

**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.

METROPOLITAN SCHOOL DISTRICT OF  
MARTINSVILLE, *et al.*

Defendants.

No. 1:21-cv-02965-TWP-MPB

**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY  
INJUNCTION**

**Introduction**

The defendants (“Martinsville”) do not dispute that A.C. is a transgender male who has identified as male for some time. Nor does Martinsville disagree with the fact that A.C. is currently receiving treatment from the Gender Health Clinic at Riley Hospital, which has diagnosed him with gender dysphoria. And it is uncontested that, consistent with this diagnosis, he is suffering from distress, anxiety, and depression. His dysphoria is exacerbated when he is denied the basics of social transition when he is not allowed to live his life as a boy. And Martinsville does not deny that being excluded from the boys’ restrooms at school is profoundly damaging and disturbing to A.C. Nevertheless, Martinsville refuses to allow A.C. to use the male restrooms. A.C. is entitled to a preliminary injunction requiring Martinsville to allow him to use the boys’ restrooms.<sup>1</sup>

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<sup>1</sup> A.C. previously asked that Martinsville also be enjoined to require that staff refer to him by his male name and by male pronouns. Martinsville’s deposition designate has indicated that staff has been instructed to refer to A.C. by his male first name and by male pronouns. (ECF No. 29-4 at 34:2-7). A.C. accordingly withdraws his request for a preliminary injunction on this point, but he reserves the right to pursue this further if staff ignores this instruction and Martinsville fails to react to the staff’s disobedience.

## Supplemental Facts

### I. A.C. is excluded from boys' restrooms despite Martinsville allowing other transgender students to use restrooms consistent with their gender identity

In November 2021, Martinsville announced to all staff at John Wooden Middle School and A.C.'s family that the policy of Martinsville is that students must "use the restrooms of their birth sex or use the clinic bathroom." (ECF No. 29-2 ¶¶ 21-22; No. 29-4 at 82; 84-8). Notwithstanding this policy, Martinsville concedes that some transgender students at its high school are allowed to use the restrooms associated with their gender identities. (ECF No. 29-4 at 23:6 – 24:18). Martinsville now says it makes these decisions pursuant to an unwritten case-by-case policy, where the school gathers relevant information, makes a recommendation to the superintendent, who, with the school board, decides if a student can use the restroom. (ECF No. 29-4 at 15:12 – 17: 6, 73:10 -74:15 ).<sup>2</sup> Under the case-by-case policy, the school takes into account 1) how many years the student has been transitioning; 2) if there is a pattern of "student changing or being a transgender as far as dress"; 3) if the student has been diagnosed with gender dysphoria<sup>3</sup>; 4) if the student is receiving hormones; and 5) if the student has legally attempted to change their name. (ECF No. 29-4 at 15:22-16:14, 19:6-14, 23:16-24:9).<sup>4</sup> However, regardless of any other

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<sup>2</sup> Martinsville blames A.C. for its pre-suit refusal to allow him access to the boys' restroom, but Martinsville did not share any information about its case-by-case policy until discovery was conducted in this case.

<sup>3</sup> Curiously, Martinsville finds it notable that one section of the United States Code not at issue in this case uses outdated and superseded clinical language. (ECF No. 35 at 6). For almost a decade, gender dysphoria, no longer called gender identity disorder, has been separated from sexual dysfunctions, formerly sexual behavior disorders. American Psychiatric Association, *Diagnostic and statistical manual of mental disorders (5th ed.)*, (2013).

<sup>4</sup> Martinsville's response memorandum states that the policy includes whether a student has had surgery. (ECF No. 35 at 3). Although Martinsville's deposition designate mentioned this originally, he later disclaimed surgery as a necessary precondition. (*Cf.* ECF No. 24 at 16:4-5 with ECF No. 25:1-21, 26:8-9, 29:16-30:1). Surgery is generally not performed on transgender persons under the age of 18. (ECF 29-1 ¶ 29).

considerations, a person with gender dysphoria has a need to use the restrooms associated with their gender identity and the failure to allow this causes harm. (ECF 29-1 ¶¶ 37-40).

Upon learning of this policy, Martinsville was provided detailed information about the length of A.C.'s transition, gender dysphoria diagnosis, medical care and treatment, and his ongoing attempt to secure a legal name and gender marker change. (ECF No. 29-2 at 9).<sup>5</sup> More information has been provided in the filings and discovery in this case. (ECF 29-1 ¶¶ 41-47; ECF No. 29-2; ECF No. 29-3; ECF No. 34-2; ECF No. 38-1 at 42:14-19; 62:19-63:19; 78:22-79:1, 83:21-85:4; ECF No. 38-2).<sup>6</sup> This is information Martinsville's designee said could meet the criteria for using the boys' restroom. (ECF No. 29-4 at 73:10-24).

But despite the unwritten policy and the information possessed by Martinsville, A.C. remains excluded from the boys' restroom. Martinsville says this exclusion is because 1) of A.C.'s age; 2) A.C. has not yet secured a legal name and gender marker change; 3) of other student's privacy; and 4) A.C. is not on hormones. (ECF No. 35 at 21).

Age or maturity are not relevant to A.C.'s diagnosis of gender dysphoria, the negative effects of being denied access to the boys' restrooms, and his need for social transition at school. If Martinsville is implying that A.C. or other thirteen-year-olds are not old enough to know their gender, that is simply untrue and belied by the record. (ECF No. 38-1 at 7:11-15; 29-1 at ¶ 13).

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<sup>5</sup> On March 23, 2022, A.C. was granted a change of name, although his request to secure a gender marker change remains pending. (ECF No. 38-3; ECF No. 29-2 ¶ 15). An unredacted copy of the order granting the change of name has been sent to Martinsville's counsel.

<sup>6</sup> ECF Nos. 38-1 and 38-2 are the depositions of Dr. Fortenberry and M.C. Portions of the depositions have been submitted by Martinsville (ECF Nos. 34-1 and 34-3). Dr. Fortenberry's deposition was taken simultaneously in this case and another case involving student restroom access, *B.E. and S.E. v. Vigo County School Corp., et al.*, No. 2:21-cv-415-JRS-MG (S.D. Ind.). A complete version of M.C.'s deposition has been submitted as ECF No. 38-2. A complete version of Dr. Fortenberry's deposition has been attached as ECF No. 38-1 except for redacted pages 46-62, which are relevant only to the other case.

The unwritten policy enunciated by Martinsville in the deposition of its designate does not consider whether a student has secured a name and gender marker change, only if a student has tried to change their name and gender marker. (ECF No. 35 at 3; ECF No. 29-4 at 16:5-7, 19:13-14). As indicated, note 5, *supra*, A.C. has now received a name change. (ECF No. 38-3). There is no evidence of privacy concerns in the restroom as the school restrooms have stalls with doors and urinals with dividers that afford privacy to the multiple students that may be in the restroom at the same time. (ECF No. 29-4 at 49:1-8). Additionally, A.C.'s earlier use of the stalls in the boys' restrooms did not cause any privacy issues or complaints. (*Id.* at 49:1-8; 64:16-65:11; ECF No. 29-3 ¶ 24). While A.C. is not yet on hormones, that is irrelevant to the fact that A.C. needs to use the boys' restroom to alleviate his gender dysphoria and ignores the fact that hormones are not always medically indicated. (*See, e.g.*, ECF No. 29-1 ¶¶ 12-48; ECF No. 29-2 at 9; ECF No. 38-1 at 71:5-72:16).

## **II. A.C.'s ongoing harms from the inability to access boys' facilities**

The only accommodation Martinsville will offer A.C. is the use of the health office restroom. (ECF No. 29-4 at 39:4-5, 81-82, 84). The health office is removed from most classrooms, unlike the regular student classrooms that are located throughout the school and designed to be easily accessible to students' classes. (*Id.* at 46:10-48:22). Other than A.C., the nurse's office restroom is not available to students unless they have permission or happen to be in the nurse's office. (*Id.* at 50:17-23).

Being recognized as the boy he is at school is critical to A.C.'s overall well-being and educational success. (ECF No. 29-1 at ¶¶ 37-40). A.C.'s exclusion from the boys' restroom exacerbates his gender dysphoria, manifesting as anxiety and depression. (ECF 38-2 at 54:9-19, 62:4-19; ECF No. 29-2 at ¶¶ 14, 31-37; ECF No. 29-3 at ¶¶ 27-29). These harms will continue

unabated, making him feel like an outcast at school because of who he is, until Martinsville treats A.C. the same as all other boys. (ECF 29-2 ¶¶ 34-37; ECF No. 29-3 ¶¶ 27-29).

## Argument

### **I. Plaintiff is likely to prevail on his claim that denying him the ability to use the boys' bathrooms violates both Title IX and equal protection**

#### **A. *Whitaker's* holding that discrimination against transgender students violates Title IX and equal protection remains good law**

Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), prohibits any school system receiving federal financial assistance from subjecting students to discrimination “on the basis of sex.”<sup>7</sup> Of course, discrimination on the basis of sex also can violate equal protection. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531-33 (1996). Martinsville does not deny this. Nor does it deny that the Seventh Circuit in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), *abrogation on other grounds recognized by Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020), specifically held that denying a transgender student the ability to use facilities consistent with his gender identity represented sex discrimination prohibited by both Title IX and equal protection. Instead, it argues that *Whitaker* should be disregarded because the decision is based on an erroneous standard, it has been undermined by the Supreme Court in *Bostock v. Clayton County, Georgia*, --U.S.--, 140 S. Ct. 1731 (2020), and it is contradicted by the Title IX regulations themselves.

#### **1. *Whitaker's* legal conclusions remain binding on this Court**

In *Whitaker*, while affirming a preliminary injunction for a transgender male student who had been denied access to his high school's boys' restrooms, the court made two key legal conclusions: 1) that “[a] policy that requires an individual to use a bathroom that does not conform

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<sup>7</sup> Martinsville receives federal financial assistance. (ECF No. 28 [Defendant's Answer] ¶ 55).

with his or her gender identity punishes the individual for his or her gender non-conformance, which in turns violates Title IX,” 858 F.3d at 1049, and 2) that denying a student access to facilities consistent with the student’s gender identity “is inherently based upon a sex-classification and heightened review applies” under equal protection. *Id.* at 1051. The court in *Whitaker* also stated that to demonstrate a likelihood of success on the merits in a preliminary injunction, the plaintiff only need establish “that his chances to succeed on his claims are ‘better than negligible.’” *Id.* at 1046 (internal citation omitted). In *Pritzker*, the court stated that “the ‘better than negligible’ standard was retired by the Supreme Court” and that a stronger showing must be made, although the issuance of a preliminary injunction requires something less than proof by a preponderance. 973 F.3d at 762-63. The court noted that *Whitaker* had used the “retired” standard. *Id.* at 762.

Martinsville argues, in effect, that *Whitaker* should be ignored because it used the now-disapproved standard for the grant of a preliminary injunction. This is erroneous. The abrogation of one portion of *Whitaker* does not affect the court’s legal conclusions that Title IX and equal protection prohibit denying transgender students, like Ash Whitaker and A.C., access to school facilities that are consistent with their gender identities. A court’s interpretation of the substantive law remains the same whether a plaintiff seeks a preliminary or permanent injunction, and regardless of whether the now-defunct “better than negligible” standard was articulated. And authority remains authoritative even if it has been abrogated on a limited point unrelated to the principle for which it is being cited. *See, e.g., Ybarra v. City of Chicago*, 946 F. 3d 975, 983 (7th Cir. 2020) (Hamilton, J., concurring) (citing Supreme Court precedent that had been “abrogated in nonrelevant part” by a subsequent Supreme Court case); *Dhakai v. Sessions*, 895 F. 3d 532, 539 (7th Cir. 2018) (citing as authority a Supreme Court case that had been “abrogated in part on other grounds” by a later case); *Wesolowski v. U.S.*, 2017 WL 3720197, at \*7 (S.D. Ind. Aug. 28, 2017)

(citing as authoritative a Seventh Circuit case that had been “abrogated in part on other grounds” by a subsequent Seventh Circuit case); *Miller v. U.S.*, 2016 WL 11721098, at \*5 (S. D. Ind. May 20, 2016) (citing to a Seventh Circuit case that had been “abrogated in part on another ground” by the Supreme Court).

Since *Pritzker*, the Seventh Circuit and this Court have cited *Whitaker* without reference to any negative subsequent authority. See *Tully v. Okeson*, 977 F.3d 608, 612 (7th Cir. 2020) (quoting *Whitaker* for the proposition that a preliminary injunction is an “extraordinary remedy”) (internal citation in *Whitaker* omitted), *cert. denied*, --U.S--, 141 S. Ct. 2798 (2021); *Kluge v. Brownsburg Community Sch. Corp.*, --F. Supp. 3d -, 2021 WL 2915023, at \*22 (S.D. Ind. July 12, 2021) (noting that in *Whitaker* “the Seventh Circuit concluded that the student was likely to succeed on his discrimination claims, [and] the court recognized that discrimination on the basis of transgender status is actionable under Title IX.”), *appeal pending* No. 21-2475 (7th Cir.). And this Court has continued to cite *Whitaker* for other purposes, again without any reference to any abrogation or negative subsequent authority. see, e.g., *Payton v. Walsh*, 2022 WL 80317, at \*2 (S.D. Ind. Jan. 7, 2022) (referring to the inquiry necessary when a preliminary injunction is sought).

This Court in *Kluge* is not alone in continuing to rely on *Whitaker*’s legal conclusions concerning discrimination against transgender persons without a mention that the case has had any subsequent history or that its precedential effect has been weakened. See, e.g., *Grimm v. Gloucester County Sch. Bd.*, 976 F. 3d 399, 401 (4th Cir. 2020) (*Grimm III*) (Wynn, J., concurring in denial of rehearing en banc) (citing *Whitaker*, and other cases, to support the fact that the panel’s decision that the School Board denied both Title IX and equal protection when it prevented a transgender male student from using the boys’ restroom was correct), *cert. denied*, --U.S--, 141 S. Ct. 2878

(2021); *Boston Alliance of Gay, Lesbian, Bisexual and Transgender Youth v. U.S. Dep’t of Health and Human Services*, --F. Supp. 3d --, 2021 WL 3667760 (D. Mass. Aug. 18, 2021) (citing *Whitaker*, and other cases, after stating that “while the First Circuit has not spoken on the subject, other circuits have held that intermediate scrutiny applies to discrimination based on transgender status in the equal protection context”); *D.T. v. Christ*, -- F. Supp. 3d --, 2021 WL 3419055, at \*6 (D. Az. Aug. 5, 2021) (citing *Whitaker* as one of a number of cases holding that “[d]iscrimination against transgender people is discrimination based on sex; as such, heightened scrutiny applies”); *Soule by Stanescu v. Conn. Ass’n of Schools, Inc.*, 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (citing *Whitaker* after stating “[c]ourts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. . . . Every Court of Appeals to consider the issue has so held.”); *Brickhouse v. Lashbrook*, 2020 WL 7059256, at \*3 (S.D. Ill. 2020) (citing *Whitaker* for the proposition that “discrimination based on a person’s transgender status or discrimination based on sex stereotyping may also be actionable as an equal protection claim”); *Hobby Lobby Stores, Inc. v. Sommerville*, --N.E.3d --, 2021 WL 3578344, at \*7 (Ill. App. Aug. 13, 2021) (citing *Whitaker* as one of many cases “upholding the right of transgender persons to be free from discrimination in employment and in access to bathrooms matching their gender identity), *appeal allowed*, 2021 WL 6500389 (Ill. Nov. 24, 2021); *Love v. Young*, 320 So. 3d 259, 274 n.17 (Fla. App. Apr. 21, 2021) (noting that “[i]n *Whitaker*, the court allowed a claim for discrimination on the basis of sex under Title IX”); *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 563 (N.H. Ct. App. 2020) (citing *Whitaker* as one of “the overwhelming majority of federal courts that have recently examined transgender education-discrimination claims under Title IX [and] have concluded that preventing a transgender student from using a school restroom or locker room consistent with the student’s gender identity violates

Title IX”).

*Whitaker* establishes that discrimination against transgender students is sex discrimination that violates Title IX and is subject to elevated scrutiny under equal protection. These holdings have not been abrogated, and as recognized by numerous cases, remain in full force and effect.

**2. Far from undercutting the validity of *Whitaker* the Supreme Court’s decision in *Bostock* supports the court’s holding in *Whitaker***

Faced with *Whitaker*, which clearly points to the unlawfulness of its actions, Martinsville argues that *Whitaker* has been undercut by the Supreme Court’s decision in *Bostock* where the Court held that discrimination against persons because of their sexual orientation and transgender status is discrimination on the basis of sex for purposes of Title VII. 140 S. Ct. at 1743. *Bostock* provides no justification for this argument and in no way undermines *Whitaker*’s validity—to the contrary, *Bostock* reinforces the holding of *Whitaker* and the strength of the A.C.’s claims here.

It is true that the Supreme Court in *Bostock* did not address the propriety of sex-segregated bathrooms or locker rooms under Title VII, 140 S. Ct. at 1753, as that question was not before it. Though the *Bostock* Court did not analyze the Title VII claims before it through a sex stereotyping analysis, it reached the same conclusion as the Seventh Circuit did in *Whitaker*—that discriminating against someone for being transgender is sex discrimination. *Id.* That the Court chose not to address an issue that was not before it cannot be construed as overruling, or even questioning, *Whitaker* where the issue was directly addressed and answered. “Lower courts, however, out of respect for the great doctrine of *stare decisis*, are ordinarily reluctant to conclude that a higher court precedent has been overruled by implication.” *Levine v. Heffernan*, 864 F.2d 457, 461 (7th Cir. 1988). There is absolutely no justification for the argument that *Bostock* in any way undercuts the validity of *Whitaker*.

Indeed, as the Fourth Circuit highlighted in *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, --U.S.--, 141 S. Ct. 2878 (2021) (*Grimm II*), *Bostock* further supports the claim that requiring a transgender student to use the bathrooms consistent with their birth-assigned sex violates Title IX in that

although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX. In *Bostock*, the Supreme Court held that discrimination against a person for being transgender is discrimination “on the basis of sex.” As the Supreme Court noted, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741. That is because the discriminator is necessarily referring to the individual’s sex to determine incongruence between sex and gender, making sex a but-for-cause for the discriminator’s action.

972 F.3d at 616 (some internal citations omitted) (cleaned up).<sup>8</sup>

### **3. Title IX regulations do not allow the discrimination directed at A.C.**

Title IX regulations specifically allow schools to “provide separate toilet, locker room, and shower facilities on the basis of sex.” 34 C.F.R. § 106.33. Martinsville argues that these regulations justify denying A.C. the ability to use male restrooms. (ECF No. 35 at 13). Martinsville does not attempt to reconcile this argument with the holding of *Whitaker*, which post-dates the enactment of the regulation. Its argument is wrong.

The court in *Grimm II* quickly dispensed with the identical argument by noting that the

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<sup>8</sup> Martinsville emphasizes the fact that Dr. Fortenberry agreed that biological sex is different than gender (*see, e.g.*, ECF No. 35 at 17), to rebut the argument that it is engaging in discrimination on the grounds of sex. But this ignores the fact, as noted in *Whitaker*, *Bostock*, and a host of other cases (*see* ECF No. 30 at 21-23), that Martinsville’s discrimination against A.C. is precisely because of his sex and the fact that he is deemed to be a girl and not a “real” boy. If he was a non-transgender boy, he could use the male restrooms at the school. But he is not allowed to because he is a transgender boy. This is discrimination based on sex. It also ignores Dr. Fortenberry’s actual testimony. Dr. Fortenberry never defined biological sex and explicitly rejected the notion that reproductive organs are associated with a sex. (ECF No. 38-1 at 9:18-10:5). Instead, he defines sex as “the identification given to a person associated with their genitals that are typically described at birth.” (*Id.* at 9:2-5).

student “does not challenge sex-separated restrooms, he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity.” 972 F.3d at 618. All that the regulation “suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what ‘sex’ means.” *Id.* (footnote omitted). What Martinsville contends is the recognition in Title IX of “the unique privacy interest in these areas with the recognized physical differences between the sexes[.]” (ECF No. 35 at 15) is nothing more than an invitation for this Court to ignore *Whitaker*'s holding. And it merely reemphasizes a point that Martinsville tries to ignore—A.C. is a boy.

#### 4. Conclusion

*Whitaker* remains good law. It is binding on this court. *See, e.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (“[T]he decisions of a superior court in a unitary system bind the inferior courts.”).

#### B. Denying A.C. the ability to use male restrooms violates Title IX

In a further attempt to evade *Whitaker*'s holding, Martinsville argues that *Whitaker* “addresses different facts.” (ECF No. 35 at 16). It is not clear what that means as, like the plaintiff in *Whitaker*, A.C. is a transgender male who has a consistent history of identifying as male, who has publicly transitioned, who is in therapy, who is diagnosed with gender dysphoria, who used the boys' restrooms without incident until he ceased doing so when threatened with discipline, who is experiencing significant distress, depression, and anxiety because of not being able to use the male restroom, and who tries not to use the bathroom at school at all, despite the fact that it causes him physical distress. *Compare* ECF No. 29-2, at 9; ECF No. 29-2 ¶ 24; ECF No. 29-3 ¶¶ 2-24; ECF No. 34-1 at 12:5 -14:13], ECF No. 38-2 at 59:1-23; *with Whitaker*, 858 F.3d at 1040-

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It is true that A.C. has not yet begun receiving hormones, (ECF No. 34-2 at 30:14-31:15), whereas Ash Whitaker had, 858 F.3d at 1040, and it is also true that Ash Whitaker was a high school student and A.C. is in middle school. Martinsville does not suggest how or why these differences are significant to the Title IX analysis, other than alluding to the fact that high school students are more mature than middle school students. (ECF No. 21 at 21). There is no suggestion that A.C.'s status as a transgender male suffering from gender dysphoria who needs to utilize the male restrooms is a product of "immaturity." The uncontested medical evidence is to the contrary. (*See, e.g.*, ECF No. 29-2 at 9).

Martinsville argues that it was not provided with the type of information that the school district was presented with in *Whitaker* prior to suit being filed. (ECF No. 35 at 21). A.C. believes that Martinsville was certainly aware of his status as a transgender male and his need to use the male restrooms before this case was filed. However, this timing is not relevant as it is uncontested that Martinsville has now been provided detailed information concerning A.C.'s transgender status and restroom needs. (*Supra* at 3). Yet, the restroom prohibition continues, thus justifying the need for a preliminary injunction at this time.

It is clear that to Martinsville, the most relevant fact here is that the sex assigned to A.C. at birth was female. Neither maturity, hormones, nor more information will alter the fact that A.C.'s sex at birth, like that of Ash Whitaker's, was female. *Whitaker* simply does not address "different facts."

As in *Whitaker*, Martinsville's provision of a unisex restroom does not weaken A.C.'s likelihood of success on the merits. *Whitaker* noted that the use of a gender-neutral restroom in the school's office was not a true alternative to restrooms consistent with the student's gender identity

given the distance from the student's classes and the increased stigmatization that the use of the alternative caused the student. 858 F.3d at 1050. *See also, e.g., Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018) (in rejecting a challenge to a school district policy allowing transgender students to use restrooms, locker rooms, and showers matching their gender identity, the court concluded that “[a] court order directing District to require students to use only facilities that match their biological sex or to use gender-neutral alternatives would violate Title IX”), *aff'd* 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, --U.S.--, 141 S. Ct. 894 (2020).

The same is true here. The health office restroom is not a true alternative. It is far from many of A.C.'s classes so that using it causes him to be late for classes—resulting in A.C. being marked tardy on several occasions until Martinsville determined to not discipline him for being late. (ECF No. 29-3 ¶ 21; ECF No. 29-2 ¶ 22). But, more importantly, A.C. faces the same stigmatization of being identified as different than every other student in the school as he is denied the ability to use the restroom that conforms to his gender identity and must use a “special” bathroom. (ECF No. 29-3 ¶¶ 22, 27).

*Whitaker* is clear. “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.” *Whitaker*, 858 F.3d at 1049-50. Shunting A.C. off into separate facilities based on stereotypical notions of sex is prohibited sex discrimination under Title IX and A.C. is likely to prevail on the merits of his Title IX claim.

**C. A.C. also is also likely to prevail on his equal protection claim**

**1. The discrimination against A.C. fails intermediate scrutiny**

Equal protection demands that the sex-based discrimination against A.C. be assessed with heightened scrutiny, requiring Martinsville to demonstrate 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. Under heightened scrutiny, it is the defendant’s burden to show that its actions are substantially related to an important governmental interest. The justifications must be genuine and not developed “*post hoc* ... in response to litigation. Nor may the justification be based upon overbroad generalizations about sex.” *Id.* at 1050 (internal citations omitted). Martinsville cannot meet its burden because the privacy arguments it offers to justify its discrimination against the plaintiffs are based on “sheer conjecture and abstraction,” *id.* at 1052, and therefore are insufficient to satisfy the “demanding” burden under heightened scrutiny. *United States v. Virginia*, 518 U.S. at 534.

Although Martinsville argues that its policy is justified by the need to “shield[ ] [students’] bodies from exposure to the opposite sex,” (ECF No. 35 at 18), the facts demonstrate that the bathrooms have stalls for toilets and partitions at the urinals. (ECF No. 29-4 at 48:24-49:8). And it is uncontested that when A.C. used the male bathrooms for three weeks, he did so without any negative reaction from students and there is absolutely no evidence that any unwanted privacy violations occur in the restroom. (ECF No. 29-3 ¶ 24; ECF No. 29-4 at 64:16-65:11). This is consistent with the court’s conclusion in *Whitaker*, as A.C. noted in his original memorandum, that “[c]ommon 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 . . . are particularly susceptible to an intrusion upon an individual’s privacy.” *Id.* at 1052.<sup>9</sup>

Martinsville argues that excluding A.C. from boys’ restrooms is related to an interest in

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<sup>9</sup> Martinsville argues that this three-week period is too short to be relevant. (ECF No. 35 at 23). This, of course, is not the case. It demonstrates that other students did not find A.C.’s presence to be untoward or objectionable. It confirms the “common sense” understanding noted in *Whitaker*.

protecting privacy. But as the Fourth Circuit explained, echoing *Whitaker*, concerns about intrusions on privacy do not apply to a transgender student’s “use—or for that matter any individual’s appropriate use—of a restroom.” *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709, 723 n.10 (4th Cir. 2016), *vacated on other grounds*, --U.S.--, 137 S. Ct. 1239 (2017) (*Grimm I*). Excluding plaintiffs from using the restroom “ignores the practical reality of how [A.C], as a transgender boy, uses the bathroom: by entering a stall and closing the door.” *Whitaker*, 858 F.3d at 1052. In fact, the very interest Martinsville claims to advance through its policy—of shielding individuals from those with different anatomical characteristics—are undermined by forcing A.C., who presents as male, into the girls’ restroom.

Although privacy concerns have been repeatedly raised to oppose the access of transgender students to school facilities consistent with their gender, those concerns have simply not materialized. *Grimm II*, 972 F.3d at 614 (“The insubstantiality of the Board’s fears has been borne out in school districts across the county, including other school districts in Virginia.”) (referring to bathroom access). And, as A.C. stressed in his original memorandum (ECF 30 at 28), courts have repeatedly rejected privacy arguments advanced by opponents to transgender students being allowed to use locker rooms or restrooms consistent with their gender identities. *See Parents for Privacy*, 949 F.3d at 1225 (cisgender students do not have a constitutional right not to share restrooms or locker rooms with transgender students); *Boyertown*, 897 F.3d at 533 (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”); *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).

Even if the privacy interests of cisgender students are implicated, they can easily be accommodated without denying A.C. the ability to use facilities consistent with his gender. As noted, A.C. uses the bathroom stalls, protecting the privacy of all. And “cisgender students who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school.” *Boyertown*, 897 F. 3d at 530. This easy solution to the illusory and conjectural concerns of Martinsville further demonstrates that denying A.C. the ability to use the boys’ restrooms is not related to any privacy interest, yet alone meeting the required standard of a substantial relationship.

**2. Discrimination based on transgender status also separately warrants heightened scrutiny**

As A.C. indicated previously, (ECF No. 30 at 26 n. 11), the discrimination here is subject to heightened scrutiny because it is both sex discrimination and discrimination based on his status as a transgender person. Although Martinsville does not address this argument, many courts have recognized that discrimination against transgender persons triggers elevated scrutiny. *Karnoski v. Trump*, 926 F.3d 1180, 1200-02 (9th Cir. 2019); *Grimm II*, 972 F.3d at 611-13; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Evancho v. Pine-Richland School 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). Transgender persons satisfy all the indicia necessary for this elevated scrutiny as (1) they have historically been subject to discrimination; (2) they have a defining characteristic that bears no relation to their ability to contribute to society; (3) they may be defined as a discrete group by

obvious, immutable, or distinguishing characteristics; and (4) they are a minority group lacking political power. *See, e.g., Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. 744, 770 (2013).

For the reasons noted above, the discrimination against A.C. fails this elevated scrutiny.

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

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

A.C. is being denied his rights under both equal protection and Title IX. This is *per se* irreparable harm for which there is no adequate remedy at law. (ECF No. 30 at 29-30). Martinsville fails to respond to this well-established law.

Instead, Martinsville argues, in effect, that there is no evidence that A.C. is being harmed as a factual matter. However, it is uncontested that A.C. suffers from gender dysphoria and that not being allowed to use the male restrooms

undermines my transition and worsens the anxiety and depression caused by my gender dysphoria. It makes me feel isolated and punished for being who I am. It also tells other students that I am different and should be treated like other boys. It makes being at school painful. I like school because I love learning but there are days I just cannot go because it feels too awful to have people not see me as the boy that I am.

(ECF No. 29-3 ¶ 27). A.C. further notes that

I also don't like using the clinic restroom because using it singles me and doesn't let me be myself at school. Because of how bad using the clinic restroom makes me feel, sometimes I avoid using the bathroom at all during the day. Even though this causes me physical discomfort, it is better than being singled out as different.

(*Id.* ¶ 22).

Dr. Fortenberry confirms that A.C. has identified bathroom usage at school as a significant source of “distress, depression, and anxiety” and that use of restrooms “consistent with [ ] experienced gender and gender identity is a standard element of our clinical protocols in terms of

its relevance to each patient’s health and safety.” (ECF No. 29-2). As Dr. Fortenberry notes in more detail

[t]he ability to be able to use toilet facilities consistent with one’s experienced and expressed gender is a prime component of gender affirmation. Being denied the use of gendered toilet facilities consistent with expressed gender is experienced as an ever-present source of distress and anxiety. Distress and anxiety are linked to increases in self-harming behaviors including suicidality.

\* \* \*

It is well-established by research and clinical experience that these experiences of shame and discrimination have long-term negative influences on mental health, physical health, and overall wellbeing.

(ECF No. 29-1 ¶¶ 37, 40).<sup>10</sup>

A.C.’s mother also confirmed that not being able to use the boys’ restroom causes A.C. anxiety and depression, while being able to use the boys’ restroom, for even a short time, made him happier and less stigmatized. (ECF No. 38-2 at 59:12-23, 62:4-16). 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 the preliminary injunction**

In balancing the harms here Martinsville ignores the significant harm being imposed on A.C. and instead argues that the privacy rights of cisgender students will be disadvantaged if an injunction is granted. However, as noted above, there is no evidence that the privacy interests of

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<sup>10</sup> Martinsville objects to Dr. Fortenberry’s statements as hearsay because he has not performed individual assessments of A.C. (ECF No. 35 at 22). However, Dr. Fortenberry is an expert and “[a]n expert may rely on hearsay evidence in forming his opinion, so long as it is the type of evidence reasonably relied on by experts in that field.” *Jenkinson v. Norfolk So. Railway Co.*, 2017 WL 11220415, at \*2 (S.D. Ind. Apr. 17, 2017), *see also* Fed. R. Evid. 703. It is to be expected that a medical expert will rely on evidence acquired by other medical personnel. *See, e.g., Erickson v. Baxter Healthcare, Inc.*, 131 F. Supp. 2d 995, 1001 (N.D. Ill. 2001) (noting that a medical expert may rely on medical records to form opinions).

In any event, hearsay can be considered in a preliminary injunction proceeding. *S.E.C. v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991).

other students will be negatively impacted and Martinsville can certainly easily accommodate students who feel their privacy is impinged upon.

Martinsville also argues that it would be burdened if A.C. is allowed to use male restrooms as it “will be forced to navigate this new frontier without the benefit of established rules.” (ECF No. 35 at 23). The contours of this “new frontier” are not clear. A.C. is a boy and seeks to use the boys’ restroom. This is not some new area. It is what is required by federal law and the Constitution.<sup>11</sup>

As previously noted, the public interest is advanced by protecting constitutional rights and enforcement of Title IX. (ECF No. 30 at 33). Martinsville responds that this issue should be decided by Congress or by federal agencies after notice and comment. (ECF No. 35 at 24). But this issue has already been decided by Congress as explained in *Whitaker* and other cases. Further delay is not an option.

### **Conclusion**

For the foregoing reasons a preliminary injunction should issue, without bond, allowing A.C. to use the male restrooms at the school.<sup>12</sup>

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<sup>11</sup> The “new frontier” argument is curious given that Martinsville conceded that at least at its high school, there are transgender students allowed to use the restrooms of their gender identity, not their sex assigned at birth. (ECF No. 29-4 at 23:6-24:15). To the extent that anything must be navigated, it appears that Martinsville has done so.

<sup>12</sup> Martinsville does not respond to A.C.’s argument that the injunction should issue without bond. (ECF No. 30 at 33-34).

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