

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child,)	
)	
)	
Plaintiff,)	
)	
v.)	No. 3:18-cv-00037-WTL-MPB
)	
EVANSVILLE VANDERBURGH)	
SCHOOL CORPORATION,)	
)	
Defendant.)	

Plaintiff’s Memorandum in Support of Motion for Partial Summary Judgment

Introduction

J.A.W. is a transgender male student who recently finished his senior year, a semester early, at an Evansville Vanderburgh School Corporation (“EVSC”) high school. Although EVSC was aware that J.A.W is a transgender male, diagnosed with gender dysphoria, who had presented himself as male for years, it refused to allow him to use male restrooms. As this Court recognized in issuing its preliminary injunction allowing J.A.W. to use the male restrooms within EVSC, this case is indistinguishable from *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. dismissed --U.S.--*, 138 S. Ct. 1260 (2018), where the court held that denying a transgender student the ability to use the bathroom consistent with his gender identity violated both Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The same is true here. There are no contested issues of material fact

and J.A.W. is entitled to partial summary judgment finding that EVSC is liable for violating his rights. The matter should then be set for trial as to his damages.¹

Statement of material facts not in dispute

Background as to gender identity, transgender and gender dysphoria

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

This lack of congruence within the transgender person and the conflict experienced thereby is diagnosed as “gender dysphoria,” a medical diagnosis that is

¹ As this Court is aware, the vast majority of the issues presented on summary judgment were also litigated at length during preliminary injunction proceedings. Moreover, aside from a supplemental declaration from J.A.W., plaintiff is introducing no new evidence at this juncture. As a result, portions of this memorandum are taken, substantially verbatim, from previous filings in this case.

codified in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”) 302.95 and the World Health Organization’s International Classification of Diseases 10 (“ICD 10”) F. 64.0. (Dkt. 50-5 ¶ 12; Dkt. 50-6 ¶ 20; Dkt. 50-7 ¶ 14).² The criteria for establishing a diagnosis of gender dysphoria for adolescents and adults is, as set forth in DSM-V 302.85:

A. A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:

1. A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).
2. A strong desire to be rid of one’s primary/and or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
3. A strong desire for the primary and /or secondary sex characteristics of the other gender.
4. A strong desire to be of the other gender (or some alternative gender different from one’s assigned gender).
5. A strong desire to be treated as the other gender (or some alternative gender different from one’s assigned gender).
6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one’s assigned gender).

² The DSM-V and ICD-10 are both standard classifications of mental and physical disorders. (Dkt. 50-6 ¶ 20; Dkt. 50-7 ¶ 14). “Gender dysphoria” was previously referred to as “gender identity disorder” and the latter term is used in ICD-10 at F64.0, although the World Health Organization announced on June 18, 2018, that the new ICD-11 will use the term “gender dysphoria.” like the DSM-V. (Dkt. 50-6 ¶ 23; Dkt. 50-7 ¶ 17). Regardless, the ICD-10 classification of “gender identity disorder” is identical to the “gender dysphoria” noted in the DSM-V. (Dkt. 50-6 ¶ 23; Dkt. 50-7 ¶ 17).

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.³

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

Untreated, gender dysphoria results in significant distress and difficulty in functioning, including anxiety, depression and the possibility of self-harming behavior, substance abuse and suicide. (Dkt. 50-5 ¶ 12; Dkt. 50-6 ¶ 18; Dkt. 50-7 ¶ 18). Indeed, studies demonstrate that up to 40% of persons who identify as transgender attempt suicide at some time, compared to 5% for the American population at large. (Dkt. 50-6 ¶ 19; Dkt. 50-7 ¶ 20).

The treatment of gender dysphoria

The standards of care for the treatment of gender dysphoria have been established by the World Professional Association for Transgender Health (“WPATH”), and are internationally recognized and have been endorsed as the authoritative standards of care by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, the American Psychological Association, the American Psychiatric Association, the World Health Organization, the American Academy of Family Physicians, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, and

³ The ICD-10, at F64, defines “gender identity disorder” as “[a] disorder characterized by a strong and persistent cross-gender identification (such as stating a desire to be the other sex or frequently passing as the other sex) coupled with persistent discomfort with his or her sex (manifested in adults, for example, as a preoccupation with altering primary or secondary sex characteristics through hormonal manipulation or surgery.” (Dkt. 50-6 ¶ 23; Dkt. 50-7 ¶ 16).

the American Association of Plastic Surgeons. (Dkt. 50-5 ¶ 14; Dkt. 50-6 ¶ 24; Dkt. 50-7 ¶ 23). The standards of care recognize that the principal treatment of gender dysphoria is to allow the person full expression of his or her gender identity. (Dkt. 50-6 ¶ 26). This involves, generally, changes in gender expression and role consistent with gender identity, which is referred to as social role transition, and hormone therapy to feminize or masculinize the person's body. (Dkt. 50-5 ¶ 16; Dkt. 50-6 ¶ 26). Additionally, psychotherapy may be helpful, not to "cure" the person of gender dysphoria, but to address the negative impact of stigma, alleviating internal transphobia, improving body image, enhancing peer and social support, etc. (Dkt. 50-5 ¶ 16; Dkt. 50-7 ¶ 25). These problems are primarily rooted in social hostility, rejection, discrimination, and emotional and physical abuse associated with the difficulty that society has in accepting the person's expressed gender. (Dkt. 50-6 ¶ 26). Some, but not all, transgender individuals will undergo surgery to alter primary and/or secondary sex characteristics. (Dkt. 50-5 ¶ 5; Dkt. 50-6 ¶ 26; Dkt. 50-7 ¶ 27). For some, the provision of hormones and social role transition are sufficient to ameliorate the various negative consequences of gender dysphoria, including anxiety and depression. (Dkt. 50-7 ¶ 27).

Hormones are provided to affirm the person's gender identity and initiate the physiologic changes in body contour and appearance to match the person's experienced gender. (Dkt. 50-6 ¶ 27). Hormone therapy has a profound effect on the physical appearance of the individual. (Dkt. 50-5 ¶ 2). For a transgender male (*i.e.*, a person assigned as female at birth), hormones will render the person increasingly male in appearance. (*Id.* ¶ 21; Dkt. 50-6 ¶ 27; Dkt. 50-7 ¶ 28). The person's voice will deepen, beard

growth and body hair growth will be stimulated, muscle mass will increase, and body fat will be redistributed. (Dkt. 50-5 ¶ 21; Dkt. 50-6 ¶ 27; Dkt. 50-7 ¶ 28). Typically, after a year of hormone therapy the transgender male will look very masculine, although full hormone effects may require up to 18 months to realize. (Dkt. 50-6 ¶ 27; Dkt. 50-7 ¶ 29).

Social role transition is an essential component of treatment for transgender individuals. (Dkt. 50-5 ¶¶ 18, 24; Dkt. 50-6 ¶¶ 28-29; Dkt. 50-7 ¶ 29). This is the process through which transgender persons present themselves in a manner consistent with their experienced gender, which includes name, gender markers, dress, hair style, and other aspects of gender presentation. (Dkt. 50-6 ¶ 29; Dkt. 50-7 ¶ 29). The point of social role transition is to allow the person to openly live the person's gender role and the greater the immersion of the person in his or her sexual identity, the better it is for the person's treatment. (Dkt. 50-7 ¶ 29). Social role transition allows the individual to present his or her gender identity in every aspect of life—at home, work, school, and in the broader community. (Dkt. 50-5 ¶ 18).

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

For some, this happens in adolescence, or even adulthood. Then, a sequential internal and external process ensues: accepting and identifying as transgender, explaining to family and others about the necessity of transition, disidentifying with the assigned gender and seeking support for post-transition life. The final stage—identity consolidation—is attained when the transgender aspect of life becomes less important, and the individual refocuses on the normal challenges of life like making a living,

forming relationships, etc. With identity consolidation, the shame of having lived as a “false self” and the grief of being born into the “wrong body” can be ameliorated. If any aspect of this social transition is impeded however, it destabilizes the patient and undermines the treatment goals.

(*Id.* [internal citation omitted]).

The importance of access to bathrooms that are consistent with gender identity

It is vitally important that social transition occur in all aspects of the transgender person’s life. (*Id.* ¶ 24). To be considered male in one situation, but not others, is inconsistent with evidence-based medical practice and is detrimental to the well-being and health of the individual. (*Id.*). The goal of treatment of a person with gender dysphoria is to achieve complete and unqualified social transition, as failure to achieve this is a source of distress and anxiety. (*Id.*; Dkt. 50-6 ¶ 30).

The need for social transition to be complete and unqualified requires that the transgender person be able to use restrooms and locker rooms that conform to gender identity. (Dkt. 50-5 ¶¶ 24-25; Dkt. 50-6 ¶ 30; Dkt. 50-7 ¶ 30). Being denied the ability to use such facilities that are consistent with gender identity, or to insist that a transgender individual use a separate restroom, is a clear statement that the person is “different,” some undifferentiated “other.” (Dkt. 50-5 ¶ 25; Dkt. 50-6 ¶ 30; Dkt. 50-7 ¶ 30). This interferes with the person’s ability to consolidate his or her identity, thus undermining the social transition process. (Dkt. 50-5 ¶ 25; Dkt. 50-7 ¶ 30).

The injuries that this denial causes are both psychological and physical. From a psychological perspective, the denial of the use of restrooms consistent with gender identity is a source of anxiety, making it difficult for the person to concentrate in the

workplace or at school. (Dkt. 50-5 ¶ 26). Expelling transgender persons from spaces with peers can be deeply traumatic, particularly for adolescents, exacerbating the depression and isolation that many transgender persons experience. (*Id.*). The denial of usage of facilities consistent with gender identity is a constant micro-aggression that often leads to an outcome consistent with post-traumatic stress disorder, a problem that may persist despite appropriate therapy. (Dkt. 50-6 ¶ 31). Indeed

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

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

From a physical perspective, young people with gender dysphoria frequently cut down on their consumption of liquids to try to avoid having to go the bathroom for the entire day because of not being able to use the restrooms associated with their gender identity, which can cause physical discomfort as well as kidney and/or bladder problems. (Dkt. 50-6 ¶ 30; Dkt. 50-7 ¶ 31). Moreover, forcing transgender individuals to use restrooms and other spaces designated for their birth-assigned sex and inconsistent with their gender identity can lead to violence and harassment against the individual. (Dkt. 50-5 ¶ 28). Studies show that transgender persons have a greater risk of being assaulted than the general population. (Dkt. 50-7 ¶ 32). If a transgender male who has

been on hormones for any length of time enters a female restroom it will be perceived as a male entering the bathroom and this could easily lead to dangerous confrontations. (*Id.*).

J.A.W.

J.A.W. is a 17-year-old former student at EVSC who, although a senior in the 2018-2019 school year, completed his course of studies to obtain a diploma after the first semester of the school year. (Dkt. 17-1 ¶¶ 1-4; Dkt. 50-1 at 13 [l. 13-14]; Dkt. 50-2 at 7 [ll. 7-21]; Second Supplemental Declaration of J.A.W. attached to Plaintiff's Motion for Partial Summary Judgment as Exhibit 1 ["J.A.W. 2nd Supp. Dec."] ¶ 4).⁴ The gender assigned to him at birth, as noted on his birth certificate, is female. (Dkt. 17-1 ¶ 7). But, he has long identified himself as male and has presented himself to the world as male. (*Id.*). It was not until he was 11, after reading on the subject, that he learned what transgender was and he recognized that he was transgender. (Dkt. 50-1 at 95 [l. 2] – 96 [l. 11]).

His discomfort with his assigned gender became an issue in middle school as he felt uncomfortable using the female restroom and wanted to be more masculine. (*Id.* at 18 [l. 6] – 19 [l. 19]). He did not say anything about it until 8th grade when he and his mother raised, with a school social worker, his discomfort in the female locker rooms. (*Id.* at 19

⁴ Although J.A.W. has now completed his high-school education at EVSC, he has been told by EVSC administrators that he may return to march with his class during graduation in the spring of 2019 and he will therefore be returning for both graduation and graduation rehearsal even though he will already have his diploma. (J.A.W. 2nd Supp. Dec. ¶ 6). This will necessitate him being present on EVSC property for both graduation rehearsal and graduation itself. (*Id.* ¶ 7). He wishes to be able to continue to use the male restrooms when he returns to EVSC property. (*Id.* ¶ 8).

[l. 13] – 20 [l. 18]).⁵ At the same time, he began to inform EVSC employees that he wanted to be known as J.A.W., a boy's name, and not the female name on his birth certificate and began to dress as a boy and adopted a boy's haircut and requested that he be addressed with male pronouns. (*Id.* at 20 [l. 22] – 22 [l. 14]; 23 [ll. 4-13]). He has consistently presented himself to the world as male since that time. (Ex. 4 to Dkt. 50-1; Dkt. 51-2 [sealed]).

In 8th grade he was too intimidated to raise the bathroom issue. (Dkt. 50-1 at 23 [l. 25] -24 [l. 1]). However, when he was a freshman, as puberty hit and as his gender dysphoria became more pronounced, he felt extremely uncomfortable using female restrooms at school. (*Id.* at 25 [ll. 5-17]). He was not yet aware that he had gender dysphoria, but he was feeling an extreme amount of discomfort and was not sure what it was. (*Id.* at 34 [l. 5] – 36 [l. 1]). He was suffering the uneasiness, unhappiness, and discomfort of not wanting to be the gender that he was born with. (*Id.* at 111 [ll. 8-18]). During this year, without permission, he started using male restrooms to change for gym as he was not comfortable being in the female locker room, but he was summoned to the school's office and told by the dean that he could not do this. (*Id.* at 37 [l. 16] - 41 [l. 9]). Instead he and another transgender student were told they could change in an upstairs portion of the female locker room that was unlocked and open to other female students. (*Id.* at 41 [ll. 10-22]).

At this time J.A.W. identified himself as transgender and asked to use male facilities. (*Id.* at 110 [ll. 3-6]). But in his freshman year, instead of being allowed to use

⁵ His mother, who is his legal custodian, fully supports his efforts to gain access to the male restrooms within EVSC. (Dkt. 50-4 ¶¶2-3; Dkt. 17-1 ¶¶35-36).

male restrooms in school, he was offered the option of either using female restrooms or the restroom in the nurse's office. (*Id.* at 45 [l. 24] – 46 [l. 12]; Dkt. 17-1 ¶ 13). The nurse's restroom is a gender-neutral, single-person bathroom and is open to students who are visiting the school nurse or who are proximate to the office; otherwise use of the restroom must be approved by administrators in the school. (Dkt. 50-2 at 18 [l. 25] – 20 [l. 25]). Most students use the male and female restrooms that are proximate to where their classes are. (*Id.* at 21 [ll. 16-19]). These restrooms are designed for multiple users at the same time. (*Id.* at 9 [l. 19] – 10 [l. 8]). The nurse's restroom was far from J.A.W.'s classes, but he nevertheless tried using it a handful of times, in both his freshman and sophomore years, but it was always locked, so he stopped trying. (Dkt. 17-1 ¶ 14; Dkt. 50-1 at 46 [l. 10] – 48 [l. 7]).

When J.A.W. was a sophomore both he and his mother had conversations with the school's principal about the fact that J.A.W. was not comfortable using the female restrooms, but he was not allowed to use the male restrooms. (Dkt. 50-1 at 57 [l. 4] – 58 [l. 15]). Early in his sophomore year J.A.W. presented his principal with an annotated copy of the Obama Administration's "Dear Colleague" letter (since rescinded) that specified that the Administration interpreted Title IX to require that transgender students be allowed to use bathrooms consistent with their gender identities. (*Id.* at 57 [l. 14] – 58 [l. 3]; Ex. 9 to Dkt. 50-2; Dkt. 61 at 23 [ll. 15-17]). But, he was not allowed to use the male restrooms. (Dkt. 61 at 23 [ll. 18-22]). At no time prior to this litigation did EVSC request that J.A.W. produce evidence as to his transgender status or his diagnosis of gender dysphoria. (Dkt. 50-2 at 16 [l. 24] – 17 [l. 6]; Dkt. 61 at 20 [ll. 4-8]).

In November of 2016, J.A.W. sent an email to EVSC's Chief Diversity Officer, identifying himself as transgender and asking for EVSC's policy on transgender and bathroom/locker room access. (Ex. 11 at 2 to Dkt. 50-2). He was told that there was no policy and that students must use the nurse's office or individual or unisex bathrooms. (*Id.*). If there are gender neutral restrooms at a school, prior permission from staff must be obtained to use them. (Dkt. 50-2 at 24 [l. 8] - 25 [l. 7]).⁶

When J.A.W. was a sophomore he began counseling as he wanted confirmation that he had gender dysphoria and that he was not crazy. (Dkt. 50-1 at 60 [l. 9] - 63 [l. 6]). His counselor recognized that he identified as male and that he should receive testosterone if he wanted it. (*Id.* at 82 [ll. 1-9]). In June of 2017 the counselor wrote to J.A.W.'s medical doctor that J.A.W. fit the criteria for "Gender Dysphoria of Adolescence," noting that he would "benefit greatly both medically and psychologically from hormone therapy." (Ex. 4 to Dkt. 50-1; Dkt. 51-2 [sealed]). J.A.W.'s medical records demonstrate that he has gender dysphoria. (Ex. 5 to Dkt. 50-1 at 3 [noting an ICCD-10 diagnosis of F.64.0., which is gender dysphoria, *see* Dkt. 50-6 ¶¶ 22-23; Dkt. 50-7 ¶¶ 16-17]; Dkt. 51-3 at 3[sealed]).

J.A.W. has been receiving the male hormone testosterone since the fall of 2017.

⁶ As a junior, J.A.W. attended a program that was in two EVSC high schools, including the one where he had been offered the ability to use the nurse's restroom. (Dkt. 17-1 ¶¶ 4-5, 25). The Superintendent opined that the other high school might have a gender neutral restroom other than one in the nurse's office, although he was not sure. (Dkt. 50-2 at 24 [ll. 5-9]). J.A.W. is not aware of the existence of such a restroom and its use was never offered to him as an option. (Dkt. 50-3 ¶¶ 3-4; Dkt. 61 at 21 [ll. 3-5]). In any event, access to the restroom, if it exists, is obtained only through prior permission from staff at the school. (Dkt. 50-2 at 25 [ll. 4-7]).

(Dkt 17-1 ¶ 21; Dkt. 50-1 at 6 [ll. 8-9]; J.A.W. 2nd Supp. Dec. ¶ 3). He injects himself with the hormone once a week. (Dkt. 50-1 at 77 [ll. 10-14]). Since beginning the hormone therapy he has developed a patchy beard, his voice has deepened, he has lost weight, and his abdomen has developed more of a male pattern. (*Id.* at 109 [ll. 3-19]). He no longer menstruates. (*Id.* at 78 [l. 24] – 79 [l. 9]). He appears to be a young man. (Ex. 6 to Dkt. 50-1; Dkt. 51-4 [sealed]).⁷ He is addressed with a male name by his teachers. (Dkt. 50-1 at 100 [ll. 22-25]), and EVSC acknowledges that he is transgender, has gender dysphoria, and that he is receiving hormones. (Dkt. 50-2 at 15 [l. 20] – 16 [l. 16; 27 [l. 22-24]; Dkt. 61 at 36 [ll. 4-16]). J.A.W. has spoken to the School Board, identifying himself as a transgender EVSC student. (Dkt. 50-1 at 59 [ll. 4-24]).

In January of 2018, J.A.W., through his attorney, formally requested from EVSC's counsel that J.A.W. be allowed to use male restrooms and this request was refused in early February of 2018. (Exs. 1 and 8 to Dkt. 50-2). If J.A.W. used male restrooms he would be subject to discipline that could possibly include suspension. (Dkt. 50-2 at 26 [ll. 4-17]; Dkt. 61 at 37 [ll. 1-10]). The only bathroom accommodation that EVSC was willing to make for J.A.W. was to provide him with a unisex bathroom. (Dkt. 61 at 43 [ll. 10-14]).

There is no evidence that J.A.W.'s classmates do not accept him as male. (Dkt. 50-2 at 29 [ll. 19-22]). With this Court's preliminary injunction in place J.A.W. was able to use

⁷ As this Court stated in its preliminary injunction decision, "[a]t the hearing, he looked and sounded like a teenaged boy; he is very unlikely to be mistaken for a girl at this point." (Dkt. 61 at 15).

male restrooms within EVSC for the entirety of the fall semester in 2018. (J.A.W. 2nd Supp. Dec. ¶ 8). He used the male restrooms without incidents or problems. (*Id.* ¶ 9).

J.A.W. has been harmed because he was not allowed access to bathrooms consistent with his gender identity

As noted, the only accommodation that EVSC made was to offer J.A.W. the ability to use the nurse's restroom in one high school, although this bathroom was not physically proximate to his classes and was locked on the few occasions that he attempted to use it. (Dkt. 17-1 ¶ 14). When he was a junior he had classes in a second high school and, although EVSC asserted that he could have used the nurse's restroom there, this was never presented to him as an option. (Dkt. 50-2 at 24 [ll. 5-9]; Dkt. 50-3 ¶¶ 3-4; Dkt. 61 at 21 [ll. 3-5]).

In any event, the need for J.A.W. to engage in the social transitioning process requires that he present as a male and the refusal of EVSC to allow him to use the male restrooms forced him to deny who he is, making him feel different and segregated from his peers. (Dkt. 17-1 ¶ 34; Dkt. 50-1 at 112 [ll. 4-17]). It was therefore not acceptable to relegate J.A.W. to a single-use, unisex, bathroom as other students use the male restrooms the vast majority of the time and denying J.A.W. similar access fails to acknowledge that he is male. (Dkt. 50-1 at 84 [ll. 4-9]; Dkt. 50-2 at 21 [ll. 16-19]).

Thus, to avoid having to use the restrooms while at school, J.A.W. severely restricted his fluid intake. (Dk. 17-1 ¶ 26). This caused him pain and discomfort. (*Id.* ¶ 27).

On the few occasions, prior to the preliminary injunction, when J.A.W. could not wait until after school to use the bathroom, he used the female restrooms as he did not

want to be disciplined by EVSC. (*Id.* ¶ 28). This made him uncomfortable, causing anxiety, depression, and other emotional difficulties as he is not female – he is male and belongs in a male restroom. (*Id.*; Dkt. 50-1 at 84 [ll. 6-9]; Tr. at 19 [ll. 4-8]). Being denied access to male restrooms contradicts what he is attempting to project to the world as to his identity. (Dkt. 61 at 18 [l. 24] – 19 [l. 3]). It makes him feel ostracized from his peers. (*Id.* at 19 [ll. 6-8]). Moreover, it is also uncomfortable for females in the restroom as he is male in appearance. (Dkt. 50-1 at 86 [ll. 11-22]; Dkt. 61 at 21 [ll. 17-19]).

J.A.W. presents as male and he belongs in a male restroom. (Dkt. 50-1 at 84 [[ll. 24-25]). The failure to allow him to use male restrooms undermined his transition, and forced him to deny who he is and made him feel different, causing stress, depression and psychological harm. (Dkt. 17-1 ¶¶ 24-34). Not surprisingly, with this Court’s preliminary injunction and his use of the male restrooms he has been allowed to continue his social transition, alleviating this source of extreme anxiety and concern. (J.A.W. 2nd Supp. Dec. ¶ 10).

*EVSC policy concerning bathroom access by transgender students and its justification*⁸

Although it is clear that J.A.W. was barred from going to male restrooms by EVSC, the exact contours of the school system’s policy are not clear as EVSC has nothing in writing concerning bathroom usage. (Dkt. 50-2 at 32 [ll. 19-21]). At one point EVSC

⁸ As this Court has already found, “EVSC has no written policy regarding transgender students’ use of restrooms.” (Dkt. 61 at 6). Nevertheless, inasmuch as EVSC made the formal determination to prohibit J.A.W. from using the bathrooms consistent with his gender identity, the determination will be referred to as a “policy.” See *Whitaker*, 858 F.3d at 1039 n.2 (“We will refer to the School District’s decision to deny Ash access to the boys’ restroom as a ‘policy,’ although any such ‘policy’ is unwritten and its exact boundaries are unclear.”).

argued that its unwritten policy was that persons born anatomically male must use male restrooms and persons born anatomically female must use female restrooms. (Dkt. 50-2 at 26 [ll. 18-20]; 27 [ll. 8-12]; 28 [ll. 2-10]; 32 [ll. 6-12]; Dkt. 61 at 39 [ll. 7-8]). However, during the preliminary injunction hearing the Superintendent of EVSC articulated a slightly different policy – suggesting that EVSC would rely on the gender marker on a student’s birth certificate so that if a transgender person had a birth certificate legally changed to reflect the gender of the student’s gender identity, the practice of bathroom exclusion might not apply. (Dkt. 61 at 40 [l. 19] – 41 [l. 7]). This permutation of the bathroom exclusion practice was not mentioned by the Superintendent in his deposition and was never mentioned to J.A.W. (Dkt. 61 at 43 [l. 22] – 44 [l. 5]). Moreover, EVSC noted that if a transgender student attempted to use the bathroom of his or her gender identity without having undergone sex-reassignment surgery, the student could still be banned the bathroom if the school deemed it to be disruptive, even if the gender marker had been changed on the student’s birth certificate. (Dkt. 61 at 54 [ll. 5-25]).⁹ The exact contours of the policy is therefore unclear, and apparently shifting. However, the bottom line is that EVSC prohibited J.A.W. from using male restrooms, the restrooms consistent with his gender identity, because he was not considered by EVSC to be male, but was deemed to be female. (Dkt. 61 at 39 [ll. 7-17]). EVSC could not be clearer in its Superintendent’s testimony at the preliminary injunction hearing;

⁹ In any event, J.A.W. was born in Florida and it does not appear from Florida statute and regulations that he is able to obtain a change of gender marker on his birth certificate. (Dkt. 50-1 at 27 [ll. 14-16]; Fla. Stat. § 382.016; Fla. Admin. Code r. 64V-1.003).

Q. And that is – that is the motivation for the position of EVSC that J.A.W. cannot use the male restroom because biologically he’s a female?

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

(*Id.* at 39 [ll. 14-17). “[I]n other words, his biological sex is the determining factor.” (*Id.* at 39 [ll. 7-8])

EVSC’s asserted justification for preventing J.A.W. from using the restrooms consistent with his gender identity is that allowing a transgender person to do so would cause disruption and an unsafe environment, although the only example that the Superintendent could articulate during his deposition in June of 2018 was an incident occurring years ago, not involving a transgender student, when a school custodian was upset when a female walked in on him while he was using the restroom. (Dkt. 50-2 at 28 [l. 11] – 29 [l. 8]). At the preliminary injunction hearing in July of 2018, EVSC Superintendent Smith indicated that he had recently been contacted by an EVSC employee who had, in turn, been contacted by a mother of a student who was upset because a transgender man had been in the bathroom with her daughter, and she felt “scared, vulnerable and terrified.” (Dkt. 61 at 33[ll. 10-17]). It is not clear what this demonstrates as a “transgender man” is a person who was assigned the sex of female at birth, but who lives as a man. (Dkt. 50-5 ¶ 21). It is EVSC’s position that this person, like J.A.W., should be using the female restroom. The Superintendent offered no other examples of disruption caused by bathroom usage. (Dkt. 61 at 55 [ll. 1-18]). And, as previously noted, J.A.W. used the male restrooms within EVSC without incident for the entirety of the 2018 fall semester. (J.A.W. 2nd Supp. Dec. ¶ 9).

The experience of other jurisdictions and school system regarding bathroom access for transgender students

Numerous other jurisdictions and school systems allow transgender students to access bathrooms consistent with their gender identities. For example, Indianapolis Public Schools has adopted a policy prohibiting discrimination on the ground of sex, which includes sexual orientation or gender identity. (Dkt. 50-9 ¶ 6; Ex. 1 to Dkt. 50-9 at 1). Consistent with this policy, the school district has an administrative guideline that allows for transgender students to generally use the restrooms and locker rooms associated with their gender identities. (Dkt. 50-9 ¶ 7; Ex. 2 to Dkt. 50-9 ¶ 5). This guideline has apparently not caused disruption or incidents. (Dkt. 50-9 ¶ 8).

The Kokomo School Corporation allowed a transgender male student to use male restrooms, the restroom associated with his gender identity, for his junior and senior years, prior to his graduation in the Spring of 2018. (Dkt. 50-10 ¶¶ 4-6). To the best of the student's knowledge, his use of the restrooms did not cause disruptions or problems with his fellow students. (*Id.* ¶ 7).

Numerous Indiana school corporations have policies that prohibit discrimination because of gender identity and/or transgender status, including Avon Community School Corporation, Bartholomew Consolidated School Corporation, Brownsburg Community School Corporation, Carmel Clay School Corporation, Elkhart Community Schools, Fort Wayne Community Schools, Gary Community School Corporation, Hamilton Heights School Corporation, Metropolitan School District of Lawrence

Township, Metropolitan School District of Warren Township, Perry Township Schools, and the South Bend Community School Corporation. (Dkt. 54-2).

The Los Angeles Unified School District, the second largest school district in the country, adopted a policy in 2011 requiring that transgender students have full access to use facilities, including restrooms and locker rooms, that match their gender identities. (Dkt. 50-8 ¶¶ 9-13; Ex. B to Dkt. 50-8 at 5-6). This mandatory policy was a continuation of a formal policy that had begun in 2005 that “strongly recommended” that transgender students be given access to facilities corresponding to their gender identities. (Dkt. 50-8 ¶ 9). Since 2013 California law has required that all students must be allowed to use facilities that match their gender identities. (*Id.* ¶ 18). During the 14 years that the policies have been in force in the Los Angeles Unified School District there have been no problems with their implementation and there have been no instances of disruption. (*Id.* ¶¶ 12, 15). Although people – primarily adults – have raised fears, they been proven unfounded. (*Id.* ¶ 15). The Program Coordinator for the Los Angeles Unified School District’s Office of Human Relations, Diversity and Equity has been frequently consulted by other school districts and she is not aware of any examples of inappropriate behaviors by transgender students who were permitted to use the facilities corresponding with their gender identities. (*Id.* ¶¶ 1, 18).

California is not alone in requiring that all schools allow transgender students to use bathrooms consistent with their gender identities. Similar requirements exist in Colorado, Connecticut, the District of Columbia, New Jersey, and Washington. (Dkt. 54-1). And, in other jurisdictions, including Hawaii, Iowa, Maine, Maryland, Massachusetts,

Michigan, Minnesota, New York, Rhode Island, and Vermont, state departments of education or other state offices recommend that local schools allow transgender students to utilize the restrooms consistent with their gender identities. (*Id.*). Similar policies or recommendations are present in many cities' school system, including Boston, Chicago, Milwaukee, Minneapolis, and New York City, for example. (*Id.*).

The receipt of federal funding by EVSC

EVSC receives federal funding and is therefore subject to Title IX. (Dkt. 1 ¶ 37 as admitted by Dkt. 34 ¶ 37; Dkt. 61 at 32 [ll. 6-9] [admission of EVSC's counsel]; Dkt. 61 at 32 [l. 16] [referring to "Title IX audit"]).

Argument

- I. The failure to allow J.A.W. to use the restrooms consistent with his gender identity represents intentional discrimination under Title IX rendering EVSC liable for his damages caused by the statutory violation**
 - A. Title IX prohibits sex-based discrimination and an entity engaging in intentional discrimination is liable for damages**

Title IX provides that no person "shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A covered institution may not, among other things:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions or other treatment.

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(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b)(1)-(4), (7). Regulations provide that a recipient of federal funding “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of another sex.” 34 C.F.R. § 106.33.

The Supreme Court has held that Title IX creates a private right of action for private parties to seek remedies for intentional violations of the statute, including damages. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (allowing a damages action under Title IX, and noting that “[m]ore than 25 years ago . . . we held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination.” [citing *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 (1979)]). Intentional discrimination is present, among other circumstances, where a funded entity has an official policy of discrimination. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (“in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond”); *Pederson v.*

La. State Univ., 213 F.3d 858, 880 (5th Cir. 2000) (“[i]f an institution makes a decision not to provide equal athletic opportunities for its female students because of paternalism and stereotypical assumptions about their interests and abilities, that institution intended to treat women differently because of their sex”).¹⁰

B. EVSC’s refusal to allow J.A.W. to use male restrooms because it did not consider him to be male violated Title IX and J.A.W. is entitled to his damages to be proven at trial

In *Whitaker* a transgender student, who was identified as female on his birth certificate, but who identified as male and was diagnosed with gender dysphoria, sued when his high school refused to allow him to use the male restrooms. 858 F.3d at 1040-41. The school, like EVSC, had indicated that the student (“Ash”)

could only use the girls’ restrooms or a gender-neutral restroom that was in the school’s main office, which was quite a distance from his classrooms. Because Ash had publicly transitioned, he believed that using the girls’ restrooms would undermine his transition. Additionally, since Ash was the only student who was permitted to use the gender-neutral bathroom in the school’s office, he feared that using it would draw further attention to his transition and status as a transgender student.

Id. at 1041.

In concluding that the plaintiff in *Whitaker* had demonstrated a probability of success on his Title IX claim the court looked first at the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality), where a four-judge plurality held

¹⁰ Intentional discrimination can also be found where, even without a policy, a school is deliberately indifferent to ongoing individual discriminatory actions. *Davis Next Friend LaShonda D. v. Monroe Co. Bd. of Ed.*, 526 U.S. 629, 645-46 (1999). This is not relevant here as J.A.W. was discriminated against by EVSC’s policy of not allowing him to use the male restrooms because it considered him to be anatomically a female.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibiting, among other things, sex discrimination in employment, was “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotype.” 490 U.S. at 251. (internal quotations and citations omitted). Therefore, the Seventh Circuit noted that “[f]ollowing *Price Waterhouse*, this court and others have recognized a cause of action under Title VII when an adverse action is taken because of an employee’s failure to conform to sex stereotypes.” *Whitaker*, 858 F.3d at 1048 (citing cases). “Our most recent application occurred when, sitting *en banc*, we held that a homosexual plaintiff can state a Title VII claim of sex discrimination based upon a theory of sex-stereotyping.” *Id.* at 1048 (citing *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017) (*en banc*)).

Having set out the applicable law as to Title VII, the court in *Whitaker* noted that “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker*, 858 F.3d at 1048. The court stated that it “look[s] to Title VII when construing Title IX,” *id.* at 1047, and that a “transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping theory,” *id.* at 1049. The court proceeded to apply this rationale to Title IX, concluding in language directly applicable here that:

A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District’s policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the

Act. Further, based on the record here, these gender-neutral alternatives were not true alternatives because of their distant location to Ash's classrooms and the increased stigmatization they caused Ash. Rather, the School District only continued to treat Ash differently when it provided him with access to these gender-neutral bathrooms because he was the only student given access.

Id. at 1049-50. In granting J.A.W.'s preliminary injunction request this Court recognized that while "there likely is a line to be drawn with regard to when Title IX requires a school to permit a transgender student to use the restrooms that coincide with his gender identity,[] in this case EVSC has drawn that line in a place the Seventh Circuit has already indicated is likely unacceptable." (Dkt. 61 at 9). EVSC's insistence that J.A.W. prove that he is male in order to use the male restrooms means that this "case is indistinguishable from *Whitaker*." (*Id.*). He is subject to EVSC's policy requiring him to use a bathroom that is not consistent with his gender identity, thus punishing him for his perceived gender non-conformance, in violation of Title IX. *Whitaker*, 858 F.3d at 1049.¹¹

¹¹ As indicated, EVSC attempted to argue at the preliminary injunction hearing that it had a policy of allowing bathroom access based on the gender marker on a student's birth certificate. However, it quickly backed away from this assertion by asserting the right to ban a student who had changed his or her gender marker without sex-reassignment surgery from the bathroom consistent with the new gender marker. In any event, the court in *Whitaker* rejected the significance of the gender designation on a birth certificate.

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

Whitaker, 858 F.3d at 1053.

Although having a Seventh Circuit case on all fours with the case at bar is certainly all that is necessary for concluding that Title IX has been violated here, it bears repeating that numerous other courts have recognized that failing to allow transgender students to utilize the restrooms that are consistent with their gender identities is problematic under Title IX. *See, e.g., Grimm v. Gloucester Co. Sch. Bd*, 302 F. Supp. 3d 730 (E.D. Va. 2018) (denying a motion to dismiss and concluding that transgender student's claims that he was denied access to the restroom consistent with his gender identity validly presented claims under both Title IX and equal protection); *M.A.B. v. Bd. of Ed. of Talbot Co.*, 286 F. Supp. 3d 704 (D. Md. 2018) (claims that transgender student not able to use locker room consistent with his gender identity presented a valid claim of discrimination under Title IX and equal protection, and motion to dismiss was denied); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. 2017) (finding that a transgender student's claim that school policy preventing her from using the bathroom associated with her gender identity presented a valid claim under Title IX and equal protection, and motion to dismiss was denied). *See also Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Ore. 2018), *appeal pending*, No. 18-35708 (9th Cir. 2018) (in action challenging a high school's policy allowing transgender students to use restrooms, locker rooms, and showers matching their gender identities the court concluded that "[a] court order directing the District to require students to use only facilities that match their biological sex or to use gender-neutral alternative facilities would violate Title IX").

The evidence is undisputed that EVSC had an official policy that banned J.A.W. from the bathrooms that were consistent with his gender identity that was predicated on

treating him differently because of gender non-conformance and that treated him differently than non-transgender students. This policy renders EVSC liable for damages under Title IX *See, e.g., Doe 12 v. Baylor Univ.*, 336 F. Supp. 3d 763, 774 (W.D. Tex. 2018) (“The first avenue for claims under Title IX is based on an institution’s official policy of ‘intentional discrimination.’”). Again, *Whitaker* could not be clearer. “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” 858 F.3d at 1049. EVSC’s policy violated J.A.W.’s rights under Title IX and he is entitled to his damages as demonstrated at trial.¹²

II. Refusing to allow J.A.W. to utilize the male restrooms represents intentional discrimination in violation of equal protection

In *Whitaker*, in examining the intentional action of the school system that denied the plaintiff access to restrooms that matched his gender identity, the court chose not to answer the question of whether discrimination against “transgender status is per se

¹² As specified previously, although J.A.W. has completed his studies, entitling him to a high school diploma, he has been invited by EVSC to participate in graduation ceremonies with his class in the Spring, necessitating a return to school for both graduation and the graduation ceremony. Given that Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination” by EVSC, 20 U.S.C. § 1681(a), and given that J.A.W. is in need of access to male restrooms when he returns to participate in graduation ceremonies, his request for a permanent injunction remains live until the Spring of 2019. However, he acknowledges that given the probable briefing schedule of this motion and EVSC’s responsive filings, it is unlikely that a summary judgment decision will issue until after the graduation and certainly the trial of this case will be after the ceremony. Consequently, the relief focused on in this motion is damages, not an injunction as his injunctive claim will be moot after the graduation ceremony.

entitled to heightened scrutiny” under equal protection, 858 F.3d 1034.¹³ Instead, the court concluded that the plaintiff was discriminated against because of his sex in that

¹³ Given the Seventh Circuit’s decision there is also no need to explore whether the discrimination against J.A.W. should be subject to heightened scrutiny because it represents discrimination against transgender status. However, J.A.W. reserves the right to make that argument at a later time if necessary as transgender persons certainly meet the criteria for being a suspect, or at least a quasi-suspect class. As the court noted in *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 2d 267 (W.D. Pa. 2017), in finding that a school policy that prohibited transgender students from using the bathrooms that were consistent with their gender identities violated equal protection:

The Supreme Court uses the following four factors to determine whether a “new” classification requires heightened scrutiny: (1) whether the class has been historically “subjected to discrimination,” *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986); (2) whether the class has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society,” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); (3) whether the class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” *Lyng*, 477 U.S. at 638, 106 S.Ct. 2727; and (4) whether the class is “a minority or politically powerless.” *Id.*

Against that backdrop, the Court concludes that an intermediate standard of Equal Protection review applies in this case. The record before the Court reflects that transgender people as a class have historically been subject to discrimination or differentiation; that they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; that as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and that as a class, they are a minority with relatively little political power. ECF 23–12; see *Adkins v. City of New York*, 143 F.Supp.3d 134, 138–41 (S.D.N.Y. 2015). Indeed, the documentary record advanced by the Plaintiffs, and not contested by the District, reveals that, as a class of people, transgender individuals make up a small (according to all parties, less than 1%) proportion of the American population. *Highland*, 208 F.Supp.3d at 874, 2016 WL 5372349, at *16. As to these Plaintiffs, their transgender characteristics are inherent in who they are as people, which is not factually contested by the District. As to these Plaintiffs, and more generally as to transgender individuals as a class, that characteristic bears no relationship to their ability to contribute to our society. More precisely, the record reveals that the Plaintiffs are in all respects productive, engaged, contributing members of the student body at the High School. Thus, all of the indicia for the application of the heightened intermediate scrutiny standard are present here. See *Carcano*, 203 F.Supp.3d at 640, 2016 WL 4508192, at *17; *Highland*, 208 F.Supp.3d at 874, 2016 WL 5372349, at *16–17.

“the School District’s policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate. This policy is inherently based upon a sex-classification and heightened review applies.” *Id.* at 1051. The Seventh Circuit is certainly not unique in concluding that discrimination against transgender persons is sex discrimination. *See, e.g., Glenn v. Bumbry*, 663 F.3d 1312, 1316 (6th Cir. 2011) (“the question here is whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause. For the reasons discussed below, we hold that it does.”); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (in a Title VII action brought by an employee born male but diagnosed with gender identity disorder the court held that “[h]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex-stereotyping and gender discrimination”); *Doe v. Mass. Dep’t of Corr.*, No. 17-122455-RGS, 2018 WL 2994403, *9 (D. Mass. June 14, 2018) (“The trend in recent cases is to apply heightened scrutiny to classifications based on transgender status.” [citing cases]).

As the Seventh Circuit noted in *Whitaker*,

[t]he rational basis test, however, does not apply when a classification is based upon sex. Rather, a sex-based classification is subject to heightened scrutiny. . . . When a sex-based classification is used, the burden rests with

Id. at 288. Other courts have similarly concluded that discrimination against persons because of their status as transgender requires elevated scrutiny under equal protection. *See, e.g., Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 873-74 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015).

the state to demonstrate that its proffered justification is “exceedingly persuasive.” . . . This requires the state to show that the ‘classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’ . . . It is not sufficient to provide a hypothesized or *post hoc* justification created in response to litigation. . . . Nor may the justification be based upon overbroad generalizations about sex. . . . Instead, the justification must be genuine.

858 F.3d at 1050 (internal citations omitted).

In this case EVSC sought to justify banning J.A.W. from male restrooms because of fear of disruption and safety concerns. But, as this Court noted in granting the preliminary injunction, EVSC has presented no evidence that allowing J.A.W. to use male restrooms would be disruptive in any way. (Dkt. 61 at 21-22).¹⁴ And, as far as safety is concerned, this Court noted that the safety concerns go the other way as “J.A.W. testified that now that his outward appearance is masculine, there are safety issues associates with using the girls’ restrooms at school.” (*Id.* at 12). Given that J.A.W. is male in appearance it is disruptive for him to use female restrooms and, not surprisingly, female students

¹⁴ Moreover, this Court noted that EVSC’s assertion at the preliminary injunction hearing that it would abide by the gender marker on a student’s birth certificate ran directly counter to its unproven allegations of disruption:

In any event, the practice identified by EVSC—determining which restroom a student may use based upon the student’s birth certificate—is inconsistent with the articulated reason for the policy. As Dr. Smith conceded that the hearing, whatever hypothetical disruption that might occur if J.A.W. were to use the boys’ restroom as school would not be caused by what J.A.W.’s birth certificate says; it is unlikely that those causing the disruption would be aware of the content of his birth certificate or that their opinion that J.A.W. should not be using the boys’ restrooms would change simply because a different box was checked on that document.

(Dkt. 61 at 12).

have expressed discomfort with his use of the female restrooms. (Dkt. 61 at 21 [ll. 11-19]). As this Court has already concluded, “there is certainly no evidence that J.A.W. poses any threat to any other student.” (Dkt. 61 at 16).¹⁵

In *Whitaker* the court found that the school’s argument against the plaintiff’s usage of male restrooms was based “upon sheer conjecture and abstraction,” in part because he had used the male restrooms for nearly six months “without incident or complaint from another student.” 858 F.3d at 1052. Similarly, here J.A.W. used the male restrooms without incident for the entirety of the Fall semester in 2018. (J.A.W. 2nd Supp. Dec. ¶¶ 8-9). This is not surprising. As previously noted, in the 14 years that transgender students have been allowed to access restrooms consistent with their gender identities in schools

¹⁵ In its preliminary injunction determination this Court noted that EVSC had, in its proposed findings, mentioned a concern about protecting privacy, although this was not previously mentioned in the case. (Dkt. 61 at 16-17). In dismissing this as a valid concern this Court concluded that not only was this not supported by any evidence, but the argument was foreclosed by *Whitaker*. (*Id.*). In *Whitaker* the court noted that the policy prohibiting the plaintiff from using male restrooms

does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door.

A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.

Whitaker, 858 F.3d at 1052.

within the Los Angeles Unified School District, the country's second-largest school system, there has been no evidence of disruption. (Dkt. 50-8 ¶¶ 11, 15).

In its preliminary injunction decision this Court concluded that “[t]he record before the Court does not support a finding that either student safety or the need to prevent ‘disruption’ is an exceedingly persuasive justification for EVSC’s transgender restroom policy.” (Dkt. 61 at 12). There is no more evidence now to support EVSC’s arguments. Its conjectures fall far short of the “exceedingly persuasive” evidence that is necessary. *Whitaker*, 858 F.3d at 1050. EVSC’s policy violated J.A.W.’s equal protection rights.

Moreover, even if low-level “rational basis” scrutiny applied here, equal protection would nevertheless be offended. After all, even under rational basis review, “courts examine, and sometimes reject, the rationale offered by the government for the challenged discrimination.” *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (citing *Village of Willowbrook v. Olech*, 523 U.S. 562 (2000) (per curiam)). See, e.g., *Romer v. Evans*, 517 U.S. 620, 626-35 (1996) (invalidating state constitutional amendment prohibiting governmental action to protect homosexual persons from discrimination because no rational basis supported the imposition of the special disability against one class of persons); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985) (invalidating zoning ordinance that excluded a group home for persons with intellectual disabilities because there was no rational basis to believe that the group home would pose any special threat to the city’s legitimate interests); *Plyler v. Doe*, 457 U.S. 202, 223-30 (1982) (invalidating statute withholding state educational funding for undocumented

children because it is not rational to impute a parent's misdeeds to his or her child); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533-38 (1973) (invalidating a statute denying food stamp benefits to households with unrelated persons because, *inter alia*, it was not rationally related to the ostensible purpose of preventing fraud).

Here, there simply was no reason whatsoever for EVSC to predict that J.A.W.'s usage of male restrooms would be problematic in any way. EVSC is predicating its entire argument on the fanciful theory that allowing a student who is male in appearance to use the male restrooms would cause problems. Not only is there no empirical justification for the theory, but it flies in the face of common sense. Admittedly, under rational basis review a classification is not unconstitutional merely because it "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (internal quotation marks and citation omitted). On the other hand, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993). The ban on J.A.W. utilizing the bathrooms associated with his gender identity lacks this necessary footing and is unconstitutional, even under the most deferential equal protection scrutiny.

Conclusion

There are no contested issues of material fact here. EVSC has engaged in intentional discrimination against J.A.W. in violation of both Title IX and equal protection. Partial summary judgment should be entered against EVSC finding that it is

liable for J.A.W.'s damages. The matter should then be set for trial to determine the amount of his damages.

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