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.,	)	
Plaintiff,	)	
v.	)	CASE NO. 1:21-cv-02965-TWP-MPB
METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE; PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL, in his official capacity,	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff A.C. filed this action to (1) force the Metropolitan School District of Martinsville[1] (the "School District") to use A.C.'s chosen names and male gender pronouns, and (2) grant A.C. complete access to boys' restrooms. However, the request for preliminary injunctive relief lacks merit, is premature, and should be denied.

With regard to the first demand, the School District voluntarily complied with A.C.'s request regarding the use of A.C.'s chosen name and pronouns well before suit was filed. Administrators instructed staff to do so and staff has complied with that request. Thus, there is no need or basis to enjoin the School District on that front. Moreover, even if teachers refer to A.C. using pronouns consistent with A.C.'s biological sex, such a reference would not violate either Title IX or the Equal Protection Clause. Indeed, any additional effort by the School District to

[1] Since Plaintiffs have redundantly sued the School District and an employee in his official capacity for the same claims, the School District is the proper and only party. *See Ball v. City of Muncie*, 28 F. Supp. 3d 797, 802 (S.D. Ind. 2014); *Shirley v. Marion Cty. Sheriff's Off.*, No. 119CV01032JPHTAB, 2020 WL 2113409, at *2 (S.D. Ind. May 4, 2020); *Tom Beu Xiong v. Fischer*, 787 F.3d 389, 398 (7th Cir. 2015).

discipline teachers for using a particular pronoun could expose the school to liability under the First Amendment.

With regard to the second demand, the School District has complied with Title IX and the Equal Protection Clause in relation to its middle school restrooms. Title IX's regulations expressly state that institutions "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 the other sex." 34 C.F.R. § 106.33. Consistent with these regulations, the School District has asked that A.C. continue to utilize the restrooms consistent with A.C.'s sex until further steps are taken and additional information is gathered. In particular, A.C. has filed a state court petition seeking to change A.C.'s legal name and gender marker, but has not yet received a ruling on that petition. The School District should be allowed to take into account whether that state court petition is granted in determining whether A.C. should be allowed access to the boys' restrooms. Until then, the School District has provided A.C. with the option of utilizing a unisex restroom in the health office, and has also provided passes to utilize the restroom during class whenever necessary.

A.C.'s legal position rests almost entirely on *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017). But *Whitaker*, according to the Seventh Circuit, applied the wrong preliminary injunction standard. *Whitaker* was also decided without the benefit of the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). Finally, *Whitaker* did not address the use of pronouns that A.C. seeks here and involved different facts, including the age of the plaintiff.

Given the legal developments since *Whitaker*, and the different facts presented in this case, A.C. cannot meet the high preliminary injunction standard. The School District respectfully requests that the motion for preliminary injunction be denied and for all other appropriate relief.

I. BACKGROUND FACTS

1. The John R. Wooden Middle School (the "middle school") is a part of the Metropolitan School District of Martinsville (the "School District"). The middle school includes seventh and eighth graders, and has 676 students in attendance. (ECF No. 29-4 at 8 ((30)(b)(6) Deposition of Fred Kutruff ("Kutruff Dep.") at 8:11-19.)

2. The middle school restrooms are separated by sex[2] (ECF No. 29-4 at 48 (Kutruff Dep. at 48:1-4), and there is a unisex restroom in the health office (*id.* at 49 (Kutruff Dep. at 49:13-25.) The restroom is available for use by all students, with permission from the school nurse. (*Id.* at 50 (Kutruff Dep. at 50:17-23.)

3. In addressing restroom access for its students, the School District complies with Title IX. (ECF No. 29-4 at 18 (Kutruff Dep. at 18:5-8.) To that end, the School District addresses a student's request seeking to use the restroom that is different than that student's biological sex on a case-by-case basis, taking into account such considerations as (1) the number of years that the student has been in transition, (2) whether the student has changed his or her outward appearance, (3) whether the student has been diagnosed with gender dysphoria, (4) whether the student is receiving hormones, (5) whether the student has received surgery, and (6) whether the student has legally requested and secured a name and gender marker change. (ECF No. 29-4 at 15-16, 19, 23-24 (Kutruff Dep. at 15:22-16:14, 19:6-14, 23:16-24:9.) At the middle school level,

[2] "Sex" is different than "gender," as a person's sex is identified "with their genitals that are typically described at birth" while a person's gender has to do with their experience relative to their sex. (ECF No. 34-3 at 2 ("Fortenberry Dep.") at 8:21-10:16.)

the School District's decision to consider these items is based on the age and maturity of the student population and an effort to protect the safety and privacy of students. (ECF No. 29-4 at 24 (Kutruff Dep. at 24:2-7.)

4. Consistent with this approach, the School District has students within its system who have been allowed to use a bathroom consistent with their stated gender identity that differs from their sex. (ECF No. 29-4 at 23 (Kutruff Dep. at 23:6-15.)

5. M.C. has brought this action on behalf of A.C., her minor child. A.C. is thirteen years old and a seventh grade student at the middle school. (ECF No. 34-1 at 2 (Deposition of M.C. ("M.C. Dep.") at 6:11-12; ECF No. 34-2 at 2 (Deposition of A.C. ("A.C. Dep.") at 13:17-20).)

6. A.C.'s sex is female, and A.C.'s physical anatomy is that of a female. (ECF No. 34-1 at 5, 10 (M.C. Dep. at 20:4-5, 40:1-3.)

7. In the middle of fifth grade, A.C. moved to Martinsville and began attending Bell Intermediate School, which provides services to students in the fifth and sixth grades in the School District. (ECF No. 34-1 at 5-6 (M.C. Dep. at 21:23-22:3.) M.C. says that she met with a school counselor at that time and requested that A.C.'s chosen name and pronouns be used. (ECF No. 34-1 at 6 (M.C. Dep. at 22:8-23:10.) M.C. does not recall the counselor's response, but recalls that A.C. told her that the chosen name was being used. (ECF No. 34-1 at 6 (M.C. Dep. at 22:21-23:10.)

8. A.C. continued attending Bell Intermediate School for sixth grade. (ECF No. 34-1 at 6 (M.C. Dep. at 23:11-18.) M.C. does not recall having any communications with school personnel regarding using A.C.'s chosen names or pronouns. (*Id.*)

9. During fifth and sixth grade, A.C. and M.C. did not request that A.C. be allowed to use the boys' restrooms. (ECF No. 34-1 at 6 (M.C. Dep. at 23:23-24:17); ECF No. 34-2 at 2 (A.C. Dep. at 12:19-13:1.) Instead, A.C. requested, and was allowed to use, the health clinic restroom at the intermediate school. (ECF No. 34-1 at 6 (M.C. Dep. at 25:1-7); ECF No. 34-2 at 2 (A.C. Dep. at 12:22-13:1.)

10. In August 2021, A.C. began seventh grade at the middle school, and began using the single person restroom in the health clinic. (ECF No. 34-1 at 7 (M.C. Dep. at 26:14-27:3.)

11. Near the beginning of the school year, A.C. became upset when an aide used A.C.'s birth name based upon the information in the class roster. (ECF No. 29-4 at 37-38 (Kutruff Dep. at 37:10-38:10.) The aide apologized to A.C., and advised A.C. that A.C.'s parents would need to make a change in the Skyward electronic system in relation to the name. (*Id.*) At that time, no use of restrooms were discussed. (ECF No. 29-4 at 38 (Kutruff Dep. at 38:16-18.)

12. The School District put a notice in its electronic records regarding A.C.'s preferred name. (*See* ECF No. 29-4 at 30-31 (Kutruff Dep. at 30:11-31:17; ECF No. 29-4 at 86-87 (Dep. Ex. 2 at 20-21.) However, the School District cannot change the legal name and gender marker in its administrative electronic records prior to A.C. legally changing them. (ECF No. 29-4 at 30-32 (Kutruff Dep. at 30:11-32:4.)

13. Additionally, middle school administrators instructed teachers to refer to A.C. using A.C.'s chosen name and pronouns. (ECF No. 29-4 at 32-34 (Kutruff Dep. at 32:17-33:3, 34:4-7.) Staff have referred to A.C. with A.C.'s chosen name and pronouns. (ECF No. 34-1 at 7 (M.C. Dep. at 28:15-24); ECF No. 29-4 at 33 (Kutruff Dep. at 33:10-13); *see also* ECF No. 34-2 at 3 (A.C. Dep. at 19:1-6 (Q. Is it true that your regular teachers use your chosen name of Alex?

A. Yes, they do. Q. And is that across the board, your teachers are using that name with regard to you? A. Yes.).) *See, e.g.,* ECF No. 29-4 at 81 (email referring to "his family".)

14. A.C. contends that school staff and substitute teachers have never used male pronouns when referring to A.C., but cannot identify specific instances where female pronouns have been used. (ECF No. 34-2 at 3-4, 5 (A.C. Dep. at 19:7-20:25, 27:4-15.) Instead, A.C. testified that "I don't really remember any incidences with my teachers at all. I try to block everything out because I don't want to remember this." (ECF No. 34-2 at 5 (A.C. Dep. at 24:23-25:3.) A.C. recalls one specific instance of correcting the band teacher when he referred to A.C. as a girl, and the band teacher said "Okay." (ECF No. 34-2 at 4 (A.C. Dep. 21:1-23:5.) A.C. contends that A.C. has corrected other teachers, but cannot identify any other specific instances of doing so. (ECF No. 34-2 at 4-5 (A.C. Dep. at 22:2-24:2, 24:14-26:25.)

15. In September or October 2021, A.C.'s stepfather called the middle school inquiring about restroom access for transgender students. (ECF No. 29-4 at 38-39 (Kutruff Dep. at 38:19-39:7.) In response, the middle school principal relayed that students who identified as transgender were allowed to use the nurse's office. (*Id.*)

16. In October 2021 and December 2021, A.C. was seen by a nurse practitioner at the Riley Gender Health Clinic, after receiving a referral. (ECF No. 34-1 at 3, 9 (M.C. Dep. at 11:22-12:10, 36:18-37:7.) At the initial visit, the nurse practitioner diagnosed A.C. with gender dysphoria, which is considered a mental and physical disorder. (ECF No. 34-1 at 10 (M.C. Dep. at 38:16-20); ECF No. 29-2, ¶ 14; ECF No. 34-3 at 3-4 (Deposition of Dr. J. Dennis Fortenberry ("Fortenberry Dep.") at 15:15-16:2).)[3] This diagnosis and related medical records were not provided to the school until after the initiation of this action and during the discovery phase of

[3] Notably, the United States Code identifies "gender identity disorders not resulting from physical impairments" as "sexual behavior disorders" alongside "transvestism, transsexualism, pedophilia, exhibitionism, [and] voyeurism." *See* 29 U.S.C. § 705(20); 42 U.S.C. § 12211.

the case. (ECF No. 34-1 at 10 (M.C. Dep. at 39:2-5); ECF No. 29-4 at 10, 40 (Kutruff Dep. at 10:6-13, 40:8-11.) Such information is something the School District takes into account in determining access to the boys' restrooms. (ECF No. 29-4 at 40 (Kutruff Dep. at 40:8-15.)

17. There is no one-size-fits-all with regard to the treatment of gender dysphoria. (ECF No. 34-3 at 5 (Fortenberry Dep. at 20:8-12.) Moreover, the treatment of gender dysphoria is an evolving area where new standards are in development. (ECF No. 34-3 at 5 (Fortenberry Dep. at 20:22-25.)

18. A.C. has gone to Riley twice to receive injections of Depo-Provera to help stop periods. (ECF No. 34-1 at 9-10 (M.C. Dep. at 36:18-37:7, 37:24-38:2.) Although A.C. has expressed an interest in receiving hormones (testosterone), no hormones have yet been prescribed. (ECF No. 34-1 at 10-11 (M.C. Dep. at 40:14-42:8.)

19. After the initial visit at Riley in October 2021, A.C. and M.C. connected with GenderNexus, an advocacy organization in Indianapolis. (ECF No. 34-1 at 11 (M.C. Dep. 42:17-43:2.) Thereafter, on November 3, 2021, M.C., A.C., and a GenderNexus employee participated in a Zoom call with middle school personnel discussing the use of A.C.'s chosen name and pronouns and requesting that the school allow A.C. to use the boys' restroom. (ECF No. 34-1 at 7, 11 (M.C. Dep. at 26:24-28:4, 43:15-45:19.) M.C. and A.C. were advised that A.C. could continue to use the health clinic restroom and that A.C. would be allocated more time to go back and forth from that restroom without being considered late for class. (ECF No. 29-4 at 61 (Kutruff Dep. at 61:6-25.)

20. Following the call, M.C. talked with A.C. about using the boys' restroom and gave A.C. her permission to use the boys' restroom. (ECF No. 34-1 at 12 (M.C. Dep. at 48:24-49:14); ECF No. 34-2 at 7 (A.C. Dep. at 34:3-15.)

21. In mid-November 2021, the middle school principal received an email from a middle school teacher who had been using a urinal in the boys' restroom and had seen A.C. in the restroom. (ECF No. 29-4 at 64 (Kutruff Dep. at 64:2-14.) On November 22, 2021, the school social worker called A.C. to the office and instructed A.C. not to use the boys' restroom and expressed concern for A.C.'s safety against bullying. (ECF No. 29-4 at 65-66 (Kutruff Dep. at 65:22-66:10); ECF No. 34-2 at 8 (A.C. Dep. at 36:19-37:12.)

22. Shortly after the Thanksgiving holiday, A.C. met with the middle school principal, who reiterated that A.C. was expected to use the health clinic restroom or the girls' restroom. (ECF No. 29-4 at 67 (Kutruff Dep. at 67:11-16.) A.C. has complied with that request. (ECF No. 34-1 at 13 (M.C. Dep. at 53:18-22.) A.C. has not used the girls' restroom, and sometimes avoids using the health restroom. (ECF No. 34-2 at 9 (A.C. Dep. at 41:3-16); ECF No. 29-3, ¶ 22.)

23. A.C. has not received any discipline for being late to class, but was marked tardy on several occasions. (ECF No. 34-1 at 7 (M.C. Dep. at 28:5-7); ECF No. 29-3, ¶ 21.) With the exception of one or two occasions, teachers have consistently granted A.C.'s requests to use the restroom during class. (ECF No. 34-2 at 3 (A.C. Dep. at 17:9-18:11.)

24. A.C. has filed an action in Indiana state court requesting a legal change of A.C.'s name and gender marker to male. (ECF No. 29-2, ¶ 15.) That request remains pending, and has not yet been ruled upon by the Indiana state court. (*See id.*) If the Indiana state court grants the legal name and gender marker change, the School District will change the administrative electronic records in accordance with Indiana law. The School District will also consider such a change in determining whether A.C. will be allowed access to the boys' restrooms. (ECF No. 29-4 at 30 (Kutruff Dep. at 30:5-10.)

II. STANDARD OF REVIEW

"To obtain a preliminary injunction, a plaintiff must first show that: (1) without such relief, it will suffer irreparable harm before final resolution of its claims; (2) traditional legal remedies would be inadequate; and (3) it has some likelihood of success on the merits." *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018). "If a plaintiff makes such a showing, the court next must weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Id.* "This assessment is made on a sliding scale: 'The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor.'" *Id.* (citation omitted). "Finally, the court must ask whether the preliminary injunction is in the public interest, which entails taking into account any effects on non-parties." *Id.* "Ultimately, the moving party bears the burden of showing that a preliminary injunction is warranted." *Id.*

"The purpose of a preliminary injunction is to preserve the status quo pending a final hearing on the merits." *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1330 (7th Cir. 1980). "Mandatory preliminary injunctions—those 'requiring an affirmative act by the defendant'—are 'ordinarily cautiously viewed and sparingly issued.'" *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020).

III. LEGAL ARGUMENT

As set forth above, there is no need or basis for injunctive relief. In relation to the use of legal names or male pronouns, the School District has voluntarily complied with A.C.'s requests regarding a preferred name and pronouns well before suit was filed. The primary dispute between the parties pertains to the use of the boys' restrooms, including whether Title IX and the

Equal Protection Clause to the United States Constitution mandate that A.C. be allowed to utilize the boys' restrooms and, if so, when such access is appropriate.

Importantly, the School District is not denying A.C. access without regard to A.C.'s transition progress. Rather, the School District considers a number of factors in deciding whether to grant access to a restroom that is not consistent with a student's sex. A.C.'s petition for gender marker change has not yet been ruled upon by the state court. The School District should be allowed to consider any such ruling in making a final determination as to A.C.'s access to the boys' restroom.

This issue is one that the School District takes seriously and which it seeks the guidance of this Court, as it is one that has been left an open question by the Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). Indeed, in *Bostock*, the United States Supreme Court noted that issues of "sex-segregated bathrooms, locker rooms, and dress codes" were not before the Court, as it had "not had the benefit of adversarial testing about the meaning" of laws pertaining to those issues. 140 S. Ct. at 1753. And while the Seventh Circuit's decision in *Whitaker* addressed restroom usage, that decision applied an incorrect standard of review as to the likelihood of success prong, failed to properly consider the plain terms of Title IX's regulations, premised its decision on an analytical framework that the Supreme Court declined to adopt in *Bostock*, and dealt with a student in the high school setting.

In the discussion that follows, the School District provides an analysis of the claims asserted under Title IX and the Equal Protection Clause. The School District then considers the balance of harms to the parties in relation to A.C.'s requested relief and public policy, each of which weighs against granting A.C.'s requested preliminary injunction.

A. Likelihood of Success on the Merits

i. A.C.'s claim that use of a chosen name and pronouns because the School District has already complied with A.C.'s request.

The evidence is undisputed that school staff have referred to A.C. using A.C.'s chosen name. (ECF No. 34-1 at 7 (M.C. Dep. at 28:15-24); ECF No. 29-4 at 33 (Kutruff Dep. at 33:10-13); *see also* ECF No. 34-2 at 3 (A.C. Dep. at 19:1-6 (Q. Is it true that your regular teachers use your chosen name of Alex? A. Yes, they do. Q. And is that across the board, your teachers are using that name with regard to you? A. Yes.).) While there may be instances where teachers slip up and use the wrong chosen name, there is no evidence that any such instances have been done intentionally. Indeed, even M.C. has admitted to using female pronouns in referring to A.C., "especially way earlier in the beginning," and acknowledges that "[i]t's definitely a learning curve." (ECF No. 34-1 at 9 (M.C. Dep. at 34:13-17.) Therefore, because the School District has already complied with A.C.'s request, there is no basis for a preliminary injunction in that regard. *Cf. Integra Healthcare, S.C. v. APP of Ill. HM, PLLC*, No. 18 C 3589, 2020 WL 606782, at *5 (N.D. Ill. Feb. 7, 2020) (denying preliminary injunction where, "from the court's perspective, Defendants are already trying to comply with their obligations; the alleged harm occurs when they make mistakes; and those mistakes could occur regardless of whether the court enters the injunction").

Likewise, the School District has also complied with A.C.'s request to use of male pronouns (ECF No. 29-4 at 33 (Kutruff Dep. at 33:10-13), so there is also no basis for an injunction on that basis. Although A.C. contends otherwise, A.C. fails to identify any specific instances where female pronouns have been used. (ECF No. 34-2 at 3-4, 5 (A.C. Dep. at 19:7-20:25, 27:4-15.) Instead, A.C. testified that "I don't really remember any incidences with my teachers at all. I try to block everything out because I don't want to remember this." (ECF No.

34-2 at 5 (A.C. Dep. at 24:23-25:3.) This type of evidence entirely fails to satisfy A.C.'s evidentiary burden for any theory.

ii. Any reference by teachers to A.C. using pronouns consistent with A.C.'s biological sex are not a violation of Title IX or the Equal Protection Clause.

Even if School District staff ignored school administrators' instructions to refer to A.C. using male pronouns (and they have not), referring to A.C. using pronouns that are consistent with A.C.'s biological sex does not violate either Title IX or the Equal Protection Clause. Title IX does not require schools to command teachers to use pronouns based upon their gender identity. And any enforcement of a mandate by the School District could expose the School to liability under the First Amendment. *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021). Likewise, any proposed injunction regarding teachers' speech arrives at the Court with a "heavy presumption" against its constitutional validity, as it may amount to a prior restraint on expression. *See Madsen v Women's Health Center*, 512 U.S. 753, 797-98 (1994) (Scalia, J., concurring) (noting that the Supreme Court has "repeatedly struck down speech-restricting injunctions"); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

With regard to Equal Protection, referring to A.C. using female pronouns subjects A.C. to the same treatment as all other students, as the pronouns are consistent with biological sex. "Under established English usage, two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females)." *Bostock v. Clayton*, 140 S. Ct. 1731, 1782 (2020) (Alito, J., dissenting); *See also Oliver v. Arnold*, 19 F.4th 843, 844 (5th Cir. 2021) (Ho, J.) (concurring) (noting the "widely-held view that biological pronouns invalidate no one, but are dictated by science, faith, grammar, or

tradition"). The Constitution does not require public school teachers to use another person's preferred pronouns. Ultimately, however, the Court should appropriately decline to undertake a constitutional analysis, because the School District and its staff have already voluntarily complied with A.C.'s request to use male pronouns. *See Lyng v. Nw. Indiana Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

iii. A.C.'s request to use the boys' restrooms is unlikely to succeed because Title IX expressly allows institutions to provide separate toilet facilities on the basis of sex.

Title IX mandates 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 education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Yet, "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *Id.* § 1686. Indeed, Title IX's implementing regulations expressly state that institutions "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 the other sex." 34 C.F.R. § 106.33.

The narrow-tailoring of this regulation to separate toilet, locker room, and shower facilities—while not extending this permission to other areas such as classrooms, laboratories, hallways or lunchrooms—illuminates the pragmatic Title IX approach. Simply put, Title IX expressly permits the segregation of facilities on the basis of enduring biological differences only

in those areas where the biological differences matter, are most likely to be exposed, and where privacy interests are heightened.

When Title IX and its implementing regulations were enacted, privacy concerns were recognized as elevated in those areas where clothes are removed and personal bodily functions are performed. *See Young v. Superior Ct.*, 57 Cal. App. 3d 883, 887, 129 Cal. Rptr. 422, 425 (Ct. App. 1976) ("An occupant of a closed bathroom, the same as an occupant of a closed bedroom, is entitled to an expectation of privacy far greater than those persons in the common areas of a house, such as the living room and kitchen."). That recognition has not changed.

Those same privacy distinctions remain true today. In *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1075 (2009), the California Supreme Court reviewed an appeal of a tort claim alleging invasion of privacy at a place of employment where video surveillance was used. *Id.* at 1066. Addressing a central issue in the case—expectation of privacy, the court surveyed rulings from state and federal courts. *Id.* at 1075. "At one end of the spectrum are settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public." *Id.* (collecting cases involving an outdoor patio of public restaurant; common, open, and exposed area of a workplace; and monitoring of customers as they shop in stores.). In those public settings, privacy interests are diminished. *See id.* at 1075.

"At the other end of the spectrum are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts." *Id.* Analyzing this end of the privacy spectrum with more heightened interests, the court cited *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1099–1100, 1103, 1119–1122 (C.D. Cal. 2006), as "recognizing that employees have common law and constitutional privacy

interests while using locker room in basement of police station, and can reasonably expect that employer will not intrude by secretly videotaping them as they undress"; *Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1424, 1427 (8th Cir. 1991), for the "similar conclusion as to models who were secretly viewed and videotaped while changing clothes behind curtained area at fashion show"; and *Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494, 1499, 1506 (M.D. Fla.1995), for a "similar conclusion as to dancers who were secretly viewed and videotaped while changing clothes and using restroom in dressing room at work." *Id.* As was the case when Title IX was enacted, spaces where individuals relieve themselves are treated differently than other spaces.

Title IX couples the unique privacy interests in these areas with the recognized physical differences between the sexes. "Physical differences between men and women are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) (cleaned up). And these physical differences are most likely to be exposed in those areas reserved exclusively for performing bodily functions or other inherently personal acts. The unique permission found in Title IX—but not in Title VII—regarding different facilities for the sexes "undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts, and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy." *Texas v. United States*, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016), *order clarified*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (cleaned up). Indeed, Title IX even extends this anatomical-centric permission to "separate educational sessions for boys and girls when dealing with instruction concerning human sexuality." *Id.* (citing 34 C.F.R. § 106.34).

Consistent with these regulations, the recognized privacy interests in these areas of facilities, and this historical understanding of the physical differences between the sexes, the School District provides separate restroom facilities on the basis of sex. In this way, the School District's position completely aligns with Title IX.

ii. *Whitaker* applied the wrong standard, does not consider *Bostock*, and addresses different facts.

In their supporting brief, A.C. omits any reference to 34 C.F.R. § 106.33. Instead, Plaintiffs contend that this Court is bound by the Seventh Circuit's decision in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017). There are, however, four reasons that *Whitaker* is not binding here.

First, the Seventh Circuit has since criticized *Whitaker* for using the wrong standard of review. *See Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020). Thus, any discussion of the merits by the *Whitaker* panel—which was premised on the "low threshold" of the "better than negligible" standard, *see* 858 F.3d at 1046, should have no precedential value.

Second, the *Whitaker* court's analysis is additionally cast into doubt by the *Bostock* decision. In *Whitaker*, the Seventh Circuit looked to Title VII when construing Title IX, and found that a student who identified as a transgender male could bring a sex-discrimination claim based on a sex-stereotyping theory under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Yet, in *Bostock*, the Supreme Court expressly declined to extend its ruling as it pertained to sex discrimination in the workplace (which is prohibited by Title VII) to issues pertaining to sex assigned restrooms and locker rooms (which are expressly permitted by Title IX). Indeed, in *Bostock*, the United States Supreme Court noted that issues of "sex-segregated bathrooms, locker rooms, and dress codes" were not before the Court, as it had "not had the benefit of adversarial testing about the meaning" of laws pertaining to those issues. 140 S. Ct. at 1753.

Third, the *Whitaker* analysis assumed that the sex stereotypying framework borrowed from Title VII applies in the Title IX restroom context, which *Bostock* does not embrace. *See also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224-25 (10th Cir. 2007) (*Price Waterhouse* does not require "employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."), *overruled on other grounds by Bostock*, 140 S. Ct. 1731. The U.S. Supreme Court specifically reserved this very issue for another day, and *Whitaker* offers no help in understanding why the distinction is "on the basis of sex." *Compare* 858 F.3d at 1047 with 34 C.F.R. § 106.33. Logically, if requiring students to use bathrooms based on sex is unlawful sex stereotyping, then Title IX is itself unlawful.[4]

Finally, the School District's position cannot in any way be characterized as sex stereotyping. The School District's position does not concern itself with stereotypes about either of the sexes. Instead, consistent with Title IX and its regulations, the School District's position is based on the fact that Title IX allows schools to separate restroom facilities on the basis of sex, and it entirely aligns with the testimony of A.C.'s own expert, who acknowledges that sex is different than gender. (ECF No. 29-4 at 8-9; ECF No. 34-3 at 2 (Fortenberry Dep. at 8:21-9:1.) As a result, A.C. is unlikely to succeed on the merits of the Title IX claim.

[4] The expert identified by A.C., Dr. Fortenberry, testified to his view that a student should be allowed access to boys' restroom merely because that student tells a school that the student is a boy, and that no other benchmarks should be required. (ECF No. 34-3 at 6-8 (Fortenberry Dep. at 32:25-34:8, 36:13-37:7.) His opinion was also that students who identified as nonbinary "should be allowed to go back and forth between restrooms", based entirely upon "their [own] selection." (*Id.*) This view goes much further than the *Whitaker* panel, and directly implicates concerns set forth in Justice Alito's dissenting opinion in *Bostock*, 140 S. Ct. at 1779.

iii. The provision of male and female restrooms on the basis of sex does not violate the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." "Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "Equal protection of the laws means that all persons similarly situated should be treated alike." *United States v. Nagel*, 559 F.3d 756, 760 (7th Cir. 2009).

The Equal Protection Clause "does not make sex a proscribed classification," and therefore a policy that classifies on the basis of sex is constitutional if it survives the two requirements of intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 533 (1996). First, the government must prove that the "classification serves important governmental objectives." *Id.* (internal quotation marks omitted). Second, the government must prove that "the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* (internal quotation marks omitted). "This intermediate level of judicial scrutiny recognizes that sex 'has never been rejected as an impermissible classification in all instances.'" *Tagami v. City of Chicago*, 875 F.3d 375, 380 (7th Cir. 2017) (citation omitted).

Here, the School District's sex-separated bathrooms policy or practice, just like Title IX, satisfies both prongs. First, the policy or practice serves important objectives of protecting the interests of students in using the restroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex. "Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising

from the biological differences between males and females." *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *vacated*, —— U.S. ——, 137 S. Ct. 1239, 197 L.Ed.2d 460 (2017). "The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). *See also Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (recognizing constitutional right to privacy, which includes "the right to shield one's body from exposure to viewing by the opposite sex" in context of video surveillance in school locker rooms); *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980) (noting privacy interest "entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex"); *Strickler v. Waters*, 989 F.2d 1375, 1387 (4th Cir. 1993) ("[W]hen not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates his constitutional rights."). If this approach does not satisfy constitutional scrutiny, then neither does Title IX's facilities provisions.

The policy is also substantially related to the achievement of these objectives, as it requires that students use the bathroom in a separate space from the opposite sex and thus protects against exposure of a students' body to the opposite sex. "[T]he Supreme Court has long required that courts defer to the judgment of public-school officials in this context." *Adams v. Sch. Bd. of St. Johns Cnty., Fla.*, 3 F.4th 1299, 1328 (11th Cir.) (Riley, J., dissenting), *rehearing en banc granted*, 9 F.4th 1369 (11th Cir. 2021).[5] Moreover, "[c]ourts have long understood that the 'special sense of privacy' that individuals hold in avoiding bodily exposure is heightened 'in the presence of people of the other sex.'" *Id.* at 1331 (collecting authority). As a result, the

[5] The United States Court of Appeals for the Eleventh Circuit is currently undertaking an *en banc* review of restroom access in *Adams v. Sch. Bd. of St. Johns Cnty., Fla.*, as oral argument was held in that case on February 22, 2022.

School District's position does not violate the Equal Protection Clause. This factor weighs against the requested injunction.

Notably, in *Whitaker*, the Seventh Circuit panel reached a different conclusion on the Equal Protection claim raised there, finding that the plaintiff was likely to succeed on the merits because the defendant school district "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently." 858 F.3d at 1051. As noted above, this analysis wrongly applies Title VII jurisprudence in an area in which the U.S. Supreme Court has not yet gone. *Bostock*, 140 S. Ct. at 1753.

iv. The School District's initial determination as to whether A.C. may be allowed access to the boys' restroom and efforts to seek additional information comply with *Whitaker*.

"Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries." *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 467 (7th Cir. 2007). To the extent that *Whitaker* applies, the School District's position of making an individualized determination as to whether a student who identifies as transgender will be allowed access to restrooms different than their sex complies with the law.

In *Whitaker*, the panel implicitly recognized that restroom access would not be necessarily be required "where a student has merely announced that he is a different gender." 858 F.3d at 1050. Instead, access to the boys' restroom was found to be appropriate in that case because the plaintiff "ha[d] a medically diagnosed and documented condition," and "[s]ince his diagnosis, he has consistently lived in accordance with his gender identity." *Id.* In its decision, the Seventh Circuit panel noted all the steps that Whitaker had taken to live as a boy student, including: (1) the number of years that Whitaker had been in transition, (2) Whitaker's

alterations of outward appearance, (3) a gender dysphoria diagnosis, (4) receipt of hormones, and (5) a legal name change. Moreover, Whitaker was a high school senior, and the request for access to the boys' restroom was made in that context. *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.11 (1975) ("In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor.").

Here, the School District was not provided with this type of information prior to the filing of the lawsuit, and has appropriately sought out more information. Unlike the senior high student in *Whitaker*, A.C. is in the seventh grade, where students are less mature and only "on the threshold of awareness of human sexuality," *J.A. v. Fort Wayne Comm'y Schs.*, No. 1:12-CV-155 JVB, 2013 WL 4479229, at *6 (N.D. Ind. Aug. 20, 2013), and "characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 564 U.S. 261, 272–73 (2011) (Sotomayor, J.) (addressing case involving 13-year-old seventh grade student and observing that "children generally are less mature and responsible than adults" and that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them" (internal citations omitted)).

A.C. has not received hormones, and has not yet completed a legal name and gender marker change. Given the lack of any guidance from the Supreme Court in *Bostock* as it pertains to issues relating to sex-segregated restrooms (much less with regard to middle school restrooms), the distinguishing factors between this case and *Whitaker* as it relates to the age of students involved and status of steps taken by the plaintiff in transition, the School District complied with the law in its initial determination to deny A.C. access to the boys' restrooms and in continuing to seek additional information that may alter that determination.

B. Balance of Harms // Irreparable Harm

The balance of harms analysis also weighs against A.C.'s request to have access to the boys' restrooms. The School District has made accommodations to allow A.C. more time to use the restroom. (ECF No. 29-4 at 61 (Kutruff Dep. at 61:6-25.) The fact that A.C. may be occasionally be late to class is not evidence of irreparable harm. *See Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007) ("[T]he damages sustained by an eighth grader as a consequence of missing phys ed and labs on nine days out of an entire school year are miniscule to the point of nonexistent[.]"). Unlike the plaintiff in *Whitaker*, there is no evidence that A.C. has restricted water intake or contemplated self harm as a result of the restroom options offered. *Cf.* 858 F.3d at 1040-42. A.C. has continued to use the unisex health office restroom. (ECF No. 34-2 at 9 (A.C. Dep. at 41:3-16); ECF No. 29-3, ¶ 22.) There is also no evidence that A.C. has been ostracized for use of the health office restroom, which is available for use by all students, with permission from the school nurse. (ECF No. 29-4 at 50 (Kutruff Dep. at 50:17-23.)

Notably, A.C.'s expert, Dr. Fortenberry, has not participated in the care of A.C., has not had any direct discussions with A.C. or M.C., has not performed an individualized assessment as to the severity of harm that A.C. will experience if not allowed to access the boys' restroom, and has not performed an individualized assessment of the reduction of harm if A.C. is allowed access to the boys' restroom. (ECF No. 34-3 at 9-10, 11-12 (Fortenberry Dep. at 63:16-64:20, 72:17-73:12.) As a result, the School District objects to Dr. Fortenberry's declaration as being based on inadmissible hearsay, lack of personal knowledge, and lack of foundation. (*See* ECF No. 29-1, ¶¶ 41-48.) Indeed, given Dr. Fortenberry's testimony that there should be an individualized assessment as to what facilities a patient would be most comfortable and safe in,

but that he has not performed such an assessment for A.C., his testimony is appropriately excluded if offered for that purpose. (ECF No. 34-3 at 11-12 (Fortenberry Dep. at 72:17-73:12.)

Here, the balance of harms analysis favors maintaining the status quo. Granting A.C. unrestricted access to the boys' restrooms would violate the privacy interests of other students and classmates as discussed above. And if the School District is unable to rely upon Title IX's regulations, which expressly allow for separate facilities by sex, School District administrators and faculty will be forced to navigate this new frontier without the benefit of established rules. A primary objective in this case should be to protect the privacy interests of all students, including A.C.

Notably, A.C. downplays the privacy interests of the other children in the middle school restrooms, contending that, during a three week period, A.C.'s "use of the boys' restroom was unremarkable to his classmates, who did not complain or seem to notice that he was using it." (ECF No. 29-3, ¶ 24.) In contrast, in *Whitaker*, the Court recognized that the plaintiff had used the boys' restroom for nearly six months without incident. The short period of time that A.C. used the boys' restrooms and lack of any opportunity for input from the actual students themselves (who are not parties to this proceeding and have not been given any avenue to express their views or concerns), does not provide any import to this Court's analysis. Indeed, even during that abbreviated period, a male teacher who was using the restroom objected to A.C.'s presence in the boys' restroom.

C. Public Policy

Public policy also weighs against the requested injunction in this case, as demonstrated by the plain language of Title IX and its regulations. As set forth above, when Title IX was enacted, it expressly permitted the separation of facilities on the basis of enduring biological

differences where privacy interests are heightened. In this way, the applicable regulations allow institutions to "provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. This regulation furthers the interest of personal privacy, consistent with the aims of Title IX. To the extent that Title IX should not allow the separation of such facilities, that decision should be made through elected representatives in Congress, using clearly understood text, or through the notice and comment process for the revision of federal regulations required by the Administrative Procedure Act, 5 U.S.C. § 553. *See Eli Lilly & Co. v. Cochran*, 526 F. Supp. 3d 393, 408-09 (S.D. Ind. 2021) (noting that the APA's procedural protections "provide an essential pathway by which the interested public may inform the agency of the ways and extent any potential policy changes will impact those being regulated").[6]

IV. CONCLUSION

For the foregoing reasons, the School District respectfully requests that the motion for preliminary injunction be denied.

[6] Deciding these issues through a notice/comment or legislative process, and certainly not through expedited review and relief in court, allows for the consideration and development of a framework for students who claim to be nonbinary or "gender fluid." As recognized by Justice Alito in dissent in *Bostock*, "a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time." 140 S. Ct. at 1779. The Supreme Court has provided "no clue" on why applying the Title VII framework to such a claim would not fail, *see id.*, which would create an untenable situation for schools as they seek to navigate these issues in a way that upholds the safety and privacy of students. The Court's ruling in this case and its effect on accommodations impacts nonbinary and other students, which is why deference to the administrative rule or legislative process is prudent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022, a copy of the foregoing "Response in Opposition to Plaintiff's Motion for Preliminary Injunction" was filed electronically. Notice of this filing will be sent to the following counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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