UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

B.E., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 2:21-cv-415-JRD-MG
	)	
VIGO COUNTY SCHOOL	)	
CORPORATION, *et al.*,	)	
	)	
Defendants.	)	

Memorandum in Support of Motion for Preliminary Injunction

Introduction

B.E. and S.E. are transgender male students attending Terre Haute North Vigo High School, one of the high schools within the Vigo County School Corporation. Although they were both designated as female at birth, they are male. Both boys have long identified and presented as male and have been known by their male first names and male pronouns since elementary school. They have been diagnosed with gender dysphoria and are under the care of physicians who have initiated a regimen of masculinizing hormones for the boys.

The two plaintiff boys have requested that they be permitted to use male restrooms and the male locker room in the school. B.E. and S.E. have also asked to be addressed by the names that reflect their gender identity, and that school employees generally refer to them as male, including with the use of male pronouns. The Vigo County School

Corporation ("the Corporation") and the Principal of Terre Haute North Vigo High School (referred to collectively as "the School") have thus far refused to allow the plaintiffs to use male restrooms and locker rooms and have refused to require staff to refer to the boys by names and pronouns that match their gender identities.

This refusal is surprising given that: (1) the Seventh Circuit, in a virtually identical 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*;[1] (2) this Court, again in a virtually identical case, held that denying a transgender male high school student the ability to use male restrooms warranted summary judgment for the student, finding again that the school corporation had violated both Title IX and equal protection, *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.*, --

[1] 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 *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020). However, this does not affect the Seventh Circuit's clear holdings in *Whitaker* concerning both Title IX and equal protection as set out below.

U.S.--, 140 S. Ct. 1731 (2020).

The law is therefore clear that the Corporation is engaging in unlawful discrimination against plaintiffs 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 the plaintiffs to use the male facilities on Corporation property and requiring that they be referred to by their male names 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 Janine Fogel, M.D., C.C.F.P., A.B.F.M. ["Fogel"] ¶ 8 [attached to this memorandum as Exhibit 1]; Declaration of James D. Fortenberry ["Fortenberry"] ¶ 12 [attached to this memorandum as Exhibit 2]).[2] For many people gender identity is established early in life and is congruent with one's anatomical features, such that persons born with a penis and testes are classified as

[2] Dr. Fogel is the Medical Director of the Gender Health Program at the Eskenazi Health Outpatient Center in Indianapolis and has treated more than 750 persons who are transgender, including adolescents. (Fogel ¶¶ 2, 4). 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 has participated in the care of both plaintiffs in this case. (*Id.* ¶ 35).

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; Fogel ¶ 9).

However, persons who are transgender have a much different experience of gender. (Fortenberry ¶ 14).[3] 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. (Fogel ¶¶ 10-13, ¶ 16; 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. (Fogel ¶¶ 10-11; Fortenberry ¶ 14). This conflict creates a sense of distress that can present through various symptoms and can, if 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

[3] 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 two transgender male students, this general overview of gender dysphoria will focus on binary transgender persons.

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. (Fogel ¶ 18).

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.[4] 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.
> >
> > 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).

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[4] 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. (Fogel ¶¶ 12, 14; Fortenberry ¶¶ 20, 22). The term "gender dysphoria" and the DSM-V classification is used in the United States and is used in this memorandum. (Fogel ¶ 15, Fortenberry ¶ 23).

> 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.

(Fogel ¶ 13; 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. (Fogel ¶¶ 18, 20; 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 ¶ 26). Treatment focuses on alleviating distress through supporting outward expression of the person's gender identity – which is social role transition. (Fogel ¶ 21). This involves allowing young people to express their gender through names and pronouns and social behaviors consistent with their gender identity. (Fortenberry ¶¶ 26-27). It may also involve bringing the person's body into alignment with the person's gender identity, to the extent deemed medically appropriate, through hormone therapy to either feminize

or masculinize the person's physiological characteristics and, if deemed warranted, through surgery to alter the person's sex characteristics. (Fogel ¶ 21; Fortenberry ¶ 27).

The provision of gender-affirming hormone therapy will start the physiologic changes in body contour and appearance to match that of the experienced gender. (Fortenberry ¶ 27). The hormones—namely testosterone—given to persons assigned female at birth with an experience of male gender identity will cause the voice to deepen, the stimulation of beard growth, increase in muscle mass, and the redistribution of body fat. (*Id.*; Fogel ¶ 25). Typically, after a year of hormone therapy most transgender males will be very masculine in appearance. (Fogel ¶ 25).

Psychotherapy may be helpful to the person with gender dysphoria. (*Id.* at ¶ 22). The purpose of mental health services is not to "cure" the person with gender dysphoria. (*Id.*). 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. (*Id.*; Fortenberry ¶ 26).

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 enables the person to express themselves in a way that is consistent with their gender identity, is essential to ameliorate gender dysphoria. (Fortenberry ¶ 29). 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 ¶ 29; Fogel ¶ 23). The more that the person can immerse themselves in their gender identity, the better it is for the person's treatment. (Fogel ¶ 26).

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 ¶ 30; Fogel ¶ 26). Transgender persons frequently report deadnaming and misgendering as a distressing experience in schools that leads to more negative school experiences and greater levels of depression and anxiety. (Fortenberry ¶ 30).

The importance of using restrooms that match the person's gender identity cannot be underestimated. (Fogel ¶ 27). 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.*; Fogel ¶ 27). This undercuts the purpose and goal of social role transition and can increase the deleterious consequences of gender dysphoria, including self-harming behavior. (Fogel ¶ 27; Fortenberry ¶ 31). 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. (Fortenberry ¶ 31). 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. (Fogel ¶ 29; Fortenberry ¶ 32). This can cause physical discomfort and injury. (Fogel ¶ 29; Fortenberry ¶ 32).

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 bathrooms that are consistent with their gender identity. (Fogel ¶ 28; Fortenberry ¶ 33). This just continues the message that the transgender student is different than the student's peers and should be segregated from them. (Fogel ¶ 28, Fortenberry ¶ 33). This undercuts the purpose of social role transition and contributes to feelings of isolation and low self-esteem that are common among transgender persons. (Fogel ¶ 28; Fortenberry ¶ 33). 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. (Fortenberry ¶ 34). 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.* ¶ 30).

B.E. and S.E.

B.E. and S.E. are 15-year-old siblings who live in Terre Haute with their mother, L.E. (Declaration of L.E. ["L.E."] ¶¶ 1-2 [attached to this memorandum as Exhibit 3]). They are freshmen attending Terre Haute North Vigo High School in the Vigo County

School Corporation. (*Id.* ¶ 3). Vigo County School Corporation is a recipient of federal funding. *See*, *e.g.*, Vigo County School Corporation Food Services, web.vigoschools.org/students/food-service/ (last visited Nov. 22, 2021) (noting the Corporation's participation in the United States Department of Agriculture's free or reduced school breakfast and lunch programs.).

B.E. and S.E. are boys who are transgender. They were designated female at birth but realized that they are boys in elementary school and have long presented themselves as male to the world. (Declaration of B.E. ["B.E."] ¶ 4 [attached to this memorandum as Exhibit 4] and Declaration of S.E., ["S.E."] ¶ 4 [attached to this memorandum as Exhibit 5]). Around 11 years old, B.E. and S.E. told their family that they are boys and asked that they be referred to by their masculine names and with male pronouns. (B.E. ¶ 5; S.E. ¶ 5). They have continued to use these names and pronouns in daily life. (B.E. ¶ 6; S.E. ¶ 6). B.E. and S.E. also began to masculinize their appearance by wearing male clothing and masculine haircuts consistent with their gender. (*Id.*). Their appearance remains masculine. (B.E. ¶ 7; S.E. ¶ 7).

Since their disclosure, the siblings have been recognized as boys by their family and friends. (B.E. ¶ 6; S.E. ¶ 6). At their and L.E.'s requests, most of their classmates and teachers used their masculine names and male pronouns for the rest of elementary school. (B.E. ¶ 8; S.E. ¶ 8). This is also how they were known throughout middle school. (*Id.*). Having lived consistent with their gender for several years, many people in their lives

have only known them as boys. (B.E. ¶ 38; S.E. ¶ 38). Others now correctly perceive them to be boys based on their appearance, easing the discomfort caused by being perceived as girls. (B.E. ¶¶ 4, 7; S.E. ¶¶ 4, 7).

Before beginning high school at Terre Haute North, B.E. and S.E. contacted their teachers to ask that they be referred to by their names and with male pronouns, not the birth names and female pronouns noted on their school records. (B.E. ¶ 9; S.E. ¶ 9). Their teachers have tried to respect this request, but several substitute teachers insist on using their birth names and female pronouns. (B.E. ¶ 33, 35; S.E. ¶ 33, 35).

At the start of the school year, B.E. and S.E. used the boys' bathrooms at school because that is the correct and comfortable choice for them. (B.E. ¶ 10; S.E. ¶ 10). Their use of the boys' bathrooms was unremarkable to their classmates. (B.E. ¶ 11; S.E. ¶ 11). But when school employees noticed them using the boys' bathrooms, they were informally reprimanded and told not to use them again. (B.E. ¶ 12; S.E. ¶ 12). When they were seen a second time, in late September, the Vice Principal called L.E. to request that she and the siblings come to the school for a meeting about their bathroom use. (*Id.*; L.E. ¶ 13).

At their initial meeting, L.E. requested that B.E. and S.E. be allowed to use the boys' bathrooms and similar facilities congruent with their gender. (L.E. ¶ 14). She also requested that the school direct its employees and students to refer to B.E. and S.E. by their masculine names and with male pronouns. (*Id.*). She explained that B.E. and S.E.

have been diagnosed with gender dysphoria and would soon begin hormone therapy to align their bodies with their male gender. (*Id.*). With this knowledge, the Vice Principal responded that B.E. and S.E. were only allowed to use the girls' bathrooms or the unisex bathroom in the health office. (*Id.* ¶ 15). The Vice Principal reiterated that they were not allowed to use the boys' bathrooms or boys' facilities. (*Id.*).

After this meeting, L.E. sent the Vice Principal a written request that B.E. and S.E. be treated in all respects as boys at school. (*Id.* ¶ 16). L.E. included materials detailing the school's legal obligations to comply with her request. (*Id.* ¶ 17). She also provided letters from B.E. and S.E.'s doctor explaining their medical needs that require frequent bathroom use. (*Id.* ¶¶ 18-19 and Exhibit 1 and 2 to L.E.). To accommodate those needs, B.E. and S.E.'s doctor requested that they be excused from class as needed and specifically asked that they be permitted to use the boys' restrooms. (L.E. ¶ 19 and Exhibit 1 and 2 to L.E.). The Vice Principal responded that L.E.'s requests were under review by Vigo County School Corporation executive staff members and the Corporation's lawyers. (L.E. ¶ 21).

In mid-October, L.E. met with the Vice Principal and Principal, where she was told that the executive staff and the Corporation's lawyers had determined that the Corporation would not comply with her requests. (*Id.* ¶¶ 22-23). B.E. and S.E. are therefore permitted only to use the girls' bathrooms or the unisex bathroom in the health office, though they are excused from class to accommodate medical needs. (*Id.* ¶ 22). They are not permitted to use the boys' bathrooms or locker rooms. (*Id.*). When B.E. and S.E.

need to change for gym class or other activities, they are instructed to use the girls' locker rooms or the health office bathroom. (B.E. ¶ 14; S.E. ¶ 14). The school also refused to direct its employees and students to use B.E. and S.E.'s name and pronouns. (L.E. ¶ 23). Instead, B.E. and S.E. will continue to be listed on their class rosters by their birth names and will be listed by their birth names in the school yearbook, even though some students at the school are known by their nicknames and are listed in the yearbook by those nicknames. (*Id.*; B.E. ¶ 17; L.E. ¶ 17). School employees are given the choice of whether or not to use the names and pronouns that reflect B.E. and S.E.'s gender. (L.E. ¶ 23).

The use of girls' bathrooms or the unisex bathroom in the health office are not viable options for B.E. and S.E. (*Id.* ¶¶ 24-26; B.E. ¶¶ 20-30; S.E. ¶¶ 20-30). They do not want to use the girls' bathrooms because they are boys. (B.E. ¶ 22; S.E. ¶ 22). Using the girls' bathrooms is antithetical to their male gender and to the social recognition of their gender. (B.E. ¶¶ 21-23; S.E. ¶ 21-23). They have been unable to attempt to use the girls' bathrooms because of the psychological distress and discomfort it causes. (B.E. ¶ 22; S.E. ¶ 22).

The health office bathroom is also not a suitable substitute because it is far from the boys' classes and locked at unpredictable times. (B.E. ¶¶ 24-28; S.E. ¶¶ 24-28). When they need a bathroom urgently, the distance makes them risk embarrassing accidents. (B.E. ¶ 27; S.E. ¶ 27). When needed during class, they miss more of class than they would using the much closer boys' bathrooms. (B.E. ¶ 26; S.E. ¶ 26). B.E. and S.E. are often late

to class because they cannot get to the health office, use the restroom, and get to their next class in the time allotted between classes. (*Id.*). And when the health office is locked, they have no restroom to use and must wait in discomfort until it is opened. (B.E. ¶ 28; S.E. ¶ 28). For these reasons, B.E. and S.E. try to avoid using the bathrooms entirely while at school. (B.E. ¶ 29; S.E. ¶ 29). These efforts are painful, distracting, and medically dangerous. (B.E. ¶ 29; S.E. ¶ 29, Fogel ¶ 30; Fortenberry ¶ 32).

Because they are prohibited from using the boys' locker rooms, they also use the health office to change for gym class. (B.E. ¶ 30; S.E. ¶ 30). The distance makes them late to gym class and spotlights that they have not come from the locker rooms like their classmates. (*Id.*).

B.E. and S.E. are patients of the Riley Gender Health Clinic, and Dr. Fortenberry has participated in their care and is aware of their medical and mental health records. (Fortenberry ¶ 35). Dr. Fortenberry confirms that they both fully meet the diagnostic criteria for gender dysphoria. (*Id.* ¶ 36). Both boys have consistently noted the distress caused by their inability to access male restrooms and by being referred to by the incorrect pronouns. (*Id.* ¶ 35).

Being treated at school as boys is extremely important to B.E.'s and S.E.'s mental and physical health. (B.E. ¶ 18; S.E. ¶ 18). Forcing B.E. and S.E. to use female restrooms undermines their transitions, exacerbates their dysphoria, and is wrong and disruptive for everyone because they are boys. (B.E. ¶¶ 18, 23-24, 31; S.E. ¶¶ 18, 23-24, 31). And use

of the bathroom in the health office remains an impractical and injurious option. (B.E. ¶ 25; S.E. ¶ 25; L.E. ¶ 25). It is inconveniently located, often inaccessible, and emphasizes to B.E., S.E., and their peers that the school believes that they are different than everyone else. (B.E. ¶¶ 26-31; S.E. ¶ 26-31).

The School Corporation's refusal to recognize B.E. and S.E. as male, allow them access to male facilities, and direct the school community to use their names and male pronouns causes them emotional and psychological harm. (B.E. ¶¶ 31-35; S.E. ¶¶ 31-35; L.E. ¶ 29). Use of their birth names forces them to disclose to their classmates and teachers that they are transgender, a disclosure they do not wish to make and that heightens their anxiety and depression. (B.E. ¶¶ 32, 36; S.E. ¶¶ 32, 36). Some substitute teachers insist on treating them as girls, making them unable to live consistently with their gender and causing other students to deny that they are male. (B.E. ¶¶ 35-37; S.E. ¶¶ 35-37). Because the School Corporation refuses to recognize their gender, B.E. and S.E. feel isolated and unable to be themselves at school. (B.E. ¶ 31; S.E. ¶ 31). They are finding it difficult to be at school altogether. (L.E. ¶ 29).

L.E. has filed a petition with the Vigo Circuit Court, on behalf of B.E. and S.E. to legally change their names and gender markers so that their birth certificates are amended to reflect their male gender and masculine names. (*Id.* ¶ 31). A decision is pending, and it is unknown what the defendants' position will be if the petition is granted. (*Id.* ¶ 32).

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;
>
> (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;
>
> (3) whether the threatened injury to the plaintiff outweighs the threatened harm the grant of the injunction may inflict on the defendant; and
>
> (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. The plaintiffs are likely to prevail on the merits of their claims

The law 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. The plaintiffs

have suffered precisely the prohibited discrimination, and they are certainly likely to prevail on the merits of their claims.

A. *Bostock* and *Whitaker* establish that the plaintiffs will succeed on the merits of their Title IX claims

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).

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 Indiana*, 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.* at 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*, it is clear that discrimination on the basis of transgender status constitutes discrimination "on the basis of sex."

2. Denying plaintiffs the ability to use male restrooms and locker rooms constitutes prohibited discrimination under Title IX

The Seventh Circuit's decision in *Whitaker* makes plain that denying the plaintiffs access to male restrooms and locker rooms 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. This was so even though the student had been diagnosed with gender dysphoria, had socially transitioned, and was undergoing masculinizing hormone therapy. *Id.* at 1041. Because use of the female or gender-neutral restrooms was damaging to him and to his transition, he attempted to restrict his water intake to avoid having to use the restroom while at school. *Id.* at 1040-41. This restriction exacerbated a preexisting medical condition and subjected

him to the risk of seizure, fainting, and dizziness. *Id.* at 1041.

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, the defendants have nonetheless denied the plaintiffs access to male restrooms—contrary to the Seventh Circuit's clear pronouncement. As in *Whitaker*, the defendants are aware that the plaintiffs have been diagnosed with gender dysphoria, are undergoing masculinizing hormone therapy, live as boys, and have preexisting medical conditions that make their access to the restroom particularly important. *See id.* at 1040-

41; (L.E. ¶¶ 14, 17-18).[5]

Just as in *Whitaker,* the school's policy punishes the plaintiffs for their gender non-conformity, and under the Seventh Circuit's clear directive, this violates Title IX.[6] This Court has already so concluded in similar circumstances, granting summary judgment to a transgender student-plaintiff regarding restroom access. *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. 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); *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").

The same is true regarding the plaintiffs' access to male locker rooms: the policy requiring them to separate from their peers and change clothes in either the girls' locker

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[5] In addition, the plaintiffs are awaiting a state court decision where they have asked to legally change their names to reflect their male identities and their gender markers to identify them as male on their birth certificates.

[6] 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.

room or the sole gender-neutral restroom subjects them "to different rules, sanctions, and treatment than non-transgender students," which violates Title IX. 34 C.F.R. § 106.31(b)(4); *see Whitaker*, 858 F.3d at 1049-50. And the provision of a "gender-neutral alternative" does not satisfy the demands of Title IX, as "it is the policy itself which violates the Act." *Whitaker*, 858 F.3d at 1050. *See also M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704, 717 (D. Md. 2018) (concluding that denying transgender student access to locker room of his gender identity subjected him to different rules, sanctions, and treatment than non-transgender students and states a claim for gender stereotyping under Title IX).

The School's refusal to allow the plaintiffs access to the restrooms and locker room consistent with their gender violates Title IX, and they are likely to succeed on the merits of their claim.

3. Defendants' refusal to require staff to refer to plaintiffs by their male names and 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). The School has indicated that it will not direct school employees to refer to the plaintiffs by the names and pronouns that reflect their male gender, but will instead allow staff to choose what names and pronouns to employ.

Should the School persist in this approach, it continues to subject the plaintiffs to

differential treatment on the basis of their transgender status, in violation of Title IX. And it does so in a manner that is irrational and indefensible, given that the plaintiffs are known in daily life by their male names, are recognized by their doctors, family, and friends as male, and expect that their birth certificates will soon reflect their male names 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 Loc. 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 adult staff members refer to the plaintiffs as if they are girls, they are singled out from their peers, outed as transgender, and humiliated in the most fundamental and public way possible. Fellow students know them, and they present, as boys: nothing could be more dissonant, therefore, than requiring them to be referred to as girls in front of their 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.).

The School violates Title IX by refusing to direct staff to refer to the plaintiffs as the boys that they are, and it should be enjoined to do so.

B. The plaintiffs will also prevail on their 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.[7]

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[7] 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); *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).

See also Grimm, 972 F.3d at 607 (applying heightened scrutiny as "the bathroom policy rests on sex-based classifications").

At this point the School has not established the basis for its decision to exclude the plaintiffs from the male restrooms and locker rooms, or its refusal to require staff to refer to them by their male names and pronouns. But as to restroom and locker room access, such policies are presumably based on generalized privacy concerns regarding other male students who would be sharing those spaces with the plaintiffs. However, the court in *Whitaker* rejected this rationale as sufficient to satisfy heightened scrutiny, as have many other courts that have considered the same arguments. And the boys' experiences make plain that such justifications are not served by banning them from the boys restrooms as they had utilized them without incident until staff prohibited them from doing so.

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 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. Both the Third and Ninth Circuits have rejected such privacy-related challenges. *See Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

It is not clear what the School will proffer as a justification for refusing to instruct staff to refer to the plaintiffs by their male names and pronouns—particularly if it continues its refusal if a legal name and gender-marker change is issued by the Vigo Circuit Court. As students within the School frequently are known by nicknames that are not their legal names (*see* B.E. ¶ 16; S.E. ¶ 16), the School certainly will not be able to mount "an exceedingly persuasive justification" for its sex-based discrimination against

the plaintiffs.

For all these reasons, the plaintiffs are likely to prevail on their equal protection claims as well.

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

A. The plaintiffs are 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 County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *see also, e.g.*, *Cohen v. Coahoma County, 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 the plaintiffs' equal-protection rights are being violated, they have established that they are suffering 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. v. Evansville Vanderburgh School Corp.*, 323 F. Supp. 3d 1030, 1040 (S.D. Ind. 2018). However, the plaintiffs have also established that the School's policies cause them stress, depression, and physical and psychological harm, for which there is no adequate remedy at law.

In *Whitaker* the Seventh Circuit noted that mental health professionals, as here,

explained how 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.

The plaintiffs are 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 unexplained 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, inasmuch as the plaintiffs have 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 the School to conform its conduct to the requirements of the Constitution and federal law—a requirement that the School 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. United States Department of Education*, 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 marks and citation omitted); *Cohen v. Brown University*, 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 the School. In the absence of such injuries, no bond should be required. *See. e.g.*, *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996).[8]

Conclusion

For the foregoing reasons the preliminary injunction should be granted, without bond, and the School should be ordered to treat the plaintiffs as the boys that they are, including allowing them to use the male restrooms and locker rooms, and requiring staff members to refer to the plaintiffs using their male names and pronouns.

[8] 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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