UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.C., a minor child, by his next friend, mother and legal guardian, M.C.,	)	
Plaintiffs,	)	
v.	)	No. 1:21-cv-02965-TWP-MPB
METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE, *et al.*,	)	
Defendants.	)	

Memorandum in Support of Motion for Preliminary Injunction

Introduction

A.C. is a transgender boy who attends John R. Wooden Middle School, one of the schools within the Metropolitan School District of Martinsville. Designated female at birth, A.C. is transgender and has long identified and presented as male. He is known by family and friends by his male first name and is addressed by male pronouns. He has been diagnosed with gender dysphoria and is under the care of medical professionals at the Gender Health Clinic at Riley Hospital.

A.C. and his mother requested that he be allowed to use the boys' restrooms at the school and that the school require that he be addressed by his male first name and with male pronouns. A.C. has also requested that he be allowed to participate on the boys' soccer team in the fall of 2022. The school is aware that A.C. is transgender and the fact

that the inability to use the boys' restrooms and failing to refer to him by his male name and with male pronouns is causing him significant distress and harm. Nevertheless, the defendants ("Martinsville") are refusing to allow him to use the boys' restrooms and are refusing to require staff to refer to A.C. by his male name and by using male pronouns.[1]

This refusal is surprising given that: (1) the Seventh Circuit, in a similar case, affirmed a preliminary injunction holding that a transgender student was likely to prevail on his claim that denying him the ability to use bathrooms associated with his gender identity violated both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for certiorari dismissed*, *abrogation in nonrelevant part by Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020);[2] (2) this Court, again in a similar case, held that denying a transgender male high school student the ability to use male restrooms warranted summary judgment for the student, concluding that the school corporation had violated both Title IX and equal protection,

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[1] Martinsville is also refusing to allow A.C. to participate on the boys' soccer team in the fall of 2022. However, A.C. is not currently seeking a preliminary injunction on this issue and it will therefore not be addressed in this memorandum.

[2] To the extent that *Whitaker* stated that a preliminary injunction could be granted by the plaintiff demonstrating a "better than negligible" chance of success on the merits, 858 F.3d at 1046, its abrogation was recognized in *Pritzker*, 973 F.3d at 763. However, this does not affect the Seventh Circuit's clear holdings in *Whitaker* concerning both Title IX and equal protection as set out below.

J.A.W. v. Evansville Vanderburgh School Corp., 396 F. Supp. 3d 833 (S.D. Ind. 2019); and (3) the United States Supreme Court, subsequent to the above two cases, held that discriminating against transgender persons is, as both this Court and the Seventh Circuit had already concluded, unlawful sex discrimination, *Bostock v. Clayton Co., Ga.*, --U.S.--, 140 S. Ct. 1731 (2020).

The law is therefore clear that Martinsville is engaging in unlawful discrimination against A.C. in violation of both Title IX and equal protection. Because the other requirements for the grant of a preliminary injunction are also met, one should issue allowing A.C. to use male restrooms in his school and requiring that he be referred to by his male name and with male pronouns.

Facts

Background as to gender identity, transgender persons, and gender dysphoria

The term "gender identity" is a well-established medical concept that refers to one's sense of belonging to a particular gender. (Declaration of James D. Fortenberry ["Fortenberry"] ECF No. 29-1 at ¶ 13).[3] For many people gender identity is established

[3] Dr Fortenberry is a Professor of Pediatrics at Indiana University School of Medicine and past president of the International Academy for Sex Research. (Fortenberry ¶¶ 2-4). He helped found the Gender Health Program at Riley Children's Health, which offers comprehensive medical, psychological, and social services support to children, teens, and young adults who have been diagnosed with gender dysphoria, and he personally provides or supervises each month the medical care of 40 or more children, adolescents, and young persons with gender dysphoria. (*Id.* ¶¶ 5-7). He supervises A.C.'s medical care and reviewed his medical records. (*Id.* ¶ 7-9).

early in life and is congruent with one's anatomical features, one's anatomical features, such that persons born with a penis and testes are classified as male at birth and typically later identify as male, and persons born with a vagina, uterus, and ovaries are classified as female at birth and typically later identify as female. (Fortenberry ¶¶ 13-14).

However, persons who are transgender have a much different experience of gender. (Fortenberry ¶ 14).[4] Transgender individuals have a gender identity that differs from the sex assigned at birth, and this can give rise to a conflict between the person's assigned-at-birth gender and the person's gender identity, which can cause significant distress and may result in a gender dysphoria diagnosis. (Fortenberry ¶¶ 15, 18, 21). Up to 0.6% of persons in Indiana identify as transgender, although recent research from the Centers for Disease Control and Prevention shows that up to 1.9% of high school students identify as transgender. (Fortenberry ¶ 16).

The conflict between a person's sex at birth and their gender identity, may arise at a very young age, although it often intensifies at puberty. (Fortenberry ¶ 14). This conflict creates a sense of distress that can present through various symptoms and can, if

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[4] Dr. Fortenberry notes that this statement is also true of persons who are nonbinary, those who do not have an established identity as "male" or "female." (Fortenberry ¶¶ 14-15). Inasmuch as this case concerns a transgender male student, this general overview of gender dysphoria will focus on binary transgender persons.

untreated, result in clinically significant anxiety and depression, self-harming behaviors, substance abuse, and suicidality. (Fortenberry ¶ 18). Research consistently demonstrates that the rates of attempted suicide for transgender and nonbinary adolescents are markedly greater than adolescents without gender dysphoria. (*Id.* ¶ 19). Up to 40% of those who identify as transgender have attempted suicide at some time. (*Id.)*

Gender dysphoria is a recognized condition codified in the American Psychiatric Association's Diagnostic and Statistical Manual, 5th edition ("DSM-V"), a standard classification of mental and physical disorders.[5] DSM-V, 302.85 sets out the following criteria for gender dysphoria among adolescents and adults.

> 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.

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[5] The condition, albeit by different names, is also recognized both by the World Health Organization's International Classification of Diseases ("ICD") 10th and 11th editions. (Fortenberry ¶¶ 20, 22). The term "gender dysphoria" and the DSM-V classification is used in the United States and is used in this memorandum. (Fortenberry ¶ 23).

4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

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

(Fortenberry ¶ 21).

The treatment of gender dysphoria

The standards 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, and the American Psychiatric Association. (Fortenberry ¶ 24). The WPATH Standards of Care recognize that the principal treatment of gender dysphoria is to allow the young person the full expression of their gender identity. (Fortenberry ¶ 27). Treatment focuses on alleviating distress through supporting outward expression of the person's gender identity – which is social role transition. This involves allowing young people to express their gender through names and pronouns and social behaviors consistent with their

gender identity. (Fortenberry ¶¶ 27-28). It may also involve bringing the person's body into alignment with the person's gender identity, to the extent deemed medically appropriate. (Fortenberry ¶ 29). Counseling is often an important part of treatment because its purpose is to assist the person with the depression, anxiety and suicidality that may flow from gender dysphoria and being transgender and not being accepted by family, friends, and society. (Fortenberry ¶ 32).

The importance of bathroom access and other aspects of social role transition

The WPATH Standards of Care recognize that allowing for social role transition, which allows the person to express themselves in a way that is consistent with their gender identity, is essential to ameliorate gender dysphoria. (Fortenberry ¶ 34). Research shows that support for social role transition, particularly from family and social institutions such as schools, at least partially lessens the negative consequences of gender dysphoria. (Fortenberry ¶ 35). The more that the person can immerse themselves in their gender identity, the better it is for the person's treatment. (*Id.*).

An obvious aspect of social role transition is the use of the person's name and pronouns that reflect his or her gender identity, as opposed to using the person's birth name or "dead name" or using pronouns that do not reflect the person's gender identity. (Fortenberry ¶ 35). Transgender persons frequently report deadnaming and misgendering as distressing experiences in schools that lead to more negative school experiences and greater levels of depression and anxiety. (Fortenberry ¶ 36).

The importance of using restrooms that match the person's gender identity cannot be underestimated, as it is a prime component of gender affirmation. (Fortenberry ¶ 31). Being forced to use restrooms that differ from the person's identity is a constant reminder that they are "different" and is a constant source of anxiety and distress. (*Id.* ¶ 37). This undercuts the purpose and goal of social role transition and can increase the deleterious consequences of gender dysphoria, including self-harming behavior. (*Id.*). Recent research demonstrates that among transgender and nonbinary students denied access to bathrooms consistent with their gender identities, 85% reported depression, 60% had serious thoughts of suicide, and about 33% reported that they had attempted suicide in the last year. (*Id.*). Transgender students denied access to restrooms consistent with their gender identities will restrict their liquids and suppress their bodily functions to avoid using the restroom at all while they are in school. (Fortenberry ¶ 38). This can cause physical discomfort and injury. (*Id.)*

Reserving a "special" bathroom or locker room solely for a transgender student, when there are sex-specific restrooms for other students, does not resolve the problems caused by barring the transgender student from the facilities that are consistent with their gender identity. (Fortenberry ¶ 39). This just continues the message that the transgender student is different than the student's peers and should be segregated from them. (*Id.*). This undercuts the purpose of social role transition and contributes to feelings of isolation and low self-esteem that are common among transgender persons. (*Id.*). These

experiences of shame and discrimination have negative long-term consequences, creating a greater risk for posttraumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality when the student becomes an adult. (*Id.* ¶ 40). Research demonstrates that school is the most traumatic aspect of growing up for transgender youth and the daily stigmatizing events experienced by transgender students lead to increased absenteeism and academic difficulties. (*Id.* ¶ 36).

A.C.

A.C. is a 13-year-old boy who lives with his mother, M.C., and family in Martinsville. (Declaration of M.C. ["M.C."] ECF No. 29-2 at 2 ¶¶ 1-2). He is a seventh grader at John R. Wooden Middle School in the Metropolitan School District of Martinsville. (*Id.* ¶ 3). The Metropolitan School District of Martinsville receives federal funding. (ECF No. 28 ¶ 55).

A.C. is transgender. (Fortenberry ¶ 42; Declaration of A.C. ["A.C."], ECF No. 29- 3 at ¶ 4.). He was designated female at birth but realized he was a boy when he was around 8 years old. (A.C. ¶ 4.) When he was around 9 years old, he told his mother, M.C., that he wasn't a girl and didn't want to be referred to with female pronouns and wanted to be called a boy's name. (*Id.* ¶ 5; M.C. ¶ 5). From then on, A.C. was called by his male name and with he or they pronouns (M.C. ¶ 6; A.C. ¶ 8). Around this time A.C. began presenting himself as a boy with masculine clothing and a masculine haircut. (A.C. ¶ 7). As people began treating A.C. like a boy, he became more sure of his male identity and

asked to only be referred to with male pronouns. (A.C. ¶ 6). A.C.'s appearance has remained masculine, and he has continued to use his boy's name and male pronouns in daily life. (A.C. ¶¶ 6-8; M.C. ¶¶ 6-8). Around this time M.C. contacted A.C.'s grade school and asked that teachers refer to him by his male name and with male pronouns. (M.C. ¶ 7).

Once A.C. was treated as a boy, there were immediate improvements in his mental health. Being treated as a boy allows A.C. to simply exist in the world and not have to think about his gender. (M.C. ¶ 10; A.C. ¶ 8). Having people accept him for who he is lowers his depression and anxiety, makes him happier and helps him blossom. (M.C. ¶ 10; A.C. ¶ 8).

When A.C. was in the fifth grade at Bell Intermediate School, one of the schools within the Martinsville Metropolitan School District ("MSD"), M.C. told school personnel that A.C. is transgender and asked that he be referred to by his male name and with male pronouns. (M.C. ¶ 16). Before beginning middle school at John R. Wooden, M.C. and A.C. met A.C.'s teachers individually and explained that he is transgender and should be referred to by his preferred name and with he/him pronouns. (M.C. ¶ 17; A.C. ¶ 12). Within weeks of the school year starting, chronic misgendering by teachers and the use of his old name by substitutes led his mother and stepfather to renew their request that MSD tell teachers to use A.C.'s correct name and pronouns. (M.C. ¶ 18; Deposition of Fred Kutruff ["Kutruff"], ECF No. 29-4 at 38:13-18; 58:23-25). And despite constant

correction from A.C. and complaints from his mother and stepfather, almost no staff use his correct pronouns and instead refer to him as a girl by using she or her pronouns. (A.C. ¶ 13).

While most of his regular teachers acquiesced to his name request, substitutes do not because Martinsville has not updated his name on class rosters. (A.C. ¶ 16). Although the database maintained by Martinsville states that A.C. "goes by" his male name, it continues to list his female name and his gender as female. (ECF No. 29-4 at 86-88). When A.C. is referred to by his "dead name," he must decide if he is going to out himself as transgender and share very personal information with adults he does not know, or be misgendered, which makes it difficult for him to remain in class. (A.C. ¶¶ 13, 18). This is extremely upsetting and causes A.C. to be anxious, depressed and angry. (A.C. ¶¶ 13-17). In December 2021, he had to leave class because a substitute teacher used his wrong name and pronouns. (A.C. ¶ 15). When Kari Mann, a school counselor, found A.C. upset over this incident, she asked him if he "felt like a real boy," which made A.C. feel even worse. (A.C. ¶ 15; M.C. ¶ 31).

At the beginning of the school year, A.C. used the school's single-sex clinic restroom. (A.C. ¶ 20). A.C.'s use of this restroom proved problematic because it singles him out and is far from most of his classes. (A.C. ¶ 22). Using the clinic restroom during passing periods has made him late to class, causing him to be marked tardy and potentially subjecting him to discipline. (A.C. ¶ 21). Because he cannot use the boys'

restroom, A.C. tries not to use the restroom during school, which puts him at risk of developing urinary tract infections. (A.C. ¶ 22; M.C. ¶ 30). Because of how harmful not using the boys' restroom was, around September, A.C.'s stepfather called the school to request that A.C. be allowed to use the boys' restroom and was told that A.C. could only use the clinic restroom. (M.C. ¶ 19; Kutruff 38:22-39:7).

Frustrated that the school was not requiring staff to use A.C.'s pronouns, update the roster, or let him use the boys' restroom, M.C. asked GenderNexus, an advocacy organization for transgender people and their families, for help advocating with Martinsville. (M.C. ¶ 21). After a representative of GenderNexus provided the school with information about A.C.'s rights as a transgender student, they requested a meeting with school personnel to discuss issues A.C. was having at school. (ECF No. 29-4 at 89-90). On November 3, 2021, M.C., A.C., and representatives from GenderNexus met with school counselor Doug Reynolds, Ms. Mann, and an intern about A.C.'s need to be called the correct name and pronouns and to use the boys' restroom. (M.C. ¶ 21). Mr. Reynolds said he would ask "higher-ups" about M.C.'s request and after conferring with the principal of John R. Wooden, Fred Kutruff, advised M.C. that the school would not allow A.C. to use the boys' restroom but that the school would no longer discipline A.C. for being late to classes. (M.C. ¶ 22; Kutruff 58:3-11). Mr. Reynolds also noted that the school was willing to have A.C. switch to remote learning. (M.C. ¶ 22). Mr. Reynolds made no mention of name and pronoun use, and staff continue to misgender A.C., and his wrong

name still appears on class rosters. (M.C. ¶ 23; A.C. ¶ 13).

A.C. subsequently did use the boys' restroom because he is a boy. (A.C. ¶ 23). For the time that he did so, M.C. noticed that he was more comfortable at school and felt better about himself. (M.C. ¶ 25). A.C.'s use of the boy's restroom was unremarkable to his classmates, who did not complain or seem to notice that he was using it. (A.C. ¶ 24; Kutruff 65:6-11). But when a staff member saw him use the boys' restroom, A.C. was called to Mr. Reynolds' office who reiterated that A.C. is not allowed to use the boys' restrooms and would be punished[6] if he continued. (A.C. ¶ 25; Kutruff 64:7-12, 66:5-25).

In response to A.C.'s restroom use, Defendants advised all staff that students may only use the restrooms of the sex assigned at birth or the clinic restroom. (ECF No. 29-4 at 82; Kutruff 14:19-15:4). Defendants also told staff to notify the front office when transgender students, and only transgender students, ask to use the restroom during class so that they can monitor which restroom transgender students use. (ECF No. 29-4 at 82; Kutruff. 22:23-24:5).

The following week, Mr. Kutruff called A.C. into the office and told A.C. that he was not allowed to use the boys' restroom and must only use the girls' or the restroom in the health clinic and reiterated that A.C. would be punished if he continued to use the

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[6] Under the school's progressive discipline policy, A.C. could be expelled for continued use of the boy's restroom. (Kutruff 66:17-25)

boys' restroom. (A.C. ¶ 26; Kutruff 67:11-24). During this meeting, A.C. called his mother on speaker phone, and Mr. Kutruff repeated Martinsville's position that A.C. must only use the girls' or clinic restroom and that if M.C. wanted A.C. to use the boys' restroom, she should contact the school board. (M.C. ¶ 27).

Though never mentioned to A.C. or M.C., Martinsville does ostensibly provide for transgender students' access to bathrooms that align with their gender on a "case-by-case basis." (M.C. ¶ 29; Kutruff 15:13; 16:11; 25; 19:6; 23:12; 28:12; 39:14; 74:7). Martinsville will evaluate bathroom requests based on how long the student has identified as transgender; whether the student is under a physician's care, if the student has been diagnosed with gender dysphoria; if the student was prescribed hormones; and if they have filed for a legal name and gender marker change. (Kutruff 23:12-24:5). Based on this unwritten policy, transgender students in Martinsville are being allowed to use restrooms that align with their gender identities. (*Id.* 23:6-15; 28:5-22). Subsequently, Martinsville received a letter from Dr. Dennis Fortenberry showing that A.C. meets these criteria. Nevertheless, M.C. is still not being allowed to use male restrooms. (M.C. ¶ 29).

Dr. Fortenberry's letter confirmed that A.C. had a years-long pattern of identifying as a boy, he is under the care of Gender Health Clinic at Riley Hospital, he was diagnosed with gender dysphoria, and he is receiving medical treatment for gender dysphoria,

which may include hormones in the future. (M.C. ¶ 14; ECF No. 29-2 at 9).[7] Martinsville was also advised that being misgendered at school and not being allowed to us the boys' restroom is a source of distress, depression, and anxiety, undermines his transition, exacerbates his dysphoria, and is wrong because he is a boy. (M.C. ¶ 14; ECF No. 29-2 at 9). This information has been insufficient to change MSD's position that it will continue to exclude A.C. from boys' restrooms.

MSD's refusal to recognize that A.C. is a boy and treat him like his male peers has disrupted and continues to disrupt his education. A.C. is a smart kid who gets good grades and loves learning. (M.C. ¶ 36). The school's refusal to recognize A.C. as a boy makes A.C. not want to go to school and to miss school. (M.C. ¶¶ 33, 36; A.C. ¶ 28). He dreads going to school, is unable to focus there, and comes home depressed and humiliated. (M.C. ¶¶ 31-37; A.C. ¶ 29). Previously in the gifted and talented program, A.C. is no longer motivated to participate in school or do his schoolwork. (M.C. ¶ 36; A.C. ¶ 29). Being constantly told by teachers that he is not really a boy heightens his anxiety and depression. (M.C. ¶¶ 35-37; A.C. ¶¶ 27-29). Because MSD refuses to recognize his gender, A.C. feels isolated and unable to be himself at school, making it difficult to be at school altogether. (M.C. ¶¶ 35-37; A.C. ¶¶ 27-29).

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[7] Although A.C. became a patient at Riley Gender Health clinic relatively recently, his family physician, who made the referral to Riley Gender Health clinic, recognized when A.C. was 8 or 9 that he had issues with his gender identity and referred him to counseling. (M.C. ¶ 11).

The preliminary injunction standard

To determine whether a preliminary injunction should be granted, the Court weighs several factors:

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

See, e.g., *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667, 675 (7th Cir. 1987). The heart of this test, however, is "a comparison of the likelihood, and the gravity of two types of error: erroneously granting a preliminary injunction, and erroneously denying it." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 590 (7th Cir. 1984). Thus, "the more likely [the preliminary injunction movant] is to win, the less the balance of harms must weigh in his favor." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015).

Argument

I. A.C. is likely to prevail on the merits of his claim

The law in the Seventh Circuit is exceedingly clear: discrimination against a person on the basis of their transgender status constitutes discrimination based on sex, which is

prohibited both by Title IX and the Equal Protection Clause of the United States Constitution. A.C. has suffered the precise discrimination prohibited by both Title IX and equal protection, and he is certainly likely to prevail on the merits of his claims.

A. *Bostock* and *Whitaker* establish that A.C. will succeed on the merits of his Title IX claim

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) (emphasis added). A covered institution may not, among other things:

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

34 C.F.R. § 106.31(b)(1)-(4).[8]

[8] Martinsville receives federal funding and is therefore subject to the requirements of Title IX. (ECF No. 28 ¶ 55).

1. Discrimination on the basis of transgender status constitutes discrimination "on the basis of sex"

Since 2017, it has been established law within the Seventh Circuit that discrimination on the basis of a student's transgender status constitutes discrimination "on the basis of sex," under Title IX. *See Whitaker*, 858 F.3d at 1049-50 (citing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc) (reaching the same conclusion as to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)). In *Whitaker*, the Seventh Circuit—looking to the analogous context of Title VII—concluded that discrimination on the basis of sex encompasses both the "biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Whitaker*, 858 F.3d at 1049. As had other circuits, the Seventh Circuit recognized 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," and therefore discrimination on the basis of transgender status was encompassed within Title IX's language prohibiting discrimination "on the basis of sex." *Id.* at 1048.

In the context of the identical language in Title VII, the Supreme Court recently reached the same conclusion in *Bostock*, 140 S. Ct. at 1743. In that case, the Supreme Court considered challenges raised under Title VII by individuals who had been subjected to adverse employment actions because of their sexual orientation or transgender status. *Id.*

at 1737-38.

The Supreme Court unequivocally concluded that sexual orientation and transgender status

> are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Id. in 1732. The Court stressed that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that should be the end of the analysis." *Id.* at 1743 (internal quotation and citation omitted).

Under both *Bostock* and *Whitaker* discrimination on the basis of transgender status clearly constitutes discrimination "on the basis of sex."

2. Denying A.C. the ability to use male restrooms constitutes prohibited discrimination under Title IX

The Seventh Circuit's decision in *Whitaker* makes plain that denying A.C. the ability to use the boys' restrooms in his school violates Title IX. In *Whitaker*—in circumstances nearly identical to those here—a transgender student, who was designated as female on his birth certificate but identified as male—sued when his high school refused to allow him to use male restrooms. 858 F.3d at 1040-41. In that case, as here, the

school only permitted the student to use restrooms associated with his gender at birth or a gender-neutral bathroom located in the school's office. *Id.* at 1041. Because use of the female or gender-neutral restrooms was damaging to him and to his transition, he attempted to avoid having to use the restroom while at school. *Id.* at 1040-41.

The district court granted a preliminary injunction requiring the school to provide the plaintiff with access to the boys' restrooms. *Id.* at 1042-43. The Seventh Circuit affirmed, in language so clear, and so clearly apposite here, that it bears repeating at length:

> [The plaintiff] can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects [him], 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 [his] classrooms and the increased stigmatization they caused [him]. Rather, the School District only continued to treat [him] differently when it provided him with access to these gender-neutral bathrooms because he was the only student given access.

Id. at 1049-50. Although nearly all the circumstances identified by the *Whitaker* court are present here, Martinsville has nonetheless denied A.C. access to male restrooms—contrary to the Seventh Circuit's clear pronouncement. As in *Whitaker*, *id*, at 1040-41, Martinsville has been aware since he was in fifth grade that A.C. is transgender and lives

as a boy.[9] As in *Whitaker*, the only options presented to A.C., to use the female restrooms or the bathroom in the nurse's office are not satisfactory. As with the plaintiff in *Whitaker*, "using the girls' restrooms would undermine his transition." *Id.* at 1040. As A.C. notes, this makes him feel isolated and punished and makes him want to disappear. (A.C. ¶ 27-28). And, the restroom in the nurse's office is problematic. Not only is it far away from A.C.'s classes, causing him to be frequently late for class, but the fact that he is being singled out to use this restroom just makes him feel even more different and disconnected from his identity as a boy, increasing his depression and anxiety. (*Id.* at ¶ 21-22). It "draw[s] further attention to his transition and status as a transgender student." *Id.* at 1040.

Just as in *Whitaker*, the school's policy punishes A.C. for his gender nonconformance, and under the Seventh Circuit's clear directive, this violates Title IX.[10] This Court has already so concluded in similar circumstances, granting summary judgment to a transgender student-plaintiff regarding restroom access. *J.A.W.*, 396 F.

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[9] Though A.C.'s right to use the restroom is not dependent upon his medical diagnosis or treatment, Martinsville is also aware that A.C. has been diagnosed with gender dysphoria and is undergoing drug therapy to address the dysphoria, and lives as a boy. (ECF 29-2 at 9) In addition, M.C. is awaiting a state court decision where she has asked to legally change A.C.'s name to reflect his male identity and his gender marker to identify him as male on his birth certificate. (M.C. ¶ 15).

[10] In *Bostock*, the Supreme Court declined to address whether denial of restroom access would constitute prohibited discrimination under Title VII or other non-discrimination statutes, as that issue was not before the Court. 140 S. Ct. at 1753. This does not impact the outcome here, however, as *Whitaker* is dispositive on the precise issue presented.

Supp. at 842 (concluding that *Whitaker* was binding precedent in circumstances such as these and granting plaintiff summary judgment as to the school's liability for denial of restroom access). Other circuits have reached the same conclusion. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618-19 (4th Cir. 2020) (holding that school's requirement that transgender student use gender-neutral restroom violated Title IX), *cert. denied*, --U.S.--, 141 S. Ct. 2878 (2021); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) ("requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination"). Other district courts agree. *See, e.g., M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 717 (D. Md. 2018) (denying a motion to dismiss, finding that denying a transgender student access to the locker room consistent with his gender identity stated a claim under Title IX); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 632-36 (M.D.N.C. 2016) (plaintiffs were likely to succeed in claim that state law requiring multiple occupancy bathrooms, showers, and similar facilities to be used only by persons based on their biological sex, defined as the sex listed on their birth certificates violated Title IX); *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. Or. 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"), *aff'd*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, --U.S.--, 141 S. Ct. 894 (2020).

Plaintiff is likely to succeed on the merits of his claim that denying him the ability to use male restrooms in his school violates Title IX.

3. Martinsville's refusal to require staff to refer to plaintiff by his male name and with male pronouns violates Title IX

As detailed above, under Title IX, the School may not "[p]rovide different aid, benefits, or services or provide aid, benefits, or services in a different manner," or "[s]ubject any person to separate or different rules of behavior, sanctions or other treatment." 34 C.F.R. § 106.31(b)(2), (4). Martinsville has indicated that it will not direct school employees to refer to A.C. by the names and pronouns that reflect his male gender but will instead allow staff to choose what names and pronouns to employ.

This approach subjects A.C. to differential treatment because of his transgender status, in violation of Title IX. And it does so in a manner that is irrational and indefensible, given that A.C. is known in his daily life by his male name, is recognized by his doctors, family, and friends as male, and expects that his birth certificate will soon reflect his male name and gender.

But even absent name and gender-marker changes, the refusal to refer to transgender students using their preferred names and pronouns violates Title IX. *See Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 879 (S.D. Ohio 2016) ("The Court orders School District officials to treat Jane Doe as the girl she is, including referring to her by female pronouns and her female name."). While non-transgender students are simply permitted to exist within the school setting in a manner consistent with their genders, each time staff members refer to A.C. as if he were a girl, he is singled out from his peers, outed as transgender, and humiliated in the most fundamental and public way possible. He presents as male, and this is essential for his social transition; nothing could be more dissonant, therefore, than allowing him to be referred to as a girl in front of his peers and other staff. This Court, while it has not been faced directly with this question, has already signaled the potential consequences under Title IX should a school refuse to refer to transgender students using appropriate names and pronouns. *See Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 1:19-CV-2462-JMS-DLP, 2021 WL 2915023, at *22 (S.D. Ind. July 12, 2021) (noting that school district exposed itself to potential liability if it refused to honor transgender students' requests to be referred to by their proper names and pronouns), *app. pending*, No. 21-2475 (7th Cir.).

Martinsville violates Title IX by refusing to direct staff to refer to A.C. as the boy that he is, and it should be enjoined to do so.

B. A.C. will also prevail on his equal protection claim

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). A critical threshold question in evaluating any equal protection challenge is what level of scrutiny applies to evaluate the allegedly offending governmental conduct: on one end of the spectrum is low-level scrutiny, under which "state action is presumed to be lawful and will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest." *Whitaker*, 858 F.3d at 1050. At the other end of the spectrum are classifications based on a person's membership in a suspect class, such as race. Those classifications are subject to strict scrutiny. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995).

However, where a classification is made by the government on the basis of sex, such actions are subjected to a form of heightened scrutiny that is somewhere in between rational basis and strict scrutiny. In those instances, "the burden rests with the state to demonstrate that its proffered justification is exceedingly persuasive," which 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." *Whitaker*, 858 F.3d at 1050-51.

In *Whitaker*, though the defendant school urged the Court to apply rational-basis review to its policy, the court concluded that heightened intermediate scrutiny applied,

as "the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate." 858 F.3d at 1051. This, of course, echoes the analysis already described in the context of Title IX. While the Supreme Court did not reach this question in *Bostock*, as that case involved only the actions of private employers, its conclusion that discrimination based on transgender status constitutes sex-based discrimination provides further support for the Seventh Circuit's application of heightened scrutiny.[11] *See also Grimm*, 972 F.3d at 607 (applying heightened scrutiny as "the bathroom policy rests on sex-based classifications").

It is clear from the deposition of Martinsville's designate that its decision to deny

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[11] Even if the Seventh Circuit had not already so concluded, heightened scrutiny is justified, as transgender individuals are part of at least a quasi-suspect class. The Supreme Court has noted that heightened scrutiny is applied to groups that have "experienced a history of purposeful unequal treatment…or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation and citation omitted). The Court has noted that appropriate considerations include whether the group in question has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," *id.* (internal quotation and citation omitted), and whether the group "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). *See Grimm*, 972 F. 3d at 607 ("…we conclude that heightened scrutiny applies to Grimm's claim because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class) (emphasis in original). Therefore, many courts have concluded that discrimination against transgender persons triggers elevated scrutiny under equal protection. *Karnoski v. Trump*, 926 F.3d 1180, 1200-02 (9th Cir. 2019); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

A.C. from using the male restrooms is based on its concerns about "privacy." (Kutruff 15:24; 16:13; 23:20; 24:7) Given that A.C. is the one who wishes to use the male restrooms, Martinsville's concern therefore involves the privacy of other students. The court in *Whitaker* rejected this rationale as sufficient to satisfy heightened scrutiny, as have many other courts that have considered the same arguments. A.C.'s experience also makes it clear that such justifications are not served by banning him from the boys' restrooms, as A.C. has utilized them in the past without incident. (Kutruff 64:15-18; A.C. ¶ 24).

In *Whitaker*, the court concluded, again in language directly applicable here, that

> [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. Nothing in the record suggests that the bathrooms at [the] High School are particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line. Therefore, this court agrees with the district court that the School District's privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.

Id. at 1052-53. The Fourth Circuit in *Grimm* likewise emphasized that the privacy arguments typically raised in this context fall flat, highlighting that many school districts across the country successfully allow transgender students to use restrooms matching

their gender identities, without incident, and concluding that the school's concerns were merely conjectural. 972 F3d at 614. And the court ultimately concluded that the school's policy, to the extent that it was based upon privacy concerns, was "marked by misconception and prejudice." *Id.* at 615.

Courts have also evaluated these privacy concerns in the context of lawsuits raised by non-transgender students seeking to prohibit transgender students from using the restrooms associated with their gender identities. Other circuits have rejected such privacy-related challenges. *See Parents for Privacy*, 949 F.3d 1210; *Boyertown,* 897 F.3d 518. In *Boyertown* the court concluded that any impingement on cisgender students' privacy rights is outweighed by the harm caused to transgender students by not being able to use restrooms and locker rooms consistent with the gender identities and "the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces." *Id.* at 533.

Of course, if cisgender students are somehow offended by the presence of A.C. in a closed bathroom stall in a boys' restroom, these students should be allowed to use the nurse's restroom. This easy solution undercuts any justification that Martinsville can offer for denying A.C. the ability to use the male restrooms. *See, e.g.*, *M.A.B.*, 286 F. Supp. 3d at 724 (inasmuch as students who did not want to change in the presence of transgender students could change in either partitioned stalls, toilet stalls with doors, or a single-use restroom, the privacy concerns raised by the defendant school district concerning

transgender students using locker rooms consistent with their gender identity means that banning transgender students is not substantially related to the asserted privacy interests raised).

Martinsville's justification for not requiring staff to refer to A.C. by his male name and with male pronouns appears to be for administrative convenience. A.C.'s "official name" and gender in the school's computer program will not be changed until a court order changes the name and marker. This does not, however, explain why the school cannot inform all staff, including substitute teachers, that A.C. should be referred to with male pronouns and by his preferred name. The slight administrative inconvenience that this will incur is hardly "an exceedingly persuasive justification" for Martinsville's sex-based discrimination against A.C.

For all these reasons, A.C. is likely to prevail on his equal protection claim as well as his Title IX claim.

II. The other requirements for the grant of a preliminary injunction are met

A. A.C. is faced with irreparable harm for which there is no adequate remedy at law

It is well-established that the denial of constitutional rights is irreparable harm in and of itself. "Courts have . . . held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305

F.3d 566, 578 (6th Cir. 2002); *see also, e.g.*, *Cohen v. Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law.").

Given that A.C.'s equal-protection rights are being violated, he has established irreparable harm. This was this Court's conclusion in granting a preliminary injunction to the student in the Evansville case noted above. *J.A.W.*, 323 F. Supp. 3d at 1040. However, A.C. has also established that Martinsville's actions cause him ongoing emotional harm and distress, for which there is no adequate remedy at law.

In *Whitaker* the Seventh Circuit noted that, as here, denying the use of male restrooms caused the student psychological harm. 858 F.3d at 1045. The court also found that, where the student was offered access to the gender-neutral restroom in the school's office,

> [t]he School District actually exacerbated the harm, when it dismissed him to a separate bathroom where he was the only student who had access. This action further stigmatized [the student], indicating that he was "different" because he was a transgender boy.
>
> Moreover, the record demonstrates that these bathrooms were not located close to [the student]'s classrooms. Therefore, he was faced with the unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time, or avoid use of the bathroom altogether at the expense of his health.

Id. The court therefore concluded that the student had demonstrated irreparable and ongoing harm, for which he had no adequate remedies at law. *Id.* at 1046. As described

at length above, the same is true here.

Likewise, in *Evancho,* the court granted a preliminary injunction to transgender students who had been prohibited from using restrooms of their identified genders. 237 F. Supp. 3d at 295. In finding that the plaintiffs satisfied this preliminary injunction requirement, the court noted that

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

Id. at 294 (quoting *Romer v. Evans*, 517 U.S. 620, 621 (1996) (other citations and footnotes omitted)). And, this Court, in granting a preliminary injunction in *J.A.W.* recognized that "a monetary award would be an inadequate remedy for the type of stress and anxiety J.A.W. likely would experience for the remainder of his time in high school if an injunction were not granted." 323 F. Supp. 3d at 1040.

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

B. The balance of harms and the public interest favor the issuance of a preliminary injunction

In *Whitaker* the Seventh Circuit concluded that the school district had failed to establish that any harm—either to the school district or to the public—would result from the issuance of a preliminary injunction. 858 F.3d at 1054. The court credited the statements made by *amici*, school administrators from twenty-one states and the District of Columbia, who "uniformly agree that the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in their combined experience, all students' needs are best served when students are treated equally." 858 F.3d at 1055. And, in the preliminary injunction determination in *J.A.W.* this Court rejected the argument that the school's privacy concerns outweighed the likely harm that the plaintiff-student was facing by being barred from restrooms associated with this gender identity. 323 F. Supp. 3d at 1041.

Moreover, since A.C. has established a substantial likelihood of success on the merits, "no substantial harm to others can be said to inhere" from the issuance of an injunction. *See, e.g.*, *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). An injunction will only force Martinsville to conform its conduct to the requirements of the Constitution and federal law—a requirement that Martinsville cannot claim is harmful.

See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (holding that if a governmental entity "is applying [a] policy in a manner that violates [the plaintiff's] First Amendment rights…then [the] claimed harm is no harm at all").

The public interest is also furthered by the injunction here, as an injunction in favor of constitutional rights and the rights secured by Title IX is always in the public interest. *See, e.g., Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (denying a stay pending appeal of an injunction requiring a school district to allow a transgender student to use the female restrooms and noting that the "public interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe's constitutional and civil rights, a purpose that is always in the public interest."); *Déjà vu of Nashville*, 274 F.3d at 400 (it is "always in the public interest to prevent violation of a party's constitutional rights) (internal quotation and citation omitted); *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) (noting that the district court did not err in concluding "that the overriding public interest lay in the firm enforcement of Title IX").

The balance of harms and the public interest therefore favor the issuance of a preliminary injunction here.

III. The injunction should issue without bond

The issuance of a preliminary injunction will not impose any monetary injuries on Martinsville. In the absence of such injuries, no bond should be required. *See. e.g.*, *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010) (citing authority for waiver

of the bond when there is no danger that a defendant will incur any damages if the injunction is granted as "[t]here is no reason to require a bond in such a case.").[12]

Conclusion

For the foregoing reasons the preliminary injunction should be granted, without bond, and Martinsville should be ordered to allow A.C. to use the male restrooms in his school and should be ordered to require staff to refer to A.C. using his male name and with male pronouns.

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[12] This Court did not require a bond in granting a preliminary injunction in the *J.A.W.* case. 323 F. Supp. 3d at 1042.

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