has been on Master Doe and what it might
15 be if it's not -- if it's not remedied.

16 MR. ORR: I anticipate that to be true,
17 Your Honor.

18 THE COURT: Okay. All right. Does that give
19 either of you any heartburn that you want to share with me
20 at the moment?

21 MR. GONZALEZ: Judge, the only thing I'd add is
22 beyond our obligation to try to get stipulated facts too,
23 if we put extra effort, I think we can do better than that
24 in terms of what we proposed --

25 THE COURT: Okay.

1 MR. GONZALEZ: -- or what will happen. Because I
2 really don't think there's a lot of disputed issues
3 certainly leading up to the event in terms of the thing.

4 THE COURT: Okay. That's wonderful.

5 What I don't want to do is I don't -- I want to
6 make sure that both -- I want the Doe family and Mr. Baxa
7 to hear me on this as well.

8 And that is that this is a -- this is a case of,
9 obviously, of constitutional import. It has a great
10 significance to Master Doe.

11 I am impressed that his current situation -- he
12 deserves an answer to the issues that he raises in his
13 complaint. And he deserves an answer with as much dispatch
14 as the Court is able to deliver in keeping with my
15 responsibility to do it in a thoughtful and deliberative
16 way and to make sure that the school board has an equal
17 opportunity to be able to make its position known and to
18 present any evidence or testimony that you think might help
19 me make an informed decision.

20 And so I think this is -- I'm going to exercise my
21 considerable discretion in this area to truncate the
22 proceedings and to accelerate the disposition by way of
23 trial in October.

24 And as I said, I'll give you an order that sets
25 out a day for you to terminate all discovery and have it

1 concluded. I'll give you a date for submissions to me of
2 what I hope would be a largely joint stipulated set of
3 facts.

4 And then if you want to submit an independent
5 brief on what you think are the issues that are in dispute.
6 Obviously the ultimate outcome you're going to dispute, but
7 the facts probably are not going to be too much disputed.

8 And I think that will help streamline us. And it
9 will give me a good opportunity for -- give me a good
10 insight into just how much trial time we're really going to
11 need. And whatever I have to do to accommodate getting
12 this case tried in October, I will do with respect to my
13 other responsibilities.

14 MR. GONZALEZ: Judge, can I ask one more thing on
15 that?

16 THE COURT: Yes.

17 MR. GONZALEZ: With respect to, in terms of
18 truncating the thing in discovery, I don't know if the
19 plaintiffs are ready. I have the suspicion that they are.
20 If they could tell us the witnesses there are and the
21 damage witnesses particularly, I think I could get on it
22 pretty quickly and do a responsive deal and figure who the
23 witnesses are on our side.

24 THE COURT: Well, I think to the extent you all
25 can do that cooperatively, I think it's great.

1 What I am -- what I really mention now and will do
2 it in my order is give you the equivalent of a Rule 26
3 disclosure deadline. And that will be pretty quick. So
4 I'm going to require you to make Rule 26 disclosures
5 probably in a week or ten days.

6 And obviously if you need to supplement those,
7 you'd be obligated to supplement those anyway as time went
8 on if additional information became available. But I would
9 expect that each of you know what your respective case is.
10 And we shouldn't have too many surprises.

11 MR. GONZALEZ: Judge, I'm sorry. I'm sorry to
12 keep butting in. But with respect to experts in
13 particular, if we could have those as early as we could, if
14 we could make that part of what you're going to do for the
15 26.

16 THE COURT: Sure. I'll give you a Rule 26
17 deadline. And then my thinking about that is that it would
18 include expert witnesses.

19 And then if you need to supplement that, I
20 obviously don't want -- I don't expect I would get it from
21 either side in this case. I would certainly frown on any
22 sort of sandbagging or holding people back. I'm not going
23 to tolerate that.

24 If you have expert witnesses, you know about them.
25 If something happens in the interim that is completely

1 unexpected, you know, sometimes these things happen. I'll
2 entertain it.

3 But I would expect you all to basically turn your
4 cards over to the other side, let them know who you expect
5 to call, what they're going to say, substance of their
6 opinions. If you're going to have an expert, we're going
7 to need them to prepare and deliver a report. So that will
8 need to be done in an abbreviated schedule too.

9 So you all are going to have some work to do.
10 You're up to the task, I'm sure.

11 MR. GONZALEZ: Judge, in case the Court needs it,
12 the record does have that the school year this year ends on
13 May 30 --

14 THE COURT: May 30.

15 MR. GONZALEZ: -- 2018, and begins for '18-'19 on
16 August 13th.

17 THE COURT: August 13th.

18 Okay. Great. I very much appreciate your
19 arguments. They are very helpful to me.

20 And I'll get out -- as I said, it will be a
21 relatively short order because I want to get it out as
22 quickly as I can. So it won't have my -- I'll say my
23 clerk's usual thoroughness in terms of the background or
24 framing the issues.

25 I'm going to do a relatively tombstone order that

1 denies the motion for preliminary injunction, as I've
2 already said, for reasons stated on the record and then
3 give you some scheduling directives.

4 And we'll set it for trial in October and get the
5 ball rolling and move it along for disposition.

6 MR. BAXA: Your Honor, Ted Baxa. I didn't mean to
7 interrupt. I'm sitting here, obviously, with Master Doe
8 and his parents.

9 And while the outcome is obviously not the one
10 that they were hoping for, there's an understanding of the
11 Court's ruling here and appreciation for the expedited
12 calendaring and the care which has been taken with respect
13 to these arguments.

14 So on behalf of plaintiff and his family, we
15 express our appreciation.

16 THE COURT: Thank you, sir.

17 We'll be in recess.

18 (Proceedings adjourned at 2:53 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

April 9, 2018

s\ Amie R. First
Amie R. First, RDR, CRR, CRC, CPE
Federal Official Court Reporter
United States District Court
Middle District of Florida