APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-1786

A.C., a minor child by his next friend, mother and legal guardian, M.C.,

Plaintiff-Appellee,

v.

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE and FRED KUTRUFF, in his official capacity as Principal of John R. Wooden Middle School,

Defendants-Appellants.

Argued: Feb. 15, 2023
Decided: Aug. 1, 2023

Before Easterbrook, Wood, and Lee, *Circuit Judges*.

OPINION

Wood, *Circuit Judge*. A.C., B.E., and S.E. are three boys with a simple request: they want to use the boys' bathrooms at their schools. But because the three boys are transgender, the districts said no. The boys sued the districts and the school principals, alleging sex discrimination in violation of Title IX of the Education Amendments Act of 1972 and the Equal

Protection Clause of the Fourteenth Amendment. The boys also requested preliminary injunctions that would order the schools to grant them access to the boys' bathrooms and, in the case of B.E. and S.E., access to the boys' locker rooms when changing for gym class. The district courts in both cases granted the preliminary injunctions, relying on our decision in *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017).

In this consolidated appeal, the school districts invite us to reverse those preliminary injunctions and revisit our holding in *Whitaker*. We see no reason to do so, however. Litigation over transgender rights is occurring all over the country, and we assume that at some point the Supreme Court will step in with more guidance than it has furnished so far. Until then, we will stay the course and follow *Whitaker*. That is just what the district courts did, in crafting narrowly tailored and fact-bound injunctions. We affirm their orders.

I.

A. *A.C.*'s Case

A.C. is a 13-year-old boy who lives with his mother M.C. in Martinsville, Indiana. A.C. is transgender and has identified as a boy since he was about eight years old. He socially transitioned when he was nine, meaning he began going by a male name, using male pronouns, and adopting a typically masculine haircut and clothing. He has never wavered from this identity since his social transition.

A.C. receives professional medical care from the Gender Health Program at Riley Children's Health,

where he was diagnosed with gender dysphoria, a condition that causes him to experience "a marked incongruence between [his] experienced/expressed gender and [his] assigned gender." American Psychiatric Ass'n, *Diagnostic and Statistical Manual* 452 (5th ed. 2013). A.C.'s gender dysphoria comes with "significant distress, depression, and anxiety." He receives therapy as well as prescribed hormonal suppression drugs that block his menstruation. He intends to begin testosterone supplements, which will further masculinize his appearance, once he is able. Additionally, the Indiana courts have authorized both a legal name change and a gender-marker change for him. A.C. and his medical care providers agree that being treated as a boy is the best way to ameliorate his depression and anxiety. This includes access to bathrooms and facilities that are consistent with his experienced gender identity. We refer to this as gender-affirming facility access.

In 2021 A.C. began seventh grade at John R. Wooden Middle School in the Metropolitan School District of Martinsville, Indiana. The school maintains sex-segregated bathrooms—a practice that A.C. does not challenge. At the beginning of the school year A.C.'s stepfather contacted the school to ask that A.C. be granted gender-affirming bathroom access. The school refused and said that A.C. had to use either the girls' bathrooms or the unisex bathroom in the health clinic. But A.C. could not use the girls' bathrooms because it exacerbated his dysphoria and exposed him as transgender to his classmates. The health clinic bathroom was unsatisfactory because it was far from A.C.'s classes and stigmatized him. A.C. had to ask

permission and sign into the health office each time he used it.

Martinsville did accommodate A.C. by refraining from punishing him for tardiness caused by his use of the health clinic bathroom. It also offered A.C. the option to attend school entirely online, but A.C. declined. For a time, A.C. defied the school's orders and used the boys' bathrooms. He immediately felt more comfortable at school and better about himself. No students raised any issues or questioned A.C.'s presence, but a staff member reported him. The school responded by telling A.C. that he would be disciplined if he continued using the boys' bathrooms.

A.C. felt isolated and punished by the school because of his transgender status. This affected his academic performance. Before middle school, A.C. earned good grades and was in the gifted and talented program. At Wooden, he found it difficult to attend school. His education was disrupted, his grades fell, and he became depressed, humiliated, and angry. He tried to avoid using the bathroom while at school, which was distracting, uncomfortable, and medically dangerous.

Martinsville has an unofficial policy for handling gender-affirming bathroom access for transgender students at the high school level. The district evaluates each bathroom-access request based on an extensive list of factors: the length of time the student has identified as transgender; whether the student is under a physician's care; whether the student has been diagnosed with gender dysphoria; whether the student receives hormone treatment; and whether the student has received a legal name change or gender-

marker change. A.C. attempted to show the school district that he qualified for an accommodation based on these criteria, but Martinsville said the policy could not be implemented in the district's middle schools and refused to change its position.

In December 2021, A.C. filed this lawsuit against Martinsville and Fred Kutruff, Wooden's principal, seeking declaratory and injunctive relief that would assure his access to gender-affirming bathrooms. On April 29, 2022, the district court granted A.C.'s motion for a preliminary injunction and issued the mandatory stand-alone order on May 19, 2022. See Fed. R. Civ. P. 65(d). The injunction prohibited Martinsville from "stopping, preventing, or in any way interfering with A.C. freely using any boys' restroom."

B. *B.E. & S.E.*'s Cases

B.E. and S.E. are 15-year-old twins who live in Terre Haute, Indiana, with their mother L.E. They attend Terre Haute North Vigo High School. They are transgender boys who socially transitioned at age 11, when they adopted male names, male pronouns, and traditionally masculine appearances. Like A.C., both B.E. and S.E. were diagnosed with gender dysphoria and are receiving professional care at the Riley Gender Health Clinic. Under the Clinic's supervision, the boys have received testosterone treatment since November 2021. This treatment causes the cessation of menstruation and the development of deeper voices, facial and body hair growth, and increased muscle mass. B.E. and S.E. obtained legal name changes and gender-marker changes in Indiana state court. Unrelated to their gender identity, both B.E. and S.E. have a condition that impedes colon function and

requires them to take laxatives, making bathroom access a particularly sensitive issue.

The twins used the boys' bathrooms at North Vigo at the beginning of the 2021-2022 school year; no students raised concerns about their presence there. School employees, however, informally reprimanded B.E. and S.E. and told them not to use the boys' bathrooms again. Their mother had a meeting with the vice principal to alert the school to both the gender dysphoria diagnoses and the colon conditions of the two boys. She requested that they be granted gender-affirming facility access, including access to the boys' locker rooms to change before and after gym class. B.E. and S.E. confirmed that they planned to use the stalls in the locker room to change in privacy and did not seek access to the locker room showers. The school denied their request; it instructed them to use either the girls' bathrooms or the unisex bathroom in the school's health office. They could change for gym class only in the girls' locker room or the health office bathroom.

B.E. and S.E. found this solution profoundly upsetting. Using the girls' bathrooms and locker rooms revealed them as transgender, and they worried about upsetting female students who might wonder why boys were in those facilities. B.E. and S.E. also had problems with the unisex bathroom. It was far from their classrooms, and the health office was locked at unpredictable times. B.E. suffered at least one embarrassing accident because of his colon condition and inability to get to the health office bathroom on time. Both boys missed time in class because they had to use a remote bathroom, and they felt stigmatized by

the requirement. As a result, they tried to avoid using the bathroom while at school—again, a practice that is painful, distracting, and medically dangerous. They dreaded going to school and suffered depression and humiliation.

Vigo County has an official policy regarding bathroom access for transgender students. It contemplates accommodating transgender students based on a smorgasbord of factors, including: the student's age; the gender marker on the birth certificate; the duration of the social transition; whether the student has name and pronoun change requests on file with the School Corporation; the student's gender dysphoria diagnosis; the receipt of hormone treatment; the duration of hormone treatment; the receipt of other transition-related medical procedures; other medical conditions; concerns raised by other students or parents; facility restrictions; and accommodations offered to other similarly situated students. At the same time, North Vigo insisted that surgical change was required before a transgender student could use gender-affirming bathrooms. That rule rendered most of the policy nugatory—Indiana prohibits such surgery for patients younger than 18 (the great majority of high school students), and some transgender persons opt not to undergo surgical transition given the risks and costs of the procedure. See *Whitaker*, 858 F.3d at 1041.

After North Vigo refused to grant B.E. and S.E. gender-affirming facility access, the boys filed this lawsuit against Vigo County School Corporation and the principal of the high school. On June 24, 2022, the district court granted their motion for a preliminary

injunction and issued a stand-alone order compelling the school district to provide B.E. and S.E. "with access to the boys' restrooms and locker room, excluding the showers." The district court rested its decision on their likelihood of success under Title IX; it did not reach their constitutional theory.

Both Martinsville and Vigo County appealed the issuance of the preliminary injunctions. At the request of the parties, we consolidated the cases on appeal.

II.

For a preliminary injunction to issue, a plaintiff "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 Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Orders granting or denying preliminary injunctive relief are immediately appealable. 28 U.S.C. § 1292(a)(1). Our review depends on the kind of issue we are considering: "[w]e review the district court's findings of fact for clear error, its legal conclusions *de novo*, and its balancing of the factors for a preliminary injunction for abuse of discretion." *Doe v. University of Southern Indiana*, 43 F.4th 784, 791 (7th Cir. 2022) (alteration in original) (quoting *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016)).

A. *Whitaker* and *Bostock*

We begin by addressing the appellants' contention that our decision in *Whitaker* is no longer authoritative, given a change in the law governing preliminary injunctions or, in the alternative, given

the Supreme Court's intervening decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

The plaintiff in *Whitaker* (A.W.) was a 17-year-old transgender boy who sued the Kenosha (Wisconsin) Unified School District, alleging that the refusal to allow him to use the boys' bathrooms violated his rights under Title IX and the Fourteenth Amendment. *Whitaker*, 858 F.3d at 1042. A.W. socially transitioned when he was 13 and received professional care for gender dysphoria. When he sought gender-affirming facility access, however, he was told that he could use only the girls' bathrooms or a unisex bathroom in the school's main office, which was far from his classes. He felt that using the remote unisex bathroom drew undesirable attention to his transgender status. *Id.* at 1040.

Like the plaintiffs in our cases, A.W. attempted to restrict his water intake in order to avoid any bathroom use. This exacerbated a preexisting medical condition—vasovagal syncope—making him susceptible to headaches, fainting, and seizures. He tried ignoring the school's orders and using the boys' bathrooms. Again as in the present case, no students complained but school employees did. He sought an accommodation with evidence of his prolonged social transition, his gender dysphoria diagnosis, and his doctor's recommendation that he be allowed to use gender-affirming facilities, but to no avail. The school district insisted that A.W. had to update his gender in the school's records, which the school would do only if he provided an amended birth certificate. This put him up against a brick wall: under Wisconsin law, the records would not be changed without surgical

transition, but those procedures are unavailable to minors, risky, and expensive. A.W. reported feeling distressed, depressed, and suicidal as a result. See *id.* at 1041-42, 1053.

We held that A.W.'s worsening mental and physical health, coupled with his suicidality, meant that the harm was irreparable and could not be adequately remedied at law. *Id.* at 1045-46. We added that since this was not a "typical tort action" about past harm, but instead a case where the harms were prospective and ongoing, that monetary damages would be insufficient. *Id.* at 1046. We concluded that A.W. had demonstrated a likelihood of success on both his Title IX and Fourteenth Amendment claims. Notably, we did not criticize the defendant school district's decision to maintain sex-segregated bathrooms. Our focus was on the district's policy for "decid[ing] which bathroom a student may use." *Id.* at 1051.

For the Title IX claim, we were guided by analogy to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its holding that discrimination based on sex-stereotyping violates Title VII of the Civil Rights Act of 1964. *Whitaker*, 858 F.3d at 1047. We reasoned 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, which in turn violates Title IX." *Id.* at 1049.

For A.W.'s Fourteenth Amendment claim, we applied intermediate scrutiny to the defendant school district's bathroom access policy, because it was "based upon a sex classification." *Id.* at 1051. We

therefore required the defendants to provide an "exceedingly persuasive" justification for their policy. *Id.* at 1051-52 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). The proffered justification the school gave was the need "to protect the privacy rights of all 22,160 students." *Id.* at 1052. We found this unconvincing (more or less the opposite of "exceedingly persuasive") because there was no evidence that A.W. was less discreet than other students while using the bathroom or that the stall doors in the bathrooms did not provide adequate privacy to all. *Id.*

Finally, we affirmed the district court's balancing of the harms. The school district's claims of harm were "speculative," especially because, prior to the lawsuit, A.W. had used the boys' bathrooms for almost six months without incident. This supported a finding that the district court did not abuse its discretion by finding that the privacy rights of other students were not invaded and that no other negative consequences materialized. *Id.* at 1054.

Whitaker answers almost all the questions raised by these consolidated appeals. But the school districts offer three reasons why we ought to revisit that decision. First, they urge that *Whitaker* was partially abrogated by *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020). Second, they point out that the Supreme Court has provided intervening guidance on how to analyze issues of transgender discrimination in *Bostock*. Third, they contend that *Whitaker* did not adequately grapple with a provision in Title IX that permits educational institutions to "maintain[] separate living facilities for the different

sexes." 20 U.S.C. § 1686. We address those arguments in turn.

1. Standard for Likelihood of Success on Merits

In *Whitaker*, we applied the now-abrogated standard for evaluating the likelihood of success on the merits under which a plaintiff had to show only that he had a "better than negligible" chance of success on the merits. 858 F.3d at 1046. That standard is now gone. In *Nken v. Holder*, in the closely related context of a stay pending judicial review, the Supreme Court went out of its way to say that "[i]t is not enough that the chance of success on the merits be better than negligible.'" 556 U.S. 418, 434 (2009). Adhering to that guidance in *Illinois Republican Party*, we concluded that the showing must be a strong one, though the applicant "need not show that [he] definitely will win the case." 973 F.3d at 763. The school districts contend that this shift has weakened *Whitaker*'s authoritative value.

Perhaps there are some cases that have been affected by the need to make a more compelling showing of likelihood of success, but *Whitaker* is not one of them. *Whitaker* did not even hint that the likelihood of success on the merits was a close issue or that anything hinged on the better-than-negligible threshold. Furthermore, both district courts in the cases now before us applied the correct standard and came out the same way, finding that the law and the evidentiary records established the necessary strong likelihood of success.

The crucial question for the Title IX theory in both of the cases now before us, just as in *Whitaker*, is one

of law: how does one interpret Title IX's prohibition against discrimination "on the basis of sex" as applied to transgender people? In *Whitaker*, we answered that discrimination against transgender students is a form of sex discrimination. Our answer to that legal question did not depend on the plaintiff's evidentiary showing, and that answer does not change with a more rigorous threshold for success on the merits. It is also telling that, in the closely related area of Title VII law, the Supreme Court held in *Bostock* that discrimination based on transgender status is a form of sex discrimination. 140 S. Ct. at 1744. Both Title VII, at issue in *Bostock,* and Title IX, at issue here and in *Whitaker*, involve sex stereotypes and less favorable treatment because of the disfavored person's sex. *Bostock* thus provides useful guidance here, even though the particular application of sex discrimination it addressed was different.

2. *Bostock*

Though *Bostock* strengthens *Whitaker*'s conclusion that discrimination based on transgender status is a form of sex discrimination, the school districts argue that a different part of *Bostock* undermines *Whitaker*. They are referring to the Court's decision to refrain from addressing how "sex-segregated bathrooms, locker rooms, and dress codes" were affected by its ruling. *Id.* at 1753. The school districts reason that the Court exercised this restraint because it saw a fundamental difference between bathroom policies and employment decisions. From that, they conclude that *Bostock*'s definition of sex discrimination does not apply in the bathroom context.

That is reading quite a bit into a statement that says, in essence, "we aren't reaching this point." The Supreme Court, and for that matter our court, does this all the time. It is an important tool with which we respect the principles of party presentation, see *United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020), and incremental development of the law. It is best to take the Court at its word. When we do so, we see that it was simply focusing on "[t]he only question before [it]," which did not involve gender-affirming bathroom access. *Bostock*, 140 S. Ct. at 1753.

Applying *Bostock*'s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes. As *Bostock* instructs, we ask whether our three plaintiffs are suffering negative consequences (for Title IX, lack of equal access to school programs) for behavior that is being tolerated in male students who are not transgender. See *id.* at 1741. Our decision in *Whitaker* followed this approach.

3. Relevance of 20 U.S.C. § 1686

The last alleged flaw in *Whitaker* that the school districts see is its supposed failure to mention 20 U.S.C. § 1686. That statute, which is part of Title IX, reads as follows:

> Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

If *Whitaker* had failed to take that admonition into account, maybe there would be a problem. But it did no such thing. *Whitaker* cited the relevant implementing regulation, 34 C.F.R. § 106.33, which affirmatively permits recipients of educational funds to "provide separate toilet, locker room, and shower facilities" on the basis of sex, provided that the separate facilities are comparable. We noted that neither Title IX nor its implementing regulations define the term "sex," and in looking to case law for guidance, we saw nothing to suggest that "sex" referred only to biological sex. *Whitaker*, 858 F.3d at 1047. We concluded 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 the 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' rooms, 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.

We also reject the notion that *Whitaker* (and perhaps *Bostock* itself) make it impossible to have "truly sex-separated bathrooms." That argument presupposes one definition of sex, as something assigned at birth or a function of chromosomal make-up. But Title IX does not define sex. Dictionary definitions from around 1972 (when Title IX was passed) are equally inconclusive. See, *e.g.*, Black's Law

Dictionary, *Sex* (4th ed. 1968) (defining sex narrowly as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism" and broadly as "the character of being male or female"); Webster's New World Dictionary, *Sex* (2d ed. 1972) (defining sex both "with reference to … reproductive functions" and broadly as "all the attributes by which males and females are distinguished"). There is insufficient evidence to support the assumption that sex can mean only biological sex. And there is less certainty than meets the eye in such a definition: what, for instance, should we do about someone who is intersex? There are several conditions that create discrepancies between external and internal sex markers, which can produce XX males or XY females, or other chromosomal combinations such as XXY or XXX that affect overall sexual development. People with this genetic makeup are entitled to Title IX's protections, and an educational institution's policy for facility access would fail to account for them if biological sex were the only permissible sorting mechanism. Narrow definitions of sex do not account for the complexity of the necessary inquiry.

The implementing regulations do not provide much additional guidance. When 34 C.F.R. § 106.33 was codified, it was published without public comment because it was viewed as working "no substantive changes." Department of Education, Establishment of Title 34, 45 Fed. Reg. 30802, 30802 (May 9, 1980). With no indication that 34 C.F.R. § 106.33 was meant to cover any more ground than 20 U.S.C. § 1686, we reject the school districts' presupposition that separate facilities for the sexes forecloses access

policies based on gender identity. Nothing in section 1686 requires this outcome.

4. Existing Circuit Split

Finally, there is already a circuit split on the issues raised in this appeal. The Fourth Circuit has decided that denying gender-affirming bathroom access can violate both Title IX and the Equal Protection Clause, while the Eleventh Circuit found no violations based on substantially similar facts. Compare *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), with *Adams ex rel. Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (*en banc*).

It makes little sense for us to jump from one side of the circuit split to the other, particularly in light of the intervening guidance in *Bostock*. As we have noted before:

> Overruling circuit law can be beneficial when the circuit is an outlier and can save work for Congress and the Supreme Court by eliminating a conflict. Even when an overruling does not end the conflict, it might supply a new line of argument that would lead other circuits to change their positions in turn. Finally, overruling is more appropriate when prevailing doctrine works a substantial injury.

Buchmeier v. United States, 581 F.3d 561, 566 (7th Cir. 2009) (*en banc*).

These factors do not weigh in favor of overruling *Whitaker*. We cannot resolve the conflict between the Fourth and Eleventh Circuits on our own. Nor can we

supply a new line of argument. Much of what is needed to resolve this conflict is present in the majority opinion and four dissents offered by the Eleventh Circuit in *Adams*; neither party here has broken new ground. Finally, consistency on our part does not cause a serious harm. *Whitaker* has been the governing decision in our circuit since 2017, and the school districts have not identified any substantial injuries it has caused. As a result, "[o]verruling would not be consistent with a proper regard for the stability of our decisions." *Id.* at 565.

B. Preliminary Injunctions

Having resolved the question of *Whitaker*'s authoritative value, we are now free to apply it to these cases. We address the factors governing a preliminary injunction—likelihood of success on the merits, irreparable harm, and the balance of equities, including the public interest—in that order.

1. Likelihood of Success on the Merits

The first, and normally the most important, criterion is likelihood of success on the merits. As we noted earlier, the plaintiffs had to make a strong showing of their chance of prevailing. See *Illinois Republican Party*, 973 F.3d at 763. For the Title IX claims, they had to demonstrate that they were "subjected to discrimination under any education program or activity receiving Federal financial assistance," and that this discriminatory treatment was "on the basis of sex." 20 U.S.C. § 1681(a). For the Equal Protection Clause (involved in only A.C.'s case), they had to show intentional discrimination on the basis of sex. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994).

It is not disputed that Wooden Middle School and North Vigo High School receive federal funding and are covered by Title IX. The point of contention is whether the school districts' refusal to grant gender-affirming facility access to the plaintiffs amounts to discrimination on the basis of sex. Both district courts decided that the plaintiffs had made a sufficiently strong showing of sex discrimination. We see no errors in those conclusions.

Using *Whitaker* as a guide, both district courts evaluated the school districts' facility access policies, not their decisions to maintain sex-segregated facilities. The courts then reasoned that an access policy that punished a student for their transgender identity would violate Title IX, see *Whitaker*, 858 F.3d at 1049, and that A.C., B.E., and S.E. all showed they were punished by the school districts' access policies. Like the plaintiff in *Whitaker*, they were threatened with discipline if they used the boys' bathrooms. All three reported feeling depressed, humiliated, and excluded by the requirement to use either the girls' bathrooms or the unisex bathroom. B.E. and S.E. were also placed at an increased risk of not making it to the bathroom on time because of their colon conditions. As a result, just as in *Whitaker*, the "gender-neutral alternatives were not true alternatives because of their distant location to [plaintiffs'] classrooms and the increased stigmatization they caused [plaintiffs]." *Id.* at 1050. And in A.C.'s case, offering remote schooling and therefore denying a transgender student the opportunity to socialize with and learn alongside his classmates is not a true alternative. Further, the harms that the plaintiffs suffered meet *Bostock*'s definition of sex discrimination, which

requires that the plaintiff be treated worse than a similarly situated person because of sex. 140 S. Ct. at 1740. Here, the school districts persisted in treating the three plaintiffs worse than other boys because of their transgender status.

The plaintiffs in *B.E./S.E.* asked the district court to include access to both bathrooms and locker rooms in the injunction, and the court obliged. It reasoned that the "distinction" between bathrooms and locker rooms was "immaterial," particularly since B.E. and S.E. "would use the stalls in the locker room, just as they used the stalls in the restroom," and communal showers were by consent carved out of the injunction. We see no clear error in the district court's factual conclusion that B.E.'s and S.E.'s locker room use would be comparable to their bathroom use. Vigo County argues that nothing in the district court's injunction confines the plaintiffs to the stalls, and so (it believes) B.E. and S.E. "may change in the open areas of the locker room, exposing their physical anatomy to their classmates, and vice versa." But this argument is untethered to the evidentiary record. Both B.E. and S.E. averred that the stalls in the locker room would allow them and other students to change privately, and that students do not disrobe entirely or use the locker room showers during the school day. As a result, the district court's conclusion that locker room use would be indistinguishable from bathroom use in this instance is not clearly erroneous.

The district court in A.C.'s case also decided that A.C. had made a strong showing of likely success on his Fourteenth Amendment claim. Per *Whitaker*'s guidance, Martinsville's access policy relies on sex-

based classifications and is therefore subject to heightened scrutiny. 858 F.3d at 1051. "[A] party seeking to uphold government action based on sex must establish an exceedingly persuasive justification' for the classification." *Virginia*, 518 U.S. at 524 (quoting *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982)). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* at 516.

The school district attempted to justify its access policy by invoking the privacy concerns of other students. The district court found, however, that the privacy concerns "appear[] entirely conjectural." See also *Whitaker*, 858 F.3d at 1052 ("[T]he School District's privacy argument is based upon sheer conjecture and abstraction."). No students complained about A.C.'s use of the bathroom. Martinsville insists that such evidence is unnecessary and that the privacy interest in protecting students from "exposure of their bodies to the opposite sex" is long-protected, legitimate, and clearly related to denying gender-affirming facility access. But the district is fighting a phantom. Gender-affirming facility access does not implicate the interest in preventing bodily exposure, because there is no such exposure. This is unlike the nudity ordinance that we contemplated in *Tagami v. City of Chicago*, 875 F.3d 375 (7th Cir. 2017), where bodily exposure was expressly and directly at issue. There is no evidence that any students will be exposed to A.C. or vice versa. "Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall." *Whitaker*, 858 F.3d at 1052. Martinsville has

not identified how A.C.'s presence behind the door of a bathroom stall threatens student privacy.

In addition to the likelihood of success on the Title IX and equal protection claims, we note also that the school districts in these two cases may be violating Indiana law. Given that all three plaintiffs have received amended birth certificates and legal name changes that identify them as boys, they appear to be boys in the eyes of the State of Indiana. If so, then it would be contrary to Indiana law for the school districts to treat A.C., B.E., and S.E. as though they are not boys and to require them to use the girls' bathrooms and locker rooms. But no plaintiff has pursued this theory of state-law violation, and so we do not explore it further.

We add a few words about the scope of our decision. First, we are addressing only the issue before us. We express no opinion on how Title IX or the Equal Protection Clause regulates other sex-segregated living facilities, educational programs, or sports teams. The district courts took the same approach in the injunctions they issued, properly confining their analysis to the immediate problem.

We also leave the door open to reasonable measures taken by the school districts to ensure that a student genuinely needs the requested accommodations. Just like the plaintiff in *Whitaker*, A.C., B.E., and S.E. have all provided ample evidence of their medical diagnoses and the care they receive from professionals to assist in their transitions. They have also demonstrated that their gender identities are enduring. All three have legal name changes and gender-marker changes. B.E. and S.E. have been

receiving testosterone treatment for over a year. These are not cases where the plaintiffs' good-faith requests for gender-affirming facility access could be questioned. Nor do these cases present the scenario offered by Indiana and other states in their *amicus* brief, where only subjective "self-identification" is offered as the basis for the plaintiffs' requests.

Further, nothing in the district courts' injunctions restricts a school district's ability to monitor student conduct in bathrooms and locker rooms. If a student enters a girls' locker room and engages in misconduct, that student has violated school rules regardless of whether the student is a girl who is properly in the space, a boy who is improperly in the space, or a boy who pretends to be a transgender girl to gain school-authorized access to the space. As the *amicus* brief of school administrators from 16 states and the District of Columbia assures us, "schools generally are adept at disciplining students for infractions of school rules," and gender-affirming access policies neither thwart rule enforcement nor increase the risk of misbehavior in bathrooms and locker rooms. We are also unconvinced that students will take advantage of gender-affirming facility access policies by masquerading as transgender. Based on the accounts of *amici* school administrators who have implemented gender-affirming facility access policies, such a scenario has *never* materialized.

2. Irreparable Harm

"[P]laintiffs seeking preliminary relief [are required] to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. Irreparable harm occurs when the "legal

remedies available to the movant are inadequate." *DM Trans, LLC v. Scott*, 38 F.4th 608, 618 (7th Cir. 2022).

Both district courts determined that the plaintiffs were likely to suffer irreparable harm, noting the similarities between the cases of A.C., B.E. and S.E. and the plaintiff in *Whitaker*. The school districts attempted to distinguish *Whitaker*, pointing out that A.C. did not report suicidal ideation and that B.E. and S.E. did not show they had restricted water intake. But the district courts found those factual distinctions insignificant.

We have little to add to their analysis, except to note again that the district courts based their decisions on facts in the record, and that the school districts have not shown clear error. The plaintiffs have established that the harm they face is ongoing, debilitating, and cannot be remedied with monetary damages. Although the plaintiff in *Whitaker* experienced suicidal thoughts, that is not essential for these cases.

3. Balance of Equities and the Public Interest

Before issuing an injunction, courts are required to "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)). This includes "particular regard for the public consequences" should the preliminary injunction be issued. *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

Both district courts found the school districts' claims of injury unconvincing. In *A.C.*, Martinsville's

claims of harm were unsupported, given that high school students were granted accommodations without incident. Similarly, in *B.E.*, the plaintiffs had used the boys' bathrooms at the beginning of the year without incident and there was no evidence of harm to Vigo County in the record. The records showed only speculative harms, which are not enough to tip the balance. See *Whitaker*, 858 F.3d at 1054.

The district courts also agreed that the public interest weighed in favor of issuing the injunctions. They noted that protecting civil and constitutional rights is in the public interest, and they saw no harm to the public. The district court in *A.C.* acknowledged the importance of individual privacy interests to the public, but A.C.'s presence in the boys' bathroom did not threaten those privacy interests. And the district court in *B.E.* observed that the school district's insistence upon the need for executive or congressional guidance was undermined by the fact that *Whitaker* has been controlling law in the Seventh Circuit since 2017. Indeed, Vigo County crafted an effective written policy to manage gender-affirming facility access despite the lack of additional rulemaking or legislation.

There was no abuse of discretion in this balancing of the equities and the public interest. Nor do we see either legal error in the underlying analysis or clear error in any of the supporting factual findings. That is enough to resolve these appeals.

III.

These consolidated appeals are almost indistinguishable from *Whitaker*. Because our reasoning in *Whitaker* controls, we AFFIRM the

orders granting the plaintiffs' motions for preliminary injunctions.

EASTERBROOK, *Circuit Judge*, concurring. Given *Whitaker v. Kenosha School District*, 858 F.3d 1034 (7th Cir. 2017), this is an easy case for the plaintiffs. I am no more disposed than my colleagues to overrule *Whitaker*. A conflict among the circuits will exist no matter what happens in the current suits. The Supreme Court or Congress could produce a nationally uniform approach; we cannot.

I concur only in the judgment, however, because, although I admire my colleagues' thoughtful opinion, they endorse *Whitaker*, while I think that *Adams v. St. Johns County School Board*, 57 F.4th 791 (11th Cir. 2022) (en banc), better understands how Title IX applies to transgender students.

My colleagues express confidence that Title VII (the subject of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)) and Title IX use "sex" in the same way. See slip op. 13-14. The majority in *Adams* was equally confident of the opposite proposition. I am not so sure about either view. Title IX does not define the word, which can refer to biological sex (encoded in a person's genes) or to social relations (gender). Sex is such a complex subject that any invocation of plain meaning is apt to misfire. I think, however, that *Adams* is closer to the mark in concluding that "sex" in Title IX has a genetic sense, given that word's normal usage when the statute was enacted.

Indiana has elected to use a social definition rather than a genetic one; the state's judiciary has entered orders classifying all three plaintiffs as boys. Like my colleagues (see slip op. 21) I'm puzzled that the school districts did not act on the logical implication of these orders. Much of life reflects social

relations and desires rather than instructions encoded in DNA. Nurture and nature both play large roles in human life. Classifying as "boys" youngsters who are *socially* boys (even if not genetically male) is an act of kindness without serious costs to third parties. But if Title IX uses the word "sex" in the genetic sense, then federal law does not compel states to do this.

Appendix B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 21-cv-02965

A.C., a minor child by his next friend, mother and legal guardian, M.C.,

Plaintiff,

v.

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE and PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL in his official capacity,

Defendants.

Filed: Apr. 29, 2022

ORDER

This matter is before the Court on a Motion for Preliminary Injunction filed pursuant to Federal Rule of Civil Procedure 65 by Plaintiff A.C. a minor child, by his next friend, mother and legal guardian, M.C. ("A.C."). (Filing No. 9.) A.C. initiated this lawsuit against Defendants Metropolitan School District of Martinsville and Principal of John R. Wooden Middle School in his official capacity (collectively, the "School District") seeking declaratory and injunctive relief for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment. (Filing No. 1.) A.C.

seeks to enjoin the School District from restricting his use of male restrooms and requests that Defendants treat him as a male student in all respects. For the following reasons, the Court **grants** the Motion for Preliminary Injunction.

I. BACKGROUND

A.C. is a transgender, 13-year-old boy who lives with his mother, M.C., in Martinsville, Indiana. (Filing No. 30 at 9.) Though designated a female at birth, when A.C. was 8 years old he realized he identified as a boy. *Id.* When he turned 9 years old, A.C. told his mother that he was not a girl and wanted to be referred to by a boy's name and addressed using male pronouns. *Id.* From that point, A.C. was referred to by his preferred name and addressed with "he" or "they" pronouns. *Id.* A.C. also began presenting himself as a boy, wearing masculine clothing and having a masculine haircut. *Id.* Around this same time, A.C.'s mother contacted his grade school and asked that teachers refer to him by his preferred name and use male pronouns.[1] *Id.* at 10.

A.C. has been given the clinical diagnosis of gender dysphoria, a condition that occurs when there is a marked incongruence between a person's experienced gender and their gender assigned at birth, and is accompanied by clinically significant distress or impairment in areas of their functioning. (Filing No. 29-1 at 4.) He is under the care of

[1] In his opening brief, A.C. also brought claims based on staff members and substitutes referring to A.C. with his previous name and using feminine pronouns. In his reply he withdrew these claims as a basis for the preliminary injunction.

physicians at the Gender Health Clinic at Riley Children's Hospital where he is being given medication for menstrual suppression; and he hopes and expects to be taking male hormones in the near future.

When A.C. began school at John R. Wooden Middle School, located within the Metropolitan School District of Martinsville, he was offered the use of the school's single-sex restroom located in the school's medical clinic. (Filing No. 30 at 11.) This accommodation, however, was not convenient for A.C. as he felt singled out and the clinic restroom was far from most of his classes. Because of the distance of the restroom, A.C. was marked tardy several times, which could have resulted in possible discipline. *Id.* at 11. A.C. began to experience anxiety, depression and stigmatization. Due to his struggles, A.C.'s stepfather called the School District and requested that A.C. be allowed to use the boys' restroom. (Filing No. 35 at 6.) The School District denied this request and stated A.C. could continue using the clinic's restroom. *Id.*

Over the frustration with the restroom access, M.C. contacted a transgender advocacy group, GenderNexus, to assist in advocating to the School District on A.C.'s behalf. (Filing No. 30 at 12.) A representative from GenderNexus arranged and attended a meeting between M.C., A.C., and the School District. *Id.* The representative provided information about A.C.'s rights as a transgender student and the group discussed the need for A.C. to use the boys' restroom. *Id.* At the end of the meeting, a school counselor said he would ask "higher-ups" about the restroom request. *Id.* After conferring with

the principal of the middle school, M.C. was advised that the School District would not allow A.C. to use the boys' restroom, but that it would no longer discipline A.C. for being late to class. *Id.* The counselor also noted that the School District was willing to allow A.C. to switch to remote learning. *Id.*

Contrary to the School District 's decision, A.C. began using the boys' restrooms after the meeting. *Id.* at 13. During the three weeks he was able to use the boys' restrooms, A.C. reported that he felt more comfortable at school, his attitude changed completely, and he felt better about himself. Additionally, there were no reported issues or complaints from A.C.'s classmates. *Id.* A staff member, however, saw A.C. using a boys' restroom and reported it to the administration. (Filing No. 35 at 8.) A.C. was called in for a meeting with the school counselor who reminded him that he was not allowed to use the boys' restrooms and would be punished if he continued to do so. (Filing No. 30 at 13.) The School District also advised staff that students should only be using the restrooms of the sex each student was assigned at birth or the clinic restroom. *Id.* Staff were also told to notify the front office when a transgender student requested to use the restroom during class so that student could be monitored for compliance with this policy. *Id.*

The week after his meeting with the school counselor, A.C. was called to the office to meet with the principal. *Id.* The principal told A.C. that he was not allowed to use the boys' restrooms, that he must only use the girls' restrooms or the one located in the clinic, and that he would be punished if he continued

using the boys' restrooms. *Id.* at 13-14. M.C. was called during that meeting and told that if she wanted A.C. to use the boys' restroom, she would need to contact the school board. *Id.* at 14.

Though it was never mentioned to A.C. or his parents prior to initiating this litigation, the School District has an unofficial policy for allowing transgender students to use the bathroom that aligns with their gender on a "case-by-case" basis. *Id.* The factors used by the School District in making these decisions include how long the student has identified as transgender; whether the student is under a physician's care; if the student has been diagnosed with gender dysphoria; if the student is prescribed hormones; and if the student has filed for a legal name and gender marker change. *Id.* After learning about this policy, A.C. submitted documentation from his supervising physician, Dr. Dennis Fortenberry. *Id.* Dr. Fortenberry has not had any direct discussions with A.C., however, he is the supervising doctor at the Gender Health Clinic at Riley Children's Hospital. (Filing No. 29-1.) The School District, however, has not granted A.C. access to the boys' restrooms since receiving this information from Dr. Fortenberry. (Filing No. 30 at 14.) As a result, A.C. reports that his education is being disrupted, "he dreads going to school, is unable to focus there, and comes home depressed and humiliated." *Id.* at 15. And despite the physical discomfort, A.C. sometimes tries to go the entire day without using the restroom at all.

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural*

Resources Defense Council, Inc., 555 U.S. 7, 24 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* (citation and quotation marks omitted). Granting a preliminary injunction is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Mach Co. v. Dresser, Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (citation and quotation marks omitted).

> To obtain a preliminary injunction, a plaintiff must establish that it has some likelihood of success on the merits; that without relief it will suffer irreparable harm. If the plaintiff fails to meet any of these threshold requirements, the court must deny the injunction. However, if the plaintiff passes that threshold, the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest.

Geft Outdoors, LLC v. City of Westfield, 922 F.3d 357, 364 (7th Cir. 2019) (citations and quotation marks omitted). Courts in the Seventh Circuit employ a sliding scale approach where the greater the likelihood of success, the less harm the moving party needs to show to obtain an injunction, and vice versa. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.,* 549 F.3d 1079, 1086 (7th Cir. 2008).

III. DISCUSSION

At this stage of the case, the only issue before this Court is whether A.C. is entitled to the preliminary injunctive relief he seeks; specifically, to use the boys' restrooms at his school.[2] To obtain a preliminary injunction, A.C. must establish the following factors: (1) that he is likely to succeed on the merits of both his Title IX and Equal Protection claims; (2) that he has no adequate remedy at law; (3) that he is likely to suffer irreparable harm in the absence of preliminary relief; (4) that the balance of equities tip in his favor; and (5) issuing the injunction is in the public interest. *Geft*, 922 F.3d at 364. The first two factors are threshold determinations. "If the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (quoting *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). The Court will address each factor in turn.

A. Likelihood of Success on the Merits

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

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[2] In his Complaint, A.C. also requests that he be allowed to participate on the boys' soccer team, but given that soccer season is a number of months away, he elected to not seek injunctive relief on that issue.

program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). To support a Title IX claim, a plaintiff must show (1) that the educational institution intentionally discriminated against the plaintiff based on the plaintiff's sex, and (2) that "gender was a motivating factor in the decision to impose the discipline." *Doe v. Indiana Univ.-Bloomington*, 2019 WL 341760, at *8 (S.D. Ind. Jan. 28, 2019) (quoting *King v. DePauw Univ.*, 2014 WL 4197507, at *10 (S.D. Ind. Aug 22, 2014)). The formative question the Court must answer is "do the alleged facts, if true, raise a plausible interference that [the School District] discriminated against [A.C.] on the basis of sex?" *Doe v. Purdue Univ.*, 928 F.3d 652, 667-668 (7th Cir. 2019).

The Seventh Circuit has held that discrimination against a person on the basis of their transgender status constitutes discrimination based on sex, which is prohibited by both Title IX and the Equal Protection Clause. (Filing No. 30 at 16-17.) In *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Education*, 858 F.3d 1034 (7th Cir. 2017), a transgender student alleged that a policy barring him from using the boys' restroom violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1039. The district court granted a preliminary injunction in favor of the student, and the Seventh Circuit agreed. *Id.* The Seventh Circuit held that a school policy that subjects transgender students to different rules, sanctions, and treatment than non-transgender students violates Title IX. *Id.* at 1049-50.

A.C. contends that the Seventh Circuit's decision in *Whitaker* "makes plain that denying A.C. the ability

to use the boys' restrooms in his school violates Title IX." (Filing No. 30 at 19.) "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 . . . . 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. A.C. asserts that just like in *Whitaker*, the School District is punishing him for his transgender status and, as the Seventh Circuit has made clear, this violates Title IX. (Filing No. 30 at 21.)

A.C. argues that he will succeed on his Equal Protection claim. *Id.* at 25. As his status as transgender is a classification based on sex, he contends the School District's action is subjected to a form of heightened scrutiny that is somewhere in between rational basis and strict scrutiny. *Id.* With intermediate scrutiny, "the burden rests with the state to demonstrate that its proffered justification is exceedingly persuasive," which requires the state to show that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Whitaker*, 858 F.3d at 1050-51.

A.C. contends the decision of the School District to deny A.C. access to the boys' restrooms was based on concerns about "privacy." *Id.* at 26-27. He points out that in *Whitaker* the court addressed alleged privacy concerns, rejected those concerns and determined that they were "insufficient to establish an exceedingly

persuasive justification for the classification." *Id.* Other courts have reached the same conclusions, both for other transgender students seeking restroom access, as well as for non-transgender students seeking to prohibit students from using the restrooms associated with their gender identities. *Id.* at 28 (citing *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018)). For all these reasons, A.C. contends that he will also be successful on his equal protection claim.

In response, the School District argues that A.C.'s request to use the boys' restrooms is unlikely to succeed because Title IX expressly allows institutions to provide separate restroom facilities on the basis of sex. (Filing No. 35 at 13.) The School District contends that Title IX's implementing regulations expressly state that institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

The School District asserts that Title IX expressly permits the segregation of facilities on the basis of enduring biological differences in areas where biological differences matter. (Filing No. 35 at 14.) Arguing that it is consistent with these regulations, the School District argues that it is complying with Title IX. *Id.* The School District argues that A.C. overly relies on the Seventh Circuit's decision in *Whitaker* and that it should be disregarded for four reasons. *Id.* at 16. First, the Seventh Circuit has criticized *Whitaker* for using the wrong standard of

review. *Id.* (citing *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020)). Because of this, the School District argues that the discussion of the merits in *Whitaker* should have no precedential value. *Id.*

Second, the School District argues that the court's analysis in *Whitaker* is put in doubt by the United States Supreme Court's decision in *Bostock v. Clayton Cnty, Georgia*, 140 S. Ct. 1731 (2020). *Id.* While the Seventh Circuit looked to Title VII in deciding *Whitaker*, the School District contends that in *Bostock*, the court expressly declined to extend its ruling as it pertained to sex discrimination in the workplace (which is prohibited by Title VII) to issues pertaining to sex assigned restrooms and locker rooms (which are expressly permitted by Title IX). *Id.*

Third, the School District argues that the *Whitaker* analysis assumed that the sex stereotyping framework borrowed from Title VII applies in the Title IX restroom context, which *Bostock* does not embrace. *Id.* at 17. The School District asserts that the Supreme Court "specifically reserved this very issue for another day, and *Whitaker* offers no help in understanding why the distinction is 'on the basis of sex.'" *Id.* The School District contends that if requiring students to use restrooms based on sex is unlawful sex stereotyping, then Title IX is itself unlawful. *Id.*

And finally, the School District argues that its position cannot be characterized as sex stereotyping. The School District contends that, consistent with Title IX and its regulations, the School District's position is based on Title IX allowing schools to separate restroom facilities on the basis of sex. *Id*. The

School District also asserts that this aligns with the testimony of A.C.'s own expert, who acknowledges that sex is different than gender. *Id.*

The School District also argues that A.C. will not be successful on his Equal Protection claim. *Id.* at 18. The School District agrees that its classification is subject to intermediate scrutiny, but that it can meet the two requirements: (1) that the classification serves important governmental objectives; and (2) the discriminatory means employed are substantially related to the achievement of those objectives. *Id.* (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

The School District first contends that the policy or practice of separate facilities "serves important objectives of protecting the interests of students in using the restroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex." *Id.* Citing a variety of cases on the issue of privacy, the School District argues that if the approach to protect privacy does not satisfy constitutional scrutiny, then neither does Title IX's facilities provisions. *Id.* at 19.

Next, the School District argues that its policy is also substantially related to the achievement of these objectives, as it requires that students use the restroom in a separate space from the opposite sex and that this protects against exposure of a student's body to the opposite sex. *Id.* The School District argues that this position does not violate Equal Protection and weighs against granting an injunction. *Id.* at 19-20. Additionally, the School District asserts that any reliance on the Seventh Circuit's decision in Whitaker

is unreliable as the "analysis wrongly applies Title VII jurisprudence in an area in which the U.S. Supreme Court has not yet gone." *Id.* at 20.

The School District lastly argues that, to the extent *Whitaker* applies, its position of making an individualized determination as to whether a student who identifies as transgender will be allowed access to restrooms different than their sex complies with the law. *Id.* The School District was not provided the type of information it needed prior to the initiation of the lawsuit. *Id.* at 21. Additionally, unlike the plaintiff in *Whitaker* who was a high schooler, the School District A.C. is only a seventh grader and is "less mature" and only "on the threshold of awareness of human sexuality." *Id.* A.C. has not received hormones and at the time this action was filed, he had not completed a legal name and gender marker change. *Id.* At the time of oral argument, A.C.'s legal name change had been granted by the state court; however, on the same day as oral arguments, his gender marker change request was denied by the state court. (Filing No. 41.) Given these differences, as well as the Supreme Court failing to discuss or decide the issue in *Bostock*, the School District argues that it complied with the law in its initial determination to deny A.C. access to the boys' restrooms and in continuing to seek additional information that may alter that determination. (Filing No. 35 at 21.)

The Court finds that A.C. has established a likelihood of success on the merits of his claims. For all its arguments presented both in its briefing and at oral argument, the School District has provided no convincing argument that *Whitaker* does not control

and favors A.C.'s likely success on his claims. Whitaker remains good law and thus is binding on this court.[3]

And the School District appears to confuse its Title IX compliance of maintaining separate sex restrooms with the claims A.C. is alleging in this case. A.C.'s claims are based on the School District's treatment of him as an individual, not a complaint that the School District lacks appropriate facilities. A.C. has not requested that additional facilities be built, or the current ones be redesignated in any way. Rather, he is seeking to use those facilities that already exist and align with his gender identity; his claim is solely that the School District is forbidding him from doing so.

Additionally, the School District's arguments that it was not provided enough information prior to the initiation of this lawsuit, as well as its arguments about A.C. not receiving hormones and a gender marker change, fail to undermine the likely success of A.C.'s claims. The School District's transgender policy is unwritten and was not provided to A.C. until *after* the initiation of this lawsuit. Further, there was no evidence presented that taking hormones and receiving a gender marker change on one's birth certificate are required prerequisites to identify as a transgender person, much less that either of these

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[3] The Court perceives that the School District is aware of the controlling nature of *Whitaker* given that at oral argument counsel for the School District admitted that this Court "isn't in a position to overrule *Whitaker*" and made clear that the arguments were being presented "for the purposes of our record . . . if this did go up on appeal."

factors would automatically authorize A.C. to use the boys' restrooms. In fact, at oral argument, counsel for the School District was unable to say whether a gender marker change or receiving hormones would be enough for the School District to change its decision regarding A.C. using the boys' restrooms. Instead, counsel was only able to say that he thought it would have "significant impact" on the decision.

Given the evidence before this Court and the controlling precedent from the Seventh Circuit, the Court finds that A.C. has established a likelihood of success on the merits of both his Title IX and Equal Protection claims.

B. Irreparable Harm, Inadequate Remedy at Law, and Balance of Harms

As argued by A.C., it is well-established that the denial of constitutional rights is irreparable harm in and of itself. (Filing No. 30 at 29.) Based on a violation of his equal-protection rights, A.C. contends that he has established irreparable harm. *Id.* at 30. Additionally, A.C. asserts that he has established that the School District 's actions caused him ongoing emotional harm and distress, for which there is no adequate remedy at law. *Id.*

A.C. also argues that because he has established a substantial likelihood of success on the merits, "no substantial harm to others can be said to inhere" from the issuance of an injunction. *Id.* at 32 (citing *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001)). An injunction will only force the School District to conform its conduct to the requirements of the Constitution and federal law, which cannot be harmful to the School District. *Id.*

In response, the School District argues that the balance of harms weighs against A.C.'s request to have access to the boys' restrooms. (Filing No. 35 at 22.) The School District notes that it has made accommodations to allow A.C. more time to use the restroom, and the fact that he may occasionally be late to class is not evidence of irreparable harm. *Id.* The School District disputes that A.C. has been ostracized for the use of the clinic's restroom, and points out that unlike the single restroom accessible for Whitaker which invited more scrutiny and attention from peers, the clinic restroom is available for use by all students with permission from the school nurse. *Id.* It argues Concerning A.C.'s expert, the School District asserts that Dr. Fortenberry,

> has not participated in the care of A.C., has not had any direct discussion with A.C. or M.C., has not performed any individualized assessment as to the severity of harm that A.C. will experience if not allowed to access the boys' restroom, and has not performed an individualized assessment of the reduction of harm if A.C. is allowed access to the boys' restroom.

Id. Finally, the School District argues the balance of harms analysis favors maintaining the status quo. *Id.* at 23. Granting "unrestricted access" to A.C. to use the boys' restrooms would violate the privacy interests of other students and classmates, as well as cause the School District to be unable to rely on Title IX's regulations. *Id.*

The Court is not persuaded by the School Districts arguments. Although any student may use the

restroom in the clinic, in order to do so the student (including A.C.) must enter the health clinic, ask permission from the school nurse and then sign in before they may use that restroom. This process appears to invite scrutiny and attention. In support of his Motion, A.C. provided a declaration in which he described feeling stigmatized and that being excluded from the boys' restrooms "worsens the anxiety and depression" caused by his gender dysphoria and makes him feel isolated. (Filing No. 29-3 at 5.) He affirms that the School District's decision "makes being at school painful." *Id.* A.C.'s mother also reported that the issues with the restroom have been emotionally harmful to A.C. and that she is concerned for the possible medical risks associated with him trying not to use the restroom during school. (Filing No. 29-2 at 6.) Like other courts recognizing the potential harm to transgender students, this Court finds no reason to question the credibility of A.C.'s account and that the negative emotional consequences with being refused access to the boys' restrooms constitute irreparable harm that would be "difficult—if not impossible—to reverse." *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1039 (S.D. Ind. 2018) (quoting *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011). Likewise, a presumption of irreparable harm exists for some constitutional violations. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011).

Additionally, the Court finds that there is no adequate remedy at law to compensate A.C. for the harm he could continue to experience. While monetary damages may be adequate in the case of tort actions, the emotional harm identified by A.C. could not be

"fully rectified by an award of money damages." *J.A.W.*, 323 F. Supp. 3d at 1039-40; *see also Whitaker*, 858 F.3d at 1054.

Finally, the Court must evaluate the balance of harms to each party. While A.C. has provided evidence of the harm he will likely suffer, the School District's alleged potential harm is unsupported. No student has complained concerning their privacy. The School District's concerns with the privacy of other students appears entirely conjectural. No evidence was provided to support the School District's concerns, and other courts dealing with similar defenses have also dismissed them as unfounded. *See Whitaker*, 858 F.3d at 1052; *J.A.W.*, 323 F. Supp. 3d at 1041. Moreover, the School District's concerns over privacy are undermined given that it has already granted permission for other transgender students to use the restroom of their identified gender, and it has presented no evidence of problems when the other transgender student have used restrooms consistent with their gender identity.

Because A.C. has demonstrated that he will likely suffer irreparable harm, and the School District has failed to support its claims of prospective harm, the Court finds that the balance weighs in favor of granting A.C.'s request.

C. Public Interest

Finally, A.C. argues that "[t]he public interest is also furthered by the injunction here, as an injunction in favor of constitutional rights and the rights secured by Title IX is always in the public interest. (Filing No. 30 at 33.) In response, the School District argues that public policy weighs in its favor. Based on its

assertion that Title IX favors the separation of facilities, the School District contends that its policy furthers the interest of personal privacy. (Filing No. 35 at 24.) The School District argues "[t]o the extent that Title IX should not allow the separation of such facilities, that decision should be made through elected representatives in Congress, using clearly understood text, or through the notice and comment process for the revision of federal regulations required by the Administrative Procedure Act." *Id.*

While acknowledging that the public interest favors furthering individual privacy interests, the Court does not believe that granting A.C. access to the boys' restrooms threatens those interests. The restrooms at the middle school have stalls and as argues by A.C.'s counsel, restrooms are an area where people are usually private which minimizes exposure of a student's body to the opposite sex. Since he was eight years old, A.C. has identified as male, and has dressed as a boy and had a boy haircut. He is under a physician's care, has been diagnosed with gender dysphoria, and has been granted a legal name. The School District's arguments regarding its facilities again confuses the basis of A.C.'s claim, which is solely based on the School District's treatment of him as an individual. Having determined that granting A.C.'s Motion is in the public interest, as well as A.C. establishing the other required factors, the Court finds that A.C.'s requested preliminary injunction should be **granted**.

IV. CONCLUSION

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. For the reasons stated above, A.C.'s Motion for Preliminary Injunction (Filing No. 9) is **GRANTED**. The School District shall permit A.C. to use any boys' restroom within John R. Wooden Middle School.

SO ORDERED.

Date: 4/29/2022

[handwritten: signature]
Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

Appendix C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 21-cv-02965

A.C., a minor child by his next friend, mother and legal guardian, M.C.,

Plaintiff,

v.

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE and PRINCIPAL, JOHN R. WOODEN MIDDLE SCHOOL in his official capacity,

Defendants.

Filed: May 19, 2022

PRELIMINARY INJUNCTION

Pursuant to the Court's Order Granting Plaintiff A.C. a minor child, by his next friend, mother and legal guardian, M.C.'s ("A.C.") Motion for Preliminary Injunction (Filing No. 50) and in compliance with Federal Rule of Civil Procedure 65(d)(1)(C), Defendants the Metropolitan School District of Martinsville and Principal of John R. Wooden Middle School are hereby preliminary enjoined from stopping, preventing, or in any way interfering with A.C. freely using any boys' restroom located on or within the

campus of John R. Wooden Middle School located in Martinsville, Indiana. No bond shall be required.

SO ORDERED.

Date: 5/19/2022

[handwritten: signature]
Hon. Tanya Walton Pratt, Chief Judge

United States District Court

Southern District of Indiana

Appendix D

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. §1681(a)

(a) Prohibition against discrimination; exceptions

No 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, except that:

…

20 U.S.C. §1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

34 C.F.R. § 106.33. Comparable facilities

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.