

Case No. 23-2568

**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 Mukwonago Area School District,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin
Case No. 2:23-CV-876
The Honorable Judge Lynn Adelman

**REPLY BRIEF OF DEFENDANTS-APPELLANTS,
MUKWONAGO AREA SCHOOL DISTRICT AND JOSEPH KOCH**

Joel S. Aziere (*counsel of record*)
Corinne T. Duffy
**Buelow Vetter Buikema
Olson & Vliet, LLC**
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Phone: (262) 364-0300
Facsimile: (262) 364-0320

*Attorneys for Defendants-
Appellants, Mukwonago Area
School District and Joseph Koch*

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PREFACE

The irony of Plaintiff-Appellee's brief is palpable. Plaintiff-Appellee begins with a "Factual Background" section asserting "facts" considered by the lower court in ordering the preliminary injunction. [App. Dkt. #17, pp. 15-22]. However, in failing to conduct a hearing prior to granting the preliminary injunction, the lower court heard no testimony, made no credibility determinations, and allowed no opportunity for cross-examination. Accordingly, the lower court has no "facts" against which to apply the law and thereby assess the likelihood of success to grant the preliminary injunction in the first place. Plaintiff-Appellee attempts to bury this simple truth.

Next, Plaintiff-Appellee asserts, "Appellants' brief contains a host of contentions and factual allegations that are not contained in the evidentiary record at the District Court" and thus should be discounted. [App. Dkt. #17, p. 54]. Plaintiff-Appellee seems to miss the point. Appellants were never given the opportunity to present highly relevant facts to the District Court because the District Court issued the preliminary injunction without conducting an evidentiary hearing. Furthermore, as stated above, the District Court had before it no "evidence" to consider.

Finally, it bears noting, Plaintiff-Appellee proffers nothing to challenge Defendants-Appellants' assertions regarding how and why this Honorable Court erred in *Whitaker v. Kenosha Unified School District* and *A.C. v. Metropolitan School District of Martinsville*. Plaintiff-Appellee fails to explain why it is proper to rely solely on Title VII case law when deciding a Title IX case (and no such justification exists). Plaintiff-Appellee fails to challenge the clear distinction between "gender" and "sex" identified in the District's initial brief. Plaintiff-Appellee fails to rebut the District's clear demonstration Title IX specifically utilized "sex" to refer to biological sex. Instead, Plaintiff-Appellee simply doubles down on this Honorable Court's prior rulings, and she urges the Court to ignore the indisputable challenges to said rulings identified in Appellants'

initial brief and apply those rulings to the case at hand—a case in which absolutely no facts were ever presented to the lower court. That would certainly be the easy route for this Honorable Court; however, it would not be the right route for this Honorable Court to take. As the Supreme Court has noted, “Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). *Stare decisis* “is not ‘an imprisonment of reason.’” *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (quoting *United States v. International Boxing Club of N. Y., Inc.*, 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting)). Blindly following the decisions of *Whitaker* and *Martinsville* would be an exercise of power over reason. In rejecting such an exercise, Justice Scalia succinctly stated, “What would enshrine power [over reason] as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted a [majority of the Court].” *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring). This Honorable Court can do better.

INTRODUCTION

As the Supreme Court has repeatedly confirmed, constitutional rights “are different in public schools than elsewhere [given] the schools’ custodial and tutelary responsibility for children.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). Educational institutions stand *in loco parentis* for minor students, which accordingly permits—and requires of—them “a degree of supervision and control that could not be exercised over free adults” because “the State is responsible for maintaining discipline, health, and safety” in the public-school environment. *Vernonia*, 515 U.S. at 655; *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 830 (2002). Given this unique and significant responsibility, the Supreme Court has afforded greater deference

to public schools when analyzing certain constitutional issues than it permits public entities in other contexts. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 403-08 (2007) (regarding the First Amendment); *Vernonia*, 515 U.S. at 665 (regarding the Fourth Amendment); *Ingraham v. Wright*, 430 U.S. 651, 671 (1977) (regarding the Eighth Amendment). Similarly, the Supreme Court has long differentiated between children and adults and schools and workplaces when assessing claims arising under federal anti-discrimination laws. *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (“Courts, moreover, must bear in mind that schools are unlike the adult workplace.”).

To this end, sex-segregated bathrooms have been widely recognized throughout American history and jurisprudence as a means of furthering the important governmental objective of protecting students’ privacy interests in using the bathroom separately from the opposite sex. *See, e.g., United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (acknowledging that admitting women to the Virginia Military Institute for the first time “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”). Likewise, this Honorable Court and several of its sister circuits have recognized the privacy interests served by sex-segregated living and bathroom facilities. For example, in *Chaney v. Plainfield Healthcare Center*, the Seventh Circuit highlighted the fact that “the law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs.” 612 F.3d 908, 913 (7th Cir. 2010). *See also Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (“[Society has given its] undisputed approval of separate public rest rooms for men and women based on privacy concerns.”). And, contrary to Plaintiff-Appellee’s contentions and those of this Court in *A.C. v. Metropolitan School District of Martinsville*, these sex-specific privacy interests hinge on using the bathroom separately from and shielding one’s body from the opposite

sex, rather than on using the bathroom in the privacy of one's own stall. [App. Dkt. #17, pp. 29, 32, 35-36]. *Martinsville*, 74 F.4th 760, 768 (7th Cir. 2023). Were it the latter, then only single-stall, sex-neutral bathrooms would suffice to ensure individual privacy. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 806 (11th Cir. 2022). Instead, however, students' sex-specific privacy interests are implicated as soon as the restroom doorways swing open; such interests are not confined to individual bathroom stalls. Further, the law is not predicated on substantiated complaints "from students or their parents when it comes to the validity of sex-separated bathrooms," nor on evidence that transgender students are "less discreet than other students while using the bathroom." *Adams*, 57 F.4th at 806; *Martinsville*, 75 F.4th at 768. [App. Dkt. #17, pp. 38, 41]. In other words, students' fundamental interest in privacy and school districts' utmost obligation to ensure students' wellbeing are sufficient to warrant the segregation of bathrooms based on sex.

Therefore, students' underlying privacy interests and the District's aforementioned obligation to provide a safe educational environment justify Board Policy 5514. Moreover, neither the Equal Protection Clause nor Title IX prevents the District from lawfully implementing such policy; to the contrary, Title IX includes an explicit exception to its prohibition on sex-based discrimination for the provision and maintenance of sex-segregated bathrooms. *See* 20 U.S.C. § 1686; 34 C.F.R. § 106.33.

Based on the foregoing, the lower court erred in granting Plaintiff-Appellee's requested injunctive relief for procedural as well as substantive reasons elucidated more fully in the District's principal appellate brief. As indicated, below, many counterpoints Plaintiff-Appellee raised in her response brief are insufficient to justify, clarify, and/or correct District Court's clear error, or to otherwise rebut the District's central arguments for reversal.

ARGUMENT

I. THE DISTRICT COURT’S DECISION MUST BE REVERSED GIVEN PROCEDURAL ERRORS BELOW.

As indicated in the District’s prior brief, the lower court shirked its obligation to hear testimony on the purported irreparable harm and implicated public interest before taking “the extraordinary step of awarding injunctive relief.” *Wheeler v. Talbot*, 770 F.3d 550, 554 (7th Cir. 2014). [Dkt. ##15, 16]. Contrary to Plaintiff-Appellee’s contentions, the court abused its discretion by equating the present situation in all material respects to the facts of *Whitaker* notwithstanding the undeveloped evidentiary record. [App. Dkt. #19, pp. 27-33, 58-59]. Moreover, the onus was on the lower court as factfinder to take evidence on such issues, rather than on the District to explicitly request that it have an opportunity to present its case—particularly given Doe’s failure to comply with federal procedural requirements and the July 4 context in which this case was filed. [*Contra* App. Dkt. #19, pp. 55-59].

A. Fed. R. Civ. P. 4 and 65(a) Preclude the Issuance of a Preliminary Injunction Without Advance Notice to and Service on the Non-Movant.

The lower court has a responsibility to ensure procedural requirements have been met before granting extraordinary relief. In rare circumstances, Fed. R. Civ. P. 65(a) enables a plaintiff to obtain a temporary restraining order (“TRO”) *ex parte*; however, in no circumstances is a preliminary injunction appropriate without notice to the adverse party. *See Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984); *Wheeler*, 770 F.3d at 552. Moreover, a plaintiff’s failure to effectuate proper service on a defendant bars the issuance of a preliminary injunction. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). Nonetheless, the Eastern District granted Plaintiff-Appellee’s requested preliminary injunction without receiving proof of notice and service and without taking evidence on the issues raised. Thus, the supposed “findings of fact” upon which the District Court based its Order are clearly erroneous

given the lack of testimony, credibility determinations, and opportunity for cross-examination, and the lower court abused its discretion by equating the disputed facts to those of Seventh Circuit precedent notwithstanding the foregoing.

Contrary to Plaintiff-Appellee's characterizations, Rule 65(a)(1) expressly bars the court from issuing a preliminary injunction when the opposing party has not been notified and given an opportunity to respond. [App. Dkt. #17, pp. 55-59]. See *Wheeler v. Talbot*, 770 F.3d 550, 552 (7th Cir. 2014). "Rule 65 contemplates that the issuance of a preliminary injunction shall be upon notice to the adverse party and after a hearing. [This is because a] hearing embodies the right to be heard on the controverted facts, as well as upon the law." *Wheeler v. Talbot*, 770 F.3d at 555 n.11 (quoting *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 573 (6th Cir. 1978)). Further, and contrary to Plaintiff-Appellee's insinuations, the notice requirement is more than a mere procedural formality, reflecting "the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc. v. Bhd. Of Teamsters*, 415 U.S. 423, 439 (1974). [App. Dkt. #17, pp. 55-56].

In this case, the lower court could not have found Defendants-Appellants were given notice of Doe's motions because such documents *do not contain a proper certificate of service*; therefore, because the District Court could not have determined the District received proper notice of Doe's motions for injunctive relief, it should have denied them pursuant to Rule 65(a)(1). It matters little that Doe's counsel sent the District a courtesy copy via email, or that the District quickly submitted a brief in response; the inquiry instead hinges on *whether Doe's motions contained a certificate of service sufficient to enable the court to conclude that notice had been accomplished* pursuant to R. 65(a)(1). Plaintiff-Appellee's initial pleadings and motions did not contain any such assurance.

[See Dkt. ##1, 1-1, 1-2, 1-3, 5, 5-1, 5-2]. Thus, the lower court should not have granted her requested relief.

Further, as Defendants-Appellants emphasized and Plaintiff-Appellee acknowledged, the District had not even been formally served with a copy of the Summons and Complaint pursuant to Fed. R. Civ. P. 4 when the court issued its preliminary injunction. [Dkt. ##15, 16, 19; App. Dkt. #17, p.56]. See *Wheeler*, 770 F.3d at 552 (“[A] court may not issue a preliminary injunction without advance notice to the adverse party, Fed. R. Civ. P. 65(a)(1), and [defendant] had not yet been served when the district court acted on [plaintiff’s] motion.”). Service of process represents a fundamental value within the judicial system: it is “designed to ensure defendants receive notice in accordance with concepts of due process.” *United States v. Jiles*, 102 F.3d 278, 282 (7th Cir. 1996).

Here, Doe filed suit and submitted her Motion for TRO and Preliminary Injunction on June 30, 2023; the District Court entered its Order granting Doe’s requested preliminary injunction on July 11, 2023; and Defendants-Appellants were finally served on July 17, 2023. [Dkt. ##1, 5, 15, 16, 19]. Accordingly, the District Court was not able to act on the motion or exercise jurisdiction over the District until July 17th, and merely demonstrating the District knew about the lawsuit before such date is legally insufficient. [*Contra* App. Dkt. #19, p. 56]. See *McMasters v. United States*, 260 F.3d 814, 817 (7th Cir. 2001) (“Actual notice to the defendant is insufficient; the plaintiff must comply with the directives of Rule 4.”); *United States v. Ligas*, 549 F.3d 497, 500 (7th Cir. 2008) (“[Courts] may not exercise personal jurisdiction over a defendant unless the defendant has been properly served with process[.]”).

Therefore, the lower court committed clear procedural errors by exercising personal jurisdiction over and entering a preliminary injunction against the District before receiving proof of notice and service.

B. Appellants Acted Expeditiously to Present Their Case Notwithstanding the Unique Circumstances.

Despite Plaintiff-Appellee's failure to properly notify and serve them, Defendants-Appellants acted swiftly in coordinating a response to Doe's Motion for TRO and Preliminary Injunction.

It bears repeating that Plaintiff-Appellee initiated this action on a Friday afternoon preceding Fourth of July weekend. [Dkt. #1]. Shortly after filing suit on Friday, June 30, 2023, Doe's counsel forwarded a copy of the Complaint and Emergency Motion for TRO and Preliminary Injunction to the District's counsel at 4:54 p.m. [See Dkt. ##5, 5-1]. Recognizing the District Court might grant Doe's requested TRO *ex parte*—notwithstanding Plaintiff-Appellee's failure to fulfill the procedural prerequisites mandated by Fed. R. Civ. P. 65(b)(1)—the District scrambled to draft and submit a response before the Eastern District resumed regular business hours Wednesday, July 5th, having been closed July 3rd and 4th in observance of the federal holiday. [Dkt. #9].

Because of this timeline, the District's response to Doe's initial motions was abbreviated in nature; the District submitted only 15 pages and attached no exhibits given its inability to coordinate witness affidavits and/or compile supporting documentation over the holiday weekend, and given its expectation the court would later conduct a hearing on Doe's Motion for Preliminary Injunction. [*Id.*]. After submitting its brief, the District's counsel then quickly began to prepare its witness list, draft witness questions, and compile exhibits for the preliminary injunction hearing they believed would be forthcoming. See Fed. R. Civ. P. 65(b)(3) ("If the order is issued without

notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time”). Plaintiff-Appellee submitted a reply brief in support of her motions on July 5th, and the District Court issued the requested TRO on July 6th. [Dkt. ##13, 14]. Then—much to the District’s surprise—the court also granted the preliminary injunction, despite having neither (1) conducted a hearing; nor (2) received documentation suggesting the District was properly notified pursuant to Fed. R. Civ. P. 65(a) and properly served pursuant to Fed. R. Civ. P. 4. [Dkt. ##15, 16].

Again, “a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Goodman v. Ill. Dep’t of Fin. & Prof’l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005) (internal citation omitted). Here, there were no established “facts” against which the District Court could apply the law and thereby assess the likelihood of success, which is the threshold consideration in any motion for preliminary injunction. [App. Dkt. #1, pp. 3-5]. See *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d at 1213. Although Defendants-Appellants acted expeditiously to present their case despite having not even been served, they were unable to formally proffer evidence and thereby call Plaintiff-Appellee’s factual assertions into question given the lower court’s failure to conduct a hearing. [Dkt. #9].

C. Appellants Raised Material Factual Disputes in Their Expeditious Response, Which Were Sufficient to Prompt Further Fact-finding and Credibility Determinations Before the Grant of Extraordinary Injunctive Relief.

Plaintiff-Appellee also argues the District should have explicitly requested a hearing on the preliminary injunction—before or after its issuance—instead of appealing directly to the Seventh Circuit. [App. Dkt. #17, pp. 57-59]. Not only is the grant of a preliminary injunction appealable as of right, however, but factual discrepancies between the parties’ briefings also should

have alerted the lower court to the need for further fact-finding. *See* 28 U.S.C. § 1292(a)(1). [*See, e.g.,* Dkt. ##1, 5-1, 9, 13; *contra* App. Dkt. #19, pp. 58-59]. Despite factual disputes the District highlighted in its brief opposing Doe’s requested relief, the court did not deem it appropriate to hold a hearing before granting Plaintiff-Appellee’s requested injunction.

For example, one of the Policy 5514 accommodations the District offered Jane Doe #1 was the use of its single-user, gender-neutral facilities. In Plaintiff-Appellee’s Complaint and memorandum in support of her dual motion, she inaccurately states, “MASD staff have directed Jane Doe #1 to use only the men’s single-occupancy restroom, which is otherwise used only by adult male administrators.” [Dkt. #1, p. 10; Dkt. #5-1, p. 7]. The District refuted this demonstrably false assertion in its response to Plaintiff-Appellee’s Motion for TRO and Preliminary Injunction. [Dkt. #9, pp. 6, 10, 14]. Similarly, the District made factual assertions regarding supports offered Jane Doe #1; the District’s repeated attempts to collaborate with Jane Doe #2 regarding Policy 5514; measures built into Policy 5514 to prevent harm to students; and Jane Doe #1’s adjustment to the implementation of Policy 5514—all of which contravened Plaintiff-Appellee’s mischaracterizations of same. [*Compare* Dkt. #9, pp. 2, 10, 11, *with* Dkt. #5-1, pp. 8, 11].¹ Perhaps most significantly, the District contradicted Plaintiff-Appellee’s contentions that “[n]o teacher,

¹ Interestingly, Plaintiff-Appellee alleges the District retaliated against Jane Doe #2 for her opposition to the District’s stance on Jane Doe #1’s bathroom usage by referring Jane Doe #1 for a 504 evaluation. [App. Dkt. #19, pp. 21-22]. In addition, Plaintiff-Appellee claims the District attempted to use such referral “to circumvent Appellee’s civil rights” under Title IX and the Equal Protection Clause. [App. Dkt. #19, pp. 48-50]. These assertions are entirely—and knowingly—inaccurate. As Doe points out, federal law mandates that schools provide necessary supports to students with disabilities through individualized education programs (“IEPs”) and Section 504 plans, and schools have an affirmative duty to locate and evaluate students who may need such supports. [App. Dkt. #19, p. 48]. Here, the increased attention to Jane Doe #1’s circumstances—and the District’s knowledge of her ADHD and gender dysphoria diagnoses—during the spring of 2023 triggered the District’s child find obligations under federal law, which in turn prompted its 504 referral. The District thus made its referral pursuant to its legal obligations and as a means of highlighting additional supports that may be available to Jane Doe #1 notwithstanding the legally permissible nature of Policy 5514. Moreover, not only are Plaintiff-Appellee’s claims offensive and disingenuous for the above reasons, but they are also particularly dumbfounding given that Jane Doe #2 has consented to a 504 evaluation for Jane Doe #1, which is scheduled to occur later this week.

administrator, or other MASD staff member has ever reported any complaints from students about Jane Doe #1's bathroom use at school" and that "MASD has never asserted that treating Plaintiff as a girl would 'harm' the school district or any of its students." [*Compare* Dkt. #1, p. 7, and Dkt. #5-1, pp. 17-18, with Dkt. #9, pp. 3, 11].

The aforementioned (non-exhaustive) list of factual discrepancies significantly affects the preliminary injunction analysis. However, the District Court neglected to conduct a hearing to address them, instead concluding "this case is not factually distinguishable from *Whitaker*"; Plaintiff-Appellee was likely to achieve success on the merits; Doe would suffer irreparable harm in the absence of an injunction; neither the school district nor the public would be harmed by Doe's continued use of the girls' bathroom; and the evidence consequently weighed in favor of granting an injunction. [Dkt. #15, pp. 13-18]. When, as in this case, "the district court merely adopts verbatim the findings and conclusions of the prevailing party 'they may therefore be more critically examined.'" *See Machlett Labs., Inc. v. Techny Indus., Inc.*, 665 F.2d 795, 797 (7th Cir. 1981) (internal citation omitted). Even a cursory examination of the District Court's legal conclusions reveals their inadequacy: here, the lower court derived its legal conclusions from thin air—or, at best, from air thinly coated with conclusory allegations Plaintiff-Appellee proffered in her Complaint and initial motions.

As such, the District Court effectively granted an *ex parte* preliminary injunction, which the Federal Rules of Civil Procedure explicitly proscribe. Fed. R. Civ. P. 65(a)(1). *See, e.g., Consolidation Coal Co. v. Disabled Miners of S.W. Va.*, 442 F.2d 1261, 1269 (4th Cir. 1971) ("As we view the record, we can only conclude that for practical purposes plaintiffs obtained an *ex parte* preliminary injunction in a case in which there were sharply disputed questions of fact and of law. This was manifestly error, because Rule 65(a)(1) is explicit that no preliminary injunction shall be

issued without notice to the adverse party.”); *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 130-31 (5th Cir. 1990) (“[t]he courts consistently have treated rule 65(a)(1) as mandatory and have not hesitated to dissolve preliminary injunctions issued without notice or the opportunity for a hearing on disputed questions of fact and law.”). Ultimately, the District Court premised its decision on legal conclusions drawn from an undeveloped factual record and despite Plaintiff-Appellee’s failure to fulfill fundamental procedural requirements.² Accordingly, the lower court abused its discretion, and this Court must therefore reverse.

II. THE DISTRICT COURT’S DECISION MUST BE REVERSED GIVEN SUBSTANTIVE ERRORS BELOW.

In addition to the procedural errors outlined in Section I, *supra*, the lower court erred by relying on *Whitaker*, which—as the District noted at length in its principal appellate brief—was wrongly decided. Accordingly, and for the reasons reiterated briefly, below, this Court must reverse.

A. Policy 5514 Passes Constitutional Muster.

Despite Doe’s assertions to the contrary, the District’s restroom policy does not violate the Equal Protection Clause.

The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike,” which Policy 5514 clearly accomplishes. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To pass constitutional muster, a policy that differentiates by sex must serve important governmental objectives and do so through means that are substantially related to the achievement of such objectives. *See Virginia*, 518 at 533; *Miss. Univ.*

² Plaintiff-Appellee appears to concede the importance of facts the District included in its principal appellate brief, which she argues this Court should ignore because they do not appear in the record below. [App. Dkt. #17, pp. 54-55]. But this is precisely the point: if the lower court had conducted a hearing prior to issuing the injunctive relief, the District would have had an opportunity to extrapolate on and provide evidence to support claims made in its brief, which, in turn, would have influenced the preliminary injunction analysis.

for Women v. Hogan, 458 U.S. 718, 724 (1982). Importantly, however, the Equal Protection Clause does not demand a perfect fit between means and ends when it comes to sex. *See Nguyen v. INS*, 533 U.S. 53, 70 (2001).

In this case, Policy 5514 does not unlawfully discriminate based on sex or transgender status. Although the policy differentiates based on sex and is therefore subject to intermediate scrutiny, it clears both constitutional hurdles by: (1) advancing an important governmental objective (i.e., student health, safety, and privacy); and (2) being substantially related to that objective (i.e., protecting students' privacy interests in using the bathroom away from, and shielding their bodies from the opposite sex to ensure student health, safety, and privacy). *See Miss. Univ. for Women*, 458 U.S. at 724. Here, the District's articulated goal is ensuring student safety and security in the school environment and protecting students' right to privacy within the use of District facilities. [Dkt. #5-6]. Certainly, these objectives are important.³

In addition, the policy's ends are well-tailored to its means; Policy 5514 "has a close and substantial bearing on" the governmental objective in question. *Nguyen*, 533 U.S. at 70. Specifically, Policy 5514 states, "except as otherwise required by law, students shall use restroom and locker room facilities on District policy and at District-sponsored events according to each student's original sex assigned at birth." [Dkt. #5-6]. The policy goes on to explain that students and/or parents may request an exception or accommodation to the policy, which the District would assess on a case-by-case basis in consultation with the student, his/her parents, the Director of Students Services, the school psychologist, the school counselor, the classroom teacher, the

³ Courts—including the Seventh Circuit—have recognized a privacy interest in shielding one's body from the opposite sex in various legal contexts. *See, e.g., Harris v. Miller*, 818 F.3d 49, 59 (2d Cir. 2016); *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494-95 (6th Cir. 2008); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994); *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981).

building principal, and any other individuals deemed appropriate. [*Id.*] Moreover, the policy provides that “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.” [*Id.*] As such, the policy’s mandate mirrors its purpose, and it is especially well-tailored given the accommodations it anticipates and authorizes.

Moreover, male and female students are treated equally under Policy 5514, and the policy classifies individuals based on biological sex rather than transgender status or gender identity. Contrary to Doe’s assertions, discrimination based on biological sex does not necessarily entail discrimination based on transgender status; a policy can lawfully differentiate by sex without unlawfully discriminating based on transgender status. *See Nguyen*, 533 U.S. at 60; *Adams*, 57 F.4th at 809. In other words, because Policy 5514 divides students into two groups, and because both groups contain transgender students, there is a “lack of identity” between the policy and transgender status. *See Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974). Nor does Policy 5514 have an unlawfully disparate impact on transgender students, as it was not motivated by “purposeful discrimination”—i.e., it was not implemented to intentionally harm any group. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). Therefore, Policy 5514 is constitutionally compliant, and the District Court erred in finding Doe likely to succeed on the merits of her Equal Protection claim.

B. Policy 5514 Complies with Title IX.

Finally, separating school bathrooms based on biological sex comports with the language of and purpose behind Title IX.

A school violates Title IX by discriminating against a student based—at least in part—on such student’s sex. However, Title IX contains an explicit exception to this rule; per 20 U.S.C. §

1686, educational institutions may “maintain[] separate living facilities for the different sexes.” Title IX’s implementing regulations confirm and expand on this exception, stating that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex,” provided such facilities are comparable regardless thereof. 34 C.F.R. § 106.33. Thus, Title IX allows educational institutions to provide separate restroom facilities based on sex notwithstanding its prohibition of sex-based exclusion from participation in educational programming and/or activities. *See* 20 U.S.C. § 1681(a). Accordingly, although an educational institution would violate Title IX by, for instance, preventing a transgender female student from being a part of the girls’ math club (as such action would implicate and discriminate against the transgender student based on her biological sex), Title IX and its implementing regulations expressly allow for sex-based distinctions within restroom facilities.⁴ Thus, even if “sex” as used within the statute implicated gender identity (which it does not), Title IX would allow school districts to discriminate on the basis thereof for the provision of separate toilet, locker room, and shower facilities given the exception in 20 U.S.C. § 1686 and 34 C.F.R. § 106.33.

Further, this exception to Title IX’s prohibition of sex-based differentiation would be nonsensical if “sex” meant anything other than biological sex. In other words, there would be no reason for allowing schools to separate bathrooms based on sex absent the physiological and anatomical differences between biological male students and biological female students. If “sex”

⁴ This is the reasoning the Supreme Court advanced in *Bostock v. Clayton County*, which held that sex-based discrimination under Title VII includes discrimination based on sexuality and transgender status. 140 S. Ct. 1731, 1737 (2020). Importantly, however, and as discussed further, below, the Supreme Court proceeded on the assumption that “sex” referred “only to biological distinctions between male and female” and explicitly acknowledged that “homosexuality and transgender status are distinct concepts from sex.” *Bostock*, 140 S. Ct. at 1739, 1746-1747. Moreover, the *Bostock* Court expressly declined “to address bathrooms, locker rooms, or anything else of that kind” and did not discuss the impact of its holding on Title IX. *Id.* at 1753.

denoted a fluid, subjective state of mind, the statutory provision concerning “sex-segregated facilities” serves no purpose.

Contrary to the foregoing, and as Plaintiff-Appellee is quick to point out, this Court in *Whitaker* and *Martinsville* noted neither Title IX nor its implementing regulations define “sex,” and, on that basis, rejected the notion “sex” serves to differentiate male from female according to 20 U.S.C. § 1686 and 34 C.F.R. § 106.33. For example, the Seventh Circuit in *Martinsville* stated the following (which Plaintiff-Appellee also cited in support of her argument):

We concluded [in *Whitaker*] that bathroom-access policies that engaged in sex-stereotyping could violate Title IX, notwithstanding 34 C.F.R. § 106.33. Similarly, section 1686 is of little relevance to this appeal. Though it certainly permits maintenance of sex-segregated facilities, we stress again that neither the plaintiff in *Whitaker* nor the plaintiffs in these cases have any quarrel with that rule. The question is different: who counts as a “boy” for the boys’ restrooms, and who counts as a “girl” for the girls’ rooms—essentially, how do we sort by gender? The statute says nothing on this topic, and so nothing we say here risks rendering section 1686 a nullity.

75 F.4th at 770. [App. Dkt. #19, p. 30]. However, this statement misconstrues the issue: if “sex” truly evades definition under the statute, and therefore includes gender-based discrimination, then how can a school establish sex-segregated facilities under 34 C.F.R. § 106.33? Congress intentionally chose the term “sex”—rather than “gender”—throughout Title IX; if the term “sex” serves to differentiate males from females when used in 20 U.S.C. § 1686 and 34 C.F.R. § 106.33, then it must carry the same meaning throughout the whole of Title IX. See, e.g., *United States v. Sparkman*, 973 F.3d 771, 775 (7th Cir. 2020) (“[I]dential words used in different parts of the same statute are generally presumed to have the same meaning.”) (internal citation omitted).

Moreover, other provisions of Title IX and its implementing regulations offer guidance on the meaning of “sex,” contrary to this Court’s assertions in *Martinsville* (and Plaintiff-Appellee’s

contentions in her appellate response brief). 75 F.4th at 770. [App. Dkt. #19, p. 40]. For example, s. 106.41, Athletics, provides as follows:

(b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor *separate teams for members of each sex* where selection for such teams is based upon competitive skill or the activity involved is a *contact sport*. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, *contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact*.

34 CFR § 106.41(b) (emphasis added). Why reference “bodily contact” to clarify which sports should be segregated by sex in s. 106.41(b) if “sex” does not mean “biological sex” under Title IX? In other words, if “sex” is not based on physical and anatomical differences between two distinct biological categories of individuals, the exception contained within s. 106.41(b) would be meaningless. However, in drafting Title IX and its implementing regulations, Congress recognized there were two sexes, wholly distinguished by physical and anatomical differences, which required certain separate treatment. How one dresses, behaves, and identifies—though this may suggest or otherwise impinge on gender identity—does nothing to alter that analysis concerning “sex,” for if it did, this language would be rendered a nullity.

Further, when addressing the same issue—i.e., the denotation of the word “sex,” standing alone—the Supreme Court in *Bostock v. Clayton County* “proceed[ed] on the assumption” the term “sex,” as used in Title VII, “refer[ed] only to biological distinctions between male and female.” 140 S. Ct. 1731, 1739 (2020). However, the Supreme Court found that sex-based discrimination included discrimination based on sexuality and gender identity because, by firing a man for his sexual interest in men while not firing a woman for her sexual interest in men, an employer is impermissibly treating the employees differently based on sex. *Bostock*, 140 S. Ct. at 1741-42. In

other words, it is not that the term “sex” incorporates and/or is affected by sexuality or gender identity; rather, it is that sexuality- and gender-based discrimination requires sex-based distinction, which is unlawful under Title VII. As the Eleventh Circuit stated, “there simply is no alternative definition of ‘sex’ for transgender persons as compared to nontransgender persons under Title IX.” *Adams*, 57 F.4th at 813-814.

By importing a Title VII framework into the Title IX analysis, the Seventh Circuit in *Whitaker* and *Martinsville* has overlooked the reality that “Title VII . . . is a vastly different statute from Title IX.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Whereas Title VII stands for the proposition that sex is “not relevant to the selection, evaluation, or compensation of employees,” Title IX conversely requires universities to “consider sex in allocating athletic scholarships, 34 C.F.R. 106.37(c), and . . . take it into account in ‘maintaining separate living facilities for the different sexes [under 20 U.S.C. 1686].” *Bostock*., 140 S. Ct. at 1741 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). The Supreme Court highlighted this reality by explicitly declining to extend its ruling as it pertained to workplace sex discrimination (prohibited under Title VII) to issues pertaining sex-segregated restrooms and locker rooms (permitted by Title IX) in *Bostock*, 140 S. Ct. at 1753. Indeed, the Court even declined to address the impact of its holding for bathrooms and locker rooms in the workplace. *Id.* (“Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.”).

Ultimately, sex-segregated bathrooms operate outside Title IX’s fundamental proscription of sex-based classifications. Whereas a school district may arguably violate Title IX by precluding a transgender female student from joining the girls’ math club, as such conduct would inherently discriminate against her on the basis of her biological sex pursuant to *Bostock*’s reasoning,

Congress created an express carveout for the provision and maintenance of restroom and living facilities. As such, sex-based classifications in this context are not only allowed, but also anticipated.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request the Seventh Circuit reverse the decision of the District Court and deny Plaintiff-Appellee's request for a preliminary injunction.

Dated at Waukesha this 9th day of November, 2023.

Respectfully submitted,

/s/ Joel S. Aziere

Joel S. Aziere (WI Bar No.: 1030823)

jaziere@buelowvetter.com

Corinne T. Duffy (WI Bar No.: 1115664)

cduffy@buelowvetter.com

Buelow Vetter Buikema Olson & Vliet, LLC

20855 Watertown Road, Suite 200

Waukesha, Wisconsin 53186

Phone: (262) 364-0300

Facsimile: (262) 364-0320

*Attorneys for Defendants-Appellants, Mukwonago
Area School District and Joseph Koch*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to Fed. R. App. P. 32 and Circuit Rule 32 for the following reasons:

1. This brief complies with the type-volume limitations set forth in Circuit Rule 32(c) because it contains 6,043 words, calculated using the “Word Count” feature of Microsoft Word.

2. This brief complies with the typeface and type style requirements set forth in Circuit Rule 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Times New Roman.

Dated at Waukesha this 9th day of November, 2023.

BY: /s/ Joel S. Aziere
Joel S. Aziere (WI Bar No.: 1030823)

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished thereby.

Pursuant to Circuit Rule 31(b), I certify that I will transmit fifteen (15) copies of this Reply Brief of Defendants-Appellants to the Court within seven (7) days of receiving notice that this Court has accepted the electronic brief for filing.

Dated at Waukesha this 9th day of November, 2023.

BY: /s/ Joel S. Aziere
Joel S. Aziere (WI Bar No.: 1030823)