UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

B.E. and S.E., minor children by their mother, legal guardian, and next friend, L.E.,	)	
Plaintiffs,	)	
v.	)	CASE NO. 2:21-cv-00415-JRS-MG
VIGO COUNTY SCHOOL CORPORATION; PRINCIPAL, TERRE HAUTE NORTH VIGO HIGH SCHOOL, in his official capacity,	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTATION OF THE RECORD ON THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants, Vigo County School Corporation ("School Corporation") and Principal, Terre Haute North Vigo High School (jointly, "Defendants"), by counsel, hereby submit their Supplementation of the Record on the Plaintiffs' Motion for Preliminary Injunction, as authorized by the Court's Order on Motion for Oral Argument and to Supplement the Record (ECF No. 48).

Supplemental Evidence from the Deposition of Dr. James Fortenberry

The Plaintiffs have named Dr. James Fortenberry ("Dr. Fortenberry") as an expert witness in this lawsuit. Dr. Fortenberry sat for a deposition on March 1, 2022, which covered Dr. Fortenberry's opinions and testimony on a separate matter as well as his opinions and testimony in this present lawsuit. With respect to this lawsuit, the deposition focused on Dr. Fortenberry's Supplemental Declaration (ECF No. 43-6), which was attached to the Plaintiffs' Reply in Support of Motion for Preliminary Injunction.

Defendants submit the portions of the deposition transcript relating to the Supplemental Declaration in this case and exclude (by redaction) the parts pertaining to the separate matter (*see* attached Exhibit 1). In doing so, they draw the Court's attention to the following specific parts of the deposition which directly address the identified paragraphs of Dr. Fortenberry's Supplemental Declaration (ECF No. 43-6):

1. Dr. Fortenberry testifies that sex and gender are different, that transgender designations must be made on a case-by-case basis, and that treatments must be based on individualized assessments rather than a one-size fits all approach. (Ex. 1 at 8:21-9:17, 12:8-13:24, 17:22-20:12; *see* ECF No. 43-6 at ¶¶ 4-5.) This supplemental evidence is offered in support of Defendants' position that Title IX and the Equal Protection Clause permit institutions to provide separate toilet and locker room facilities on the basis of sex, which is different than gender. (ECF No. 30 at 10-11, 15-17.)

2. Dr. Fortenberry testifies that there are two parts to hormone therapy treatment for female-to-male transitioning patients: (1) patients seeking "to disguise aspects that they associate with being female" and (2) patients "seeking some characteristics that are associated with being male." With respect to these efforts, Dr. Fortenberry testifies that hormone therapy affects secondary sex characteristics—not outward changes to a patient's genitalia or breasts. (Ex. 1 at 23:14-27:2; ECF No. 43-6 at ¶¶ 6-7.) This supplemental evidence is offered to support Defendants' position that Title IX and the Equal Protection Clause permit institutions to provide separate toilet and locker room facilities on the basis of sex because enduring physical differences persist (there is no sex stereotyping going on) and those anatomical differences are most likely to be exposed in those spaces. (ECF No. 30 at 12-15, 17-18.)

3. Dr. Fortenberry testifies that surgical intervention is not really an option until the Plaintiffs are 18 due to current standards of care from one association, physician choice, and lack of insurance coverage for such procedures. (Ex. 1 at 27:20-31:1; ECF No. 43-6 at ¶¶ 10-18.) This supplemental evidence acknowledges the enduring anatomical differences between S.E., B.E., and the students they seek to share spaces with and underscores the need to balance the privacy interests of all students. (ECF No. 30 at 11-13, 16-19, 21.)

4. Dr. Fortenberry testifies that "the most central reason" to allow access to boys' bathrooms and locker rooms by S.E. and B.E. is "they are boys" because "that is what they told us"—"it's [absolutely] based on their [own] definition of 'boy.'" (Ex. 1 at 31:23-33:13; ECF No. 43-6 at ¶ 19.) This supplemental evidence is offered in relation to Defendants' position on the public policy prong of the preliminary injunction analysis, as it juxtaposes the opinion of Dr. Fortenberry with competing opinions on where to draw lines regarding access and underscores the need for legislative guidance. (ECF No. 30 at 21-22.)

5. Dr. Fortenberry testifies that access also supports their mental health by affirming them in their gender identity but acknowledges there is less information about benefits due to locker room access and no studies on whether there may be a negative impact on birth assigned females changing in front of other students in a male locker room. (Ex. 1 at 34:9-35:22, 37:19-39:25; ECF No. 43-6 at ¶¶ 3, 19.) This supplemental evidence is offered in support of Defendant's position regarding distinctions between the request for bathroom access in *Whitaker* and the request for bathroom and locker room access in this case. (ECF No. 30 at 18-19.)

6. Dr. Fortenberry testifies that all students who self-identify as boys should have access to boys' bathrooms regardless of the passage of time or certain benchmarks being met and even if a student is gender fluid—not viewing gender as static or fixed. (Ex. 1 at 33:21-34:8, 35:23-

37:7; ECF No. 43-6 at ¶ 19.) This supplemental evidence is offered in support of Defendants' position on public policy, as it juxtaposes the opinion of Dr. Fortenberry with competing opinions on where to draw lines regarding access and underscores the need for legislative guidance. (ECF No. 30 at 21-22.)

7. Dr. Fortenberry testifies his opinion does not include a consideration of the privacy interests of other students and has no opinion with regard to the potential harm other students may face as a result of being exposed to the physical anatomy of B.E. or S.E. (Ex. 1 at 43:16-44:25; ECF No. 43-6 at ¶¶ 3, 19.) This supplemental evidence is offered in support of Defendants' position that the Court must consider the privacy interests and potential harms to other students and that those considerations have not been factored into the medical opinions provided. (ECF No. 30 at 11-13, 17-22.)

8. Dr. Fortenberry testifies that the extent of his direct involvement in the care of B.E. and S.E. has been limited to part of one telehealth appointment, reviewing medical records, and speaking with Dr. Nomi Sherwin—he was not present for conversations about facility access, individualized harm, or harm reduction. (Ex. 1 at 45:10-56:24; ECF No. 43-6 at ¶ 8.) This supplemental evidence is offered in support of Defendants' position regarding the balance of the harms analysis. (ECF No. 30 at 19-21.)

9. Dr. Fortenberry testifies that depression and anxiety are common experiences for young people and can be the result of numerous causes. (Ex. 1 at 66:8-68:1; ECF No. 43-6 at ¶ 19.) This supplemental evidence is offered in support of Defendants' position that there is no evidence—from the experts or otherwise—to tip the balance of the harms prong of the preliminary injunction analysis in favor of Plaintiffs. (ECF No. 30 at 19-21.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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/s/ *Philip R. Zimmerly*
Philip R. Zimmerly

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
Case Number 1:21-CV-02965-TWP-MPB

A.C., a minor child by his next friend, mother, and legal guardian, M.C., Plaintiff, -vs- METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE; PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL, in his official capacity Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION
Case Number 2:21-CV-00415-JRS-MG

B.E. and S.E., minor children by their mother, legal guardian, and next friend, L.E., Plaintiffs, -vs- VIGO COUNTY SCHOOL CORPORATION; PRINCIPAL, TERRE HAUTE NORTH VIGO HIGH SCHOOL, in his official capacity, Defendants.

REMOTE DEPOSITION OF

J. DENNIS FORTENBERRY, M.D., M.S.

CONFIDENTIAL

March 1, 2022

The remote deposition upon oral examination of J. DENNIS FORTENBERRY, M.D., M.S., a witness remotely sworn by me, Tara Gandel Hudson, RPR, CRR, a Notary Public in and for the County of Hancock, State of Indiana, taken on behalf of the Defendants, with the witness located in Indianapolis, Marion County, Indiana, on the 1st day of March, 2022, scheduled to commence at 1:00 p.m., pursuant to the Federal Rules of Civil Procedure with written notice as to the time and place thereof.

APPEARANCES
(All appearing remotely.)

FOR THE PLAINTIFFS:
A.C., a minor child by his next friend, mother, and legal guardian, M.C., and B.E. and S.E., minor children by their mother, legal guardian, and next friend, L.E.

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Metropolitan School District of Martinsville; Principal, John R. Wooden Middle School, in his official capacity, and Vigo County School Corporation; Principal, Terre Haute North Vigo High School, in his official capacity

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(1:06 p.m.)

J. DENNIS FORTENBERRY, M.D., M.S., having been first remotely sworn to tell the truth, the whole truth and nothing but the truth relating to said matter, was examined and testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY PHILIP R. ZIMMERLY:

Q Good afternoon, Dr. Fortenberry. Would you please state your name for the record.

A James Dennis Fortenberry.

Q Hi, Dr. Fortenberry. My name is Phil Zimmerly. I'm counsel for the defendants in two separate actions: One is the Vigo County School Corporation; the other defendant is MSD Martinsville. And we're here today for your deposition. You provided declarations or expert testimony in both of those cases. Is that true?

A Yes.

Q Have you ever given a deposition before?

A No.

Q So just a couple of sort of ground rules for today. You understand that you're under oath and you have the obligation to provide truthful

and accurate testimony?

A Yes.

Q Is there any reason why you cannot provide truthful and accurate testimony today?

A No.

Q You're not under the influence of any drugs or alcohol or medication that would influence your testimony?

A None of those things.

Q I'm going to presume that if I ask a question and you answer it, that you understood the question that I asked. Is that fair?

A Yes.

Q If at any point you need to take a break -- stretch your legs, get a drink, run to the restroom -- totally fine. My only request would be if there's a question pending, that you answer that question before we take a break. Is that fair?

A Fair.

Q Dr. Fortenberry, it's my understand that you were one of the founders of the Gender Health Program at Riley's Children Health in 2016. Is that true?

A That's correct.

Q What are your roles and responsibilities at the Gender Health Program?

A At this point, I both provide direct patient services to gender-diverse young people, and I supervise people in training, primarily adolescent medicine fellows, in the care of gender-diverse young people.

Q So there's a treatment component but also a training component?

A Yes.

Q What age of patients does the Gender Health Program provide services?

A We have children beginning at age 3 who have been seen in our program and usually up to until around age 21 to 22.

Q Is there an average age as to when children would come to the clinic for treatment?

A Probably between ages 14 and 16 would be a good average.

Q And how does a new patient come to receive treatment at the Gender Health Program? Are they referral-based, or do they initiate their own treatment, or is it a combination of both?

A It's a combination of both. The majority are referred by physicians in the state.

Q And what percentage of that patient population at the Gender Health Program include patients who have been diagnosed with gender dysphoria?

A I'll have to ask for clarification. You mean prior to their arrival at our program?

Q Yes. Good point.

So prior to their arrival, how many of those patients have been diagnosed with gender dysphoria?

A Relatively few. Perhaps 10 percent.

Q And after they have been referred or begin receiving treatment at the Gender Health Program, how many -- what percentage of those patients are diagnosed with gender dysphoria?

A The majority. The large majority. Perhaps 85, 90 percent.

Q Is that the primary condition that's being treated at the Gender Health Program, is gender dysphoria?

A Yes.

Q One of the things I noted in review of the medical records is that the records make a distinction between sex assigned at birth and gender identity. Is it fair to say that sex and gender are different things?

A Yes.
Q How would you define "sex"?
A I base that on the identification given to a person associated with their genitals that are typically described at birth.
Q Here's a quote that I took from Dr. Mazur, the Yale School of Medicine. Let me know if you agree or disagree with this statement. She defines "sex" as:
"In the study of human subjects, the term 'sex' should be used as a classification generally as male or female according to the reproductive organs and functions that derive from the chromosomal complement, generally XX for female and XY for male."
Would you agree with that statement?
A Yes.
Q Is it true that biological males and biological females have different reproductive organs?
A I think we need to clarify that because I'm not sure what your meaning of biological male and female refers to.
Q So I guess what I'm referring to as a biological male is someone who was born with a penis.
A Being born with a penis does not equal being

male. A penis is a penis associated with a particular genetic inheritance. A vulva is a vulva, without a sex associated with it, associated with a particular genetic inheritance.
Q How would you define "gender"?
A People do define that differently. My personal definition has to do with each person's experience of their/themselves relative to their sex.
Q When you say "relative to their sex," what do you mean by that?
A Because those young people have no -- have been identified with a sex. Their experience of their gender is often compared to the sex that was assigned at birth.
Q There's a quote from the same doctor, Dr. Carolyn Mazur, at the Yale School of Medicine. Let me know whether or not you agree or disagree with this statement. In defining "gender," she states:
"In the study of human subjects, the term 'gender' should be used to refer to a person's self-representation as male or female or how that person's responded to by social

institutions on the basis of the individual's gender presentation."
Do you agree with that statement?
A I think it's incomplete; so I disagree with it.
Q What would you add or take away from it?
A So the thing that I would add is that gender is an experience. It's an internal experience first; and then the presentation of that gender follows which is included in Dr. Mazur's definition.
And the interaction of that presentation and the experience creates the third aspect, or the second aspect in Dr. Mazur, which is the social definition of "gender."
Q One other term that is not really involved with this case but I'm just interested to hear your definition or how you would define it is the term "sexual orientation." How would you define that term?
A It's generally identified as the representation of the people or persons that an individual is attracted to sexually.
Q There are a couple of documents that we'll be using as exhibits today. Do you have those documents that I sent to counsel? They are

Exhibits 15 -- they are marked Exhibits 15 through 19 in the pdf names.
A I do have them.
Q The first document I'd like to ask you a question about or just refer to is Exhibit 17 which is the declaration that you provided in the A.C. Martinsville case?
A Okay.
(Deposition Exhibit 17 was presented for identification.)
Q I just want to ask you about some of the statements in that. In paragraph 8 you make the statement -- and just -- I suppose just so the record is clear, is this a declaration that you assigned as sworn testimony in the A.C. v. MSD Martinsville case?
A Yes.
Q And there's a statement in paragraph 8. This is the second-to-last sentence in that paragraph where you state:
"Gender transition is the process whereby the transgender person lives as a member of the sex of their gender identity."
In dealing with gender dysphoria, is it true that gender transition is a process?

A Yes.
Q And in your opinion, what length of time must someone go through that process before they are considered transgender?
A I think that's not an answerable question because of the variability of the duration and the different steps that people take, and there's no absolute outcome that would qualify as transgender.
Q So is it fair to say that making that determination would require a case-by-case analysis with regard to each individual?
A In general, yes, although each individual knows when that's happened for them.
Q Is it possible for someone to be considered transgender in an immediate decision such that, you know, perhaps they were -- they have been listed as biological female or their sex assigned at birth was female, and just in the matter of a day, they can make the decision that they are -- that their gender identity is male?
A I don't have any experience of descriptions of that particular experience of gender for it to be that instantaneous.
Q How would you define the term "transgender"?

A I'll use the commonly used definition which is the sense of a gender experience that's different than that expected to be associated with the sex assigned at birth.
Q And the sex assigned at birth would differ based on the sexual anatomy of that particular individual at birth?
A The sex assigned at birth would be defined by the anatomy that was recorded at birth.
Q Are all individuals who identify as transgender, do you expect them to receive gender dysphoria diagnoses?
A No. Not all individuals who identify as transgender or gender "nonbinary" -- which is an alternative term that's important -- not everyone experiences dysphoria associated with it.
Q You used the term "gender binary" and said that that was an important term. Can you tell me what that term refers to?
A "Gender nonbinary." So the reference to "transgender" means the movement from one category of gender which is assumed to be binary into the other. That's the basis of the word "trans." People who identify as nonbinary don't

recognize their gender as belonging to either of those categories.
Q Going back to your declaration in the Metropolitan School District case, in paragraph 12, you state: "Gender dysphoria is an accepted diagnosis for individuals with a gender identity that differs from social gender expectations associated with the person's birth-assigned sex."
Is that consistent with what you've testified just a few moments ago?
A Yes.
Q In paragraph 20 of your declaration, you state that:
"Gender dysphoria is a recognized condition codified in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V) at 302.85 (64.0) [sic], and the World Health Organization's International Classification of Diseases 10 (ICD/10) Version that became active on October 1, 2021, at F64.2. These are both standard classifications of mental and physical disorders used worldwide."
Is it true that gender dysphoria is a

diagnosis for a mental and physical disorder?
A Yes, as specified in those manuals.
Q For new patients, what sort of timeline would one expect before a gender dysphoria diagnosis is rendered?
A Typically, the timeline follows that suggested by these guidelines, diagnostic criteria of at least six months.
Q Is it common for such a diagnosis of gender dysphoria to be made during an initial visit or consult?
A Yes.
MR. FALK: Objection. "Initial visit or consult" with whom? Because many of these patients are being referred by other doctors.
MR. ZIMMERLY: Let me ask a different question.
BY MR. ZIMMERLY:
Q When someone comes to the Gender Health Program at Riley Children's Health, is it common for there to be a diagnosis of gender dysphoria during that initial consult?
A Yes.
Q And how do you account, with regard to that six-month period, as being one of the guidelines

that you would look at?
A Our interpretation of that six-month period is drawn from information provided by the young person themselves, by their parents, and corroborated by their parents. So we established the timeline as part of our evaluation. We don't observe it.
Q When someone is diagnosed with gender dysphoria, what length of treatment would you expect for the treatment of that condition?
A There's not an outer bound placed on that treatment in terms of the time of treatment.
Q Is there an expected amount of time such that a person would be receiving treatment for gender dysphoria or not?
A So I'll need to clarify a little because gender dysphoria does improve with treatment. The time course for that is variable.
Q And does gender dysphoria ultimately resolve with treatment?
A In many cases, yes.
Q I'm going to ask you to turn to a different exhibit. This is Exhibit 15 --
(Deposition Exhibit 15 was presented for identification.)

Q -- which is your supplemental declaration in the Vigo County case.
A Okay.
Q Paragraph 4, you make the statement:
"As explained in my previous declaration, treatment for gender dysphoria varies based on individualized assessments and medical need."
Is it true that treatment for gender dysphoria is based on individualized assessments?
A Yes.
Q And who ultimately is responsible for making those individualized assessments?
A The outcomes of those in terms of decisions are shared between the clinician, the patient, and the parent.
Q When you say "the outcomes are shared," is that different than the assessment itself, or are you using those terms interchangeably?
A The assessment is shared, as are the outcomes. The decision's based on the assessments.
Q And who is responsible for making the individualized assessments?
A I'm a little unclear about your meaning here.
Q Well, I suppose what do you mean by that? When

you say, "The treatment for gender dysphoria varies based on individualized assessments and medical need," what do you mean by the use of the term "individualized assessments"?
A So each patient that comes to the clinic is individually interviewed and examined by a clinician. Additional information is obtained from a parent. The results of those interviews are then shared among all of those people, discussed; treatment alternatives are discussed; and treatment decisions are based on the outcomes of the discussions.
Q And so in making that individualized assessment, is it true that that requires a case-by-case analysis with regard to each particular patient?
A Yes.
Q In the next sentence of that paragraph 4, you state:
"Treatment is not a single process, nor are there specific steps that all individuals will complete."
What do you mean by that?
A It means that we provide different kinds of treatment options, especially at the beginning. We provide support for the young person as part

of our treatment in terms: We provide support for findings, counseling, mental health support on the facts indicated.
And so there are a variety of things that can happen at any given visit, and different parts of those, different choices may be made subsequently.
Q So no one size fits all with regard to the treatment of gender dysphoria?
A I think that's accurate even though there are some commonalities in the things that we do, for sure.
Q When making that individualized assessment, is it important for the physician to meet and speak with the patient?
A Yes.
Q In making that individualized assessment, is it also important for the physician to take into account concerns that are expressed by that patient?
A Yes.
Q Is it fair to say that the treatment for gender dysphoria is an evolving area where new standards are in development?
A I think that's fair to say.

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Q For example, at Riley at the Gender Health Program, it's been in place since 2016. Have all recommended treatments stayed the same during the last six years, or have they changed as more information is gathered?
A The basis of treatments are very much the same over the duration of the time the program has been in place.
Q When you say "the basis of treatments," what do you mean by that? What has remained unchanged?
A So the essential element of supporting the young person in their gender expression; the review of important other kind of mental health issues that may be associated with the gender experience; the use of hormones or puberty blockers; and the support -- the ongoing support for accommodations in schools with driver's licenses; with name and gender marker changes -- those are all elements of the service that we provide.
Q In terms of -- am I correct in understanding that the incidence of adolescent females or adolescent -- adolescent individuals who are assigned the sex of female at birth identifying as transgender female to male has grown

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exponentially in the last six to ten years?
A I'm going to correct your terms a little bit. The proportion of birth-assigned females who are seeking care in specialty services like our clinic, the proportion accounted for by birth-assigned females has increased over about a 15-year period.
It's been a worldwide increase. It's not clear what that represents.
(A discussion was held off the record to correct technical issues.)
Q Have there been any studies with regard to that shift as it deals with the growth in that area for individuals with sex assigned at birth of female?
A There have been some studies that have purported to examine that with -- to examine the hypothesis that this is a social contagion heavily influenced by social media platforms. It's become a popular perspective over the past five years or so.
Q Have you yourself studied that phenomenon in any way?
A No.
Q Do you have an opinion one way or the other?

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A Yes.
Q What is your opinion?
A The data to support that particular social contagion hypothesis is extraordinarily weak and has been refuted by at least some additional research, although some of the research is fairly small.
Q With regard to treatment for gender dysphoria, one of the treatments that you mention in your declarations are puberty blockers. Are any of the plaintiffs in either of these actions being provided with puberty blockers?
A No.
Q Another one of the treatments that you referred to in your declarations is hormone treatment. Let's turn to paragraph 6 of your supplemental declaration in the Vigo County case.
You make the statement in the second-to-last sentence:
"Hormone therapy initiates anatomical and physiological changes in body contour, appearance, and sex-based characteristics to match that of the individual's experienced gender."
In that statement, what do you mean by the

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term "sex-based characteristics"?
A Usually the things that would become evident at puberty. Facial hair, for example; breast growth; changes in genitals; onset of menses; body proportions; body contours such as fat distribution.
Q In terms of the hormone therapy to initiate changes with regard to sex-based characteristics to match that of the individual's experienced gender, is it correct to say that those individuals who are transitioning from female to male, they are seeking to have characteristics that would be associated with those who are male?
A There's two parts to that. They are seeking to disguise aspects that they associate with being female, and they are seeking some characteristics that are associated with being male.
Q So with regard to -- I don't know if you used the word "hiding," but addressing those things that are associated with female, that would be the onset of menses or having a period?
A So that would be addressed with one form of hormones which would be to suppress menstrual

bleeding, but it would also be associated with activities like binding of the chest and the breasts to create an appearance of a flat chest.

Q And the more affirmative actions, there's one that's sort of hiding characteristics, but there's one where they're gaining new characteristics. That would be the growth of facial hair to be perceived as male. Are there others?

A Prior to that, many people will just change the way they wear their hair, change their clothing, change even the way they speak to create a more masculine appearance.

Q I suppose that leads to my next question that I had with regard to paragraph 7 of Exhibit 15 which is your supplemental declaration.

You make the statement -- this is the second sentence:

"Gender-affirming hormone therapy with testosterone produces secondary sex characteristics such as voice deepening, beard growing, fat redistribution, and increased muscularity, and enlargement of the clitoris."

You may have already answered this based on your prior question, but when you use the term

"secondary sex characteristics," what do you mean by that?

A All of those parts that would have been changed by puberty.

In this case, the capacity to develop a beard; to change the genitals; the appearance of the genitals; to change the way the body looks -- those are all qualities that are affected by testosterone.

Q Is it true that the use of a hormone treatment like testosterone can't change certain aspects of the outward anatomy of a subject?

A It is true. It has relatively little effect on breast size once the breasts have developed. For people who have already gone through puberty, it won't change their height. Their height is more or less fixed by that point.

Q And hormone treatment won't alter the fact that an individual who is born with a vagina still has a vagina and someone who is born with a penis still has a penis; is that true?

A That's correct. So they still have a vulva, a vagina, a cervix, a uterus, fallopian tubes, ovaries.

Q That would be true for someone whose sex

assigned at birth was female?

A Correct.

Q Is it also true that a physician will still need to account for those aspects of an individual's biological sex in providing treatment?

A Yes.

Q For example, with regard to the students at issue here, they will continue to need to receive care for menses?

A Yes.

Q And, likewise, these students who are female transitioning to male are advised of the potential impact that testosterone may have on their own fertility and ability to bear children; is that true?

A That's correct. They are counseled for that prior to the initiation of testosterone, and it's regularly reviewed as part of their ongoing care.

Q Another potential treatment that you've discussed in your declarations, including your supplement declaration, is surgical intervention. Is that true?

A Yes.

Q And you've indicated in your supplemental

declaration that surgical intervention is not generally a treatment option until age 18 in Indiana. Is that true?

A That's correct.

Q In particular, if you turn to paragraph 13 of your declaration, in paragraph 13, you make this statement:

"In particular, absent extenuating circumstances and approval of the hospital ethics committee, to my knowledge, no physicians practicing in Indiana will perform gender-affirming genital surgery on the minor plaintiffs in this case."

Why is that?

A I think there are several reasons. The first is that the current standards of care defined by the World Professional Association for Transgender Health don't support genital surgery under the age of 18.

As a corollary to that, many physicians wouldn't refer people under the age of 18 for genital surgery.

And as a third point, many insurance companies use those guidelines to help them decide what they will approve in terms of

payment, and so genital surgery is typically not covered by many providers.
Q So putting insurance to the side, with regard to the first two groups, the WPATH and individual physicians, what is the position behind WPATH's position in not recommending that for children under the age of 18?
A I think that it has to do with the -- to the extent of surgery required. They are demanding surgeries; they are technically complex; they often require more than one procedure; and the writers of the guidelines have really assigned a higher level of accountability associated with those procedures.
Q A higher level of accountability for who?
A For the -- for the providers for that part of counseling young people about options.
Q Do you have your own sort of opinion about -- putting aside whether it's legal or recommended in Indiana under the age of 18, do you have your own opinion as to surgical intervention under the age of 18?
A I do.
Q And what is that?
A There are definitely individuals for whom

surgical intervention would clearly contribute to their well-being, particularly chest surgery.
Q In that (indiscernible) cutoff at the age of 18, is there an aspect of this that has to do with reaching the age of majority and being able to give legal consent?
A Yes, I think that's accurate. That's the way the guidelines are defined in terms of the age of majority in the nation or the region of question.
Q Is -- one of the considerations in terms of being able to make that decision, does it have to do with the risk of involuntary sterilization with that kind of treatment?
A No, I think not because that would be -- it depends on the surgical procedure; so at some point we will have to clarify that. But, in general, if a procedure would require sterilization, that would be part of the consent process.
Q Well, in terms of -- I suppose my question was unclear.
So with regard to genital surgery, can that lead to involuntary sterilization?
A Yes, some of those procedures require a

vaginectomy.
MR. FALK: I'm just going to interpose an objection a little bit late. I'm sorry. I don't know what the term "involuntary" means in that context. I think the doctor is indicating that there has to be a consent process for the actual procedure.
So with that objection --
BY MR. ZIMMERLY:
Q Is it possible that the use of puberty blockers can place an individual at risk of sterilization?
A No, I think that's not true.
Q What about the use of hormone therapy? Can that place an individual at risk of sterilization?
A That is a possible outcome; however, I think the data suggests that fertility will be retained if, in this case, testosterone were removed.
And then just add one other point is that fertility is always possible if the person's eggs or ovaries are preserved prior to the initiation of any procedure.
Q So in this case or the two cases, the parties dispute whether a particular student should have access to a restroom that is different than

their sex assigned at birth. And in your supplemental declaration, paragraph 19, you make the statement -- and this is the second sentence:
"For these reasons and those in my November 22, 2021, declaration, it remains my opinion that the plaintiffs' health and well-being is best served through free access to the restroom and locker room facilities at school as consistent with their male gender."
In that statement, what do you mean by "free access"?
A Used by choice and need, I suppose.
Q And with regard to B.E. and S.E. in the Vigo County case, the two separate physical spaces at issue are the restroom and the locker room. Does your opinion regarding to those physical spaces make any distinction between the restroom and the locker room?
A No, I think not.
Q And why not?
A I assume that some of the facilities of a locker room are also present as part of -- also include restroom facilities.
Q In your view or your opinion, why is it

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important for each of these students to have access to the boys' restroom?
A Well, the first important point is that they are boys, and that's really the most central reason for that.
Q When you say "they are boys," are you making that statement from a medical perspective or a legal perspective?
A A medical perspective.
Q And how would you define "boy"?
A That's what they told us they were.
Q So it's based on their definition of "boy"?
A Absolutely.
Q So is it true that any student who identifies as a boy should be allowed to use the boys' restroom?
A It's a step beyond a medically substantiated perspective; so I hesitate to respond.
Would you be able to clarify that a little more?
Q I guess I'm trying to figure out where you're drawing the lines.
As I understand your testimony, your definition of a particular individual, particularly these plaintiffs, as them being

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boys is based on what they have told you; that they have told you that they are boys and, therefore, they are boys.
I guess my question is with regard to other individuals, other students, if they identify as boys, should they have access to the boys' restroom?
A Yes.
Q Going back to my initial question, I'd asked you why it's important for each of these students to have access to the boys' restrooms, and you said the first primary point was that they are boys. Then we kind of went, you know, on kind of a bunny trail and asked some questions there.
Were there other considerations as to why you believe it's important that they have access to the boys' restroom?
A From a medical perspective, I've outlined a number of reasons why that access supports their mental health presently and in the future.
Q And so -- is there anything else?
A No.
Q And so if I understand that second point, it's so that those students feel affirmed in their gender identity. Is that a fair statement?

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A Yes.
Q Would your answer be the same with regard to why it's important for B.E. and S.E. to have access to the boys' locker room?
A Yes.
Q So same two reasons?
A I think the thing you might add, there are less -- there's less information in the medical literature about locker rooms than there is bathrooms, but it's important for social affirmation to be seen as a boy in the place boys would be seen.
Q Have you done any studies as to whether or not or do you have an opinion as to whether or not there may be a negative impact on students who have -- who are female sex assigned at birth who are changing in front of other students in a male locker room?
A There are not any studies that I'm aware of that particularly address that.
Many young people are modest about their bodies no matter who's present.
Q Do you have an opinion as to what standard a school should adopt in making the decision as to whether to allow a student to have access to a

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restroom that does not align with their sex assigned at birth?
A I think I voiced that, which is recognition of the young people's expressed gender and a concern for their well-being, both currently and in the future.
Q Do you believe there's a certain amount of time that should pass, before a student who claims that they are transgender, before they should be allowed access to a restroom that does not align with their sex assigned at birth?
A I don't have an opinion about that.
Q Do you have an opinion as to whether or not certain sort of benchmarks should be met before a student is allowed access to a restroom that doesn't align with their sex assigned at birth?
A Yeah. And that's consistent with what I've said before.
Q What are those benchmarks?
A Exactly what the person tells you.
Q Do you believe that school should allow for gender fluidity such that students should be allowed to go back and forth between restrooms?
A Yes. And the reason that I would say that is because many students experience restrooms as

places of "I don't feel safe."
Q And for students who are nonbinary or identify as nonbinary, do you have an opinion as to what benchmarks you would expect to be in place that govern that situation with regard to their selection of a restroom?
A I think it would rest on their selection.
Q In rendering your opinion in this matter, did you take into account the privacy interests of the plaintiffs?
A I'm not sure I know what you mean by that.
Q Was, I suppose, privacy sort of included in the calculus of whether or not each of these plaintiffs should be allowed access to the male restrooms?
A Yes, in the sense that choice is something that incorporates the concept of privacy in terms of spaces like restrooms.
Q If S.E. or B.E. said that "they don't want to be known as trans or in the LGBTQ community in school or public," how would that desire for anonymity be aided by them gaining access to the boys' restrooms and locker rooms?
A I think that would just be their direct expression of being boys.

Q Do you believe that S.E.'s and B.E.'s mental health would be served by allowing them to disrobe in the open space of the locker room in front of other students?
A By their choice, yes.
MR. FALK: Phil, it's been an hour and 15 minutes. Do you want to take a break?
(A recess was taken between 2:14 p.m. and 2:22 p.m.)
BY MR. ZIMMERLY:
Q When you were talking about having access to the restroom and locker room, I believe your testimony -- part of your testimony was that -- was that so that these students can have social approval, given that there were boys where boys are expected to be. Is that fair? Is that an accurate account of your testimony?
A Yes.
Q And when you're talking about social approval, who are we seeking approval from?
A Others. Because being in a boys' restroom, means you're a boy, and that would be violated if you were in the girls' restroom and you're a boy.
Q Have you studied the potential impact that might

occur to a student if they changed their clothes in a locker room in front of other students with a different sex assigned at birth?
A I've not done that study. I don't believe that study's been done. As part of my larger practice, I have supported many young people who identify as male but who have a condition called "gynecomastia," which is an appearance of breasts, who are uncomfortable in changing in a locker room. So it's possible to be uncomfortable changing in front of others even if you're -- even with a complete sense you're in the right space.
Q If S.E. and B.E. were to disrobe or shower in front of other students in the girls' restroom, would that allow them to be outed as transgender?
A Yes, probably.
Q Is it possible that the peer reactions in that setting may also cause them shame?
A Based on stories of my patients, the discomfort felt in female bathrooms is far larger than any that they experience in male bathrooms.
Q What about with regard to locker rooms?
A I don't think I have a reference point for that.

Q There was a statement made in one of the articles that you referenced or that was referenced in your declarations. It was in an article by Myeshia Price-Feeney, Amy Green, and Samuel Dorison. The title of the article is "Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth."
Are you familiar with that article?
A Yes, I am.
Q And one of the statements in the conclusions that I'd like your opinion on is that they conclude:
"Offering gender-neutral bathrooms, avoiding restrictive policies, and providing private places to change clothes in locker rooms may not only improve mental health for these youths but could potentially save TGNB youths' lives."
Do you have an opinion as to why their conclusion was that providing private places to change clothes in locker rooms may help to improve mental health and save lives?
A I think they are referring to --
MR. FALK: I'm sorry. I hate Zoom. I was trying to object.

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I'm just going to interpose an objection just because that's an incomplete reading of the conclusion. Further on, the conclusion states, I'm quoting:

"School administrators and teachers should explicitly support the right of students to use a bathroom that matches their identity and efforts to establish gender-neutral facilities on campus."

I just want to have that as before the doctor -- as he responds.

Thank you.

THE WITNESS: Ken, you sort of put words in my mouth.

MR. FALK: I'm sorry. That's what lawyers do. I apologize.

You may continue. Go ahead and answer, Doctor. I'm sorry.

BY MR. ZIMMERLY:

Q As I interpreted that statement by them with regard to providing private places to change clothes, and for specific reference to locker rooms, is that that would provide privacy to those students and improve their mental health and potentially save their life -- save lives as

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it pertains to locker rooms. Do you think I'm misunderstanding their conclusion with regard to that?

A A bit. Because I think they are also, in general, referring to privacy across the board for young people in terms of their bodies.

Q Are you aware of whether S.E. and B.E., if either of those students was engaged in self-harm via cutting and/or had suicidal ideation in the summer before school started in the 2021-2022 school year?

A I cannot remember the specific reference to that in the record.

Q [redacted]

[redacted]

[redacted]

[redacted]

A [redacted]

[redacted]

Q Have you rendered any opinion as to whether access to bathrooms and locker rooms at this school, whether that's prompted any feelings of self-harm or suicidal ideation by any of these students?

A I think both S.E. and B.E. have noted the stress

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that's been associated with the interactions with the school and the issue with bathroom access.

Q And is that based on something that they have said to you?

A That was indicated in the medical record.

Q Something in the medical record, but you're relying on the medical record for that, not based on your personal interaction with either of those two students?

A That was reviewed in the interactions -- the limited interactions that I've had with those two patients.

Q In providing --

(Reporter request for clarification.)

Q In providing your opinions in this matter with regard to restroom access and/or locker room access, did you take into consideration the privacy interests of other students who use the boys' restrooms and/or locker rooms at the school?

A I did not.

Q Have you conducted any studies with regard to whether an individual's exposure to the sexual anatomy of someone from the opposite sex during

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middle school has any impact on that individual?

A Not personally conducted research of that nature.

Q Are you familiar with any studies in that regard?

A Not as you've described it.

Q Have you conducted any studies with regard to whether an individual's exposure to the sexual anatomy of someone from the opposite sex during high school -- during high school has any impact on that individual?

A I'm aware of research that addresses exposure to household nudity up through adolescence without finding specific harms associated with it absent of other issues, but I believe that exposure to other peers has not been addressed in that same fashion other than people associated with naturism, nudism, where that is also a family experience, typically, for young people.

Q So you would have no opinion with regard to whether there was harm or not harm with regard to other students -- middle school students or high school students that were being exposed to the physical anatomy of these plaintiffs?

A Yeah, I think that's accurate.

Q In your supplemental declaration, which we've marked as Exhibit 15, I don't know that I ever authenticated this document with you, but is this the declaration that you provided as sworn testimony in the B.E. v. Vigo County School Corporation case?
A Let me pull it up and make sure I can validate that.
Yes, it is.
Q In paragraph 8, you begin that paragraph by stating:
"As noted in my November 22, 2021, declaration, I reviewed the medical records of the plaintiffs in this case and participated in their care received at the Riley Gender Health Clinic."
What specific medical records do you recall reviewing for S.E.?
A I reviewed their -- the medical record for the visit -- for their initial visit at the Riley Gender Program.
Q Have you reviewed any other medical records for S.E.?
A I reviewed the record for a subsequent visit.
Q Any other record that you've reviewed with

regard to S.E.?
A No.
Q When you say that you -- when you testified via the declaration that you participated in the care of S.E., what do you mean by that?
A It means that their initial visit to the Riley Gender Clinic was through a virtual medicine format; and I supervised the work of an adolescent medicine fellow in the provision of the care that it provided during that visit; and I met the patients and their mother as part of that care.
Q So was that a telehealth visit?
A Yes.
Q Had you had any other interactions with the -- with S.E. or with B.E. or their mother other than that initial consult?
A No.
Q Have you had any in-person interactions with S.E., B.E., or L.E. in terms of being in the same room as them, or was it that one interaction that was via telehealth?
A I had one interaction via telehealth.
Q What do you recall about that interaction?
A The fact that they were twins; the support for

her children described by L.E.; the consistency of both S.E. and B.E. in terms of their interest in moving forward with gender-affirming testosterone.
Q And when you met with --
A That's all.
Q When you met with S.E., was it at the same time you met with B.E., or were they separate?
A They were separate for much of their visit. The final summation with L.E. was done as a group, but that was at the mother's request.
Q When you met with S.E., did you speak with S.E. about S.E.'s desire to use the boys' locker room?
A That was covered. I was not present for that part of the discussion.
Q Were you present for any discussion about S.E.'s desire to use the boys' restroom?
A No, that was covered but not in my presence.
We did discuss providing a letter to the school to support the use of the boys' restroom, and that letter was provided.
Q When you say "we did discuss," who discussed?
A The adolescent medicine fellow who was primarily responsible for the care and the boys' mother.

Q And were you a party to that discussion?
A Yes.
Q Same questions with regard to B.E. Did you speak with B.E. about B.E.'s desire to use the boys' restroom?
A No, not directly. That was covered by the adolescent fellow.
Q And who was the adolescent fellow in this instance?
A Nomi Sherwin.
Q Did you discuss B.E.'s desire to use the boys' locker room?
A It was discussed, but not directly by me.
Q Did you speak with S.E. about S.E.'s past use of the health office restroom at the school?
A It was discussed but not directly me.
Q What about with regard to B.E.? Did you discuss B.E.'s past use of the health office restroom at the school with B.E.?
A It was discussed but not directly present.
Q And how do you know that it was discussed if you weren't present for that?
A That was documented by the fellow in their note.
Q So you're relying on the record for that but not based on your own personal knowledge?

A Other than the fact, that as reported to me at the time of the visit, that was also reported.
Q Reported to you by -- is it Dr. Sherwin?
A Yes.
Q Dr. Sherwin reported that to you?
A Yes.
Q Did Dr. Sherwin share with you the scope of that conversation with regard to use of the locker room -- boys -- use of the boys' restroom? use of the boys' locker room? past use of the health office restroom?
A It included those three things and then participation in ROTC.
Q What do you recall Dr. Sherwin saying to you specifically about those topics?
A Just that there were issues that they had at school on a regular basis; and that, particularly, the restrooms and ROTC and issues with name and gender marker or name and pronouns were distressing issues regularly at school.
Q That's what Dr. Sherwin told you?
A Yes.
Q Do you know whether or not --
Did you have any conversations with S.E. about S.E.'s concerns for privacy in the locker

room?
A No.
Q Do you know whether or not that was discussed?
A Not to my knowledge.
Q Do you know whether B.E. expressed any concerns about privacy either in the restroom or the locker room?
A Not to my knowledge.
Q Did you have a discussion with S.E. about what individualized harm S.E. believed would occur if S.E. was not allowed full access to the boys' restroom or the boys' locker room?
A No.
Q Do you know whether or not that was discussed with Dr. Sherwin?
A I don't.
Q Did you speak with B.E. about what individualized harm B.E. believed would occur if B.E. was not allowed full access to the boys' restroom or the boys' locker room?
A No.
Q Do you know whether or not Dr. Sherwin had such a conversation with B.E.?
A No.
Q Do you think such information with regard to,

you know, either B.E.'s or S.E.'s belief about what harm would occur to them if they didn't have access to the boys' restroom or the boys' locker room would be important to consider in making an individualized assessment?
A I think that discussion would have been issues around being unable to void or use a restroom over the course of a school day.
Q When you say "you think," is that based on your personal knowledge that such a conversation occurred, or are you making an assumption?
A I'm recalling the discussion about the boys' reluctance to use a bathroom at school during the day because of their inability to use the boys' restroom.
Q And you recall that conversation. Who was a party to that discussion?
A Dr. Sherwin reported that.
Q That was Dr. Sherwin and you?
A Yes.
Q Have you performed an individualized assessment as to the severity of the harm to S.E. if S.E. is not allowed access to the boys' restroom and locker room?
A Not personal.

Q Have you performed an individualized assessment of the reduction of that alleged harm if S.E. is allowed access to the boys' restroom and locker room?
A Based on the understanding of potential harm, yes, in association with Dr. Sherwin.
Q And what evidence did you consider in that individualized assessment?
A The details obtained during the interview and that reported by their mother.
Q Have you performed -- same questions with regard to B.E. Have you performed an individualized assessment of the reduction of any alleged harm if B.E. is allowed access to the boys' restroom and locker room?
A It would be the same answer.
Q And the same answer with regard to any evidence that you considered?
A Yes.
Q I asked you about specific records you recalled reviewing for S.E. What specific medical records do you recall reviewing for B.E.?
A B.E. reviewed an entire transcript of their Indiana University health record.
Q And so all the way from birth to present?

A I don't think it included birth history, but it included their engagement not only in our clinic but in other clinics associated with some of their other conditions.
Q In paragraph 8 of your supplemental declaration, you indicated that you participated in the care received by B.E. at Riley Gender Health Clinic.
With regard to your participation in the care of B.E., what do you mean?
A As with S.E., it was a supervision of the fellow's work and then direct meeting with the patient and his mother.
Q And what do you recall about that direct interaction with B.E. and B.E.'s mother?
A It was conducted at the same time with S.E.; so the content was the same.
Q Did you have any conversations with B.E. about B.E.'s use of the boys' restroom, the locker room, or the health office restroom?
A Those were covered as part of the fellow's interactions with B.E., and then they were discussed as a group as we left at the end of the visit, again, as part of preparing a letter to the school.
Q If you would pull up Exhibit 16 --

(Deposition Exhibit 16 was presented for identification.)
Q -- which are excerpts of the medical records for B.E. which you've only excerpted because there's I think 720 pages that were produced to us, and so we tried to narrow it down to a few pertinent visits.
Do you have that document in front of you?
A Yes.
Q On the first page, there is History-Social. Is this information that's gathered from the patient during the initial visit?
A So you're referring to Employment/School? Hobbies/Interests? Home/Environment?
Q Yes.
A Yes.
Q So the information included in the comment is input by Dr. Sherwin based on information that's provided by the patient?
A Yes.
Q With regard to the Employment/School box there on the first page, the second sentence after education, there's a statement:
"Doesn't want to be known as trans or in the LGBTQ community in school or public."

Do you recall a discussion along those topics, along those lines with B.E.?
A I don't.
Q Did Dr. Sherwin share any such sentiment with you following her meeting with B.E.?
A I don't recall that.
Q This statement, a few sentences later:
"Has not used a S2P."
I'm not familiar with that? What does S2P mean?
A Stand-to-Pee, which is a device to collect urine and be able to direct a stream into a receptacle. It's used by people for camping as well; so it has broad use.
Q So that would allow an individual sex assigned at birth of female to stand and use the urinal --
A Yes.
Q -- in a boys' restroom?
A That's correct.
Q Under the Other box, there's a statement here about:
"Safety: Last SHB thoughts a few months ago (plus cutting at that time). Plus SI over the summer, no plans."

The SHB, what does that stand for?
A Self-harming behavior.
Q And SI stands for suicidal ideation?
A Correct.
Q Did you have any discussions with B.E. about either self-harming behavior or suicidal ideations?
A That would have been covered by Dr. Sherwin during the interview directly with the patient.
Q And did you discuss that with Dr. Sherwin?
A Yes.
Q And what do you recall about that discussion?
A Very little other than acknowledging its existence.
Q And was it your understanding based on the discussion that that -- that those self-harming thoughts and suicidal ideation occurred over the summer prior to the start of the school year?
A I don't think I connected them to being prior to the school year.
Q Did you have a sense of their timing one way or the other?
A Not to my recall, other than I think they were recent.
Q If you would turn to page 5 of 18, there's under

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Subjective. Are you there? It's Clinic_Office Records, and there's an addendum by Fortenberry, J. Dennis, M.D. Are you there?
A I know it's there. I haven't gotten to it yet.
Okay.
Q Just under Subjective there, halfway through the page, there's Reason for Consultation, Subjective, which includes:
"Name used: B.E. Pronouns use: He/him. Gender identity: Male. Sex assigned at birth: Female."
Do you see that?
A Yes.
Q Why is that information gathered with regard to gender identity and sex assigned at birth?
A We use that to appropriately identify the patient throughout the visit with respect to their name and their pronouns.
And not everyone who comes to our clinic as transgender or nonbinary identifies -- who is birth assigned female identifies as male.
Q What other sort of identifiers would you see as someone with gender dysphoria, female identifies as female, or are there other categories?
A That's where people might say try -- nonbinary;

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some would say gender queer, queer, or agender. There are a variety of terms that young people may use.
Q Okay. At the end of that sort of section there is a statement:
"Desire for biological children: I don't know. I don't really think about it."
Why is that information included?
A We used that as a way to frame discussion about fertility, desires, and that helps frame a discussion about potential effects of gender-affirming hormones.
Q Turn to page 7 of 18.
A Okay.
Q Under the Assessment/Plan, scrolling down to the second-to-last paragraph within that section, it begins:
"Family is also having a lot of trouble."
Do you see that.
A Yes.
Q It states:
"Family is also having a lot of trouble with gender affirmation in school, including difficulties with bathroom/locker room use; being outed at school occasionally; and problems

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joining ROTC as a male."
That reference to "being outed at school occasionally," is that something that you discussed with B.E.?
A Not directly.
Q Did you discuss that with Dr. Sherwin?
A I don't recall that specific discussion, no.
Q Do you know whether that was a concern of B.E. that B.E. would be outed?
A I think the reference here is that B.E. was already being outed against his will.
Q Did B.E. also express a desire to have surgery?
A I think that there was a mention of being -- desire for top surgery or chest surgery in the future.
Q Is that something you discussed with B.E. yourself, or is that something that Dr. Sherwin mentioned to you?
A That's something Dr. Sherwin identified and quoted.
Q If you would turn to the page that's marked PLTF000722. It's near the end of this excerpted set of medical records.
A 732?
Q I'm sorry, 722.

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A Okay.
Q What is this document?
A This is a letter to support name and gender marker change.
Q And the statement --
This was signed by Dr. Sherwin?
A Yes.
Q Did you have any input with regard to this letter?
A No, I don't believe so, but I probably wouldn't have.
Q You wouldn't have had any input to the letter?
A No. It's a -- it's a standard part of provider care for gender-diverse youth who are ready to pursue name and gender-marker change.
Q There's a statement here in the second paragraph of the letter:
"B.E. has had the appropriate clinical treatment for gender transition to the new gender of male."
Do you have any opinion about that statement?
A It's standard language that is necessary to complete this legal transition.
Q And in terms of the clinical treatment that had

occurred prior to this letter with regard to Riley, it had been that one initial consult?
A Yes.
Q If you turn the page to the next page here.
A Okay.
Q This was a follow-up visit on December 17, 2021, by B.E. You had mentioned reviewing two medical records with regard to -- I take that back. With S.E., you said there were two records that you reviewed, two visits; and with B.E., you reviewed the entire file. Is that correct?
A Yes.
Q Do you know whether or not the fall visit with S.E. occurred on or about December 17, 2021?
A Yes. I think they were on the same day again.
Q Okay. And there would be a separate medical record, I would assume, for S.E. for that visit?
A Yes.
Q And were you present for this second visit?
A I was not.
Q One of the things I noted in and throughout the medical records for B.E. is that the birth name is up in the right-hand column of these records. Do you see that?
A Yes.

Q And these documents, according to the Bates stamp at the bottom, were printed on February 25, 2022?
A Okay.
Q Is that considered deadnaming?
A Yes.
Q And that's -- these are IU Riley's medical records?
A That's true.
Q Did you do that purposely?
A No.
Q Is that something as someone's transitioning, their records over the course of time take time to adjust to reflect that transition?
A Yeah. The medical record requires that their current legal name be represented in the medical record. It's required for a variety of reasons to assure that this is the right patient so --
Q REDACTED

REDACTED

Q REDACTED

REDACTED

Q In paragraph 27 of the A.C. declaration -- your declaration in the A.C. case --
A Okay.
Q -- you make a statement, three sentences in:
"Hormone therapy to feminize or masculinize the body is considered by many, but not all, young people."
Who ultimately makes the decision as to whether or not hormone therapy is instituted?
A As I think with all of these cases, it's a joint decision based on the young person's preference; the parents' support of that choice if the person is under age 18; and the provider's assessment.
Q You mentioned that the age ranges of children who receive care at the Gender Health Clinic

range from 3 to 21. Does that -- does the type of treatment and decisions regarding treatment differ with regard to younger children than it does the adolescent children?
A Yes, completely.
Q Turn back to paragraph 27.
A Okay.
Q The sentence -- you make the statement:
"It is important to note that these mental health issues, the depression and anxiety, primarily are most often responses to social hostility, rejection, discrimination, emotional abuse, bullying, and physical violence associated with society's rejection of the person's expressed gender."
What are you basing that statement on?
A An amalgam of research literature that suggest that these mental health conditions are not -- wouldn't have existed or wouldn't have existed in the same way without the kind of treatment that they've received in terms of their gender expression.
Q Is it true that there may be other causes for feelings of depression and anxiety in any given patient?

A Yes --
Q And what other --
A -- absolutely.
Q What other causes could those involve?
A Depression is a common experience with many young people. These are young people; so they are not immune from all the other kinds of things that young people face that are associated with depression.
Q Is that also true for anxiety?
A Yes.
Q And does the cause for any particular depression or anxiety depend on each particular patient?
A Yes, although there are predictable risk factors that can be associated with the experience with depression.
Q What do you mean by that?
A So things like gender identity would be one; things like a history of abuse could be one; sexual orientation could be one -- those are the kinds of things that might be associated with depression or anxiety.
Q And would that require an individualized assessment for that particular patient to determine the cause and treatment?

A Yes.
Q REDACTED
REDACTED
A REDACT
Q Did you perform an individualized assessment for B.E. or S.E.?
A As noted, yes, I participated in that assessment.
MR. FALK: Phil, do you want to take a five-minute break?
(A recess was taken between 3:26 p.m. and 3:34 p.m.)
BY MR. ZIMMERLY:
Q REDACTED

Page 69

1 REDACTED

Page 71

1 A REDACTED

Page 70

1 REDACTED

Page 72

1 REDACTED

Page 73

1 REDACTED

Page 74

1 Q REDACTED

Page 75

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Page 76

1 REDACTED

REDACTED

(A recess was taken between 3:52 p.m. and 4:11 p.m.)

MR. FALK: Doctor, I'm required as a lawyer to now say, "I have a few questions." Okay? All lawyers say it. We don't necessarily have a good sense of what the word "few" means, but we'll get it a shot. Okay?

CROSS-EXAMINATION,

QUESTIONS BY KENNETH J. FALK:

Q At the beginning of your deposition -- and I might have gotten this wrong -- but you made a comment concerning the plaintiffs --

MR. FALK: Excuse me for a second. Let me close my office door.

I'm sorry.

BY MR. FALK:

Q You made a comment about continuing menstruation. So, first, focusing on B.E. and S.E., are they still menstruating at this point?

A I don't believe so. I think that's been addressed both with medication as well as an effective testosterone that they have been on.

Q REDACTED

REDACTED

Q You were asked a question about the Price-Feeney article and a conclusion concerning gender-neutral bathrooms. Do you remember those questions?

A Yes.

Q And what is your understanding that that article was saying about who should have the option of utilizing gender-neutral bathrooms or gender-neutral places to change?

A I think they were referring to young people in general having that option, with gender-diverse young people being fully included in that -- in that access to spaces that felt safe.

Q So if a cisgender student felt uncomfortable in a locker room -- I think you alluded to students who might have gynecomastia -- they should have the option of having a private space if they want it?

A I've supported that for many young people.

Q Regardless of whether they are transgender or not?

A Yes.

Q Now, from reviewing the medical records and your knowledge of the plaintiffs, they have all --

have they all expressed distress, depression, and anxiety concerning having to use either female restrooms at school or a gender-neutral nurse's restroom?

A Yeah, I think they have all -- I think that has been recorded in all of their medical records and more than one time for all of them.

Q Is that consistent -- I'm sorry.

Is that consistent with the literature concerning how transgender youth react when not allowed to use bathrooms associated with their gender identity?

A Yeah, I think the literature suggests that the large majority feel distress over that kind of discrimination and the lack of access that it represents.

Q And is that consistent with your experience in treating all the patients you've treated throughout your career?

A Yes, absolutely. It's by far more common an experience than to not experience.

Q Far more common to experience that sort of mental distress?

A Absolutely.

Q And similarly, had your review of the records

and your knowledge of their care and knowledge of them regarding B.E. and S.E., have they expressed distress, depression, anxiety, over having to use or not being able to use the male locker room?

A Yeah. As best I can tell, we've voiced -- they've voiced that consistently for the times that we interacted with them in our clinic.

Q And, again, is that sort of mental distress expressed by a transgender person about not being able to use a locker room consistent in this case with his gender identity consistent with the literature as you understand it?

A Yes, it can. And both in the United States and Canada, studies from Australia, from Western Europe, come to the same conclusion along those lines.

Q And is it consistent with your experience, again, in the breadth of your treatment of these youth over the years you've treated them?

A Yes. Yeah.

Q You've indicated the medical records indicate the three plaintiffs all meet the diagnostic criteria for gender dysphoria; is that correct?

A Correct.

Q You were asked some questions by Mr. Zimmerly about your view about whether students should have access to boys' restrooms who say they are boys. Do you remember those questions?

A Mm-hmm.

Q Regardless of your opinion about that -- and we'll talk about that in a second -- the plaintiffs in this case, in addition to saying they are boys, have been diagnosed with gender dysphoria, which requires them to have over a long period of time manifested certain -- taking certain positions as to their view of themselves and manifested those as well as showing emotional distress; is that correct?

A Yes.

Q In a situation where a student just out of the blue pops into school one day -- and, obviously, this is not the situation of the plaintiffs here -- but just pops into school one day and says, "I want to use the boys' restroom even though my assigned sex at birth was female," what should the school do?

A In my opinion, they should have a procedure in place for recognizing that student and supporting them, and then supporting them for any additional services that might be helpful.

Q And would that procedure also involve making sure that the student meets certain diagnostic criteria?

A No. I am not committed to the school using diagnostic criteria for access to bathrooms. I think, in my experience, very, very few adolescents would use this as a prank or a whim. The social consequences as we have seen for that kind of behavior are pretty extreme. And so my sense, as I think guidelines for schools have suggested, is that supporting the student in their express gender is their first priority.

Q But in any event, the plaintiffs in this case meet diagnostic criteria for gender dysphoria?

A And they also engaged in a process for working with the school to make that known.

Q And they meet the criteria for gender dysphoria; is that correct?

A Yes, completely.

Q REDACTED

Q REDACTED

Q [redacted]

MR. FALK: Just -- I'm going to turn my sound off for a second. Just consult with my co-counsel to see if there are any other questions.

(A discussion was held off the record.)

MR. FALK: No further questions.

MR. ZIMMERLY: I may just have one or two follow-ups for you, Dr. Fortenberry.

REDIRECT EXAMINATION,

QUESTIONS BY PHILIP R. ZIMMERLY:

Q [redacted]

[redacted]

MR. ZIMMERLY: I have no further questions.

One note that I would make is that we reserve rights to a follow-up deposition with regard to other components of this case outside the preliminary injunction phase. There are a number of medical records that we have not yet been able to obtain. I don't know that it would be necessary, but we just make that note.

MR. FALK: Thank you.

And we'll take signature.

Doctor, I forgot to ask you, but as a lawyer I just assume what the right answer is.

You have the right to review this deposition. Relive the experience.

I'm a little offended that Phil, since this was your first deposition, does not have some sort of prize for you, but I'm sure that's coming.

But you can review the deposition. If there are mistakes as to names or what have you, we can fill out an errata sheet. You can waive

that right. I would suggest you not waive it. We will both review it, and then we can go over it, if that's okay.

THE WITNESS: Okay.

MR. FALK: So we will take signature. I'm the only one getting the copy for the plaintiffs. We would like E-Tran.

THE REPORTER: You want a copy, and I will send the original to you and not to the doctor?

MR. FALK: That is fine. I will get him to sign off on it.

(Time noted: 4:25 p.m.)

AND FURTHER THE DEPONENT SAITH NOT.

_____

J. DENNIS FORTENBERRY, M.D., M.S.

STATE OF INDIANA)
) SS:
COUNTY OF HANCOCK)

I, Tara Gandel Hudson, RPR, CRR, a Notary Public in and for the County of Hancock, State of Indiana at large, do hereby certify that the deponent, J. DENNIS FORTENBERRY, M.D., M.S., was by me remotely sworn to tell the truth, the whole truth, and nothing but the truth in the aforementioned matter;

That the foregoing deposition was taken on behalf of the Defendants, with the witness located in Indianapolis, Marion County, Indiana, on the 1st day of March, 2022, scheduled to commence at 1:00 p.m., pursuant to the Federal Rules of Civil Procedure;

That said deposition was reported stenographically and transcribed to English under my direction, and that the transcript is a true record of the testimony received remotely of said deponent; and that the signature of said deponent to his deposition was requested;

That the parties were represented by their counsel as aforementioned.

I do further certify that I am a disinterested person in this cause of action; that I am not a

relative or attorney of either party, or otherwise interested in the event of this action, and am not in the employ of the attorneys for either party.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 4th day of March, 2022.

<%21162,Signature%>
Tara Gandel Hudson

_____

Seal
Notary Public, State of Indiana
Commission No. 682534
My Commission Expires March 27, 2024

Veritext Legal Solutions
1100 Superior Ave
Suite 1820
Cleveland, Ohio 44114
Phone: 216-523-1313

March 4, 2022

To: Mr. Falk

Case Name: B.E. And S.E., Et Al. v. Vigo County School Corporation, Et Al.
Veritext Reference Number: 5088138
Witness: J. Dennis Fortenberry , M.D., M.S. Deposition Date: 3/1/2022

Dear Sir/Madam:

Enclosed please find a deposition transcript. Please have the witness review the transcript and note any changes or corrections on the included errata sheet, indicating the page, line number, change, and the reason for the change. Have the witness' signature notarized and forward the completed page(s) back to us at the Production address shown above, or email to production-midwest@veritext.com.

If the errata is not returned within thirty days of your receipt of this letter, the reading and signing will be deemed waived.

Sincerely,
Production Department

NO NOTARY REQUIRED IN CA

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 5088138
CASE NAME: B.E. And S.E., Et Al. v. Vigo County School Corporation, Et Al.
DATE OF DEPOSITION: 3/1/2022
WITNESS' NAME: J. Dennis Fortenberry , M.D., M.S.
In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.
I have made no changes to the testimony as transcribed by the court reporter.

_____ _____
Date J. Dennis Fortenberry , M.D., M.S.
Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal this _____ day of_____, 20____.

_____
Notary Public

_____
Commission Expiration Date

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 5088138
CASE NAME: B.E. And S.E., Et Al. v. Vigo County School Corporation, Et Al.
DATE OF DEPOSITION: 3/1/2022
WITNESS' NAME: J. Dennis Fortenberry , M.D., M.S.
In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.
I have listed my changes on the attached Errata Sheet, listing page and line numbers as well as the reason(s) for the change(s).
I request that these changes be entered as part of the record of my testimony.

I have executed the Errata Sheet, as well as this Certificate, and request and authorize that both be appended to the transcript of my testimony and be incorporated therein.

_____ _____
Date J. Dennis Fortenberry , M.D., M.S.

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:
They have read the transcript;
They have listed all of their corrections in the appended Errata Sheet;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.
I have affixed my name and official seal this _____ day of_____, 20____.

_____
Notary Public

_____
Commission Expiration Date

ERRATA SHEET

VERITEXT LEGAL SOLUTIONS MIDWEST

ASSIGNMENT NO: 5088138

PAGE/LINE(S) / CHANGE /REASON

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Date J. Dennis Fortenberry , M.D., M.S.

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____

DAY OF _____, 20_____ .

_____

Notary Public

_____

Commission Expiration Date