UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

B.E., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 2:21-cv-00415-JRS-MG
	)	
VIGO COUNTY SCHOOL CORPORATION, *et al.*,	)	
	)	
Defendants.	)	

Reply Memorandum in Support of Motion for Preliminary Injunction

Introduction

The defendants ("VCSC" for "Vigo County School Corporation") do not dispute that B.E. and S.E. are transgender boys who have identified as male for some time and have gender dysphoria. VCSC also acknowledges that the plaintiff boys are taking testosterone to treat their diagnosed gender dysphoria, which has increasingly masculinized their physical appearance. And it does not disagree that the State of Indiana, through the Vigo Superior Court, has decreed that the plaintiffs are male.[1] The gender markers and names on their birth certificates now acknowledge that fact. (Supplemental Declaration of L.E. ["L.E. Suppl. Decl."] ¶ 3, ECF No. 43-9 at 1-4). Nevertheless, contrary to binding authority from the Seventh Circuit and numerous cases, VCSC argues that the plaintiff boys should not be allowed to use the male restrooms or locker rooms until and unless they obtain "surgical or anatomical change[s]." (ECF No. 30 at 17-18). VCSC's policy of excluding the plaintiff boys from the restroom based on physiological characteristics serves no

[1] Because the State of Indiana, through its courts, has recognized that the plaintiff boys are male, it is disquieting that the State, through the Office of the Attorney General, has filed an amicus brief in this action arguing that the plaintiffs should not be so treated.

legitimate purpose and singles the boys out from their peers in discriminatory and stigmatizing ways. This is unlawful, and this Court should issue a preliminary injunction, without bond, requiring VCSC to allow the plaintiff boys to use male facilities in its schools.[2]

Supplemental Facts

I, B.E. and S.E. are excluded from male restrooms because VCSC requires that transgender students have unspecified surgery, despite B.E. and S.E.'s satisfaction of VCSC's guideline criteria.

VCSC maintains an "Administrative Guideline Regarding Accommodations for Transgender Students" that establishes criteria for administrators to evaluate a student's request to use restrooms that do not correspond to their birth-assigned sex. (ECF No. 43-2). The Guideline applies only to restroom (not locker room) use, was approved by the current school board several years ago (though its author and effective date are unknown) and is the only guidance VCSC has adopted regarding transgender students. (Mason Dep. Tr. 13:6-15:20, ECF No. 43-1 at 4[3]). Guideline considerations include:

- The student's age;
- Whether they have received or sought a change of sex designation on their birth certificate;
- "The duration of any public or aesthetic transition period";
- Whether the student made previous requests to be known by a different name and pronouns;
- Whether the student has been diagnosed with gender dysphoria and given VCSC written documentation with specific content;
- Whether the student has received hormone therapy and the duration of hormones, and whether the student has received any other transition-related medical treatment or procedure;

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[2] The plaintiff boys initially requested that the preliminary injunction order VCSC to require staff to refer to the plaintiffs using male pronouns and their male names. Now that their gender markers and names have been changed by order of the Vigo Superior Court (ECF No. 29-5 at 1-4), VSCS has agreed that staff will refer to the plaintiff boys by their legal male names and male pronouns. (Mason Dep. Tr. 20:3-21:9, ECF No. 43-1 at 5-6). The preliminary injunction request is therefore limited to restroom and locker room use.

[3] The docket numbers and page numbers of exhibits cited in this memorandum refer to those assigned by the Court's electronic filing system.

- Whether the student has any other relevant medical conditions;
- "Concerns or objections raised by other students or parents or guardians of other students" to the request; and
- "Accommodations offered to other similarly-situated individuals"

(ECF No. 43-2 at 1-2).

B.E. and S.E. would seem to satisfy these criteria. Their names and gender markers have been legally changed (ECF No. 29-5 at 1-4), they socially transitioned at 11 years old (ECF No. 22-4 at 1, ¶ 5; ECF No. 22-5 at 1, ¶ 5), and they provided VCSC documentation of their gender dysphoria diagnoses and related medical conditions bearing on the need for restroom access. (L.E. Dep. Tr. 50:2-51:3, ECF No. 43-3 at 14; ECF No. 29-5 at 5-8). VCSC knows that their doctors consider them male and that they now receive masculinizing testosterone therapy. (Mason Dep. Tr. 11:16-13:5, ECF No. 43-1 at 3-4). Even if VCSC could consider the complaints of third parties, a point that the plaintiffs most certainly do not concede, B.E. and S.E.'s previous use of the boys' restrooms was not disruptive to other students and did not occasion complaints from parents or anyone else. (Mason Dep. Tr. 28:1-30:12, ECF No. 43-1 at 7-8).

Notwithstanding the Guideline criteria, B.E. and S.E. are excluded from the boys' facilities because VCSC requires that they (and any transgender student) have surgery before they will be allowed to use the boys' restrooms or locker room. (*Id.* at 22:3-18, ECF No. 43-1 at 6). VCSC cannot explain what surgery or medical documentation would suffice. (*Id.* at 41:19-42:8, ECF No. 43-1 at 11). Absent unknown proof of unspecified "surgical or anatomical change," (*Id.* at 18:21-24, ECF No. 43-1 at 5), B.E. and S.E. are permitted only to use the girls' restrooms or the restroom in the health office and are subject to discipline if they use the boys' facilities. (*Id.* at 35:9-39:24, ECF No. 43-1 at 9-10).

VCSC cites students' privacy needs as the basis for its surgery requirement and B.E. and S.E.'s resulting exclusion from the boys' facilities. (*Id.* at 42:5-16, ECF No. 43-1 at 11; ECF No.

43-2 at 1). The school restrooms have stalls that afford privacy to the multiple students that may be in the restroom at the same time. (Mason Dep. Tr. 37:10-38:7, ECF No. 43-1 at 10). B.E. and S.E.'s previous use of the stalls in the boys' restrooms did not cause any privacy or other issues. (*Id.* at 28:1-30:12, ECF No. 43-1 at 7-8; B.E. Dep. Tr. 22:8-10, ECF No. 43-4 at 7; S.E. Dep. Tr. 13:14-20, ECF No. 43-5 at 4). The boys' locker room also has toilets with stalls in addition to an open changing area and common showers. (ECF No. 29-6 at 3-12). If they were allowed to use the boys' locker room, B.E. and S.E. would use the stalls to change privately. (Supplemental Declaration of B.E. ["B.E. Suppl. Decl."] ¶ 6, ECF No. 43-7 at 2; Supplemental Declaration of S.E. ["S.E. Suppl. Decl."] ¶ 6, ECF No. 43-8 at 2). Not all students who take gym use the locker room showers, nor do B.E. and S.E. intend to use them.[4] (B.E. Suppl. Decl. ¶ 7, ECF No. 43-7 at 2; S.E. Suppl. Decl. ¶ 7, ECF No. 43-8 at 2).

II. Gender affirming medical and surgical interventions

Even though VCSC cannot articulate what surgery it requires, (Mason Dep. Tr. 41:19-42:8, ECF No. 43-1 at 11), B.E. and S.E. cannot satisfy any surgical requirement because surgery is not generally medically indicated for minors and is not indicated for B.E. and S.E. at this time. (Supplemental Declaration of James D. Fortenberry, M.D., M.S., ["Fortenberry Suppl. Decl."] ¶¶ 10-13, ECF No. 43-6 at 3-4). Genital surgeries specifically are not performed on minors.[5] (*Id.* at ¶ 13). There is no physician in Indiana that would perform gender affirming genital surgery on B.E. and S.E. (*Id.*). VCSC's vague reference to surgical and anatomical change therefore poses a

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[4] Although they do not intend to shower at school, the health office restroom that they currently use in lieu of the boys' restrooms and locker room does not have a shower. (B.E. Suppl. Decl. ¶ 7, ECF No. 43-7 at 2; S.E. Suppl. Decl. ¶ 7, ECF No. 43-8 at 2).

[5] Genital surgeries are not considered when other gender affirming therapies are sufficient and will never be necessary for many individuals. In adulthood, fewer than 30% of transmasculine individuals require any type of genital surgery because other treatments are sufficient. (Fortenberry Suppl. Decl. ¶ 16, ECF No. 43-6 at 5).

complete bar to the plaintiffs.

While surgery is not an option, B.E. and S.E. are experiencing anatomical changes resulting from their gender affirming testosterone therapy. (*Id.* at ¶ 8). Hormone therapy initiates physiological changes that, over time, aligns the person's body with their gender. (*Id.* at ¶ 6). B.E. and S.E. began masculinizing hormone therapy in November 2021. (*Id.* at ¶ 8). They can expect further physical changes during the first year of receiving testosterone including the cessation of menstruation, fat redistribution, facial and body hair growth, increased muscle mass, deepening of the voice, clitoral enlargement, and vaginal atrophy. (*Id.* at ¶ 9). No matter the duration or effects of testosterone, VCSC will permit them to use the girls' facilities and prohibit them from using the boys' facilities (Mason Dep. Tr. 35:9-24, ECF No. 43-1 at 9) in the absence of surgeries that no surgeon would presently perform and that will likely never be necessary. (Fortenberry Suppl. Decl. ¶¶ 10-16, ECF 43-6 at 3-5).

III. B.E. and S.E.'s ongoing harms from the inability to access boys' facilities

The only accommodation VCSC will offer the plaintiffs is the use of the health office restroom. (Mason Dep. Tr. 35:9-15, ECF No. 43-1 at 9). 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 37:17-19, ECF No. 43-1 at 10; ECF No. 43-2 at 3). B.E. and S.E.'s classrooms are primarily located on the east side of the first floor, and on the second and third floors. (B.E. Suppl. Decl. ¶ 4, ECF No. 43-7 at 1; S.E. Suppl. Decl. ¶ 4, ECF No. 43-8 at 1). Other than B.E. and S.E., the health office restroom is not available to students unless they have permission or happen to be in the nurse's office. (Mason Dep. Tr. 35:25-36:10, ECF No. 43-1 at 9).

Because the school nurse uses the health office, it is locked when the nurse is not there and

when there are sensitive items in the office. (Mason Dep. Tr. 36:21-37:4, ECF No. 43-1 at 9-10). B.E. and S.E. have found the health office locked before, during, and after school, leaving them without a restroom to use. (B.E. Dep. Tr. 35:4-36:9, ECF No. 43-4 at 10; S.E. Dep. Tr. 21:4-22:9, ECF No. 43-5 at 6-7). Given their gastrointestinal medical issues, B.E. and S.E. need close, consistently available restrooms that the health office does not provide. (ECF No. 22-4 at ¶¶ 18, 31; ECF No. 22-5 at ¶ 18, 31). Like for their physical health, being recognized as boys at school is critical to their overall well-being and educational success as students who are transgender. (ECF No. 22-2 at ¶¶ 30-34). B.E. and S.E.'s exclusion from the boys' facilities exacerbates their gender dysphoria, manifesting as anxiety, depression, and self-harming behaviors and ideations. (L.E. Dep. Tr. 36:16-37:20, ECF No. 43-3 at 10). These harms will continue unabated, making them feel like outcasts at school because of who they are, until VCSC treats the plaintiff boys the same as all other boys. (S.E. Dep. Tr. 17:20-18:4, ECF No. 43-4 at 5; B.E. Dep. Tr. 24:9-23, ECF No. 43-5 at 7).

Argument

I. The plaintiff boys will prevail on the merits of their claims

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

Title IX of the 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."[6] VCSC also agrees that discrimination on the basis of sex can violate equal protection, and 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*

[6] VCSC receives federal financial assistance. (ECF No. 27 [Defendants' Answer ¶ 44]).

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. Yet VCSC and its amici argue that *Whitaker* has been abrogated, that it has been undermined by *Bostock v. Clayton County, Georgia.* –U.S.--, 140 S. Ct. 1731 (2020), and that it was incorrectly decided. VCSC is wrong on all counts and its actions violate both Title IX and equal protection.

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 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 needs to establish "that his chances to succeed on his claims are 'better than negligible.'" 858 F.3d 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 it 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.

VCSC argues, in effect, that *Whitaker* has been overruled because it used the now-disapproved standard. 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 Mr. Whitaker and the plaintiffs, access to school facilities that are consistent with

their gender identities. A court's interpretation of the law remains the same whether a plaintiff seeks a preliminary or permanent injunction. 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); *Dhakal 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.

B. The plaintiff boys have a likelihood of success in establishing that VCSC is violating Title IX by denying them access to male facilities

VCSC is forced to argue that *Whitaker* is no longer good law because, as the plaintiffs noted in their opening memorandum, this case is virtually identical to *Whitaker*. (ECF No. 22 at 17-22). Given that *Whitaker* is still good law, there is no need for further argument concerning the Title IX claim here. 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.").

Undaunted, VCSC argues that *Whitaker*'s Title IX holding should not be considered good law because it was "cast into doubt by the *Bostock* decision." (ECF No. 30 at 13). *Bostock* provides no justification for this argument and in no way undercuts *Whitaker*'s validity—if anything, *Bostock* reinforces the holding of *Whitaker* and the strength of the plaintiffs' 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 using 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 (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).

VCSC, continuing to ignore its obligation to follow *Whitaker*, argues that given Title IX's regulations that allow schools to have sex-segregated bathrooms and locker rooms, 34 C.F.R. § 106.33, *Whitaker* is incorrect because "if requiring students to use bathrooms based on sex is unlawful sex stereotyping, then Title IX is itself unlawful." (ECF No. 30 at 14). This is not a unique

argument and was quickly dispensed with in *Grimm II* where the court noted, in language apposite to this case, that the 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 VCSC 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. 30 at 12), is nothing more than an invitation for this Court to ignore *Whitaker*'s holding.

As in *Whitaker*, VCSC's provision of a unisex restroom does not weaken the plaintiffs' 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 distant from many of the plaintiff boys' classes—so much so that they must be given permission to be late for classes to use it—and is sometimes locked so they cannot use the restroom. (L.E. Dep. Tr. 70:7-71:25, ECF No. 43-3 at 19; B.E. Dep. Tr. 35:4-36:9, ECF No. 43-4 at 10; S.E. Dep. Tr. 21:4-22:9, ECF No. 43-5 at 6). And

they face the same stigmatization of being uniquely forced to use a gender-neutral restroom rather than ones that conform to their gender identity. (ECF No. 22-4 at ¶ 31; ECF No. 22-5 at ¶ 31).

Although *Whitaker* focuses on restrooms, its holding applies equally to locker rooms in that requiring the plaintiff boys to use the girls' locker room or a gender-neutral alternative also punishes them for their gender nonconformance. This is recognized by case law from other jurisdictions. Thus in *M.A.B. v. Board of Educ. of Talbot Co*., 286 F. Supp. 3d 704 (D. Md. 2018), the court, in denying a motion to dismiss, found that denying a transgender student access to the locker room consistent with his gender identity stated a claim under Title IX.

> Like the policy in Whitaker, Defendants' policy of barring M.A.B. from the boys' locker room requires him to use a facility that "does not conform" with his gender identity. The Policy, then, "punishes" M.A.B. for his "gender non-conformance, which in turn violates Title IX." And most notably, like the policy in Whitaker, Defendants' decision to bar M.A.B. from the boys' locker room subjects him, "as a transgender student, to different rules, sanctions, and treatment than non-transgender students."

Id. at 717 (citations to Whitaker omitted). *See also*, *e.g.*, *Doe by and through Doe v. Boyertown Area Sch. Distt.*, 897 F.3d 518, 527 (3rd Cir. 2018) (rejecting a challenge to a school policy allowing transgender students to use bathrooms and locker rooms consistent with their gender identities as the policy served "a compelling state interest in not discriminating against transgender students." [quoting district court]); *Parents for Privacy*, 326 F. Supp. 3d at 1106 (D. Or. 2018) (finding that banning transgender students from locker rooms as well as bathrooms that matched their gender identities would violate Title IX); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 632-36 (M.D. N.C. 2016) (plaintiffs were likely to succeed in claim that state law requiring multiple occupancy bathrooms, showers, and similar facilities to be used only by persons based on their biological sex, defined as the sex listed on their birth certificates).

Whitaker remains good law that must be followed. Its holding 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 the plaintiffs off into separate facilities based on stereotypical notions of sex is prohibited sex discrimination under Title IX and the plaintiffs are therefore likely to prevail on the merits of their Title IX claim.

C. The plaintiff boys will also prevail on their equal protection claim

1. The discrimination against the plaintiffs fails the intermediate scrutiny demanded by *Whitaker*

Equal protection demands that the sex-based discrimination against the plaintiffs be assessed with heightened scrutiny, requiring VCSC 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). VCSC 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 their "demanding" burden under heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 534 (1996).

Although VCSC argues that its policy is justified by the need to "shield[ ] children from unwanted exposure to the anatomy of the opposite sex," (ECF No. 30 at 17), the facts demonstrate that plaintiffs have used the boys' restrooms without any negative reaction from students and there

is absolutely no evidence that any unwanted privacy violations occur in the restroom. (Mason Dep. Tr. 28:1-30:12, ECF No. 43-1 at 7-8). This is consistent with the court's conclusion in *Whitaker* 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 at [the] High School are particularly susceptible to an intrusion upon an individual's privacy." *Id.* at 1052.[7]

VCSC and its *amici* claim that excluding plaintiffs from facilities that align with their male gender is related to an interest in protecting privacy. But as the Fourth Circuit explained, 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 [they], as … transgender boy[s], use[] the bathroom: by entering a stall and closing the door." *Whitaker*, 858 F.3d at 1052. In fact, the very interests VCSC claims to advance through its policy – of shielding individuals from those with different anatomical characteristics – are undermined by forcing plaintiffs into the girls' restroom. As a result of receiving testosterone, the plaintiff boys are becoming increasingly masculine in appearance and anatomy. (Fortenberry Suppl. Decl. ¶ 8, ECF No. 43-6 at 3). They will grow facial and body hair and breast development will stop as their body fat is redistributed and they will appear typically masculine as they go about their day. (*Id.* at ¶¶ 8-10). The policy does not protect the privacy of students generally but instead just alienates

[7] The fact that persons using bathrooms or changing in locker rooms tend to be discreet, even among persons of their own gender, distinguishes the school facilities from the public places at issue in *Tagami v. City of Chicago*, 875 F.3d 375 (7th Cir. 2017), cited by VCSC, where the court upheld an ordinance prohibiting women from exposing their breasts in public.

and isolates plaintiffs from their peers.

Even if the privacy interests of cisgender students are implicated, they can easily be accommodated without denying the plaintiffs the ability to use facilities consistent with their gender. The plaintiff boys use the bathroom stalls, protecting the privacy of all. (B.E. Dep. Tr. 22:8-10, ECF No. 43-4 at 7; S.E. Dep. Tr. 13:14-20, ECF No. 43-5 at 4). The locker rooms also have toilets with stalls where the plaintiffs and other students can change privately. (ECF No. 29-6 at 8-10; B.E. Suppl. Decl. ¶ 6, ECF No. 43-7 at 2; S.E. Suppl. Decl. ¶ 6, ECF No. 43-8 at 2). Students do not necessarily shower after gym and neither B.E. nor S.E. intend to use the showers once they have access to the locker room. (B.E. Suppl. Decl. ¶ 6, ECF No. 43-7 at 2; S.E. Suppl. Decl. ¶ 6, ECF No. 43-8 at 2). And if students feel "uncomfortable changing around their peers in private spaces, whether transgender or cisgender," VCSC can certainly allow those students to "change in a bathroom stall [or the] single-user bathroom." *Boyertown*, 897 F. 3d at 530.

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 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).[8]

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

As plaintiffs have previously noted (ECF No. 22 at 25 n. 7), the discrimination here is subject to heightened scrutiny because it is both sex discrimination and discrimination based on their status as transgender persons. As recognized by many courts, 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

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[8] The secret surveillance of students in locker rooms, condemned as a Fourth Amendment violation in *Brannum v. Overton Co. School Bd.*, 516 F.3d 489, 498 (6th Cir. 2008) and cited by VCSC (ECF No. 30 at 16), is a far cry from the proper use of facilities in a school by those who are simply changing or relieving themselves and going about their day and who can and will shield their bodies from others as a matter of course. And VCSC's citation of cases from the prison context (ECF No. 30 at 16) for the general principle that persons may not want their bodies to be viewed by members of the opposite sex have no relevance here where the plaintiff boys indicated that they will take steps in the boys' restrooms and locker rooms to be discreet and where other students are free to take similar steps.

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 the plaintiff boys fails this elevated scrutiny.

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

A. The plaintiff boys are suffering irreparable harm for which there is no adequate remedy at law

VCSC does not respond to plaintiffs' argument that they are faced with irreparable harm for which there is no adequate remedy at law. It acknowledges elsewhere that at times the health office has been locked and the restroom has been inaccessible to the boys, while attempting to minimize the number of bowel accidents that the boys have had in school. (ECF No. 30 at 20-21). Regardless, VCSC does not deny that the boys suffer from gender dysphoria, that they experience distress associated with the inability to use male restrooms and locker rooms, and that being relegated to the restroom in the health office only accentuates that they are different and negatively affects their mental health. (ECF No. 22-2 ¶¶ 33-36[9]; ECF No. 22-4 ¶¶ 21-31; ECF No. 22-5 ¶¶ 21-31). Nor does it deny that one of the plaintiffs attempted suicide and both have experienced suicidal thoughts and suffer from depression. (L.E. Dep. Tr. 36:16-37:20, ECF No. 43-3 at 10).

The boys are experiencing psychological harm and a denial of their rights under both equal

[9] This citation is to the original declaration of Dr. Fortenberry, one of the founders of the Gender Health Program at Riley Children's Health and an expert on gender dysphoria in children and adolescents. VCSC has objected to some of his opinions as being based on hearsay. (ECF No. 30 at 20 n.4). The basis for this is not clear as VCSC appears to be objecting to what Dr. Fortenberry has learned through experience and research. "An 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. Ev. 703. 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).

protection and Title IX. This is irreparable harm for which there is no adequate remedy at law. (ECF No. 22 at 28-30).

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

In balancing the harms here VCSC ignores the significant harm being imposed on the plaintiff boys and instead argues how the privacy rights of cisgender students will be disadvantaged if an injunction is granted. It also argues that it would be burdened as it "would be expected and required to immediately police students with different anatomy and disrobing and showering in the same facility." (ECF No. 30 at 21). The argument concerning the privacy interest of other students is not, as stressed above, based on fact, and does not outweigh the significant rights and needs of the plaintiffs. It is not clear if the VCSC is stating that policing will be necessary because it expects a horde of students to claim they are transgender or if it is saying the special policing will be necessary when the plaintiffs enter male facilities. If it is making the former argument[10]—obviously VCSC can require documentation that a student is transgender and that, as with plaintiffs, a medical or mental health professional agrees that they are to use the facilities associated with their gender identity. If it is the latter argument—suffice it to say that the plaintiff boys have used the male restrooms without the need for extra policing and, presumably, adults monitor the students in restrooms and locker rooms, even without the presence of transgender students.

As previously noted, the public interest is advanced by protecting constitutional rights and enforcement of Title IX. (ECF No. 22 at 31-32). VCSC responds that this issue should be decided by Congress or by federal agencies after notice and comment. (ECF No. 30 at 22). But this issue

[10] This is precisely the argument made by the amici. *See* ECF No. 35 at 11.

has already been decided 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 the plaintiffs to use the male restrooms and locker rooms within school facilities.[11]

Kenneth J. Falk
Stevie J. Pactor
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059
fax: 317/635-4105
kfalk@aclu-in.org
spactor@aclu-in.org

Kathleen Bensberg
Indiana Legal Services, Inc.
1200 Madison Ave.
Indianapolis, IN 46225
317/631-9410
fax: 317/269-7219
Kathleen.bensberg@ilsi.net

Megan Stuart
Indiana Legal Services
214 S. College Ave., 2nd Floor
Bloomington, IN 47404
812/961-6902
Megan.stuart@ilsi.net

Attorneys for Plaintiffs

[11] VCSC did not respond to plaintiffs' argument that the injunction should issue without bond. (ECF No. 22 at 32).