

NO. 23-2568

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

JANE DOE #1, a minor, by her mother and next friend,  
JANE DOE #2,  
*Plaintiff-Appellee,*

v.

MUKWONAGO AREA SCHOOL DISTRICT and  
JOSEPH KOCH, in his official capacity as Superintendent of the  
Mukwonago Area School District,  
*Defendants-Appellants.*

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On Appeal from the United States District Court for the  
Eastern District of Wisconsin, Case No. 2:23-cv-00876  
The Honorable Judge Lynn Adelman

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**SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLEE,**  
JANE DOE #1, a minor, by her mother and next friend, JANE DOE #2

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

Jane Doe #1, a minor, by her mother and next friend, Jane Doe #2,

Plaintiff,

v.

MUKWONAGO AREA SCHOOL DISTRICT and JOE KOCH, in his official capacity as Superintendent of the Mukwonago Area School District,

Defendant.

Civ. Action No. 2:23-cv-876

**PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Plaintiff Jane Doe #1, by and through her mother and next friend, Jane Doe #2, move this Court, on an emergency basis and pursuant to Fed. R. Civ. P. 65, to enter a temporary restraining order and preliminary injunction against Defendants Mukwonago Area School District (“MASD” or “the District”) and Joe Koch, in his official capacity as Superintendent of the District. Plaintiff, who is a transgender girl, has suffered and continues to suffer irreparable harm based on Defendants’ discriminatory refusal to permit her to use girls’ restrooms at school under the threat of disciplinary consequences. Defendants’ conduct is barred by, *inter alia*, the controlling decision of *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

Through this motion, Plaintiff requests that this Court restrain and enjoin Defendants and their employees, agents, and representatives, by the beginning of the school day on July 3, 2023,

or as soon as is reasonably practicable, and thereafter during the pendency of this litigation,  
from:

(1) enforcing against Plaintiff any policy, practice, or custom of the District that denies Plaintiff access to girls' restrooms at school and school-sponsored events; and

(2) taking any formal or informal disciplinary action against Plaintiff for using girls' restrooms at school and school-sponsored events.

In support of this motion, Plaintiff submits the accompanying memorandum of law and the following exhibits:

1 – Declaration of Alexa Milton

1-1 – May 23, 2023 Email from MASD to Jane Doe #2

1-2 – May 24, 2023 Letter from T. Baines

1-3 – June 16, 2023 Email from MASD to Jane Doe #2

1-4 – June 19, 2023 Email from C. Bowden to Jane Doe #2

1-5 – June 22, 2023 Email from C. Bowden to Jane Doe #2

1-6 – June 22, 2023 Email from Jane Doe #1 to Jane Doe #2

1-7 – June 22, 2023 Email from A. Schultz to Jane Doe #2

1-8 – June 28, 2023 Email from Jane Doe #1 to Jane Doe #2

1-9 – June 28, 2023 Email from B. Kossow to Jane Doe #2

1-10 – June 29, 2023 Email from B. Kossow to Jane Doe #2

1-11 – June 27, 2023 Letter from A. Milton

1-12 – June 28, 2023 Letter from J. Aziere

1-13 – June 29, 2023 Letter from A. Milton

1-14 – Policy 5514

2 – Declaration of Jane Doe #2

2-A – Photo of Jane Doe #1

Plaintiff moves the Court to enter the requested temporary restraining order with immediate effect to avoid the significant educational, psychological, and emotional harms to Plaintiff that she will suffer if she cannot obtain relief from the District's discriminatory policies, practices, or customs, as specified above.

Dated: June 30, 2023

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

Jane Doe #1, a minor, by her mother and next friend, Jane Doe #2,

Plaintiff,

v.

MUKWONAGO AREA SCHOOL DISTRICT and JOE KOCH, in his official capacity as Superintendent of the Mukwonago Area School District,

Defendant.

Civ. Action No. 2:23-cv-876

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR A  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**INTRODUCTION**

Plaintiff Jane Doe #1, by her mother and next friend Jane Doe #2, has filed this emergency motion to request the Court's immediate intervention to stop Defendants Mukwonago Area School District ("MASD" or "the District") and Superintendent Joe Koch, in his official capacity as Superintendent of the District (collectively, "Defendants") from denying her permission to use restrooms consistent with her gender identity. Plaintiff is a transgender girl and has used the girls' restrooms at Prairie View for nearly three years without incident. Defendants have done a complete about face, however, and currently are denying Plaintiff permission to use the girls' restroom in her summer school program.

This violates Plaintiff's rights, as made plain by the Seventh Circuit's controlling decision in *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017). *Whitaker* leaves no room for doubt: denial of transgender students' ability

to use the bathroom consistent with their gender identity constitutes discrimination in violation of both Title IX and the Equal Protection Clause. *Id.* at 1046-54. The law in this case is clear, and Defendants are plainly violating it. Moreover, Defendants' conduct is causing Plaintiff substantial and irreparable harm. Defendants have rejected entreaties from Jane Doe #2 and counsel to cease immediately this denial of Plaintiff's rights.

Plaintiff Jane Doe #1 is an eleven year-old girl and an incoming sixth grade student in the Mukwonago Area School District ("MASD") in Mukwonago, Wisconsin. Plaintiff was designated "male" on her birth certificate, but she began presenting as a girl at home at the age of three, and at school since she began first grade. Since then, she has lived as a girl and participated with girls in school activities when they are separated by gender. She has also used the girls' bathroom at school since moving to the district at the beginning of third grade.

After nearly three years of Jane Doe #1 using the girls' bathroom without incident, Jane Doe #2 was informed earlier this month that her daughter must use "a gender-neutral or male bathroom" at summer school. Since then, Defendants have worked to deny Jane Doe #1 access to girls' restrooms at schools, directed school staff to monitor her restroom usage and report her use of the girls' restroom to administrators, and threatened disciplinary action for continued use of the girls' restroom.

Unless enjoined, Defendants' continuing discrimination against Jane Doe #1 will subject her to irreparable injuries. Beyond interfering with her ability to learn and to enjoy the privileges and benefits of summer school, living under the specter of disciplinary action for exercising her rights under federal law will disrupt her ability to attend and fully enjoy summer school—as any eleven year-old should be able to. Meanwhile, allowing Jane Doe #1 to use the girls' restrooms while this case proceeds on the merits will harm no one.

Through this motion, Plaintiff is asking only that the Court restore the status quo ante in which Plaintiff could use the girls' bathroom. For the reasons outlined below, the Court should issue a temporary restraining order barring Defendants from interfering with Plaintiff's use of girls' restrooms consistent with her longstanding gender identity and presentation.

### STATEMENT OF FACTS

Plaintiff Jane Doe #1 is an eleven-year-old girl who will enter her sixth-grade year at Prairie View Elementary School ("Prairie View"), one of MASD's elementary schools, in the fall. Dec. of Jane Doe #2, Ex. 2 at ¶ 3. She is currently enrolled in summer school at Mukwonago High School for her third summer participating in this program. *Id.* at ¶ 10.

Plaintiff is transgender. *Id.* at ¶ 4. Although she was assigned male at birth, she expressed to Jane Doe #2 from a very young age that she saw herself as a girl. *Id.* As such, she began presenting and living as a girl at home when she was three years old. *Id.* She began publicly presenting as a girl in first grade at the elementary school that she attended in another school district prior to Prairie View—she began using female pronouns and a more feminine name, growing out her hair, and wearing traditional girls' clothing. *Id.* at ¶ 5. Plaintiff has been diagnosed with gender dysphoria by a medical doctor and is currently under the care of a therapist to support her emotional and psychological wellbeing as a transgender child. *Id.* at ¶¶ 7, 34; May 24, 2023 Letter from T. Baines, Ex. 1-2.

When she was entering third grade, Plaintiff and her family moved to Waukesha County and she was enrolled at Prairie View. Ex. 2 at ¶ 3. Jane Doe #2 disclosed her daughter's transgender status to a few Prairie View staff members that Jane Doe #2 believed were necessary to help ensure her daughter's safety at school: the Prairie View principal, Jane Doe #1's classroom teacher, and the gym teacher. *Id.* at ¶ 9. Jane Doe #2 also met with then-

Superintendent Shawn McNulty at that time, who agreed that Jane Doe #1 would be treated as a girl and would use girls' restrooms. *Id.* These staff members were supportive and welcoming, using Jane Doe #1's feminine nickname and referring to her with female pronouns. *Id.* at ¶ 10.

Until Defendants' discriminatory conduct began, Jane Doe #1 did not encounter resistance to her use of facilities and participation in school activities consistent with her gender identity. *Id.* at ¶ 10. During the entirety of her time at Prairie View, Plaintiff has used female pronouns and presented physically as a girl. *Id.* at ¶ 9. Just like the other female students, she has participated in girls' groups whenever teachers separated students by gender. *Id.* Plaintiff also used the girls' bathroom during the nearly three years she has attended Prairie View. *Id.* Plaintiff's use of the girls' bathroom at Prairie View did not cause any disruption or concern until the events at issue in this lawsuit began in the late Spring of 2023, and there have not been any complaints from students or parents about Plaintiff's restroom usage that Jane Doe #2 has been made aware of. *Id.*

Around early April 2023, the Prairie View principal told Jane Doe #2 that she had begun receiving phone calls from parents of Prairie View students. *Id.* at ¶ 12. Shockingly, these parents were asking questions about Jane Doe #1's genitals and expressing concern about her bathroom use at school. *Id.* The principal also told Jane Doe #2 that parents and other residents of Waukesha County had created a Facebook group, called "Mukwonago Parents for Normal Education." *Id.* Group members were writing posts clearly referring to Jane Doe #1, describing the eleven-year-old child as dangerous. *Id.* One member asked whether Jane Doe #1's parents were pedophiles. *Id.* When Jane Doe #2 read these posts, she was horrified and worried about Jane Doe #1's safety at school. *Id.* Unfortunately, her concerns were well-founded.

About a month after the Facebook group appeared and the Prairie View principal began receiving calls about Jane Doe #1, MASD began interfering with Jane Doe #1 and her bathroom use at school. *Id.* at ¶ 12. On May 15, 2023, through its governing School Board, MASD held a closed executive meeting where it discussed Jane Doe #1's bathroom use and raised several options, including forcing Jane Doe #1 to use a separate bathroom designated solely for transgender students or a separate, single-occupancy gender-neutral restroom. *Id.* at ¶ 13. Jane Doe #2 attended part of the closed meeting. *Id.* She vehemently opposed the options presented by the School Board and told its members that her daughter had the right to use the girls' bathroom. *Id.* She explained that these options would single Jane Doe #1 out from her peers, force her to reveal to others that she was transgender without her consent, and stigmatize her. *Id.* The School Board did not make a decision that night but told Jane Doe #2 that it was "stuck between a rock and a hard place", stating that it could either upset parents who were opposed to Jane Doe #1's presence and bathroom use at school if it allowed her to continue using the girls' bathroom, or it could be sued by Jane Doe #2 if it prevented Jane Doe #1 from using the girls' bathroom. *Id.* at ¶ 15.

One week later, on May 22, 2023, the School Board held a public meeting at which members of the public spoke against Jane Doe #1 using the girls' bathroom and made hurtful comments towards her, calling her a "boy in the girls' bathroom." *Id.* at ¶ 17. Again, the School Board did not make a decision at this meeting but then-Superintendent McNulty told Jane Doe #2 the next morning that Jane Doe #1 could continue using the girls' restroom for the remainder of the school year if she provided a doctor's note confirming Jane Doe #1's gender dysphoria diagnosis. *Id.* at ¶ 18. Jane Doe #1's health care provider promptly provided this documentation, and she continued using the girls' restroom at Prairie View. *Id.*; see Ex. 1-2.

On May 23, 2023, the School Board sent an email to parents and students in the district stating that “students should use the locker rooms and bathrooms of their sex at birth.” May 23, 2023 Email from MASD to Jane Doe #2, Ex. 1-1. The email stated that the School Board would develop a related policy during the summer of 2023 for implementation in the 2023-24 school year. *Id.* On June 26, 2023, MASD adopted a new restroom policy for the district, “Policy 5514,” which mandates that students must use “restrooms and locker room facilities on District property and at District-sponsored events according to each student’s original sex assigned at birth.” Policy 5514, Ex. 1-14.

Later that week, Jane Doe #2 received a phone call from Christine Bowden, MASD’s Director of Pupil Services, who told Jane Doe #2 that she would like to refer Jane Doe #1 for a special education or Section 504 referral based on her ADHD and anxiety diagnoses. Ex. 2 at ¶¶ 19. MASD staff had never told Jane Doe #2 that they were considering a Section 504 referral for Jane Doe #1 before the events leading to MASD’s discriminatory conduct toward her began. Ex. 2 at ¶¶ 20-21. Jane Doe #2 was confused because there was no indication that Jane Doe #1 needed additional support in those areas, and felt that the referral was actually in retaliation for her opposition to MASD’s interference with Jane Doe #1’s bathroom use as a transgender girl. Ex. 2 at ¶¶ 20-21.

Before Jane Doe #1 began summer school programming at Mukwonago High School, Superintendent Joe Koch sent Jane Doe #2 a letter on June 16, 2023, stating that Jane Doe #1 was required to use “a gender-neutral or male bathroom” at summer school. June 16, 2023 Email from MASD to Jane Doe #2, Ex. 1-3. The MASD Director of Pupil Services, Christine Bowden, also sent Jane Doe #2 an email attaching a map of the high school indicating the location of Jane Doe #1’s summer school classrooms and the location of the “gender-neutral” single-occupancy

restrooms in the administration office and the health room. June 19, 2023 Email from C. Bowden to Jane Doe #2, Ex. 1-4. While Jane Doe #1’s classes are mostly situated on the second floor of the building, the single-occupancy restrooms are located at a significant distance on the first floor. *Id.* In contrast, the girls’ bathrooms are located just across the hall or around the corner from Jane Doe #1’s summer school classes. *Id.* Moreover, the supposedly “gender-neutral” single-occupancy restrooms on the first floor are not, in fact, “gender-neutral”—they are meant to be used by school staff members and are separately labeled male and female. Ex. 2 at ¶ 25. MASD staff have directed Jane Doe #1 to use only the men’s single-occupancy stall, which is otherwise used by adult male administrators. *Id.*

Jane Doe #1 does not feel comfortable using the boys’ restroom in general, nor at summer school. *Id.* at ¶ 27. Jane Doe #1 identifies as a girl and feels deeply distressed at the idea of using the boys’ restroom. *Id.*

Jane Doe #1 also does not feel comfortable using the single-occupancy restrooms in the administration office and the health room. *Id.* at ¶¶ 24, 27. These restrooms are typically used by teachers, not students. *Id.* at ¶ 25. It is devastating to Jane Doe #1 that she would be the only student allowed—in her case, required—to use these restrooms. *Id.* at ¶ 27.

MASD staff began monitoring her bathroom use shortly after summer school began and has repeatedly told her that she is required to use the boys’ bathroom or single-occupancy restrooms on the first floor. *Id.* at ¶¶ 25-26. MASD staff have sent several emails and placed several calls to Jane Doe #2 notifying her of Jane Doe #1’s “violation” of the bathroom policy. *See* June 22, 2023 Email from C. Bowden to Jane Doe #2, Ex. 1-5; June 28, 2023 Email from B. Kossow to Jane Doe #2, Ex. 1-9; June 29, 2023 Email from B. Kossow to Jane Doe #2, Ex. 1-10.

Plaintiff has been forced out of the classroom to meet with MASD administrators each day after she uses the girls' bathroom. *See* Ex. 1-9; Ex. 1-10.

Though counsel, Jane Doe #2 attempted to resolve this dispute prior to filing litigation. On June 27, 2023, Plaintiff's counsel wrote a letter to Defendants informing them that their treatment of Plaintiff constitutes impermissible discrimination and demanding that MASD cease its discriminatory treatment of Jane Doe #1 and rescind its bathroom policy. *See* June 27, 2023 Letter from A. Milton. Defendants refused this demand. *See* June 28, 2023 Letter from J. Aziere.

Since the events at issue in this lawsuit began, Plaintiff has experienced escalating bullying and harassment from other students, including students taunting about her genitalia, asking whether she is a girl or boy, and telling her that she should not be allowed at school because she is a "freak." Ex. 2 at ¶ 32. As a result, she has refused to board the school bus on multiple occasions because she fears more harassment. *Id.* at ¶ 32. She has also suffered from significant depression and anxiety. *Id.* at ¶ 33. For example, after MASD staff took Plaintiff on a "tour" of the boys' and gender-neutral restrooms, Plaintiff informed the school social worker, Alexis Schultz, that she was experiencing thoughts of self-harm. June 22, 2023 Email from A. Schultz to Jane Doe #2, Ex. 1-7.

Before MASD began prohibiting her from using the girls' bathroom, Jane Doe #1 previously came home in smiles after school or summer school and tell her mother what she did that day. Ex. 2 at ¶ 33. Now, she comes home crying and upset almost every day, telling Jane Doe #2 how MASD staff are singling her out, surveilling her, and making her feel like she is somehow wrong for her identity. *Id.* Jane Doe #1 has even began to ask her mother, "Why am I even alive?" *Id.*

## LEGAL STANDARD

“The purpose of a temporary restraining order is to preserve the status quo pending the complete briefing and consideration of a motion for a preliminary injunction.” *Faust v. Vilsack*, 519 F. Supp. 3d 470, 474 (E.D. Wis. 2021); *see also Geneva Assurance Syndicate, Inc. v. Med. Emergency Servs. Assocs.*, 964 F.2d 599, 600 (7th Cir. 1992) (“The essence of a temporary restraining order is its brevity, its ex parte character, and . . . its informality.”). “[T]he showing required for a temporary restraining order and a preliminary injunction are the same.” *Faust*, 519 F. Supp. 3d at 474; *accord Concentric, LLC v. Mages*, No. 2:21-CV-00937, 2021 WL 4710607, at \*3 (E.D. Wis. Oct. 8, 2021).

In the Seventh Circuit, a district court undergoes a two-step analysis in determining whether this standard is met. *See Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020). First, “a plaintiff must show that: (1) without this relief, it will suffer irreparable harm; (2) traditional legal remedies would be inadequate; and (3) it has some likelihood of prevailing on the merits of its claims.” *Id.* (cleaned up) (quoting *Speech First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020)). If a plaintiff makes this threshold showing, the court must then “weigh the harm the denial of the preliminary injunction would cause the plaintiff against the harm to the defendant if the court were to grant it.” *Id.* “This balancing process involves a ‘sliding scale’ approach: the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa.” *Id.* At this stage, a court may consider evidence inadmissible at trial, such as hearsay and declarations. *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997).

## ARGUMENT

The facts of Plaintiff's case and the clear dictates of the law demand that the Court grant Plaintiff's motion. Because Defendants refuse to respect Jane Doe #1's gender identity, she is suffering immense harm to her physical and psychological health, her emotional well-being, and her ability to learn. That harm is impeding her ability to take full advantage of the educational opportunities at school, and that harm will continue if Defendants are not enjoined from denying her equal access to facilities consistent with her gender identity. For the reasons explained below, Plaintiff's likelihood of success on both her Title IX and Equal Protection Clause claims is not only strong; it is ordained by Seventh Circuit in cases similar in all material respects to this one. And the balance of equities weighs heavily in Plaintiff's favor: as demonstrated by her use of girls' restrooms without incident for nearly three years in this school district, allowing her to continue to use those restrooms will impose no hardship on MASD or any MASD student. While an injunction would impose no harm—let alone irreparable harm—on Defendants, the permanent harm to Plaintiff without emergency relief would be profound.

**I. Plaintiff will suffer irreparable educational, psychological, and emotional harms if MASD's discriminatory policies and practices are not enjoined immediately, and she has no adequate remedy at law for those harms.**

Irreparable harm is found where a final judgment would be insufficient to compensate for the harm caused by Defendants' actions. *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.* 735 F.3d 735, 740 (7th Cir. 2013). The Seventh Circuit has upheld a finding of irreparable harm where a transgender student was denied access to bathrooms consistent with their gender identity, based on the resulting stigma and negative effects on their emotional wellbeing. *Whitaker*, 858 F.3d at 1045. In another example, the Seventh Circuit upheld a finding of irreparable harm where a disabled student would suffer "diminished academic motivation" if he were unable to participate on his school basketball team. *Washington v. Ind. High Sch.*

*Athletic Ass'n, Inc.*, 181 F.3d 840, 853 (7th Cir. 1999). While the school argued that its policies would not directly *prohibit* the plaintiff from attending school, the court credited testimony that playing basketball “improved [plaintiff’s] confidence in other areas of life, including education,” the diminution of which, it held, would be irreparable.

Moreover, despite more than ample actual evidence of irreparable harm, there is also a *presumption* of irreparable harm when a plaintiff’s constitutional or civil rights have been violated. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (constitutional rights are “intangible and unquantifiable interests” that “cannot be compensated by damages”); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (“where a defendant has violated a civil rights statute,” “irreparable injury [may be presumed] from the fact of the defendant’s violation”); *Rogers v. Windmill Pointe Village Club Ass’n*, 967 F.2d 525, 528 (11th Cir. 1992) (irreparable harm “may be presumed from the fact of discrimination”).

Defendants’ conduct has already exposed Plaintiff to significant injuries. Plaintiff has experienced thoughts of self-harm when she has been told by MASD administrators that she cannot use the girls’ bathroom at summer school. She is experiencing lowered self-esteem, embarrassment, social isolation, and stigma, as well as heightened symptoms of gender dysphoria. When school administrators and staff instructed Plaintiff not to use the girls’ restrooms and otherwise undermined her female identity and singled her out as different from all other girls, she has felt deeply hurt, disrespected, and humiliated. Ex. 2 at ¶¶ 24, 27, 33-34.

Without injunctive relief, Plaintiff will experience a greater level of social stigma, emotional distress, academic harm, and impediments to her gender identity resulting from Defendants’ refusal to allow her to use the girls’ restroom. She will be faced with the choice of using the boys’ restroom—where she feels uncomfortable, anxious, and afraid—or the single-

user restrooms in the administration office and the health room—which impose not just a considerable inconvenience given their distance from her classroom, but also stigma associated with being the only student forced to use a segregated bathroom apart all of her classmates. Further, denying Plaintiff access to the girls’ bathroom further conveys to her peers that she should be viewed and treated as a boy. For these reasons, multiple courts in this Circuit have found that “the negative emotional consequences with being refused access to the [] restrooms [consistent with one’s gender identity] constitute irreparable harm that would be ‘difficult—if not impossible—to reverse.’” *See A. C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 601 F. Supp. 3d 345, 355 (S.D. Ind. 2022) (quoting *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1039 (S.D. Ind. 2018)).

There are no adequate remedies at law for these harms. “In saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered.” *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7<sup>th</sup> Cir. 1984). Courts in this Circuit have consistently held that damages are not an adequate remedy for the long-term detrimental harm that stems from being denied bathroom access based on gender identity. *See A. C. by M.C.*, 601 F. Supp. 3d at 355; *J.A.W.*, 323 F. Supp. 3d at 1039-40; *Whitaker*, 858 F.3d at 1054; *B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 734–35 (S.D. Ind. 2022). As in those cases, so too here are damages inadequate to redress the Plaintiff’s injuries; injunctive relief is required to safeguard Plaintiff’s constitutional and civil rights.

## **II. Plaintiff is likely to succeed on the merits of her Title IX and Equal Protection Clause Claims.**

In addition to showing irreparable harm and the inadequacy of traditional legal remedies, a Plaintiff seeking a TRO must also show “some likelihood of prevailing on the merits.” *Speech*

*First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020) (quoting *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018)). Although “a plaintiff must demonstrate that its claim has some likelihood of success on the merits, not merely a ‘better than negligible’ chance,” the 7th Circuit has noted that “[w]hat amounts to ‘some’ depends on the facts of the case at hand” because of its sliding scale approach. *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020) (internal citations and quotations omitted). That standard is far surpassed here, where there is directly on point 7th Circuit precedent deciding precisely the same question in the plaintiff’s favor.

This case is a direct match to the facts in *Whitaker*, where the 7<sup>th</sup> Circuit upheld this Court’s issuance of a preliminary injunction requiring that the plaintiff, a transgender boy, be permitted to use the boys’ restrooms at school. *Whitaker*, 858 F.3d at 1039. In *Whitaker*, as in this matter, the school district required the plaintiff to either use bathrooms based on his assigned sex at birth or use isolated single-user restrooms located in administrative areas of the building at a distance from his classes. *Id.* at 1040. And as in this case, the plaintiff in *Whitaker* had used restrooms consistent with his gender identity without issue for an extended period of time before the discriminatory treatment at issue in the case began. *Id.* at 1041 (noting that plaintiff had used the boys’ restrooms at school for six months his junior year without incident). There are no meaningful distinctions between the facts of the two cases. The ages of the plaintiffs differ—here an elementary student and there a high school senior—but their ages have no effect on the students’ statutory or constitutional rights.

Without any significant distinguishing facts, the 7th Circuit’s opinion in *Whitaker* is controlling here. The 7th Circuit in *Whitaker* found that the plaintiff was likely to succeed on both his Title IX and Equal Protection claims. The same holds true here.

Title IX prohibits discrimination “on the basis of sex” in “any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The court in *Whitaker* held that discrimination against an individual because they are transgender is actionable under Title IX as a form of sex-stereotyping discrimination, because “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker*, 858 F.3d at 1048. Since *Whitaker* was decided, this conclusion has only been strengthened by the Supreme Court’s decision in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), which held, in the context of Title VII, that discrimination based on transgender status is a form of sex discrimination. *See also* U.S. Dep’t. of Justice, *Memorandum Regarding Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021) (applying *Bostock* rule to Title IX); U.S. Dep’t of Education, *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (to be codified at 34 C.F.R. ch. 1) (same).

As the court in *Whitaker* explained, “A policy that requires an individual to use a bathroom that does not conform with his or her gender identify punishes that individual for his or her gender non-conformance, which in turn violates Title IX.... Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.” *Whitaker*, 858 F.3d at 1049-50. Many other courts have similarly struck down school districts’ policies requiring transgender students to use bathrooms corresponding with their assigned sex at birth, or a gender-neutral alternative, under Title IX. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S.Ct. 2878 (2021) (“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.”); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 601 F. Supp. 3d 345 (S.D. Ind. 2022) (“The overwhelming majority of federal courts—including the Court of Appeals for the Seventh Circuit—have recently examined transgender education-discrimination claims under Title IX and concluded that preventing a transgender student from using a school restroom consistent with the student’s gender identity violates Title IX. This Court concurs.”); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 841 (S.D. Ind. 2019) (granting summary judgment on behalf of transgender student challenging restroom policy).

Given the strength of this precedent, Plaintiff’s likelihood of success on the merits of her Title IX claim is exceedingly strong. The fact that MASD has recently adopted a formal policy that contains some references to supposed exceptions or possible accommodations does not change this conclusion. Title IX “protects against discriminatory practices, not just policies” and MASD is engaged in a current, ongoing practice that violates Plaintiff’s Title IX rights. *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 841 n7 (S.D. Ind. 2019), quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).<sup>1</sup>

The Plaintiff here likewise has a strong likelihood of prevailing on the merits of her Equal Protection claim. The Equal Protection Clause provides that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Policies that include classifications based on sex trigger intermediate scrutiny by courts, under which a policy must be “substantially related to a sufficiently important governmental interest,”

---

<sup>1</sup> Plaintiff has provided Defendants with documentation of her gender dysphoria, but Defendants have nevertheless denied her access to the girls’ restroom under its policies. There is no further information that Plaintiff could provide that would be illuminate her entitlement—by law—to an exception from Defendants’ policy.

*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), and a state actor must provide an “exceedingly persuasive” justification, *United States v. Virginia*, 518 U.S. 515, 534 (1996). Bathroom policies such as MASD’s that treat transgender students differently from other students are subject to intermediate scrutiny because these policies are “inherently based on a sex-classification”, *Whitaker*, 858 F.3d at 1051, and because transgender plaintiffs constitute “at least a quasi-suspect class” meriting increased protection under Equal Protection principles, *Grimm*, 972 F.3d at 610.

The vast majority of courts that have considered the issue, including the Seventh Circuit in *Whitaker*, have found that school districts’ purported justifications for trans-exclusionary bathroom policies do not satisfy intermediate scrutiny, and thus violate the Equal Protection Clause. In particular, courts have roundly rejected the idea that privacy concerns of non-transgender students provide a sufficient justification to exclude, stigmatize, and harm transgender students. *See Grimm*, 972 F.3d at 613 (finding that exclusionary bathroom policy failed intermediate scrutiny because “the Board's policy [was] not substantially related to its important interest in protecting students' privacy”); *Whitaker*, 858 F.3d at 1052-54 (finding that bathroom policy was “arbitrary” and “based upon sheer conjecture and abstraction” and thus would not satisfy intermediate scrutiny). *See also Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527 (3d Cir. 2018) (holding that school district’s policy allowing students to use bathrooms and locker rooms consistent with their gender identity did not violate the privacy rights of objecting students); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (rejecting plaintiff parent group’s privacy arguments against school’s policy allowing transgender boy to use boys’ restrooms). Accordingly, MASD has advanced no justification and, in fact, *cannot* advance any justification sufficient to pass intermediate scrutiny; outrageous and

groundless charges from some members of the community do not remotely come close to justifying Defendants' decision to deny Plaintiff her right to be free of sex discrimination. Policies that force transgender students to use bathrooms that do not correspond to their gender identity or relegate them to separate facilities "very publicly brand all transgender students with a scarlet 'T,'" and Jane Doe #1 "should not have to endure that as the price of attending [her] public school." *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d at 529.

### III. The balance of the equities weighs in favor of granting Plaintiff's motion.

This Court must weigh "any *irreparable* harm the nonmoving party would suffer if the court were to grant the requested relief" against the irreparable harm Plaintiff *will* suffer if the injunction is not granted. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA*, 549 F.3d 1079, 1086 (7th Cir. 2008) (emphasis added). Speculative harms to the nonmoving party are not enough. *See, e.g., E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700 (7th Cir. 2005). Further, "there can be no irreparable harm to a [defendant] when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect" constitutional rights. *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (internal quotations omitted).

Defendants will not suffer any harm—let alone harm that outweighs the considerable harm Plaintiff stands to suffer—from complying with a temporary restraining order. In *Whitaker*, the Seventh Circuit concluded that there was no evidence of harm where a transgender student had used the bathroom consistent with their gender identity "for nearly six months" without complaint. 858 F.3d at 1054. Here, Plaintiff has been using the girls' bathroom for nearly *three years*. There is no evidence of any problems arising during the entirety of that time: no teacher, administrator, or other MASD staff member has ever reported any complaints from students

about Plaintiff's bathroom use at school. Indeed, MASD has never asserted that treating Plaintiff as a girl would "harm" the school district or any of its students. Any harms now suggested by Defendants would be not only speculative but entirely belied by Plaintiff's use of the same girls' restrooms for years without issue.

Defendants' blocking Plaintiff from using the girls' bathroom threatens her with irreparable harm. Enjoining this policy and practice preserves the status quo that has existed for years without any evidence of harm. A balance of the equities—along with the public's interest in safe, inclusive schools for all students—points strongly in favor of issuing a temporary restraining order. In ordering this relief, "[t]here is no reason to require a bond in such a case" because there is "no danger that the opposing party will incur any damages from the injunction." *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010). Courts have consistently refused to require a bond in ordering the exact injunctive relief sought here. *See B.E.*, 608 F. Supp. at 736; *J.A.W.*, 323 F. Supp. 3d at 1042; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at \*7 (E.D. Wis. Sept. 22, 2016).

## CONCLUSION

As she has for the past nearly three years, Plaintiff is attending summer school to learn, to play, and to make friends. Defendants' unfounded interference with her use of the girls' restroom does not just get in the way of these ambitions—it stigmatizes her, inconveniences her, and causes her distress, discomfort, and anxiety. Plaintiff has the right to go to school on the same terms as all of her classmates. There is no reason to compound the challenges Plaintiff is sure to face as she enters adolescence by subjecting her to discriminatory treatment. Therefore, Plaintiff respectfully requests that the Court enter a temporary restraining order as soon as possible to

prohibit Defendant from enforcing against Plaintiff any policy, practice, or custom that denies Plaintiff access to girls' restrooms at school and school-sponsored events and taking any formal or informal disciplinary action against Plaintiff for using girls' restrooms at school and school-sponsored events.

Dated: June 30, 2023

Respectfully submitted,

Victoria Davis  
Robert (Rock) Theine Pledl  
DAVIS & PLEDL S.C.  
1661 N. Water Street, Suite 410  
Milwaukee, WI 53202  
Phone: (414) 667-0390  
vldd@davisandpled.com  
rtp@davisandpled.com

/s/ Alexa Milton  
Alexa Milton  
Glenn Schlactus\*\*  
Emily Curran\*  
Nicholas Abbott\*  
RELMAN COLFAX PLLC  
1225 19th Street NW, Suite 600  
Washington, DC 20036  
Phone: (202) 728-1888  
Fax: (202) 728-0848  
amilton@relmanlaw.com  
gschlactus@relmanlaw.com  
ecurran@relmanlaw.com  
nabbottt@relmanlaw.com

*\*\* Application for admission to this Court  
forthcoming*

*\* Admission to this Court Pending*

# EXHIBIT A

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

Jane Doe #1, a minor, by her mother and next friend, Jane Doe #2,

Plaintiff,

v.

MUKWONAGO AREA SCHOOL DISTRICT and JOE KOCH, in his official capacity as Superintendent of the Mukwonago Area School District,

Defendant.

Civ. Action No. \_\_\_\_\_

**DECLARATION OF ALEXA MILTON**

I, Alexa Milton, hereby declare as follows:

1. I am over the age of eighteen and am competent to make this Declaration. I have personal knowledge of the matters set forth herein.

2. I am counsel for Plaintiff in the above-captioned case. I am admitted to practice in the Eastern District of Wisconsin.

3. I submit this Declaration in support of Plaintiffs’ Memorandum in Support of Plaintiffs’ Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

4. Exhibit 1 to this Declaration is a true and correct copy of a May 23, 2023 Email from MASD to Jane Doe #2.

5. Exhibit 2 to this Declaration is a true and correct copy of a May 24, 2023 Letter from T. Baines “to whom it may concern.”

6. Exhibit 3 to this Declaration is a true and correct copy of a June 16, 2023 Email from MASD to Jane Doe #2.

7. Exhibit 4 to this Declaration is a true and correct copy of a June 19, 2023 Email from C. Bowden to Jane Doe #2.

8. Exhibit 5 to this Declaration is a true and correct copy of a June 22, 2023 Email from C. Bowden to Jane Doe #2.

9. Exhibit 6 to this Declaration is a true and correct copy of a June 22, 2023 Email from Jane Doe #1 to Jane Doe #2.

10. Exhibit 7 to this Declaration is a true and correct copy of a June 22, 2023 Email from A. Schultz to Jane Doe #2.

11. Exhibit 8 to this Declaration is a true and correct copy of a June 28, 2023 Email from Jane Doe #1 to Jane Doe #2.

12. Exhibit 9 to this Declaration is a true and correct copy of a June 28, 2023 Email from B. Kossow to Jane Doe #2.

13. Exhibit 10 to this Declaration is a true and correct copy of a June 29, 2023 Email from B. Kossow to Jane Doe #2.

14. Exhibit 11 to this Declaration is a true and correct copy of a June 27, 2023 Letter from A. Milton to J. Koch.

15. Exhibit 12 to this Declaration is a true and correct copy of a June 28, 2023 Letter from J. Aziere to A. Milton.

16. Exhibit 13 to this Declaration is a true and correct copy of a June 29, 2023 Letter from A. Milton to J. Aziere.

17. Exhibit 14 to this Declaration is a true and correct copy of Policy 5514, adopted by the Mukwonago Area School District on June 26, 2023.

18. On June 29, 2023 I sent Joel Aziere, counsel for Mukwonago Area School District, correspondence advising him that Plaintiff intended to file for a Temporary Restraining Order absent an immediate change in policy allowing [REDACTED] to return to using the girls' restroom at school. I received an automatic out of office notification email from Mr. Aziere in response, directing the recipient to contact his assistant, Katie Mungoven, in his absence. I forwarded the same communication to Ms. Mungoven. I have not yet received a response to this communication.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED WITHIN THE UNITED STATES ON: June 30, 2023



---

Alexa Milton  
Attorney  
RELMAN COLFAX PLLC  
1225 19th Street NW, Suite 600  
Washington, DC 20036  
Tel: 202-728-1888  
Fax: 202-728-0848  
amilton@relmanlaw.com

# **EXHIBIT 1 to Declaration of Alexa Milton (June 30, 2023)**

[Redacted]

[Redacted]

[Redacted]

----- Forwarded message -----

From: <noreply@masd.k12.wi.us>

Date: Tue, May 23, 2023, 5:01 PM

Subject: Mukwonago Area School District Board Statement 5.23.2023

To: Jane Doe #2



*This is a message from the Mukwonago Area School District*

May 23, 2023

Dear Parents,

During the School Board meeting on May 22, 2023, a number of residents of the Mukwonago Area School District voiced concerns over bathroom usage in our school district. The School Board of the Mukwonago Area School District affirms its position that students should use the locker rooms and bathrooms of their sex at birth. The School Board directs administration to review any current accommodation plans, create a formal team-based process to address any gender-based accommodation requests, and implement plans accordingly. The School Board will develop policy during the summer of 2023 to address bathroom and locker room accommodation requests to be implemented prior to the start of the 2023-24 school year.

Sincerely,

Dale Porter  
School Board President

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# **EXHIBIT 2 to Declaration of Alexa Milton (June 30, 2023)**

May 24, 2023

**ProHealth Medical Group, Inc.**  
**Sussex Behavioral Health**  
N57 W24950 N CORPORATE CIR  
SUSSEX WI 53089-4383  
Phone: 262-928-4036  
Fax: 262-928-5096

To Whom It May Concern:

**Jane Doe #1** 2/26/2011 is a patient under my care.  
This letter is to confirm her diagnosis of gender dysphoria.

If you have any questions or concerns, please don't hesitate to call.

Sincerely,

Tamhara M Baines, APNP

# **EXHIBIT 3 to Declaration of Alexa Milton (June 30, 2023)**

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

----- Forwarded message -----

From: Christine Bowden <[bowdech@masd.k12.wi.us](mailto:bowdech@masd.k12.wi.us)>

Date: Fri, Jun 16, 2023, 8:00 AM

Subject: Summer School

To: Jane Doe #2

Cc: Joseph Koch <[kochjo@masd.k12.wi.us](mailto:kochjo@masd.k12.wi.us)>

Jane Doe #2

Please see the attached communication.

Thank you,

Christine Bowden

*Christine Bowden*

*Director of Pupil Services*

*Mukwonago Area School District*

*262-363-6300 ext. 24200*

[bowdech@masd.k12.wi.us](mailto:bowdech@masd.k12.wi.us)

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## Mukwonago Area School District

*Building Better Schools Together*

6/15/23

Jane Doe #2

On May 23, 2023, the school board released the attached communication regarding students using the restrooms and locker rooms of their assigned sex at birth. As a result, J.D. #1 may use a gender-neutral or male bathroom starting on the first day of summer school, Monday June, 19th.

If J.D. #1 wishes to access a gender-neutral bathroom, they are located in the main office entering through the AP door and the health room on the first floor. We can provide a map identifying the location of J.D. #1's summer school classes and the nearest staircases to the restrooms, as well as a staff-led review of the pathways to those restrooms on the first day of summer school.

Please feel free to contact any of the following pupil services staff on staff during summer school if J.D. #1 would like support or guidance.

Kelly Schmitz, school psychologist at [schmike@masd.k12.wi.us](mailto:schmike@masd.k12.wi.us)  
Kristy Maxwell, school psychologist at [maxwekr@masd.k12.wi.us](mailto:maxwekr@masd.k12.wi.us)  
Alexis Schultz, school social worker at [schulal@masd.k12.wi.us](mailto:schulal@masd.k12.wi.us)

Sincerely,

  
Dr. Joe Koch  
Superintendent  
Mukwonago Area School District



*This is a message from the Mukwonago Area School District*

May 23, 2023

Dear Parents,

During the School Board meeting on May 22, 2023, a number of residents of the Mukwonago Area School District voiced concerns over bathroom usage in our school district. The School Board of the Mukwonago Area School District affirms its position that students should use the locker rooms and bathrooms of their sex at birth. The School Board directs administration to review any current accommodation plans, create a formal team-based process to address any gender-based accommodation requests, and implement plans accordingly. The School Board will develop policy during the summer of 2023 to address bathroom and locker room accommodation requests to be implemented prior to the start of the 2023-24 school year.

Sincerely,

Dale Porter  
School Board President

# **EXHIBIT 4 to Declaration of Alexa Milton (June 30, 2023)**

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----

From: Christine Bowden <[bowdech@masd.k12.wi.us](mailto:bowdech@masd.k12.wi.us)>  
Date: Mon, Jun 19, 2023, 9:23 AM  
Subject: J.D. #1- Restroom Usage for Summer Adventures  
To: Jane Doe #2  
Cc: Joseph Koch <[kochjo@masd.k12.wi.us](mailto:kochjo@masd.k12.wi.us)>

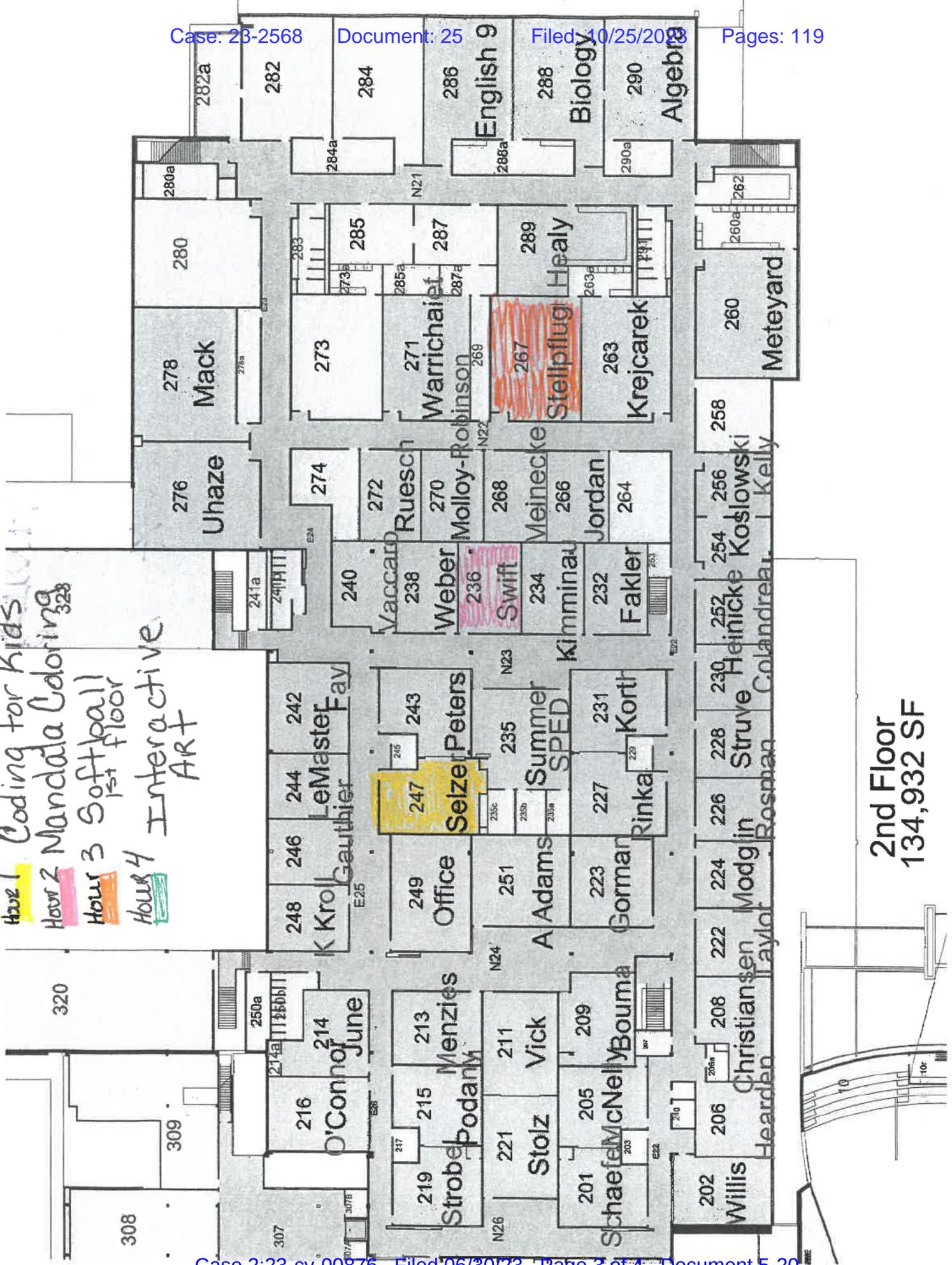
Good Morning,  
I just wanted to confirm that you received the email on Friday regarding the restroom usage for J.D. #1. Attached is a map that highlights her summer classes and stars the restrooms in the high school administration office and the health room. Ms. Fendry is here for summer school as well in the health office.  
Thank you,  
Christine

*Christine Bowden*  
*Director of Pupil Services*  
*Mukwonago Area School District*  
*262-363-6300 ext. 24200*  
[bowdech@masd.k12.wi.us](mailto:bowdech@masd.k12.wi.us)

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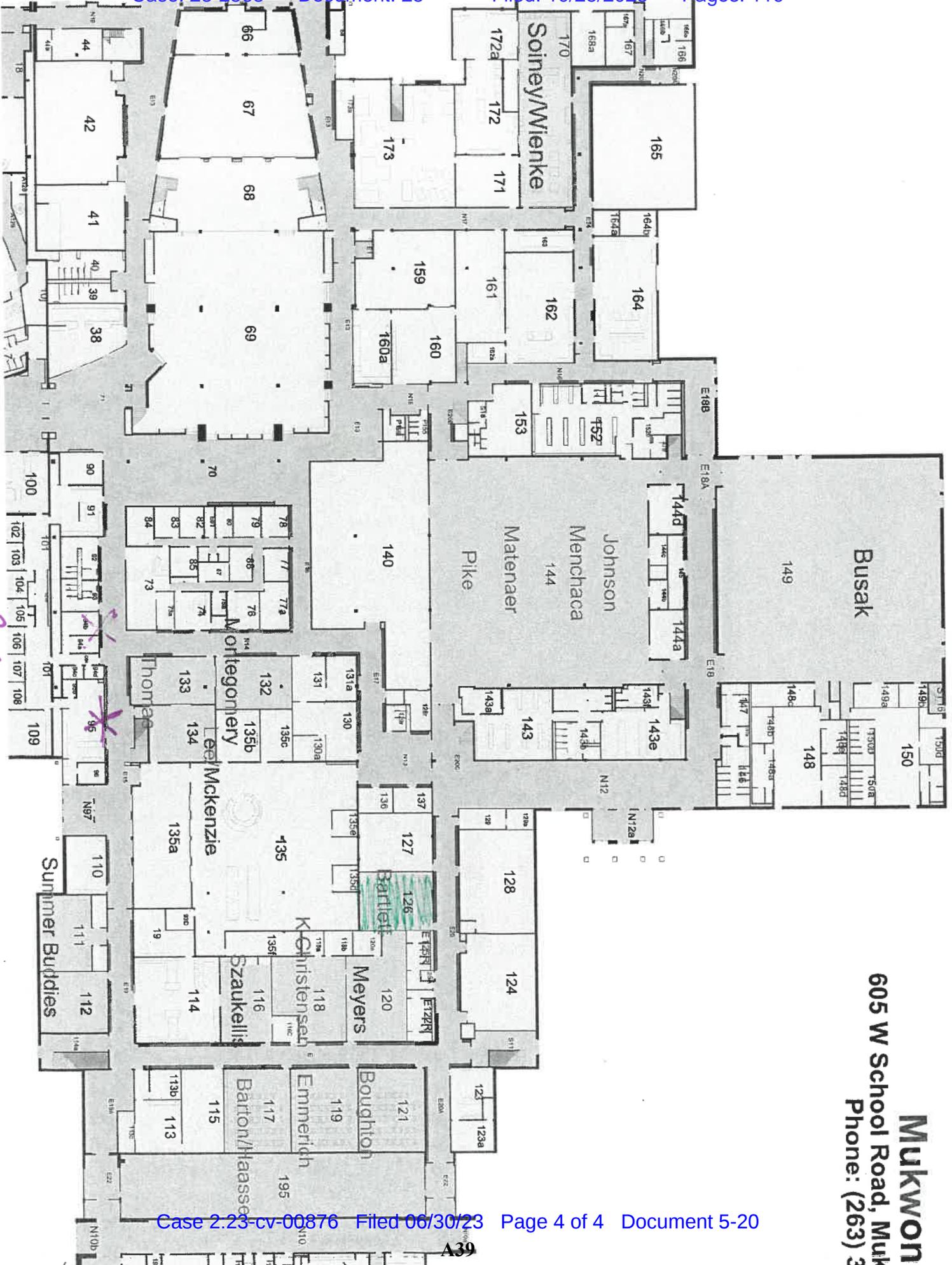
Hour 1 Coding for Kids  
Hour 2 Mandala Coloring  
Hour 3 Softball  
Hour 4 Interactive ART



2nd Floor  
134,932 SF

Scale: 1" = 43.91'

05/23/2023



**Mukwon**  
 605 W School Road, Mukwonago, IL 60061  
 Phone: (263) 393-3333

# **EXHIBIT 5 to Declaration of Alexa Milton (June 30, 2023)**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----  
From: Christine Bowden <[bowdech@masd.k12.wi.us](mailto:bowdech@masd.k12.wi.us)>  
Date: Thu, Jun 22, 2023, 9:34 AM  
Subject: Conversation  
To: Jane Doe #2  
Cc: Joseph Koch <[kochjo@masd.k12.wi.us](mailto:kochjo@masd.k12.wi.us)>

Jane Doe #2

On June 16th, our superintendent, Dr. Koch sent correspondence regarding [REDACTED] J.D. #1's use of either a gender neutral or male restroom. On Wednesday, June 21st, during Summer Adventures [REDACTED] J.D. #1 used the female restroom. We will ensure a trusted adult supports [REDACTED] J.D. #1 in complying with the Prairie View Elementary School Handbook requirement that students obey instructions promptly and this includes Summer Adventures. Mrs. McCarthy, a student services support staff member, met with [REDACTED] J.D. #1 [REDACTED] J.D. #1 did remember her from last summer. Her name was formerly Ms. Schultz. She will be available during the remainder of Summer Adventures. Please let us know if you have any questions or would like to collaborate further regarding support for [REDACTED] J.D. #1.

Thank you,  
Christine Bowden

*Christine Bowden*  
Director of Pupil Services  
Mukwonago Area School District  
262-363-6300 ext. 24200  
[bowdech@masd.k12.wi.us](mailto:bowdech@masd.k12.wi.us)

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# **EXHIBIT 6 to Declaration of Alexa Milton (June 30, 2023)**

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----

From: Jane Doe #1 [REDACTED]  
Date: Thu, Jun 22, 2023, 8:58 AM  
Subject: Please respond to this email ASAP  
To: Jane Doe #2 [REDACTED]

Mommy, I just got o tour of the boys and girls ap office restrooms, and the gender-neutral restroom in the health room

Jane Doe #1  
5th grade  
PVES

# **EXHIBIT 7 to Declaration of Alexa Milton (June 30, 2023)**

[REDACTED]

---

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----

From: Alexis Schultz <[schulal@masd.k12.wi.us](mailto:schulal@masd.k12.wi.us)>

Date: Thu, Jun 22, 2023, 12:58 PM

Subject: J.D. #1 Today

To: Jane Doe #2

Cc: Ben Kossow <[kossobe@masd.k12.wi.us](mailto:kossobe@masd.k12.wi.us)>, Christine Bowden <[bowdech@masd.k12.wi.us](mailto:bowdech@masd.k12.wi.us)>

Hi J.D. #2

Per our phone call, I am emailing you what occurred today.

Today, Mr.Kossow and I met with J.D. #1 regarding school expectations of bathroom use. After that conversation, J.D. #1 and I did a tour of the bathrooms to help her feel comfortable. As we went back to the office she stated thoughts of depression and when social worker asked what she meant by that she stated "thoughts of harm" the social worker asked further about her thoughts and she stated she wanted time alone. J.D. #1 during that time re-regulated and emailed her mom and watched a video online. When the social worker went back in to check with her she then said she was ready to go back to class and had no further self harm thoughts. Mom was then contacted regarding these concerns stated.

Thanks,  
Alexis

--

**Alexis Schultz MSW**

*She/Her/Hers*

*School Social Worker*

*Mukwonago Area School District*

*Parkview Middle school 7-12:00pm and Clarendon Avenue Elementary 12:15-3:30 pm (262-363-6292 x 27406)*

*"Education is the most powerful weapon, which you can use to change the world"*

**Waukesha County Crisis Line: (262) 548-7666**

**National Crisis Text Line: Text "HOPELINE" to 741741 to speak with a live crisis counselor**

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# **EXHIBIT 8 to Declaration of Alexa Milton (June 30, 2023)**

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----

From: Jane Doe #1  
Date: Wed, Jun 28, 2023, 11:22 AM  
Subject: Just as a heads up...  
To: Jane Doe #2

Mrs. Shultz, and the principal just brought me into the special Ed office to just give me a "Reminder" that "The school board has expectations" (☹️). And that I have to use the boys' bathroom or a gender neutral restroom 😭😭😭. I think I need to come home, and the school is going to call you as well. So Please come pick me up **BEFORE** they call please. I am trying to hold back my emotions. So please hurry!😭😭😭😭😭😭😭

Jane Doe #1  
5th grade  
PVES

# **EXHIBIT 9 to Declaration of Alexa Milton (June 30, 2023)**

[REDACTED]

---

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----

From: Ben Kossow <[kossobe@masd.k12.wi.us](mailto:kossobe@masd.k12.wi.us)>

Date: Wed, Jun 28, 2023, 2:01 PM

Subject: Phone Conversation Follow Up

To: Jane Doe #2

Dear Jane Doe #2

Per your request, this email will summarize our conversation from earlier today.

This morning, Mrs. Alexis McCarthy and I spoke with J.D. #1. The purpose of this conversation was to provide a reminder of the board policy regarding student privacy in restrooms and locker rooms in light of the fact that J.D. #1 was witnessed entering a girls' bathroom by a summer school administrator. I reminded J.D. #1 that she is to use a gender-neutral or boys' restroom.

At that point, J.D. #1 said "I don't give a shit about that." I told J.D. #1 that I respected that and gave J.D. #1 the choice to continue to meet with Mrs. McCarthy or to go back to class. J.D. #1 expressed a preference to go home. I suggested that J.D. #1 and Mrs. McCarthy talk for a few minutes first.

After a few minutes, I returned and J.D. #1 reasserted the preference to go home. Mrs. McCarthy took J.D. #1 to the main office. Then, Mrs. McCarthy and I called you. You requested J.D. #1's participation on the phone call. We hung up briefly so Mrs. McCarthy could get J.D. #1 who then participated in the phone call. At the conclusion of the phone call, J.D. #1 decided to stay for the remainder of summer school.

No disciplinary action was taken against J.D. #1 today, but additional violations of the school board policy will result in discipline to be taken.

In addition, if J.D. #1 continues to use inappropriate language with staff members, disciplinary action could be taken.

Please let me know if I can be of further assistance.

Ben

**Benjamin Kossow**

Mukwonago Area School District

Coordinator of Assessment and Data

385 E. Veterans Way  
Mukwonago, WI 53149  
262.363.6300 x24410

---

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# **EXHIBIT 10 to Declaration of Alexa Milton (June 30, 2023)**

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----  
 From: Ben Kossow <[kossobe@masd.k12.wi.us](mailto:kossobe@masd.k12.wi.us)>  
 Date: Thu, Jun 29, 2023, 12:36 PM  
 Subject: Phone Conversation Follow Up  
 To: Jane Doe #2

Dear Jane Doe #2

Per your request, this email will summarize our conversation from earlier today.

This morning, Mrs. Alexis McCarthy and I spoke with J.D. #1. The purpose of this conversation was to provide a reminder of the board policy regarding student privacy in restrooms and locker rooms in light of the fact that J.D. #1 was witnessed entering a girls' bathroom by a summer school administrator. I reminded J.D. #1 that she is to use a gender-neutral or boys' restroom.

In addition, at the beginning of the conversation, I gave J.D. #1 a reminder to use appropriate language with school administrators when addressing them.

No disciplinary action was taken against J.D. #1 today, but additional violations of the school board policy will result in discipline to be taken.

Please let me know if I can be of further assistance.

Ben

**Benjamin Kossow**  
 Mukwonago Area School District  
 Coordinator of Assessment and Data  
 385 E. Veterans Way  
 Mukwonago, WI 53149  
 262.363.6300 x24410

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# **EXHIBIT 11 to Declaration of Alexa Milton (June 30, 2023)**

  
RELMAN COLFAX PLLC

1225 19<sup>th</sup> Street, N.W., Suite 600  
Washington, D.C. 20036  
202.728.1888  
www.relmanlaw.com

**CONFIDENTIAL**

June 27, 2023

**VIA ELECTRONIC MAIL**

Joe Koch  
Superintendent  
Mukwonago Area School District  
385 E. Veterans Way  
Mukwonago, WI 53149  
[kochjo@masd.k12.wi.us](mailto:kochjo@masd.k12.wi.us)

Dear Superintendent Koch,

We represent **Jane Doe #2** and her daughter, **J.D. #1** an incoming sixth grade student at Prairie View Elementary School in the Mukwonago Area School District (“MASD” or the “District”). MASD is currently prohibiting **J.D. #1**, a transgender girl, from using the girls’ bathrooms during the summer school program. This contravenes **J.D. #1’s** rights and is in direct violation of controlling legal precedent of the United States Court of Appeals for the Seventh Circuit. It is causing significant and escalating harm to our clients on a daily basis. MASD must immediately cease and desist from this illegal and reprehensible conduct. If it does not do so within the next twenty-four hours, our clients will consider their other options to address this matter, including litigation.

Relman Colfax PLLC is a national civil rights law firm with over 20 years of experience litigating cases for victims of discrimination, including transgender students who have faced discrimination and harassment at school. Our firm previously represented the plaintiff in *Whitaker v. Kenosha Unified School District*, in which we achieved a landmark ruling from the Seventh Circuit affirming the rights of transgender students to use the restroom corresponding to their gender identity and ultimately settled the case for \$800,000 on behalf of our client Ash Whitaker.

We understand that MASD is prohibiting **J.D. #1** from using the girls’ restroom facilities during the MASD-run summer school program in which she is currently enrolled. Instead, MASD is requiring that **J.D. #1**, an eleven-year-old transgender girl, use either restrooms designated for boys or men or use a distant gender-neutral restroom that would single her out and stigmatize her and cause her to miss class time. We also understand that on June 26, 2023, MASD’s School Board passed a new restroom usage policy, but is continuing to prohibit **J.D. #1** from using the girls’ restrooms. This prohibition is discriminatory and contrary to clearly established law. The Seventh Circuit held in *Whitaker* that policies prohibiting transgender students from using restrooms consistent with their gender identity at school would likely violate

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June 27, 2023

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both Title IX of the Educational Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018), *abrogated on other grounds by Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020). The Court enjoined the Kenosha school district from doing exactly what MASD is currently doing to [J.D. #1]. In addition to violating [J.D. #1's] civil rights, MASD's actions expose the District to significant financial liability.

Our clients are now considering filing a federal lawsuit against MASD for violating [J.D. #1's] rights. If MASD is interested in exploring an amicable resolution of our clients' claims without the need for litigation, please respond within the next twenty-four hours to confirm that MASD will immediately:

- rescind its bathroom policy requiring students to use restrooms corresponding with their assigned sex at birth or a gender-neutral alternative;
- permit [J.D. #1] and all other transgender students to use the restrooms and other facilities that correspond with their gender identity at summer school at Mukwonago High School and during the regular school year;
- interpret and apply its newly-passed policy such that, at a minimum, any transgender student who presents a gender dysphoria diagnosis will be permitted to use the restroom consistent with their identity; and
- take appropriate steps to ensure that [J.D. #1] is not subjected to discrimination for her gender identity, including taking appropriate action to respond to and deter gender-based harassment and bullying by other students.

## FACTUAL BACKGROUND

Jane Doe #1

[Jane Doe #1] is a student at Prairie View Elementary School ("Prairie View") in the Mukwonago Area School District. She will be entering sixth grade in the fall and has been enrolled at Prairie View since she was in third grade. [J.D. #1] loves science and technology, experimenting with robotics, and hiking, swimming and other outdoor activities with her family. She has participated in the summer school program at Mukwonago High School for the last three years, where she enjoys participating in classes like coding for kids and softball.

[J.D. #1] is also a transgender girl. She has presented as a girl at home since she was three years old and at school since first grade. When [Jane Doe #2] enrolled her at Prairie View, she disclosed [J.D. #1's] transgender identity to a few staff members who she felt needed to know for purposes of [J.D. #1's] safety and wellbeing at school: the Prairie View principal, [J.D. #1's] classroom teacher, and the gym teacher. Until the events leading to the unlawful discrimination addressed in this letter began, [J.D. #1] was happy at school. She was supported by her teachers, she enjoyed friendships with her classmates, and she felt welcomed by the school overall. [J.D. #1] has

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participated with other girls when school activities were separated by gender, and she has used the girls' bathroom without issue for all three years she has been enrolled at Prairie View.

### **Gender Identity-Based Discrimination Against J.D. #1**

J.D. #1's experience at school changed dramatically around early April 2023. Sometime before then, parents of other children at Prairie View learned that J.D. #1 is transgender. The Prairie View principal reported to Jane Doe #2 that she had begun receiving phone calls from parents asking inappropriate questions about J.D. #1's genitals. The principal refused to answer these questions, but she alerted Jane Doe #2. Jane Doe #2 also learned that parents and community members had created a Facebook group called Mukwonago Parents for Normal Education in which group members were writing disparaging posts and comments clearly referring to J.D. #1, describing the eleven-year-old child as dangerous, and making false accusations that she was exposing herself to other children in the bathroom. Group members went so far as to accuse Jane Doe #2 and her partner of pedophilia. The Facebook group shocked and alarmed Jane Doe #2, who worried about J.D. #1's safety at school in the wake of these harmful and inflammatory statements.

Shortly after these posts began appearing on the Facebook group and the Prairie View principal started receiving phone calls from parents about J.D. #1, the MASD School Board ("School Board") became involved with J.D. #1 and her bathroom use at school. On May 15, 2023, the School Board held a closed executive meeting, attended by its attorney, where it discussed J.D. #1's bathroom use. Jane Doe #2 attended part of this meeting with her partner. The School Board suggested several options that were both illegal and unacceptable to Jane Doe #2, including forcing J.D. #1 to use a separate bathroom designated solely for transgender students or a separate gender-neutral restroom. Any restroom designated for transgender students would be solely used by J.D. #1 as the only transgender student at Prairie View, as far as our clients are aware. The School Board told Jane Doe #2 that it was in a difficult position, stating that it could either anger parents who were opposed to J.D. #1's presence and bathroom use at school if it allows J.D. #1 to continue using the girls' bathrooms, or get sued by Jane Doe #2 if it refuses to allow J.D. #1 to use the girls' bathrooms—an acknowledgement that prohibiting J.D. #1 from using the girls' bathrooms—as the School Board is now doing—is illegal. After this initial meeting, then-Superintendent McNulty told Jane Doe #2 that the School Board had not reached a decision and that in the interim J.D. #1 could continue using the girls' bathroom as she had been doing.

The School Board then held a public meeting on May 22, 2023. During this meeting, members of the public spoke against J.D. #1 using the girls' bathrooms and made vitriolic comments towards her, including stating that there was a "boy in the girls' bathroom." The School Board did not make a decision at that meeting, but afterwards Superintendent McNulty informed Jane Doe #2 that J.D. #1 could continue using the girls' restroom for the remainder of the school year if she provided a doctor's note confirming J.D. #1's gender dysphoria diagnosis. Jane Doe #2 sent a note from J.D. #1's doctor with this confirmation the next day. The School Board then sent an email to parents and students in the district on May 23<sup>rd</sup> stating that "[t]he

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School Board of the Mukwonago Area School District affirms its position that students should use the locker rooms and bathrooms of their sex at birth. The School Board directs administration to review any current accommodation plans, create a formal team-based process to address any gender-based accommodation requests, and implement plans accordingly.” The email stated that the School Board would develop a policy during the summer of 2023 for implementation in the 2023-24 school year.

Subsequently, J.D. #1 began summer school on Monday June 19, 2023. Before programming began, you sent Jane Doe #2 a letter on Friday June 16<sup>th</sup> stating that J.D. #1 was required to use “a gender-neutral or male bathroom” at summer school. The Director of Pupil Services, Christine Bowden, also sent Jane Doe #2 an email attaching a map of the high school indicating the location of J.D. #1’s summer school classrooms, many situated on the second floor of the building and one outside the building, and the “gender-neutral” restrooms located in the administration office<sup>1</sup> and the health room, situated on the first floor of the building. In contrast, the girls’ bathrooms are situated just across the hall or around the corner from J.D. #1’s classes. Although J.D. #1 initially used the girls’ bathroom during the first few days of summer school—as she has for her three years at Prairie View and her previous two years at summer school in the district—District staff have now begun monitoring her bathroom use. Christine Bowden sent an email to Jane Doe #2 on June 22<sup>nd</sup> notifying her that J.D. #1 had used the “female restroom” at summer school the day before in violation of the requirement listed in your letter. The summer school principal likewise told J.D. #1 on June 22<sup>nd</sup> that she must use the gender-neutral bathroom on the first floor, and District staff took her on a “tour” of the boys’ and gender-neutral restrooms. This interaction caused J.D. #1 to become distressed and she advised the staff that she was experiencing thoughts of self-harm.

MASD’s bathroom policy is illegal, irresponsible, and unacceptable. It presents an impossible choice to J.D. #1, where she must either travel to a different floor of the building to use an isolated and stigmatizing restroom separate from other students, or use the male restroom where she (an eleven-year-old transgender girl) might encounter high school boys in an unsupervised setting. This policy is no less illegal or unacceptable at the elementary school level—MASD will be violating the law if it continues to enforce a policy in the 2023-24 school year of prohibiting J.D. #1 from using the girls’ bathrooms.

We understand that the Board adopted a new policy addressing these subjects on June 26, 2023, which continues to require that, “except as otherwise required by law,” students use restrooms “according to each student’s original sex assigned at birth.” Although it is beyond clear that the law requires J.D. #1 and other similarly-situated students to be allowed to use the girls’ room, it appears, based on members’ statements upon adoption and the District’s actions to date, that the School Board is planning to use this policy in a manner that is inconsistent with controlling law. Any implementation of this policy that does not, at a minimum, permit any

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<sup>1</sup> The restrooms in the administration office are not in fact gender-neutral—instead there are two single-occupant restrooms, one designated for women and one designated for men. During the tour discussed below, J.D. #1 was instructed to use only the men’s restroom, which is otherwise used only by adult male administrators.

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transgender student who presents a gender dysphoria diagnosis to use the restroom consistent with their identity is illegal. Given that the requirements of the law are clear as to these students, no “case-by-case” consideration is needed or allowed.

Furthermore, MASD’s actions have inflicted significant harm on J.D. #1, and will continue to do so if MASD does not refrain from its illegal conduct. J.D. #1 is experiencing significant stress and anxiety about not being able to use a restroom at school that is safe and appropriate for her. The thought of being forced to comply with MASD’s illegal policy, along with the increased scrutiny from teachers and administrators at summer school, has already caused J.D. #1 significant emotional distress and thoughts of self-harm and self-injury. Jane Doe #2 is also concerned that it will lead her to avoid using the restroom at school altogether, which would likely endanger her physical health—while unhealthy for any individual, refraining from using the restroom when needed would be particularly dangerous for J.D. #1 due to an unrelated gastrointestinal concern she experiences. Moreover, J.D. #1 has been experiencing unprecedented bullying at school based on her gender identity since community backlash to J.D. #1’s presence and restroom use at school began, and since MASD subsequently began targeting J.D. #1 in discussions and policymaking. She has experienced episodes of bullying based on her gender identity multiple times a week, and has refused to get on the bus to go home on multiple occasions because of the repeat instances of bullying by other students she has experienced in that setting. As a young transgender girl, she is also particularly vulnerable to bullying and even abuse if she is forced to use the boys’ restroom; that is all the more so at the high school during summer school where older teenage boys may be present. Therefore, MASD’s conduct has directly harmed J.D. #1 and there is a significant risk of even greater harm if MASD fails to cease immediately its illegal discriminatory treatment of J.D. #1.

### **MASD’S LEGAL AND FINANCIAL EXPOSURE**

The law in the Seventh Circuit, including Wisconsin, is clear that prohibiting transgender students from using the restroom corresponding to their gender identity is illegal. Should this matter need to be resolved by a court, there is little doubt it would find that MASD’s treatment of J.D. #1 constitutes illegal and unconstitutional discrimination based on her sex and gender identity in violation of Title IX and the Fourteenth Amendment of the United States Constitution.

First, MASD is in violation of Title IX by enforcing a policy requiring J.D. #1 and other students to use bathrooms corresponding with their assigned sex at birth and allowing transgender students access only to individual “gender-neutral” bathrooms and bathrooms that do not correspond to their gender identity. Title IX provides that, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31(a). Title IX’s prohibition of discrimination “on the basis of sex” encompasses discrimination based on gender identity and/or transgender status. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020) (in the context of Title VII, holding that discrimination based on transgender status is a form of sex discrimination); U.S. Dep’t. of Justice, *Memorandum Regarding Application of Bostock v. Clayton County to Title IX*

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of the Education Amendments of 1972 (Mar. 26, 2021) (applying *Bostock* rule to Title IX); see also U.S. Dep't of Education, *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (to be codified at 34 C.F.R. ch. 1).

Courts agree that Title IX prohibits discrimination against transgender students, including by requiring them to use a bathroom corresponding with their assigned sex at birth or a gender-neutral alternative. The Seventh Circuit decided a case with facts nearly identical to MASD's conduct towards [J.D. #1] in *Whitaker*, 858 F.3d at 1034. Just like MASD's actions towards [J.D. #1] the Kenosha Unified School District ("KUSD") had denied a transgender boy access to the boys' bathrooms and required him to use either the girls' bathrooms or an isolated "gender-neutral" bathroom in the school's main office. In affirming the district court's grant of a preliminary injunction preventing enforcement of this policy, the Seventh Circuit found that the policy likely violated Title IX. Many other courts have similarly struck down school districts' policies requiring transgender students to use bathrooms corresponding with their assigned sex at birth, or a gender-neutral alternative, under Title IX. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S.Ct. 2878 (2021) ("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."); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 601 F. Supp. 3d 345 (S.D. Ind. 2022) ("The overwhelming majority of federal courts—including the Court of Appeals for the Seventh Circuit—have recently examined transgender education-discrimination claims under Title IX and concluded that preventing a transgender student from using a school restroom consistent with the student's gender identity violates Title IX. This Court concurs.").

Additionally, MASD is in violation of the Equal Protection clause of the Fourteenth Amendment of the Constitution. The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Policies that include classifications based on sex trigger intermediate scrutiny by courts, under which a policy must be "substantially related to a sufficiently important governmental interest," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), and a state actor must provide an "exceedingly persuasive" justification, *United States v. Virginia*, 518 U.S. 515, 534 (1996). Bathroom policies such as MASD's that treat transgender students differently from other students are subject to intermediate scrutiny because these policies are "inherently based on a sex-classification", *Whitaker*, 858 F.3d at 1051, and because transgender plaintiffs constitute "at least a quasi-suspect class" meriting increased protection under Equal Protection principles, *Grimm*, 972 F.3d at 610.

The vast majority of courts that have considered the issue, including the Seventh Circuit in *Whitaker*, have found that school districts' purported justifications for trans-exclusionary bathroom policies do not satisfy intermediate scrutiny, and thus violate the Equal Protection Clause. In particular, courts have roundly rejected the idea that privacy concerns of non-transgender students provide a sufficient justification to exclude, stigmatize, and harm transgender students. See *Grimm*, 972 F.3d at 613 (finding that exclusionary bathroom policy

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failed intermediate scrutiny because “the Board's policy [was] not substantially related to its important interest in protecting students' privacy”); *Whitaker*, 858 F.3d at 1052-54 (finding that bathroom policy was “arbitrary” and “based upon sheer conjecture and abstraction” and thus would not satisfy intermediate scrutiny). *See also Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527 (3d Cir. 2018) (holding that school district’s policy allowing students to use bathrooms and locker rooms consistent with their gender identity did not violate the privacy rights of objecting students); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (rejecting plaintiff parent group’s privacy arguments against school’s policy allowing transgender boy to use boys’ restrooms). Accordingly, MASD has advanced no justification and, in fact, *cannot* advance any justification sufficient to pass intermediate scrutiny. Policies that force transgender students to use bathrooms that do not correspond to their gender identity or relegate them to separate facilities “very publicly brand all transgender students with a scarlet ‘T,’” and J.D. #1 “should not have to endure that as the price of attending [her] public school.” *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d at 529.

Finally, we note that MASD has an obligation under Title IX to take effective action to protect J.D. #1 from bullying perpetrated against her based on her gender identity. Title IX prohibits “hostile environment harassment” when sexual harassment by one student to another is “severe, pervasive, or objectively offensive,” and “so undermines and detracts from the victims’ educational experience that [she] is effectively denied equal access to an institution's resources and opportunities.” *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 651 (1999) (interpreting 20 U.S.C. § 1681(a)). Numerous courts have found that Title IX imposes a duty on schools to protect students from harassment based on gender stereotyping equivalent to their duty to protect students from other gender-based harassment. *See, e.g., Montgomery v. Local Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1091–93 (D. Minn. 2000); *Ricco v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 224–26 (D. Conn. 2006). This includes harassment of transgender students. *See Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 858 (S.D. Ohio 2016) (granting preliminary injunction to transgender plaintiff and upholding finding made by Department of Education that school had violated Title IX in part by “fail[ing] to assess whether a hostile environment existed for [transgender eleven-year-old girl]” subjected to harassment and bullying by other students); U.S. Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 34 C.F.R. pt. 106. The bullying and harassment J.D. #1 has experienced at the hands of other students in recent months has been continuing to escalate in severity, and MASD will be in further violation of Title IX if it fails to sufficiently intervene to swiftly address and deter this harassment.

Should our clients need to pursue litigation to bring a halt to MASD’s illegal discrimination, they intend to seek temporary and permanent injunctive relief, compensatory damages, and attorney’s fees and costs, exposing MASD to significant financial liability. J.D. #1 is entitled to compensatory damages for the emotional harms and educational injuries she suffered because of the discriminatory treatment outlined above. In other Title IX cases, public school districts have paid significant damages to students who suffered gender-based discrimination, including similar cases involving restroom policies for transgender students. For example, our firm settled our client’s case against Kenosha Unified School District for \$800,000 after securing

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June 27, 2023  
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an appellate decision affirming a preliminary injunction barring the defendant school district from discriminating against the plaintiff. *See Whitaker*, 858 F.3d 1034. Other single-plaintiff lawsuits involving sex-based discrimination against students have resulted in significant settlements and verdicts. *See, e.g., Grimm*, 972 F.3d at 586 (\$1.3 million settlement following affirmance of summary judgment); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (\$135,000 settlement following preliminary injunction in favor of transgender student barred from restrooms consistent with gender identity); *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020) (\$300,000 settlement in transgender-exclusionary restroom case); *Walsh v. Tehachapi Unified Sch. Dist.*, No. 11-cv-1489 (E.D. Cal. 2014) (\$750,000 settlement in gender-based harassment lawsuit).

In addition to its own legal fees and costs of defense, MASD may also be found liable for the **Does'** attorneys' fees and costs under the fee-shifting provisions of 42 U.S.C. § 1988.

### DEMAND

Our clients are prepared to litigate their claims against MASD, but are willing to explore a voluntary pre-suit resolution if MASD ceases its illegal and discriminatory treatment without delay. Accordingly, our clients demand that MASD immediately rescind its bathroom policy requiring students to use restrooms corresponding with their assigned sex at birth or a gender-neutral alternative; permit **J.D. #1** and all other transgender students to use the restrooms and other facilities that correspond with their gender identity at summer school at Mukwonago High School and during the regular school year; confirm that the newly passed policy will be interpreted and applied by the District such that, at a minimum, any transgender student who presents a gender dysphoria diagnosis will be permitted to use the restroom consistent with their identity; and take appropriate steps to ensure that **J.D. #1** is not subjected to discrimination for her gender identity, including taking appropriate action to respond to and deter gender-based harassment and bullying by other students.

Given the urgency of this situation and the ongoing and escalating harm to which **J.D. #1** is being subjected on a daily basis, please provide written confirmation within twenty-four hours of MASD's response to these demands. If we do not hear from you or MASD's legal counsel, we will assume that MASD is not interested in amicably resolving the **Does'** claims, and we will proceed accordingly.

Sincerely,  
  
Alexa Milton  
Glenn Schlactus  
Emily Curran

CC: MASD School Board Members Dale Porter, Craig Vertz, Cheri Winchowky, Jake Heiligenthal, Crosby Bugenhagen, Erika Conner, Gayle LeSage, Vito Schwartz, and Carolyn Simon

# **EXHIBIT 12 to Declaration of Alexa Milton (June 30, 2023)**



## Buelow Vetter

Buikema Olson & Vliet, LLC

*The Solution Starts Here.*

Writer's Direct Dial: (262) 364-0250  
Writer's Direct Fax: (262) 364-0270  
jaziere@buelowvetter.com

June 28, 2023

**Sent via email only:** *amilton@relmanlaw.com*

Attorney Alexa Milton  
Relman Colfax PLLC  
1225 19th Street, N.W., Suite 600  
Washington, D.C. 20036

**Re: Initial Response to [Doe] Demand Letter**

Dear Attorney Milton:

Please be advised we represent the Mukwonago Area School District in the above-captioned matter and acknowledge receipt of your letter to Superintendent Joe Koch, dated June 27, 2023.

The District does not agree with the factual assertions outlined in your letter but, because the District is interested in exploring an amicable resolution of this matter, we will not rebut them at this time. Likewise, we will not address your legal assertions, other than to point out the facts in this case are significantly different than those in *Whitaker*.

Your letter references a recently adopted policy regarding student privacy in restrooms. A copy of said policy (Mukwonago Area School District Board Policy 5514 – Student Privacy in Restrooms and Locker Rooms) is attached.

Board Policy 5514 requires a team of District staff to consider exceptions or accommodations on a case-by-case basis in consultation with the student, the student's parents, the Director of Student Services, the school psychologist, the school counselor, the classroom teacher, the building principal, and any other individuals the District deems appropriate.

Currently, a team of District staff provides support and accommodations for [J.D. #1], including access to a trusted adult at any time during the summer school day, support from a trusted adult in response to violations of Board Policy 5514, the option to use the boys' restroom or a gender-neutral restroom, and a map and a tour of the building to ensure [J.D. #1] is familiar with the location of these restrooms. The District initiated an evaluation of [J.D. #1] under the Individuals with Disabilities Education Act (IDEA) to determine whether [J.D. #1's] diagnoses of ADHD or anxiety may qualify her under other health impairment and consider whether she requires specially

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designed instruction in, for example, coping skills or other non-academic areas. Through this evaluation or an evaluation under Section 504 of the Rehabilitation Act, [J.D. #1's] parent would have the opportunity to provide any information related to gender dysphoria for the team's consideration. This could include ways to support [J.D. #1] emotionally and socially as she navigates the school environment.

This team of District staff attempted repeatedly to consult with the parent and to secure consent for an IDEA evaluation of [J.D. #1]. The parent consistently refused to collaborate with the District regarding supports for [J.D. #1] and denied consent for an IDEA evaluation.

By way of example only, on May 23, 2023, Superintendent McNulty and Principal Val Vos met with [Jane Doe #2] to discuss the May 22, 2023 Board decision. At that time, a Section 504 evaluation was introduced as a possible option and next step. On May 25, 2023, Christine Bowden called [Jane Doe #2] to discuss a comprehensive evaluation. In addition, the following correspondence was sent to [Jane Doe #2]:

5/30/23

[Jane Doe #2],

Thank you for taking the time to talk with me last week (5-25-23). As discussed, based on [J.D. #1's] diagnosis of ADHD and generalized anxiety disorder, state and federal laws regarding Child Find require the District to initiate a special education and/or Section 504 referral. A referral is the first step in the evaluation process to determine whether [J.D. #1] qualifies as a child with a disability under the IDEA and if so, whether [J.D. #1] requires specially designed instruction. We could also explore whether [J.D. #1] qualifies for additional support or services under Section 504. I understand you do not wish to pursue a referral nor consent to additional testing at this time, and you have that right to refuse consent.

With the summer approaching and the need to create a team, I would ask that for scheduling purposes, you return the consent for evaluation by June 2nd. This date is certainly flexible. Please contact me with any questions. I can be reached at 262.363.6300 ext. 24200.

Attached is the referral for an evaluation and a copy of your procedural safeguards.

On June 1, 2023, the District emailed [Jane Doe #2] a Notice and Consent Regarding Need to Conduct Additional Assessments. This included identifying the existing data to be reviewed along with the suggestion of behavior rating scales to determine eligibility. There was no response to these efforts.

On June 16, 2023 [Jane Doe #2] emailed Christine Bowden confirming she had received the hard copies of the Special Education and Section 504 referral. [Jane Doe #2] reiterated she did not give consent for said referrals and asked for an explanation of why they were deemed necessary.

On June 22, 2023 Christine Bowden responded with the following email correspondence.

Good Afternoon **Jane Doe #2**,

Thank you for your email. I understand that you do not wish to pursue a referral for special education or a 504 and that is your right to refuse consent. I would like to frame out the rationale and reasoning behind the district's child find obligation and special education referral for **J.D. #1**.

ADHD- **J.D. #1** currently has universal supports in place for managing her ADHD these include taking motor breaks during the school day and using fidgets as necessary. Although these are currently supported in the general education setting, an IEP or 504 solidifies these supports and ensures that **J.D. #1** continues to be able to access them as she transitions from grade to grade and elementary to middle school. A referral for special education is not indicative of qualifying for special education services, it is a team approach to analyzing if **J.D. #1** would benefit from any additional support. ADHD is a recognized area of impairment and is defined as such in the DSM-V.

Generalized Anxiety Disorder- **J.D. #1** currently accesses the school counselor or school psychologist 2-3x per week. Although these are currently supported from a universal lens, an IEP or 504 solidifies these supports and ensures that **J.D. #1** continues to be able to access them as she transitions from grade to grade and elementary to middle school. Additionally, the school psychologist also checks in with the classroom teacher weekly to ensure that **J.D. #1** is being successful in navigating her emotions.

Gender Dysphoria-Currently this diagnosis is recognized as a disorder in the DSM-V. This does not equate to **J.D. #1** having a disability. However, as **J.D. #1** navigates the emotions and social situations, it can have an impact that may require additional services such as coping strategies, more frequent check-ins, emotional regulation strategies as some examples. This may not require specially designed instruction. It does foster conversations around how to best support her.

As outlined in the Department's regulations implementing Section 504, school districts must conduct individualized evaluations of students who, because of disability, including ADHD, need or are believed to need special education or related services, and must ensure that qualified students with disabilities receive appropriate services that are based on specific needs, not cost, and not based on stereotypes or generalized misunderstanding of a disability. These and other Section 504 obligations apply to all students with disabilities and specifically pertain to students with ADHD.

Thank you,

Christine Bowden

There was no response from Jane Doe #2.

We are not summarily rejecting the items in your demand letter. However, the District would like to first engage with the family and carry out the processes outlined in its policy. Following a meeting with the family, we anticipate being able to respond to the demands in more certain terms at that time.

Thank you for your time and attention to this matter. I look forward to hearing from you.

Very truly yours,

Buelow Vetter Buikema Olson & Vliet, LLC



Joel S. Aziere  
JSA/et  
*Attorneys for Mukwonago Area School District*

# **EXHIBIT 13 to Declaration of Alexa Milton (June 30, 2023)**

  
REL MAN COL FAX PLLC

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June 29, 2023

**VIA EMAIL ONLY**

Joel S. Aziere  
Buelow Vetter Buikema Olson & Vliet, LLC  
20855 Watertown Road, Suite 200  
Waukesha, WI 53186  
jaziere@buelowvetter.com

Re: Discriminatory Treatment of **Jane Doe #1** by Mukwonago Area School District

Mr. Aziere:

It is regrettable that your letter of June 28, 2023, in response to ours of the day before, sidesteps the issues we raised. As we explained, your client the Mukwonago Area School District (“MASD”) is currently and actively enforcing a policy that prohibits **Jane Doe #1** from using school bathrooms that conform to her gender identity as a girl. This constitutes unlawful sex discrimination, violates **J.D. #1's** rights, and is causing her immediate and substantial harm.

Your letter fails to address this issue in any meaningful way. Without any attempted explanation you cursorily dismiss the 7th Circuit’s directly on point and controlling decision in *Whitaker ex. rel. Whitaker v. Kenosha Unified Sch. Dist., No. 1 Bd. Of Educ.*, 858 F.3d 1034 (7th Cir. 2017), as having facts that are “significantly different.” To the contrary, the facts in *Whitaker* precisely parallel those at issue here. *Whitaker* makes plain that **J.D. #1**, who has provided MASD with a gender dysphoria diagnosis and until recently used the girls’ bathrooms at school without incident for nearly three years, is entitled to again use the girls’ bathrooms without interference.

Instead of responding regarding the discriminatory and damaging treatment **J.D. #1** is currently being subjected to by MASD, your letter is addressed predominantly to whether **J.D. #1** should be evaluated for a special education plan. That is irrelevant, and nothing in your letter suggests otherwise. ADHD and anxiety disorder, which you raise, have no bearing on **J.D. #1's** constitutional and statutory right to use the girls’ bathrooms at school. Sadly, the only connection that mental health considerations have to MASD’s denial of **J.D. #1's** rights is that her mental health is being harmed by MASD’s refusal to follow the law.

Your closing assertion that MASD is “not summarily rejecting” our demand that **J.D. #1** be afforded her rights is of no moment. Those rights are being denied *right now* without any lawful justification; the notion that MASD “would like” to take more time to consider whether or not it



RELMAN COLFAX PLLC

June 29, 2023

Page 2 of 2

will continue to deny her rights does nothing to address this issue of immediate concern. Absent an immediate change in policy allowing **J.D. #1** to return to using the girls' bathrooms at school, **Jane Doe #2** intends to seek a temporary restraining order forthwith on behalf of her daughter. If MASD will at least temporarily suspend enforcement of its policy, however, it would create an opportunity to resolve this issue amicably and without the need for emergency judicial relief. Please let us know right away if MASD will do so.

Sincerely,

Alexa Milton

# **EXHIBIT 14 to Declaration of Alexa Milton (June 30, 2023)**



Book Policy Manual  
 Section Policies Adopted by the Board  
 Title STUDENT PRIVACY IN RESTROOMS AND LOCKER ROOMS  
 Code po5514 - NEW  
 Status Approved:Ready for Neola

**5514 - STUDENT PRIVACY IN RESTROOMS AND LOCKER ROOMS**

The Board believes students should feel safe and secure in the school environment, and the Board respects their right to privacy as it pertains to the use of District facilities. To that end, except as otherwise required by law, students shall use restroom and locker room facilities on District property and at District-sponsored events according to each student's original sex assigned at birth.

Student and/or parent requests for an exception or accommodation to this policy shall be considered by a team of District staff on a case-by-case basis in consultation with the student, the student's parents, the Director of Student Services, the school psychologist, the school counselor, the classroom teacher, the building principal, and any other individuals the District deems appropriate. All decisions related to such requests will take into consideration the safety and privacy of all students.

Accommodations for a diagnosis of gender dysphoria shall be addressed in accordance with Section 504 of the Rehabilitation Act of 1973, and the District's corresponding procedures for developing Section 504 Plans.

The Administration shall develop administrative guidelines for the implementation of this policy and the provisions herein.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

Jane Doe #1, a minor, by her mother and next friend, Jane Doe #2,

Plaintiff,

v.

MUKWONAGO AREA SCHOOL DISTRICT and JOE KOCH, in his official capacity as Superintendent of the Mukwonago Area School District,

Defendant.

Civ. Action No. \_\_\_\_\_

**DECLARATION OF Jane Doe #2**

1. My name is Jane Doe #2 I am the mother of Jane Doe #1 the Plaintiff in the above-captioned action. I am over the age of eighteen and am competent to make this Declaration. I have personal knowledge of the matters stated in this Declaration.

2. I live in Waukesha County, Wisconsin, within the Mukwonago Area School District (“MASD”), with J.D. #1 my partner [REDACTED], and my two other children.

3. J.D. #1 has attended Prairie View Elementary School since we moved to the area when she was entering third grade. She is currently attending MASD’s Summer Adventures program, held at Mukwonago High School. She will enter the sixth grade at Prairie View Elementary in the fall.

4. J.D. #1 was designated “male” at birth, but at age three she began to consistently express to me and other family members that she was a girl and to insist that we refer to her as a girl. Although she continued to use her traditionally male birth name

and male pronouns at in public, she began to wear girls' clothing and use the nickname [J.D. #1] at home.

5. When [J.D. #1] was in the first grade, her self-identification as a girl became even more insistent, and she told me she couldn't "continue to go to school and pretend to be someone I'm not." She began presenting as a girl at school, including by using female pronouns and the traditionally feminine name [J.D. #1] growing her hair, and wearing traditional girls' clothing.

6. Since that time, [J.D. #1] has consistently presented as a girl in all aspects of her life, and has been recognized as a girl by her family, friends, and community. A recent photo of [J.D. #1] is attached to this declaration as Exhibit A.

7. Throughout this process we have consulted with [J.D. #1's] pediatrician and other medical providers, who have acknowledged that she is transgender and female since she was in first grade. We eventually received a formal gender dysphoria diagnosis in 2022.

8. Although administrators at the school [J.D. #1] attended at the time were initially unsure of how to handle [J.D. #1's] transition, I worked to educate them on the needs of transgender children and [J.D. #1] was ultimately permitted to use the girls' restrooms at school. [J.D. #1's] mental health, school performance, and behavior at school all improved dramatically after this change was made. Throughout her remaining time in this school district, [J.D. #1] continued to use the girls' restrooms without issue.

9. Upon enrolling [J.D. #1] at Prairie View Elementary, I informed [J.D. #1's] classroom teacher and gym teacher and Prairie View's principal that [J.D. #1] is transgender. I thought it was important for those individuals to be aware that she was transgender in

order to ensure her physical safety at school. I also met with Superintendent McNulty at that time, and it was agreed that [J.D. #1] would be treated as a girl and would use the girls' restrooms.

10. [J.D. #1] continued to use the girls' restrooms at Prairie View throughout the third, fourth, and fifth grades, and during her first two summers at summer school, and has participated with other girls on occasions where school activities are separated by gender. [J.D. #1] was happy at school, felt supported by her teachers, enjoyed friendships with her classmates, and felt welcomed by the school overall. Her classmates, teachers, and administrators called her by her feminine nickname, [J.D. #1] and referred to her using female pronouns.

11. During all of this time, [J.D. #1's] use of the girls' bathroom at Prairie View never caused any disruption or concern. Until the events at issue in this lawsuit began in the Spring of 2023, there had never been, to the best of my knowledge, any complaint from students, parents, or MASD staff about [J.D. #1's] restroom usage.

12. [J.D. #1's] experience at school changed dramatically around early April 2023. Prairie View's principal, Valerie Vos, told me that she had begun receiving phone calls from other parents asking inappropriate questions about [J.D. #1's] genitals. Around the same time, I discovered that community members were also writing disparaging posts and comments clearly referring to [J.D. #1] on a Facebook group called Mukwonago Parents for Normal Education, including posts describing her as dangerous, and calling me and my partner pedophiles. I was shocked and horrified by these inappropriate inquiries and false statements, and feared for [J.D. #1's] safety at school and the safety of our family.

13. Shortly after these incidents began, the MASD School Board began

involving itself in [J.D. #1's] restroom usage. On May 15, 2023, the Board held a closed executive meeting to discuss [J.D. #1] and her bathroom use at school. I and my partner were invited to attend a portion of this closed meeting. The Board indicated that it might require [J.D. #1] to use a separate bathroom designated for transgender students, or a separate gender-neutral bathroom. I explained to the Board that both of these options were unacceptable and illegal because they would single [J.D. #1] out from her peers, force her to reveal to others that she was transgender without her consent, and stigmatize her.

14. School Board members also brought up an unsubstantiated rumor that [J.D. #1] had allegedly “bragged” to a group of boys at school that she gets to use the girls’ restroom. I pressed these Board members, but they could not provide any details to substantiate this rumor, and I am certain it never happened.

15. One Board member told me that the Board was “stuck between a rock and a hard place,” because MASD could either continue to let [J.D. #1] use the girls’ restroom and anger a vocal group of other parents, or refuse and get sued by me. I understood this to be an acknowledgement that the School Board understood that refusing to let [J.D. #1] use the girls’ room would violate her rights.

16. After this meeting, then-Superintendent Shawn McNulty told me that the Board had not reached a decision, that [J.D. #1] could continue to use the girls’ bathrooms at school as usual for the next week, and that the Board would hold another meeting the following week.

17. On May 22, 2023, the School Board held a public meeting. The meeting was held at the high school, instead of the usual smaller meeting space at the MASD offices. Although there was nothing about this issue on the agenda, and public comments

would normally have been restricted to agenda items at this type of meeting, this restriction was lifted to allow members of the public to speak about this issue. Around eight people spoke angrily about transgender students' bathroom usage and complained about a "boy" using the girls' restroom, in reference to [J.D. #1]. One person, a teacher from Prairie View, spoke up in support of [J.D. #1] and transgender students, citing statistics from studies showing the importance of supporting transgender students and respecting their gender identities. I did not speak at the meeting because I was afraid doing so would disclose [J.D. #1's] name and identity to these angry community members and endanger her safety.

18. Superintendent McNulty called me later that evening to tell me that the Board had still not made a final decision at that meeting, and set a meeting with me for 8:40 the next morning. At that meeting, he told me that if I could provide a note from a doctor confirming [J.D. #1's] gender dysphoria diagnosis, [J.D. #1] would be allowed to use the girls' restrooms for the rest of the school year, and that the School Board would be developing a plan for next year over the summer. [J.D. #1's] health care provider promptly provided the requested letter to MASD.

19. Later that week, I received a phone call from Christine Bowden, MASD's Director of Pupil Services. Ms. Bowden thanked me for providing the gender dysphoria letter. She then told me that she saw in their records that [J.D. #1] had ADHD and generalized anxiety diagnoses as well, and that she would like to do a special education or 504 referral.

20. I was confused why a special education referral would be needed now. Although [J.D. #1] had struggled with her ADHD at times in the past, during this fifth grade

school year she had been doing very well – excelling in reading and math, and not having trouble with behavior. I asked Ms. Bowden why they were doing this now, and she couldn't explain why other than to say that J.D. #1 “has a diagnosis,” and was seeing a school counselor.

21. I felt that this referral was being done in order to retaliate against me and J.D. #1 for insisting on J.D. #1's right to use the girls' restroom. There did not seem to be any other reason for the school to be pushing a special education referral now when J.D. #1 was doing so well. In fact, the previous year when J.D. #1 was struggling, I had asked about the possibility of doing a special education referral or 504 plan and was told by the school that it was not necessary because they could handle it on their own. I told Ms. Bowden that I did not consent to the referral.

22. I asked Ms. Bowden whether there was anything else she had wanted to discuss besides the special education referral. She said that she wanted to talk with me about MASD's intentions to develop a Gender Support Plan, which she said could allow J.D. #1 to be called J.D. #1 rather than ██████ at school, put privacy policies in place, and give J.D. #1 a “support ladder” of school staff to contact to escalate any problems. It was unclear to me why that would require a special plan, since all students already are able to be called by nicknames, have privacy rights at school, and are told how to escalate problems through a support ladder of school staff. Nevertheless, I told Ms. Bowden to let me know when the District had an actual plan we could discuss.

23. After the call, Ms. Bowden sent me paperwork relating to the special education and 504 referral. The subject matter of the referral was exclusively ADHD and anxiety. None of the paperwork made any mention of gender dysphoria. Since I did not

believe [J.D. #1] needed that level of support with her ADHD or anxiety at this time, I reiterated that I did not consent to the referral.

24. [J.D. #1] was scheduled to attend MASD's Summer Adventures program beginning on Monday June 19, 2023. She had attended the same program, which is held at Mukwonago High School, both of the two previous summers, and had used the girls' restrooms near her classes without incident. On Friday June 16, 2023, I received an email containing a letter from the new MASD Superintendent, Joe Koch, informing me that [J.D. #1] was required to use "a gender-neutral or male bathroom" at summer school. I told [J.D. #1] about this letter. She was upset and confused, and expressed that she was scared of getting in trouble at school. She hated that they were treating her like she was different and "like I'm garbage." I told her to continue using the girls' bathroom, as was her right, and that if she got in trouble I would deal with it.

25. [J.D. #1] used the girls' bathrooms as usual for the first couple of days of summer school without incident. But on June 22, 2023, it became clear that MASD staff had begun monitoring [J.D. #1's] use of the bathroom the day before. Ms. Bowden sent me an email telling me that a staff member had seen [J.D. #1] use the girls' room the day before, and reminding me that it was not permitted. The same day, [J.D. #1] was taken out of class by the summer school principal, Mr. Kossow and another staff member, taken on a tour of the boys' and gender-neutral bathrooms, and told she was required to use those bathrooms only. I learned about this when I received a call from the school telling me that, as a result of this interaction, [J.D. #1] had become extremely distressed and upset, and that she expressed to MASD staff that she was having thoughts of self-harm. [J.D. #1] later told me that of the "gender-neutral" restrooms she was told she could use, one is in the

health room, and the other is not actually gender-neutral—it is a designated male single-user restroom in the Assistant Principals’ office, used by adult staff.

26. Since then, [J.D. #1] has continued to be pulled out of class and taken to the principal’s office each day after she uses the bathroom, where she is lectured about the requirement that she use either boys’ or gender-neutral bathrooms. [J.D. #1] has informed me of these interactions, as have MASD staff.

27. These interactions have been extremely upsetting to [J.D. #1]. It is distressing and creepy to her to know that her bathroom use is being monitored by adults, and devastating to be told she has to use separate bathrooms from the other children or use boys’ bathrooms when she is not a boy.

28. I am also concerned that [J.D. #1] might start avoiding using the bathroom altogether while at school, which could cause her significant physical harm. [J.D. #1] has been having gastrointestinal symptoms, and we are working with her doctor to identify the cause. As a result of these symptoms, her doctor has indicated that it would be harmful or impossible for [J.D. #1] to “hold it” if she needs to use the bathroom.

29. Each time the school has called me after one of these interactions, I have been clear that [J.D. #1] has the right to use the girls’ bathroom, and that I will not instruct her to do otherwise because it would be harmful to her mental health and put her physical safety in jeopardy. Mr. Kossow and the other MASD administrators’ only response is that they will take disciplinary action against [J.D. #1] if this continues. At no point during these conversations have any MASD staff indicated that there are any alternative options or accommodations that would let [J.D. #1] use the girls’ bathrooms.

30. On June 26, 2023, I attended a public MASD School Board meeting, at

which a new student bathroom policy was introduced for the Board's approval. Although the policy mentions possible accommodations for certain students, the Board's discussion made it clear to me that it had no intention of allowing any student to use a bathroom not corresponding to their sex assigned at birth. In fact, the Board amended the proposed policy to add "original" before "sex assigned at birth," with multiple Board members stating that the change was intended to ensure that even if a transgender student had been able to change the sex marker on their birth certificate they would still not be allowed to use the bathroom corresponding to their gender identity and amended birth certificate.

31. Since the passage of the new policy, MASD officials have continued to enforce the same rule against J.D. #1 by pulling her out of class and threatening disciplinary action if she continues to use the girls' restroom. Again, no mention has been made in any of these interactions about any alternative accommodation that would allow her to use the girls' restroom.

32. Since the MASD School Board began involving itself in J.D. #1's bathroom use, J.D. #1 has also faced escalating bullying and harassment from other students based on her gender and gender identity. Students have pointedly questioned and taunted her about whether she is a boy or a girl, about her genitalia, and about whether she is a lesbian, and told her she shouldn't be allowed at their school because she is a freak. Much of this bullying has occurred on the school bus, and J.D. #1 several times has refused to get on the bus because she fears more harassment. She experienced this type of bullying multiple times a week towards the end of the school year, and has continued to experience it during summer school, particularly on the bus.

33. J.D. #1's mental health has been severely harmed by these experiences.

Since this started, [J.D. #1] started having nightmares three to four nights a week, often involving kids at school killing or injuring her. Previously, she would get off the bus all smiles after school or summer school, full of stories about what she learned and did at school. Now she is coming home almost daily in tears and upset, telling me about how teachers and administrators are singling her out, surveilling her, and making her feel like who she is is somehow wrong. She has also started to ask me “why am I even alive?”

34. It has been really hard for me to watch [J.D. #1] go through this. Her therapist, her prescriber and I all try to help her with coping mechanisms but they can only do so much. I miss seeing her smile and laugh the way she used to. She is a good kid—smart and funny and likes to learn, and full of curiosity and gusto for life. It is devastating to watch the adults in her life snuff out that light in her.

35. Each day that MASD and summer school staff continue to enforce this rule on [J.D. #1] I can see the harmful effects on her wellbeing and mental health increase. Summer school is not scheduled to end until July 13. If MASD continues to single [J.D. #1] out in this way and prevent her from using the girls’ bathroom at summer school or during the school year next fall, I believe she will experience even worse harms.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in the United States on June 30, 2023

By: \_\_\_\_\_

**Jane Doe #2**

# **EXHIBIT A**



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

JANE DOE #1, a minor,  
by her mother and next friend, JANE DOE #2,

Plaintiffs,

Case No.: 2:23-cv-876

v.

MUKWONAGO AREA SCHOOL DISTRICT,  
and JOSEPH KOCH, in his official capacity as  
Superintendent of Mukwonago Area School District,

Defendants.

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**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'  
MOTION FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

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NOW COME Defendants, Mukwonago Area School District (“MASD” or “District”) and Joseph Koch, in his official capacity as District Superintendent (collectively, “Defendants”), who move this Honorable Court to deny the Motion for Temporary Restraining Order and Preliminary Injunction filed by Jane Doe #2, as mother and next friend of Jane Doe #1, against Defendants.

**INTRODUCTION**

On June 30, 2023, Plaintiffs filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction.” [Dkt. #5, p.1]. Specifically, Plaintiffs seek “the Court’s immediate intervention to stop Defendants . . . from denying [Jane Doe #1] permission to use restrooms consistent with her gender identity” based on the irreparable harm Jane Doe #1 will purportedly suffer in the absence of such order. [Dkt. #5, p. 1; *see also* Dkt. #5-1, p. 1]. For the reasons articulated herein, a preliminary injunction is inappropriate to and unavailable in the case at bar.

First, Plaintiffs cannot make the requisite showing that, absent an injunctive order, harm will occur when the District has offered—and Plaintiffs have not availed themselves of—reasonable solutions to effectively address the present situation. Plaintiffs fail to acknowledge the measures the District has taken to mitigate and prevent harm to Jane Doe #1 and to ensure she has adequate educational, social, and emotional support.

Second, Plaintiffs fail to acknowledge facts and legal realities that distinguish the present situation from that which the Seventh Circuit examined in *Whitaker v. Kenosha Unified School District No. 1*, 858 F.3d 1034 (7th Cir. 2017).

Finally, Plaintiffs’ proposed relief is a poor fit for the present situation given the extraordinary nature of emergency injunctive relief and the few weeks of summer school that remain. For these reasons, Plaintiffs’ motion must be denied.

### **FACTUAL BACKGROUND**

The current sociopolitical landscape presents school districts across the United States with various challenges regarding educational best practices. Proponents of one strategy insist on a “one-size-fits-all” response, while opponents to the same strategy insist on an equally uncompromising position. Difficulties arise when either approach is applied to public social situations, such as the public-school classroom. This is particularly true in the context of sex, sexual orientation, and gender identity, wherein the complexity and nuance of the underlying issues—and disagreement over how to best teach, discuss, and approach them—renders a school district’s job especially challenging. Defendants do not dispute their legal obligation to provide educational within a safe and constructive setting; indeed, the District has devoted considerable time and effort to identifying and implementing appropriate policies and practices when it comes to serving its students and the greater Mukwonago community. However, Defendants vehemently

refute any contention they have subjected Jane Doe #1 to discrimination or otherwise interfered “with her ability to learn and enjoy the privileges and benefits of summer school.” [Dkt. #5-1, p. 2]. Likewise, Defendants strongly disagree with Plaintiffs’ baseless assertion that, “[u]nless enjoined,” District School Board Policy 5514 will cause Jane Doe #1 to suffer “irreparable injury.” [Id.]

Jane Doe #1 is an eleven-year-old transgender student at Prairie View Elementary School (“Prairie View”), a primary school within the District. [Dkt. #5-1, p. 3]. Although Jane Doe #1 was assigned male at birth, she identifies as a girl, using she/her pronouns and presenting as a girl in everyday life. [Id.]. In the spring of 2023, the District began receiving phone calls and emails from parents regarding student restroom use. Specifically, several District parents and community members had expressed concerns regarding Jane Doe #1’s use of the girls’ bathroom despite having been assigned male at birth. Consequently, the District School Board held a closed executive meeting on May 15, 2023 to discuss the matter. [Dkt. #5-1, p. 5]. Jane Doe #2 attended part of this meeting, during which the School Board conveyed to her the concerns the District had received and proffered various means of redress. [Id.]. By her own admission, Jane Doe #2 “vehemently opposed the options presented by the School Board,” instead insisting that Jane Doe #1 be able to use the girls’ bathroom despite parent demands to the contrary. [Id.]

On May 22, 2023, the School Board held an open meeting to again consider the restroom use issue. [Dkt. #5-1, p. 5]. The following day, May 23, the School Board emailed District parents and students, stating the District would be requiring students to use the locker rooms and bathrooms of their sex assigned at birth and would be developing a School Board policy to this effect. [Dkt. #5-1, p. 6; Dkt. #5-17, p. 2]. That same day, former District Superintendent Shawn McNulty and Prairie View Principal Valerie Vos met with Jane Doe #2 to discuss the School

Board's decision and how best to support Jane Doe #1. At such meeting, former Superintendent McNulty and Principal Vos suggested a Section 504 evaluation as a possible next step, particularly given Jane Doe #1's anticipated attendance in the Mukwonago High School summer school program. On May 25, 2023, Director of Pupil Services Christine Bowden called Jane Doe #2 to discuss a comprehensive evaluation. Then, Ms. Bowden sent Jane Doe #2 the following email on May 30, 2023:

[Jane Doe #2],

Thank you for taking the time to talk with me last week (5-25-23). As discussed, based on [Jane Doe #1]'s diagnosis of ADHD and generalized anxiety disorder, state and federal laws regarding Child Find require the District to initiate a special education and/or Section 504 referral. A referral is the first step in the evaluation process to determine whether [Jane Doe #1] qualifies as a child with a disability under the IDEA and if so, whether [Jane Doe #1] requires specially designed instruction. We could also explore whether [Jane Doe #1] qualifies for additional support or services under Section 504. I understand you do not wish to pursue a referral nor consent to additional testing at this time, and you have that right to refuse consent.

With the summer approaching and the need to create a team, I would ask that for scheduling purposes, you return the consent for evaluation by June 2nd. This date is certainly flexible. Please contact me with any questions. I can be reached at 262.363.6300 ext. 24200.

Attached is the referral for an evaluation and a copy of your procedural safeguards.

On June 1, 2023, the District sent Jane Doe #2 a Notice and Consent Regarding Need to Conduct Additional Assessments, which included identifying the existing data to be reviewed along with the suggestion of behavior rating scales to determine eligibility. Despite the aforementioned efforts, the District received no response from Jane Doe #2. On June 16, 2023, Jane Doe #2 emailed Ms. Bowden to confirm she had received hard copies of the Special Education and Section 504 referral forms in the mail, to reiterate the fact that she did not give consent for

said referrals, and to inquire into why such referrals were necessary. On June 22, 2023, Ms. Bowden emailed Jane Doe #2 the following response:

Good Afternoon [Jane Doe #2],

Thank you for your email. I understand that you do not wish to pursue a referral for special education or a 504 and that is your right to refuse consent. I would like to frame out the rationale and reasoning behind the district's child find obligation and special education referral for [Jane Doe #1].

ADHD – [Jane Doe #1] currently has universal supports in place for managing her ADHD [sic] these include taking motor breaks during the school day and using fidgets as necessary. Although these are currently supported in the general education setting, an IEP or 504 solidifies these supports and ensures that [Jane Doe #1] continues to be able to access them as she transitions from grade to grade and elementary to middle school. A referral for special education is not indicative of qualifying for special education services, it is a team approach to analyzing if [Jane Doe #1] would benefit from any additional support. ADHD is a recognized area of impairment and is defined as such in the DSM-V.

Generalized Anxiety Disorder – [Jane Doe #1] currently accesses the school counselor or school psychologist 2-3x per week. Although these are currently supported from a universal lens, an IEP or 504 solidifies these supports and ensures that [Jane Doe #1] continues to be able to access them as she transitions from grade to grade and elementary to middle school. Additionally, the school psychologist also checks in with the classroom teacher weekly to ensure that [Jane Doe #1] is being successful in navigating her emotions.

Gender Dysphoria – Currently this diagnosis is recognized as a disorder in the DSM-V. This does not equate to [Jane Doe #1] having a disability. However, as [Jane Doe #1] navigates the emotions and social situations, it can have an impact that may require additional services such as coping strategies, more frequent check-ins, emotional regulation strategies as such examples. This may not require specially designed instruction. It does foster conversations around how to best support her.

As outlined in the Department's regulations implementing Section 504, school districts must conduct individualized evaluations of students who, because of disability, including ADHD, need or are believed to need special education or related services, and must ensure that qualified students with disabilities receive appropriate services that are based on specific needs, not cost, and not based on stereotypes or generalized misunderstanding of a disability. These and other Section 504 obligations apply to all students with disabilities and specifically pertain to students with ADHD.

Thank you,

Christine Bowden

Again, the District received no response from Jane Doe #2 regarding additional supports for Jane Doe #1. The same day, Superintendent Koch sent Jane Doe #2 a letter to articulate the requirement that Jane Doe #1 use either a single-user, gender-neutral bathroom or the boys' restroom during summer school. [Dkt. #5-1, p. 6]. On June 19, 2023, Ms. Bowden again emailed Jane Doe #2, this time attaching a map of the high school to indicate the location of Jane Doe #1's summer school classrooms and the single-user, gender-neutral bathrooms at her disposal. [Dkt. #5-1, pp. 6-7; Dkt. #5-20, p. 2]. When Jane Doe #1 continued to use the girls' restroom despite the District's directives to the contrary, District personnel communicated this to Jane Doe #2 and reiterated the requirement that she use either a single-user, gender-neutral bathroom or the boys' restroom. [Dkt. #5-1, pp. 7-8]. Additionally, District personnel met with Jane Doe #1 to communicate the District's expectations and offer additional support. [See, e.g., Dkt. #5-23, p. 2].

On June 26, 2023, the District codified its student bathroom use policy as Policy 5514 – Student Privacy in Restrooms and Locker Rooms, pursuant to which students are directed to use the bathroom corresponding with their sex assigned at birth. [Dkt. #5-16]. Board Policy 5514 requires a team of District staff to consider exceptions or accommodations to this requirement on a case-by-case basis in consultation with the student, the student's parents, the Director of Student Services, the school psychologist, the school counselor, the classroom teacher, the building principal, and any other individuals the District deems appropriate. [*Id.*]

Plaintiffs' legal counsel sent the District a demand letter on June 27, 2023, alleging the District's treatment of Jane Doe #1 constitutes impermissible discrimination based on sex and demanding that MASD both cease its purported discrimination and rescind its Board Policy 5514. [Dkt. #5-1, p. 8; Dkt. #5-27]. Contrary to Plaintiffs' contentions, the District did not refuse the

demands articulated in the June 27 letter; in fact, the District's legal counsel indicated the direct opposite in their response letter of June 28, 2023:

We are not summarily rejecting the items in your demand letter. However, the District would like to first engage with the family and carry out the processes outlined in its policy. Following a meeting with the family, we anticipate being able to respond to the demands in more certain terms at that time.

[Dkt. #5-28, p. 5; *but see* Dkt. #5-1, p. 8].

Rather than attempt to resolve the dispute through the foregoing means, Plaintiffs filed suit against the District and Superintendent Koch on June 30, 2023, alleging discrimination based on sex in violation of Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983. In addition, Plaintiffs simultaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction, which is the subject of this brief. Based on the Plaintiffs' inability to demonstrate irreparable harm, the absence of analogous case law in support of their request, and the extraordinary nature of emergency injunctive relief (particularly when paired against the present circumstances), Defendants respectfully request that this Court deny such motion.

### **LEGAL STANDARD**

A preliminary injunction functions as an equitable, interlocutory form of relief, and for those reasons it is “an exercise of a very far-reaching power, **never to be indulged in except in a case clearly demanding it.**” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008) (emphasis added). Importantly, the showing required for obtaining a temporary restraining order and a preliminary injunction are the same. *Faust v. Vilsack*, 519 F. Supp. 3d 470, 474 (E.D. Wis. 2021).

Courts engage in two distinct analytical phases in determining whether to grant a request for preliminary injunction: a threshold phase, and a balancing phase. *Girl Scouts*, 549 F.3d at

1085-86. The moving party must demonstrate three requirements in the threshold phase: (1) without a preliminary injunction, irreparable harm is likely to occur preceding final resolution of claims; (2) traditional legal remedies are inadequate; and (3) the claim has “some likelihood of succeeding on the merits.” *Id.* Should the movant fulfill these threshold requirements, the court then conducts a balancing analysis to weigh the irreparable harm a movant would suffer without a preliminary injunction against that which the respondent would incur in the face of such order. *Girl Scouts*, 549 F.3d at 1085-86. This analysis requires a sliding-scale approach: where a plaintiff is more likely to prevail, the balance of harm need not weigh so heavily in her favor; where a plaintiff is less likely to win, the balance of harm must weigh far more heavily in her favor. *Id.* Finally, the balancing analysis invites consideration for harm nonparties may face—i.e., the “public interest.” *Id.*

Courts have interpreted this rule narrowly, especially at the preliminary stage. *See Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020). A preliminary injunction is an “extraordinary remedy” that “is never awarded as a matter of right” and “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Whitaker v. Kenosha Unified Sch. Dist. No 1 Bd. Of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). This is not a case in which such extraordinary action should be taken.

## ARGUMENT

### **I. PLAINTIFFS CANNOT DEMONSTRATE AN IMMEDIATE, IRREPARABLE LOSS WOULD OCCUR IN THE ABSENCE OF AN INJUNCTIVE ORDER.**

First, Plaintiffs cannot make the requisite showing that, absent an injunctive order, immediate and irreparable harm will occur. This is particularly true given that the District has offered—and Plaintiffs have not availed themselves of—reasonable solutions to effectively address the present situation.

Plaintiffs argue Jane Doe #1 has and will suffer irreparable harm if the District is not enjoined from implementing Board Policy 5514. [Dkt. #5, p. 3; Dkt. #5-1, pp. 10-12]. While the District disagrees Jane Doe #1 faces any irreparable harm, the District has repeatedly attempted to engage in the process set forth in the policy to ensure the absence of any such potential harm. In their plea for relief, Plaintiffs fail to acknowledge the measures the District has taken to prevent any potential harm to Jane Doe #1 and to ensure she has adequate educational, social, and emotional support. Moreover, Plaintiffs' refusal to engage with the District in the accommodation procedure articulated within Board Policy 5514—which is intended to ensure no harm to the student—negates Plaintiffs' claims of irreparable harm.

Harm is considered irreparable if it “cannot be prevented or fully rectified by the final judgment after trial.” *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1089 (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). In the case at hand, the District has attempted to remove the possibility of any alleged harm to Jane Doe #1 by implementing the process set forth in its policy and instituting a host of supportive measures. The District's Board Policy 5514 requires a team of District staff to consider exceptions or accommodations on a case-by-case basis in consultation with the student, the student's parents, the Director of Student Services, the school psychologist, the school counselor, the classroom teacher, the building principal, and any other individuals the District deems appropriate. The intent behind this policy provision is to collaborate with the student, her parents, and a team of District staff to consider potential issues that may arise with regard to a student's request for restroom accommodations, to discuss all available options to remove any such harm, and to ensure the student can access District facilities safely. During this process, the District would take into

consideration all information provided by the student and/or her parents to address any possibility of harm to her and/or other students.

The District has made numerous attempts to collaborate with the Plaintiffs regarding Jane Doe #1's request to use the girls' restroom. Additionally, the District has offered and implemented an array of supportive measures to prevent and address any alleged harm to Jane Doe #1— notwithstanding Plaintiffs' refusal to meet with the District. Currently, a team of District staff provides support and accommodations for Jane Doe #1, including access to a trusted adult at any time during the summer school day, support from a trusted adult in response to violations of Board Policy 5514, the option to use the boys' restroom or a gender-neutral restroom, and a map and a tour of the building to ensure Jane Doe #1 is familiar with the location of these restrooms. [Dkt. #5-20, p. 2; Dkt. #5-21, p. 2; Dkt. #5-23, p. 2]. The District also initiated an evaluation of Jane Doe #1 under the Individuals with Disabilities Education Act ("IDEA") to determine whether Jane Doe #1's diagnoses of ADHD or anxiety may qualify her under other health impairment(s) and consider whether she requires specially designed instruction in, for example, coping skills or other non-academic areas. Through this evaluation or an evaluation under Section 504 of the Rehabilitation Act ("Section 504"), Plaintiffs would have the opportunity to provide any information related to gender dysphoria for the team's consideration, which could include ways to support Jane Doe #1 emotionally and socially as she navigates the school environment.

Plaintiffs have not responded to the District's attempts to ensure the absence of any potential harm, they have not provided consent for a Section 504 or IDEA evaluation, and they have not met with the personnel team to devise further mitigative efforts. Despite their refusal to engage with the District to consider and discuss Jane Doe #1's request to use the girls' restroom, the District has provided a number of supportive measures as listed above, and it will continue to

provide these supportive measures and any other measures deemed appropriate during the final two weeks of summer school. Through the aforementioned efforts, the District has already removed, and will continue to address, any alleged irreparable harm to the Plaintiff pending the present litigation. In fact, after meeting with trusted personnel regarding bathroom usage on one occasion, Jane Doe #1 was able to self-regulate, demonstrating the efficacy of the support measures in place and negating the notion that irreparable harm has occurred or would in the future. Further, Plaintiffs' failure to engage in the procedure set forth in the Board Policy 5514—which was formulated for the express purpose of preventing harm to students—invalidates Plaintiffs' allegations of irreparable harm.

Ultimately, Plaintiffs cannot argue Jane Doe #1 will face irreparable harm absent a temporary restraining order and/or preliminary injunction when they have not availed themselves of methods presented for the purpose of *preventing* this purported harm. The fact that only two weeks of summer school remain further negates such allegations of irreparable harm, as does evidence from the school counselor to refute that any such harm has occurred.

## **II. FACTUAL DISSIMILARITIES AND LEGAL REALITIES DISTINGUISH THE PRESENT SITUATION *WHITAKER V. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1***

Second, Plaintiffs fail to acknowledge facts and legal realities that distinguish the present situation from that which the Seventh Circuit examined in *Whitaker v. Kenosha Unified School District No. 1*, which cuts against their ability to succeed on the merits of their claims.

Plaintiffs argue Jane Doe #1 has suffered irreparable harm and has a likelihood of success on the merits based on their assertion that the facts of this case are directly aligned with those of *Whitaker*, 858 F.3d 1034 (7th Cir. 2017). While there are factual similarities between the cases, there are also several important differences. For example, and contrary to Plaintiffs' assertions, the age difference between Jane Doe #1 and the *Whitaker* complainant is significant. [Dkt. #5-1,

p. 13]. In *Whitaker*, the student at issue was a senior in high school; here, the Court is tasked with evaluating the school bathroom policy's impact on an 11-year-old student and similarly aged classmates. *Whitaker*, 858 F.3d at 1038. At 11 years old, students are beginning to discuss and witness the impact of puberty and sexuality; many students' bodies begin to change at this age, and their understanding of the world gains nuance. Moreover, 11-year-olds are less emotionally mature than 18-year-olds. These factual dissimilarities impact the analysis. In addition, the *Whitaker* plaintiff was receiving hormone replacement therapy and was diagnosed with vasovagal syncope, which access to a singular restroom greatly exacerbated. *Whitaker*, 858 F.3d at 1041. Here, the policy at issue would take such circumstances into account; indeed, an examination of each individual student's situation is an essential component of Board Policy 5514. In addition, Jane Doe #1 has access to more than one restroom and various supplemental supports, and only two weeks of summer school remain. These facts likewise affect the legal analysis, creating greater distance between *Whitaker* and the instant dispute.

Additionally, the current legal landscape differs considerably from that of 2017 (when the Seventh Circuit decided *Whitaker*), which thereby lessens the likelihood that Plaintiffs will succeed on the merits of their claims. For example, a recent Eleventh Circuit case has created a split among the federal appellate courts, setting the stage for resolution at the Supreme Court. *See Adams v. School Board of St. Johns County*, 968 F. 3d 1286 (11th Cir. 2022).<sup>1</sup>

Further, a key component of the Eleventh Circuit's opinion lends considerable support to the District's position and weakens that of Plaintiffs. The majority opinion's analysis of the

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<sup>1</sup> Consideration of the Eleventh Circuit's decision in *Adams* is particularly relevant given the Seventh Circuit's heavy reliance on Eleventh Circuit decisions in *Whitaker*. Twice, the *Whitaker* court cited *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) in support of its sex-stereotyping theory. *Whitaker*, 858 F.3d at 1048, 1051. The court even relied upon an unpublished Eleventh Circuit decision: *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883 (11th Cir. 2016) (unpub.). *Whitaker*, 858 F.3d at 1048.

plaintiff's claims relied on statutory and regulatory carveouts, which, it said, foreclosed such claims. Specifically, the majority pointed to the following language in Title IX: “[N]othing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686. In addition, the Court referenced Title IX's implementing regulations, which allow for “separate toilet[s], locker room[s], and shower facilities on the basis of sex.” 34 C.F.R. § 106.33. While guidance from the Obama Administration required schools to allow transgender students access to facilities consistent with their gender identity notwithstanding 34 CFR § 106.33, the Trump Administration withdrew and rescinded the prior administration's guidance on this topic, and the Biden Administration has not explicitly taken the Obama Administration's stance on the bathroom issue. *See Dear Colleague Letter on Transgender Students*, U.S. Department of Justice and U.S. Department of Education (May 12, 2016) (rescinded); *see also Dear Colleague Letter*, U.S. Department of Justice and U.S. Department of Education (February 22, 2017); *see generally Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (January 20, 2021).

Therefore, the following all weaken Plaintiffs' likelihood of succeeding on the merits:

- The Trump-era Guidance and its impact on the rationales set forth in the 2015 and 2016 Obama Administration letters;
- The *Auer v. Robbins* deference due these or other non-revoked prior Departmental interpretations of Title IX;
- The interrelationship between Title IX and the Regulation regarding the meaning of “sex” when applied to transgender students and their use of common school bathrooms; and
- The current makeup of the Supreme Court.

### **III. A TEMPORARY RESTRAINING ORDER IS AN UNFIT REMEDY FOR THE CASE AT BAR.**

Finally, and contrary to their assertions, Plaintiffs do not seek a preliminary injunction in order to “preserve the status quo pending a final hearing on the merits.” *American Hospital Ass’n v. Harris*, 625 F.2d 1328, 1330 (7th Cir. 1980). Rather, Plaintiffs ask that this Court:

[R]estrain and enjoin Defendants and their employees, agents, and representatives . . . as soon as is reasonably practicable, and thereafter during the pendency of this litigation, from:

- (1) enforcing against Plaintiff any policy, practice, or custom of the District that denies Plaintiff access to girls’ restrooms at school and school-sponsored events; and
- (2) taking any formal or informal disciplinary action against Plaintiff for using girls’ restrooms at school and school-sponsored events.

[Dkt. #5, p. 2]. Affirmatively “restraining” or “enjoining” Defendants from enforcing school policies is certainly not “maintaining the status quo.” Instead, any such order would represent a departure from established District protocol through which Plaintiffs seek to *upend* the status quo. This is not the purpose of a preliminary injunction, which is an “extraordinary remedy” that “is never awarded as a matter of right.” *Whitaker*, 858 F.3d at 1044.

Further, the District has offered—and Plaintiffs have not availed themselves of—less drastic solutions to effectively address the present situation. For example, the District repeatedly offered to meet with Jane Doe #2 to discuss additional supports faculty and staff could implement in order to make Jane Doe #1 feel more comfortable. In addition, the District identified specific personnel to act as “trusted adults” for Jane Doe #1 throughout the school day; took her on a tour of the high school to ensure she knew where the single-user, gender-neutral facilities were in relation to her classrooms; and suggested further IDEA and/or Section 504 evaluations for the purpose of determining supplemental means of lending Jane Doe #1 support. Thus, less “extraordinary” remedies were available to Plaintiffs—they simply did not take advantage of the alternatives at their disposal. Accordingly, the requested relief is inappropriate in this instance.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request the Court deny Plaintiffs' request for a temporary restraining order and preliminary injunction.

Dated this 4<sup>th</sup> day of July, 2023.

Respectfully Submitted,

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District and Joseph Koch*

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

JANE DOE #1, a minor, by her mother and  
next friend, JANE DOE #2,

Plaintiff,

v.

MUKWONAGO AREA SCHOOL  
DISTRICT and JOE KOCH, in his official  
capacity as Superintendent of the Mukwonago  
Area School District,

Defendant.

Civ. Action No. 2:23-cv-876-LA

**PLAINTIFF’S REPLY BRIEF IN SUPPORT OF THEIR EMERGENCY MOTION FOR  
A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**INTRODUCTION**

Defendants’ brief in response to Plaintiffs’ motion for a Temporary Restraining Order and Preliminary Injunction [Dkt. 9] seeks to muddle and obfuscate what is, in fact, a straightforward question for the Court. Contrary to Defendants’ assertions, this case does not require the Court to weigh in on hot-button social policy questions facing school districts in the “current sociopolitical landscape.” [Dkt. 9, p.2]. Rather, granting Plaintiff’s motion requires only that the Court apply the law as it exists. Directly controlling precedent of the Seventh Circuit requires the Mukwonago Area School District and its Superintendent to permit Plaintiff Jane Doe #1 to use the girls’ restrooms at school activities. Each day that the District refuses to do so, it directly causes significant irreparable harm to Plaintiff, an eleven-year-old girl under its care. Defendants’ repeated invocation of their “process,” which they claim might, at some unspecified point in the future, provide Jane Doe #1 with “supportive measures” and “coping skills” to help

her deal with the clear discrimination she faces at their hands does not in any way absolve Defendants of their responsibility to immediately cease discriminating against her.

**I. Defendants Ignore the Significant Irreparable Harm They are Directly Causing to Plaintiff Each Day They Continue to Deny Her Right to Access the Girls' Restroom.**

This motion is about, and was brought to remedy, the significant irreparable harm that Plaintiff is actively experiencing at the hands of Defendants—harm that continues to be inflicted each and every day she attends Defendants' summer school program. As Plaintiff's Brief in Support of her Emergency Motion for a Temporary Restraining Order and Preliminary Injunction details Defendants' discriminatory refusal to permit Plaintiff to use the girls' restroom at school has caused severe emotional distress and mental health effects, including thoughts of self-harm, nightmares, embarrassment, social isolation and stigma, and lowered self-esteem, and will continue to cause these harms to escalate as long as it continues. [Dkt. 5-1 at 11-12; *see also* Decl. of Jane Doe #2 at ¶¶ 33-35]. Furthermore, as Plaintiff noted, irreparable harm is presumed when, as here, a constitutional or civil right is being violated. [Dkt. 5-1 at 11].

Defendants' brief does not seriously attempt to dispute these harms. Rather, Defendants summarily dismiss the importance of the harms that Plaintiff is *currently actively experiencing* in order to argue that (1) they are trying to help Plaintiff cope with the harms they are themselves inflicting, and (2) Plaintiff's mother is somehow at fault for not doing more to stop Defendants' own discrimination.

Defendants argue that their "efforts" have "already removed, and will continue to address, any alleged irreparable harm to the Plaintiff pending the present litigation." [Dkt. 9 at 11]. This specious assertion ignores that the irreparable harm is being caused by the very discrimination Defendants refuse to cease. To support their assertion, Defendants argue, for

example, that meeting with “trusted personnel” after an instance of Defendants’ discrimination was upheld and enforced by the same personnel allowed Plaintiff to self-regulate after she experienced thoughts of self-harm, and that this “demonstrat[es] the efficacy of the support measures in place and negat[es] the notion that irreparable harm has occurred or would in the future.” *Id.* But the evidence submitted by Plaintiff shows that, in the words of this “trusted personnel” herself, Plaintiff was able to self-regulate and reduce the thoughts of self-harm only after she asked for and received “time alone” during which she “emailed her mom and watched a video online.” [Exhibit 7 to Decl. of Alexa Milton, Dkt 5-2]. Causing an eleven-year-old child to experience thoughts of self-harm by violating her constitutional and statutory rights does not cease to be irreparable injury just because the child is eventually able, for the time being, to self-regulate afterwards. In fact, these are just the types of harms that the Seventh Circuit held in *Whitaker* to be irreparable. *Whitaker v. Kenosha Unified School District No. 1*, 858 F.3d 1034, 1045 (7th Cir. 2017). This Court is not required to wait for a child to actually harm herself in order to consider these injuries irreparable.

Likewise, Defendants’ focus on what they see as a lack of cooperation from the family of Jane Doe #1 with the undefined, yet apparently elaborate, “process” they claim to have set up is irrelevant and immaterial. Defendants claim—without citing any supporting evidence—to have “made numerous attempts to collaborate with the Plaintiffs regarding Jane Doe #1’s request to use the girls’ restroom.” [Dkt. 9 at 10]. They have not. Defendants repeatedly invoke a supposed “process” whereby they would “collaborate” with the family, “consider potential issues,” “discuss all available options,” and “institut[e]. . . supportive measures.” But unless one counts the meetings and calls at which the District and/or its School Board refused to consider any options that would allow Jane Doe #1 to use the girls restrooms, *see* Decl. of Jane Doe #2 at ¶¶

13, 29, and 31, the only attempts the District has made to engage the family in this supposed “process” have been through its entreaties to Jane Doe #2 to engage in a process to evaluate Jane Doe #1 for special education services or disability accommodations for her ADHD and anxiety diagnoses under the Individuals with Disabilities Education Act (“IDEA”) and/or Section 504 of the Rehabilitation Act (“Section 504”). Whether or not Jane Doe #1 is eventually evaluated for these services has absolutely no bearing on her constitutional and statutory right to use the girls’ restroom. And none of the District’s communications about this evaluation have made any mention of a connection between the special education evaluation and Jane Doe #1’s ability to use the girls’ restroom. *See, e.g.*, Dkt 9 at 4-5, quoting email communications from District staff to Jane Doe #2; Decl. of Jane Doe #2 at ¶ 23. That is because there is no connection. Defendants’ entire discussion of special education evaluations is a red herring, and completely irrelevant to the decision before the Court. The issue before the Court concerns bathrooms, not special education.

None of the potential outcomes of the “process” Defendants offer (and castigate Plaintiff for not engaging in) involve actually rectifying the violation of Jane Doe #1’s rights. Instead, Defendants suggest that their process will be valuable because it will “make Jane Doe #1 feel more comfortable” with their discrimination, and might result in more “supports” such as the “tour” they took her on of the male-designated and gender-neutral restrooms they sought to force her to use in violation of her rights. [Dkt 9 at 14]. That Defendants cite the very tour that led to Plaintiffs’ thoughts of self-injury and mental distress as a valuable offering—one which they claim Plaintiff should have sought more of via participation in their “process”—demonstrates the utter lack of concern for Jane Doe #1’s well-being that has made the requested relief necessary. Nor can Defendants rest on the “accommodation procedure” they claim is articulated within the

recently passed Board Policy 5514. [Dkt. 9 at 9]. The District has denied Jane Doe #1 access to the restrooms consistent with her gender identity both before and after the passage of the policy, and has made no mention of any possible accommodation that would include permitting Plaintiff to use the girls' restrooms as is her right. Decl. of Jane Doe #2 at ¶ 31. In any event, this matter is not about an accommodation for a disability; it is about the constitutional and statutory right for a transgender student with established gender dysphoria to use a restroom consistent with her gender identify.

**II. Contrary to Defendants' Assertions, Whitaker Requires That Plaintiff's Motion be Granted.**

Defendants further obfuscate by dismissing the central importance of the Seventh Circuit's controlling decision in *Whitaker v. Kenosha Unified School District No. 1*, 858 F.3d 1034 (7th Cir. 2017). As explained in Plaintiffs' opening brief, *Whitaker* is directly on point and compels the outcome here—granting the requested relief to Plaintiff. The plaintiff in *Whitaker* prevailed on his Title IX claims because “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,” *Id.* at 1049; and prevailed on his Equal Protection Claims because (1) the policy as enforced was inherently based on sex, *Id.* at 1051; and (2) the School District's privacy arguments for its policy were based on sheer conjecture and abstraction and insufficient to establish the required justification, *Id.* at 1052-53. Each of those factors is fully present here. *See* Dkt. 5-1 at 12-17; Decl. of Jane Doe #2 ¶¶ 10-12, 14 (Jane Doe #1 used girls' restroom without incident or complaint for nearly three years, and recent parent agitation regarding the issue has not included any substantiated privacy concerns).

Defendants highlight a few minor factual distinctions between the two cases, but these distinctions are immaterial to the analysis in *Whitaker* and do not affect the outcome it prescribes. There is nothing whatsoever in *Whitaker* suggesting that the Seventh Circuit's analysis turned on these supposed distinctions. They are classic distinctions without a difference.

First, *Whitaker* does not hinge in any way on the fact that the plaintiff there was a high school senior, rather than an elementary student, nor does it hinge on the emotional or physical maturity of other students at the school, or the fact that the plaintiff in *Whitaker* was receiving hormone therapy.

Likewise, Defendants argue that the plaintiff in *Whitaker* was restricted to a single restroom, while Jane Doe #1 is not—but this is both incorrect and immaterial. The plaintiff in *Whitaker* was initially instructed to use either restrooms incompatible with his gender identity or a gender-neutral option located in the administrative offices. Here, Plaintiff was given the same choice. She was told to use either the boys' restrooms or a male-designated single-user restroom in the Assistant Principal's office—both incompatible with her gender identity—or to use a single gender-neutral option located in the health offices. *See* Decl. of Jane Doe #2 at ¶ 25. Additionally, the two proffered administrative office options are located a few doors apart in the same area of the building, far from Plaintiff's classes, thus not providing any increase in convenience or ease of use. *See* Exhibit 4 to Decl. of A. Milton, Dkt 5-2. Even more significantly, Defendants are incorrect in asserting that the decision in *Whitaker* was based on the plaintiff's restriction to only a single gender-neutral bathroom. In fact, the Seventh Circuit explicitly notes that the plaintiff in *Whitaker* was eventually given the option to use two additional single-user gender-neutral restrooms, in addition to the one in the administrative office, *Whitaker*, 858 F.3d at 1041-42, and its decision finds this insufficient. Finally, Defendants

note the *Whitaker* plaintiff’s vasovagal syncope diagnosis. But the Seventh Circuit’s opinion notes this only in the factual background section, and does not mention it, let alone rely on it, anywhere in its legal analysis—and at any rate, Jane Doe #2 also has additional medical factors which are exacerbated by restricted restroom usage. *See* Decl. of Jane Doe #2 at ¶ 28.

None of the supposed distinctions Defendants highlight are relevant to the Seventh Circuit’s legal analysis, and the result of that analysis is clear—Jane Doe #1 must be permitted to use the restrooms corresponding to her gender identity at school.

**III. Whitaker is Binding Precedent, and This Court is Not Permitted to Accept Defendants’ Invitation to Ignore it.**

Defendants explicitly ask this Court to disregard *Whitaker*, evidently recognizing that it cannot be meaningfully distinguished and that it compels the relief requested. Defendants’ request is improper and unpersuasive.

*Whitaker* is controlling precedent in the Seventh Circuit and squarely on point with MASD’s treatment of Jane Doe #1. A decision of the Eleventh Circuit and who currently sits on the Supreme Court—both relied on by Defendants—does not change that, and it is black letter law that District Courts in the Seventh Circuit must follow Seventh Circuit precedent unless “reversed by it or by a superior court.” *See Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 910 (7th Cir. 1994) (quoting *Insurance Group Comm. v. Denver & R.G. W. R.R.*, 329 U.S. 607, 612 (1947)). Defendants cannot skirt fundamental principle because they think a different court might disagree with the Seventh Circuit.

Even if this Court’s duty to follow Seventh Circuit precedent were in doubt—which it is not—consideration of post-*Whitaker* Supreme Court precedent and regulatory action only buttresses the *Whitaker* decision.

In *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), the Supreme Court held that Title VII of the Civil Rights Act of 1964 protects transgender people from employment discrimination because the phrase, “because of sex,” encompasses discrimination based on gender identity and sexual orientation. In *Whitaker*, the Seventh Circuit found that Title IX’s language, “on the basis of sex,” mirrors Title VII and thus protects transgender students from sex discrimination. *Whitaker*, 858 F.3d at 1049-50. *Bostock* therefore confirms that *Whitaker* decided that issue correctly. Furthermore, subsequent Circuit Court decisions have applied *Bostock* to Title IX, paralleling *Whitaker*. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) (per curiam).

Additionally, Defendants’ citation to federal guidance on this issue is both irrelevant and misleading. First, *Whitaker* did not mention—let alone rely on—the Obama Administration guidance discussed by Defendants. And the Trump guidance Defendants cite to—which does not itself offer any interpretation of Title IX—was issued over three months before the Seventh Circuit’s decision in *Whitaker*. Moreover, both the U.S. Department of Justice and the U.S. Department of Education have recently issued documents affirming the core holding of *Whitaker*: Title IX protects transgender students from discrimination on the basis of gender identity. *Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021) (“DOJ Memorandum”); *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021) (“DOE Interpretation”). Both Departments cite *Whitaker* in support of their positions. See DOJ Memorandum at 2; DOE

Interpretation at 32639. To the extent “the current legal landscape differs considerably from that of 2017,” [Dkt. 9 at 12], that landscape only strengthens *Whitaker*’s foundation.

*Whitaker* controls, and Defendants’ attempt to seize upon one out-of-circuit decision, the current makeup of the Supreme Court, and regulatory activity, [*see* Dkt. 9 at 12], is entirely unsuccessful.

#### **IV. A Temporary Restraining Order is Necessary and Warranted in this Circumstance.**

Beyond the elements discussed above, Defendants attempt to graft on a requirement that Plaintiff’s motion must seek to “preserve the status quo.” [Dkt. 9 at 14]. Preservation of the status quo is neither a requirement nor a consideration under the Seventh Circuit’s standard for a temporary restraining order or preliminary injunction. *See Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020). If applied as Defendants suggest, plaintiffs could almost never obtain a preliminary injunction against any discriminatory policy—claims would not be ripe prior to its enactment, while post-enactment claims would “upend the status quo,” [Dkt. 9 at 14].

Nevertheless, Plaintiff’s requested relief would effectively preserve the status quo by restoring the situation as it existed for Plaintiff from third grade through fifth grade, which she completed just weeks ago. This further buttresses her claims for emergency injunctive relief. Plaintiff has used the girls’ restroom for years during her time in MASD schools, including at summer school. [Dkt. 5-32 at ¶¶ 9-10]. This status quo persisted uninterrupted and without incident until the events at issue in this lawsuit began. [*Id.* at ¶ 11]. Defendants assert that emergency relief would “upend the status quo” because Policy 5514 represents “established District protocol.” [Dkt. 9 at 14]. But Defendants did not begin to interfere with Plaintiff’s bathroom usage until the late Spring of 2023, [Dkt. 5-32 at ¶ 11], and Policy 5514 was adopted

on June 26, 2023—four days before the filing of Plaintiff’s Motion. Further, the Motion narrowly seeks only that relief which is necessary to preserve what was the status quo for Plaintiff for *years*. It does not otherwise seek to enjoin or limit the general operation of any of MASD’s policies or practices, including Policy 5514. Rather, it only seeks that relief which is necessary to preserve the longstanding situation whereby Plaintiff is permitted to use the girls’ restroom.

Defendants’ contention that “less drastic solutions,” [Dkt. 9 at 14], are adequate has no bearing on the adjudication of Plaintiff’s motion. First, the suggestion that it is “drastic” to permit Plaintiff to use the bathroom that comports with her identity—just as in *Whitaker* and as she did from third through fifth grades—is baseless.

Second, the mere possibility that Defendants may at some point in the future allow Plaintiff to return to using the girls’ restrooms through a non-legal process (*i.e.*, under Policy 5514) in no way undermines her claim for equitable relief. *Cf. Mays*, 974 F.3d at 818 (evaluating the adequacy of alternative *legal* remedies); the possibility of future relief does nothing to reduce the irreparable harm right that Plaintiff is suffering right now. For example, in *Kirsch v. Racine Cnty. Sheriff*, the court enjoined defendants from denying an inmate access to prescription pain medication. No. 08-C-913, 2008 WL 4872595 (E.D. Wis. Nov. 11, 2008) (Adelman, J.).

Defendants asserted that a preliminary injunction was not warranted because the plaintiff would receive his medication “provided he has a valid prescription and there are no medical contraindications to his taking the medication.” *Id.* at \*3. In response, the court wrote, “[D]efendants do not identify any harm that would be caused by my granting a preliminary injunction, and thus to avoid the possibility that defendants will again deny plaintiff his pain medication, I will enter a preliminary injunction[.]” *Id.* In the instant case, the assurances offered

by Defendants are even less meaningful than those provided in *Kirsch*. Defendants already possess the information they need to confirm that, under *Whitaker*, they must provide the relief requested, yet cite Policy 5514 as a basis for withholding that relief. Even disregarding the essential issue of timing, the notion that Defendants will at some point use Policy 5514 to come to Plaintiff's aid is dubious, to say the least, given what it is currently doing to her in disregard of *Whitaker*. And, as in *Kirsch*, Defendants have not pointed to any harm that will follow from allowing Plaintiff to continue to use the girls' bathroom—as she has without incident for years. Emergency injunctive relief is therefore warranted here, notwithstanding Defendants' vague invocation of non-specific and clearly inadequate alternatives.

### CONCLUSION

For the reasons detailed in Plaintiff's opening brief, Dkt. 5-1, and above, Plaintiff satisfies the requirements for a Temporary Restraining Order or Preliminary Injunction. None of the counterarguments raised by Defendants are availing. Plaintiff respectfully requests that the Court grant Plaintiff's motion and order the relief sought.

Dated: July 5, 2023

Respectfully submitted,

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*\*\* Application for admission to this Court  
forthcoming*

*\* Admission to this Court Pending*

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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**JANE DOE #1, a minor, by her mother  
and next friend, JANE DOE #2,  
Plaintiff,**

**v.**

**Case No. 23-C-0876**

**MUKWONAGO AREA SCHOOL  
DISTRICT and JOE KOCH, in his  
Official capacity as Superintendent of  
The Mukwonago Area School District,  
Defendants.**

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**TEMPORARY RESTRAINING ORDER**

Before the court is plaintiff's emergency motion for a temporary restraining order and preliminary injunction. Defendants have filed a written response to the motion, and plaintiff has filed a reply. For the reasons stated briefly below, the motion for a temporary restraining order will be granted. The court will take the motion for a preliminary injunction under advisement and issue a separate, more detailed opinion on the motion soon.

Plaintiff Jane Doe #1, by her mother and next friend Jane Doe #2,<sup>1</sup> is an eleven-year-old girl and incoming sixth grade student in the Mukwonago Area School District ("MASD"). Plaintiff was designated "male" on her birth certificate, but she has identified as female since the age of three. She has lived as a girl and participated with girls in gender-separate school activities. She has used the girls' bathroom at school since

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<sup>1</sup> Plaintiff has sought permission to litigate under a pseudonym because she is a minor. See Fed. R. Civ. P. 5.2(a). The court will grant such permission.

moving to the district and beginning third grade. She has been diagnosed with gender dysphoria.

Plaintiff is currently attending summer school at a school within the MASD. Although she has used the girls' bathroom without incident since beginning third grade, on June 16, 2023, the superintendent of the district (defendant Joe Koch) informed plaintiff's mother that she would be required to use either the boys' bathroom or a gender-neutral bathroom at the school. More recently, defendants have begun enforcing this policy against plaintiff. Defendants' refusal to permit plaintiff to continue using the girls' bathroom as she has for years has caused plaintiff to suffer severe emotional distress and mental health effects, including thoughts of self-harm, nightmares, embarrassment, social isolation and stigma, and lowered self-esteem.

Plaintiff commenced this lawsuit under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. She alleges that defendants' refusal to allow her continued access to the girls' bathroom violates these provisions of law, and that their refusal is causing irreparable mental and emotional harm and creating a risk of physical harm, including self-harm and a worsening of gastrointestinal issues. She seeks immediate relief to restore her access to the restrooms and prevent this ongoing harm during the pendency of this litigation.

District courts generally consider the same standards that apply to preliminary injunctions when determining whether a plaintiff is entitled to a temporary restraining order under Federal Rule of Civil Procedure 65. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable

harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008).

Based on *Whitaker By Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), I conclude that plaintiff is likely to succeed on the merits. There, the Seventh Circuit held that both Title IX and the Equal Protection Clause prevent discrimination against transgender individuals under circumstances identical to those present here. The court held, among other things, that 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.” *Id.* at 1049. The court further held that “[p]roviding a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates [Title IX].” *Id.* at 1050. These holdings give plaintiff a likelihood of success on her claims.

Moreover, plaintiff will suffer significant irreparable harm without a temporary restraining order. Defendants have begun enforcing the policy against plaintiff and are currently causing her to experience emotional and mental harms, as the following email from plaintiff to her mother demonstrates:

Mrs. Shultz, and the principal just brought me into the special Ed office to just give me a "Reminder" that "The school board has expectations" (☹️). And that I have to use the boys' bathroom or a gender neutral restroom 😞😞😞. I think I need to come home, and the school is going to call you as well. So Please come pick me up **BEFORE** they call please. I am trying to hold back my emotions. So please hurry! 😞😞😞😞😞😞😞

(ECF No. 5-10.) On the other side of the balance, if a restraining order is granted, defendants will not suffer significant harm. The only reason the defendants have provided for the policy is that some district parents and community members have expressed

unspecified “concerns” regarding plaintiff’s use of the girls’ bathroom. (ECF No. 9 at 3.) But plaintiff has used the girls’ bathroom at her school for years prior to the adoption of the policy, and no harm has resulted. Further, only a few days of summer school remain, and it is exceedingly unlikely that any harm could occur during this time. Finally, the Seventh Circuit in *Whitaker* rejected the idea that discrimination of the sort defendants are perpetrating can be justified based on complaints by a few parents and community members. 858 F.3d at 1052–53. The same analysis applies to the public-interest factor, which therefore weighs in favor of issuing a restraining order. *Id.* at 1054.

The court finds that plaintiff is not required to post a bond or other security because there is no danger that defendants will incur damages from the restraining order. See *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010).

For the reasons stated, **IT IS ORDERED** that plaintiff’s motion for a temporary restraining order is **GRANTED**. The Mukwonago Area School District, Superintendent Joe Koch, and all officers, employees, and agents of defendants, are hereby restrained from: (1) enforcing against plaintiff any policy, practice, or custom that denies plaintiff access to girls’ restrooms at school and school-sponsored events; and (2) taking any formal or informal disciplinary action against plaintiff for using girls’ restrooms at school and school-sponsored events.

Dated at Milwaukee, Wisconsin, this 6th day of July, 2023, at 10:30 a.m.

/s/Lynn Adelman  
LYNN ADELMAN  
United States District Judge