Nos. 22-1786, 22-2318

United States Court of Appeals for the Seventh Circuit

B.E. and S.E., minor Children by their Mother, legal guardian, and next friend, L.E., Plaintiffs-Appellees, v. VIGO COUNTY SCHOOL CORPORATION, *et al.,* Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division Case No. 2:21-cv-00415-JRS-MG Honorable James R. Sweeney II, Judge. Appeal No. 22-2318
A.C., a minor child by his next friend, mother and legal guardian, M.C., Plaintiff-Appellee, v. METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE, *et al.*, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Case No. 1:21-cv-2965-TWP-MPB Honorable Tanya Walton Pratt, Chief Judge. Appeal No. 22-1786

BRIEF OF APPELLEES

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Attorneys for Appellees

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1786

Short Caption: A.C. v. Metropolitan School District of Martinsville

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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ACLU of Indiana by Kenneth Falk and Stevie Pactor

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N/A

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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Kenneth J. Falk Date: May 5, 2022

Attorney's Printed Name: Kenneth J. Falk

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Phone Number: 317/635-4059 Fax Number: 317/635-4105

E-Mail Address: kfalk@aclu-in.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1786

Short Caption: A.C. v. Metropolitan School District of Martinsville

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Stevie J. Pactor Date: May 5, 2022

Attorney's Printed Name: Stevie J. Pactor

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Indianapolis, IN 46202

Phone Number: 317-635-4059 Fax Number: 317-635-4105

E-Mail Address: spactor@aclu-in.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2318

Short Caption: B.E. v. Vigo County School Corporation, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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B.E., S.E.

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ACLU of Indiana, Indiana Legal Services

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N/A

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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Kenneth J. Falk Date: 7/28/2022

Attorney's Printed Name: Kenneth J. Falk

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: ACLU of Indiana, 1031 E. Washington St., Indianapolis, IN 46202

Phone Number: 317/635-4059 Fax Number: 317/635-4105

E-Mail Address: kfalk@aclu-in.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2318

Short Caption: E. et al v. Vigo County School Corporation et al

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ACLU of Indiana

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Stevie Pactor Date: 7/28/2022

Attorney's Printed Name: Stevie Pactor

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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E-Mail Address: spactor@aclu-in.org

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1786

Short Caption: A.C. v. Principal, John R. Wooden Middle School, et al

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ACLU of Indiana by Kenneth Falk and Stevie Pactor

Indiana Legal Services by Megan Stuart and Kathleen Bensberg

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n/a

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Megan Stuart Date: 5/5/2022

Attorney's Printed Name: Megan Stuart

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Indiana Legal Services, 214 S. College Ave, 2nd Floor

Bloomington, IN 47404

Phone Number: 812-961-6902 Fax Number: 812-961-6903

E-Mail Address: megan.stuart@ilsi.net

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1786

Short Caption: A.C. v. Metropolitan School District of Martinsville

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/Kathleen Bensberg Date: May 5, 2022

Attorney's Printed Name: Kathleen Bensberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Indianapolis, IN 46225

Phone Number: (317) 744-5799 Fax Number: (317) 631-9775

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Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2318

Short Caption: B.E., et al v. Vigo County School Corp., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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n/a

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Megan Stuart Date: 10/7/2022

Attorney's Printed Name: Megan Stuart

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Bloomington, IN 47404

Phone Number: 812-961-6902 Fax Number: 812-961-6903

E-Mail Address: megan.stuart@ilsi.net

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2318

Short Caption: B.E., et al. v. Vigo County School Corporation, et al.

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N/A

Attorney's Signature: /s/Kathleen Bensberg Date: October 7, 2022

Attorney's Printed Name: Kathleen Bensberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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E-Mail Address: kathleen.bensberg@ilsi.net

Table of Contents

Table of Authorities

Cases:

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Jurisdictional Statement

The jurisdictional statement of the appellants in this consolidated appeal is not complete and correct.

The district courts had jurisdiction pursuant to 28 U.S.C. § 1331. Their jurisdiction was based on alleged violations by defendants of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), and the Equal Protection Clause of the Fourteenth Amendment.

This Court has jurisdiction of this consolidated appeal pursuant to 28 U.S.C. § 1292(a)(1) as it is an appeal from the district courts' grants of plaintiffs' motions for preliminary injunction. The district court in *A.C.* issued its Order on Plaintiff's Motion for Preliminary Injunction on April 29, 2022 (Appellants' Short Appendix ["A."] 24 [*A.C.* District Court Docket {"Dkt."} 50]). This was followed by a stand-alone Preliminary Injunction on May 19, 2022. (A.40 [*A.C.* Dkt. 65]). The district court in *B.E.* entered its Order on Plaintiffs' Motion for Preliminary Injunction and stand-alone Preliminary Injunction on June 24, 2022. (A.1, A.22 [*B.E.* Dkt. 56, Dkt. 57]). The merits of plaintiffs' cases remain to be resolved by the district court.

No motions were filed that tolled the time within which to appeal the preliminary injunctions. The Notice of Appeal in *A.C.* was filed on May 3, 2022. (*A.C.* Dkt. 52). The Notice of Appeal in *B.E.* was filed on July 25, 2022. (*B.E.* Dkt. 60). There are no prior or related proceedings,

A defendant in *A.C.* is the Principal of the John R. Wooden Middle School, sued in his official capacity. The current principal is Fred Kutruff. A defendant in *B.E.* is

the Principal of Terre Haute North Vigo High School, sued in his official capacity. The current principal is Stephen Joseph.

Statement of the Issue

B.E. and S.E. are high school boys who are transgender. They socially transitioned and have been living consistently with their identity as boys for five years. Both boys have been diagnosed with gender dysphoria and, as part of their medical care to treat this condition, have been receiving masculinizing gender-affirming hormones since November of 2021. A.C. is a thirteen-year-old middle school boy who is transgender and who has identified as a boy since he was eight. He has also been diagnosed with gender dysphoria and is under medical care to treat this condition.

Although B.E. and S.E. identify and consistently present as male, the appellants in *B.E.* ("Vigo Schools") prohibited the two boys from using the same restrooms as other boys and from using private stalls to change for gym in the boys' locker room. And although the appellants in *A.C.* ("Martinsville") allow some transgender students in the high school to use restrooms consistent with the gender identities, they denied A.C. the ability to use the boys' restrooms at his middle school. The evidence is uncontested that being excluded from the boys' facilities by the appellants (together "the Schools") has caused all three appellees, B.E., S.E., and A.C. (together "the Youth"), a great deal of stress, anxiety, and physical discomfort.

The issue presented is whether the district courts properly entered preliminary

injunctions in this matter, allowing all three appellees to use the boys' restrooms and allowing B.E. and S.E. to change, but not shower, in their school's boys' locker room, after concluding, as dictated by *Whitaker v. Kenosha Unified School District No. 1 Board of Education,* 858 F.3d 1034 (7th Cir. 2017), *abrogation in nonrelevant part recognized by Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020), and consistent with *Bostock v. Clayton County, Georgia*, –U.S.–, 140 S. Ct. 1731 (2020), that they are likely to prevail on their claims under Title IX and the Equal Protection Clause.

Statement of the Case

I. Factual background

A. Introduction to B.E. and S.E.

B.E. and S.E. are 15-year-old siblings who live in Terre Haute and, at the time that the preliminary injunction was issued, had completed their freshman year at Terre Haute North Vigo High School, one of the schools within the Vigo County School Corporation. (L.E. Dec. ¶¶1-3 [*B.E.* Dkt. 22-3]). Vigo Schools is a recipient of federal funding. (Answer ¶44 [*B.E.* Dkt. 27]).

Although B.E. and S.E. were designated as female at birth, they realized in elementary school that they were boys, and they have long presented themselves to the world as male. (B.E. Dec. ¶4, S.E. Dec. ¶4 [*B.E.* Dkts. 22-4; 22-5]). Since they were 11, they have used male names and pronouns and have masculinized their appearances so that they appear as boys. (B.E. Dec. ¶¶5-7; S.E. Dec. ¶¶5-7 [*B.E.* Dkts.

22-4; 22-5]). They are recognized as boys by their friends and family, and many people know them only as boys. (B.E. Dec. ¶¶6, 8, 38; S.E. Dec. ¶¶6, 8, 38 [*B.E.* Dkts. 22-4; 22-5]). They are referred to at school by their male names and pronouns. (Mason Dep. 20:3-21:9 [*B.E.* Dkt. 43-1 at 5-6]).

B.E. and S.E. have both been diagnosed with gender dysphoria and are receiving care through the Riley Gender Health Clinic. (Fortenberry Dec. ¶¶35-36 [*B.E.* Dkt. 22-2]). Gender dysphoria is a recognized condition, codified in the American Psychiatric Association's Diagnostic and Statistical Manual, 5th edition ("DSM-V"), which is a standard classification of mental and physical disorders. (Fortenberry Dec.¶ 20 [*B.E.* Dkt. 22; *A.C.* Dkt. 20-1]).[1] Both B.E. and S.E. have

---

[1] The DSM-V sets out the following criteria for gender dysphoria in adolescents and adults:

> A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:
>
> > 1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).
> >
> > 2. A strong desire to be rid of one's primary/and or secondary sex characteristics because of a marked incongruence with one's experienced/ expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
> >
> > 3. A strong desire for the primary and /or secondary sex characteristics of the other gender.
> >
> > 4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
> >
> > 5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

suffered from anxiety, depression, and suicidal thoughts, with B.E. attempting to suffocate himself. (L.E. Dec. 35:25–38:5 [*B.E.* Dkt. 43-3]). They receive medication for depression. (*Id.*).

In November 2021 B.E. and S.E. began to take gender-affirming testosterone, which initiates physiological changes to align their bodies with their gender. (Fortenberry Supp. Dec. ¶¶6-8 [*B.E.* Dkt. 43-6]). During the first year of testosterone administration, the hormone causes cessation of menstruation and produces secondary sex characteristics such as voice deepening, facial and body hair growth, increased muscle mass, and vaginal atrophy. (*Id.* ¶ 9). B.E. and S.E. are experiencing these anatomical changes. (*Id.* ¶10). A state court has entered orders changing their first names to male names and ordering that their gender markers be changed to male. (Orders on Verified Petition for Change of Name and Gender Marker [*B.E.* Dkt. 29-5 at 1, 3]; Supp. Dec. L.E. ¶2, and exhibits [*B.E.* Dkt. 43-9]).

B. Introduction to A.C.

A.C. is a 13-year-old boy who lives with his mother, M.C., and family in Martinsville, Indiana. (M.C. Dec. ¶¶1-2 [*A.C.* Dkt. 29-2]). When the preliminary injunction was entered, he was in the seventh grade at John R. Wooden Middle School in the Metropolitan School District of Martinsville. (*Id.* at ¶ 3). The school district is

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> 6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).
>
> B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

(Fortenberry Dec.¶ 21 [*B.E.* Dkt. 22; *A.C.* Dkt. 20-1]).

a recipient of federal funding. (Answer ¶55 [*A.C.* Dkt. 28]).

A.C. is transgender. (Fortenberry Dec. ¶42 [*A.C.* Dkt. 29-])[2]; A.C. Dec. ¶4 [*A.C.* Dkt. 29- 3]). He was designated female at birth but realized he was a boy when he was about 8 years old. (A.C. Dec. ¶4 [*A.C.* Dkt. 29-3]). When he was around 9 years old, he told his mother, M.C., that he was not a girl and did not want to be referred to with female pronouns and wanted to be called a boy's name. (*Id.* at 1 ¶5; M.C. Dec. ¶¶5-6 [*A.C.* Dkt. 29-2]). From then on, A.C. was called by his male name and has used he/him pronouns. (M.C. Dec. ¶5 [*A.C.* Dkt. 29-2]); A.C. Dec. ¶¶5-6 [*A.C.* Dkt. 29-3]). Around this time A.C. began presenting himself as a boy with typically masculine clothing and haircuts. (A.C. Dec. ¶7 [*A.C.* Dkt. 29-2]). A.C.'s appearance has remained

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[2] The Schools cite to the objection that Martinsville made to Dr. Fortenberry's opinions concerning A.C. based on hearsay, lack of personal knowledge, and lack of foundation. (Appellants' Br. 38-39). The basis for this objection is not apparent as Dr. Fortenberry helped to found, and still works at, the Gender Health Program at Riley Children's Health, where A.C., as well as B.E. and S.E, receive treatment, and which offers comprehensive medical, psychological, and social services support to children, teens, and young adults who have been diagnosed with gender dysphoria, and he personally provides or supervises each month the medical care of 40 or more children, adolescents, and young persons with gender dysphoria. (Fortenberry Dec. ¶¶5-7, 41 [*A.C.* Dkt. 29-1]). He supervises A.C.'s medical care and reviewed A.C.'s medical records. (*Id.* ¶¶9, 42). Moreover, Dr. Fortenberry is an expert and "hearsay may be admissible if the evidence relied on by the expert is the type of evidence that experts in that field normally rely on when forming their opinions." *United States v. Rollins*, 862 F.2d 1282, 1293 (7th Cir. 1988) (further citation omitted), *see also* Fed. R. Evid. 703. It is to be expected that a medical expert will rely on evidence acquired by other medical personnel. *See, e.g.*, *Walker v. Soo Line R. Co.*, 208 F.3d 581, 591 (7th Cir. 2000) (noting that the lack of examination by a medical expert does not render testimony inadmissible as evaluation of the medical records is a reliable method of determining that a patient is ill, even without a physical examination) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 762 (3d Cir. 1994)). In any event, hearsay can be considered in a preliminary injunction proceeding. *S.E.C. v. Cherif,* 933 F.2d 403, 412 n.8 (7th Cir. 1991). The district court ignored this objection (A.12-13 [*A.C.* Dkt. 50]), and its implicit rejection of the objection is certainly not an abuse of discretion. *See, e.g., Houlihan v. City of Chicago*, 871 F.3d 540, 552 (7th Cir. 2017) ("We review evidentiary rulings for abuse of discretion.") (further citation omitted).

masculine, and he has continued to use his boy's name and masculine pronouns in daily life. (*Id.* ¶¶6-8; M.C. Dec. ¶¶6-8 [*A.C.* Dkt. 29-3]). When A.C. came out to his family as transgender M.C. contacted A.C.'s grade school and asked that teachers refer to him by his male name and with male pronouns. (M.C. Dec. ¶7 [*A.C.* Dkt. 29-2]). He is known and accepted by many of his peers as a boy. (*Id.* at ¶34).

A.C. has been diagnosed with gender dysphoria and experiences significant distress, depression, and anxiety related to the condition. (A.C. Dec. ¶9 [*A.C.* Dkt. 29-3]). A.C. describes this as "distress and pain that comes from my body not matching my gender." (*Id.*). When A.C. first disclosed that he was transgender, he received therapy from a mental health provider to address the psychological distress that he was suffering. (M.C. Dec. ¶11 [*A.C.* Dkt. 29-2]). When this did not alleviate his distress, he was referred to the Riley Hospital program where he continues to be treated. (*Id.* ¶13). With age his symptoms have increased as he has a maturing body that does not match his gender identity, causing depression, anxiety, anger, and self-harm. (*Id.* ¶12). To help address his gender dysphoria, his health professionals have prescribed hormonal suppression to block his menstrual periods. (*Id.* ¶9; Fortenberry Dec. ¶45 [*A.C.* Dkt. 29-1]). He intends to start receiving testosterone when medically indicated. (A.C. Dep. 30:14-31:15 [*A.C.* Dkt. 34-2 at 6]).

Once A.C. was able to present himself to the world as a boy, some of his emotional and psychological distress decreased, although he continues in counseling. (M.C. Dec. ¶10 [*A.C.* Dkt. 29-2]); M.C. Dep. 16:1-20 [*A.C.* Dkt. 38-2]). Being treated as a boy makes him feel more like himself and makes him happier, lowering his

depression and anxiety. (M.C. Dec. ¶10 [*A.C.* Dkt. 29-2]). He is happiest in the summer when he is out of school, and no one treats him as if he were a girl. (*Id.*). When he is in school and is not treated as a boy, his depression and anxiety become progressively worse as the school year continues. (*Id.*).

School personnel have been instructed to refer to A.C. by his male name and with male pronouns. (Kutruff Dep. at 34:2-7 [*A.C.* Dkt. 29-4]). Prior to the preliminary injunction decision, A.C. received a legal name change from an Indiana court. (Order on Verified Petition for Change of Name [*A.C.* Dkt. 38-3]). Subsequent to the decision he also received an order changing his gender-marker to male. (*See A.C.*, Seventh Circuit Dkt. 39 (No. 22-1786)).

C. Exclusion of B.E. and S.E. from restrooms and the locker room

At the start of their freshmen year, both B.E. and S.E. used the boys' restrooms at school because that was the correct and comfortable choice for them. (B.E. Dec. ¶10; S.E. Dec. ¶10 [*B.E.* Dkts. 22-4; 22-5]). The restrooms have urinals as well as toilets in stalls with doors, and the restrooms are conveniently located throughout the school. (B.E. Dec. ¶10; S.E. Dec. ¶10 [*B.E.* Dkts. 22-4, Dkt. 22-5]; Mason Dep. at 37:5-38:7 [Dkt. 43-1 at 10]). Their use of the restrooms did not cause any issues with other students, and no students questioned their presence in the boys' restrooms. (B.E. Dec. ¶11; S.E. Dec. ¶11 [*B.E.* Dkts. 22-4; 22-5]). However, when school employees noticed that they were using the boys' restrooms, B.E. and S.E. were informally reprimanded and told not to use them again. (B.E. Dec. ¶12; S.E. Dec. ¶12 [*B.E.* Dkts. 22-4; 22-5]). When they persisted in using the boys' restrooms, the boys

and their mother were called for a meeting with the school's vice principal. (B.E. Dec. ¶12; S.E. Dec. ¶12 [*B.E.* Dkts. 22-4; 22-5]). At the meeting, the boys' mother discussed their gender dysphoria diagnosis and their imminent initiation of hormone therapy, and asked that the boys be allowed to use the boys' restrooms and similar facilities that were consistent with their male gender. (L.E. Dec. ¶14 [*B.E.* Dkt. 22-3]). She followed that up with material from the boys' physician indicating that they both have medical conditions requiring frequent restroom use and that they should be allowed to use the bathrooms and locker rooms consistent with their male gender. (Medical accommodation requests [*B.E.* Dkt. 22-2, Dkt. 22-3]). B.E. and S.E. were born prematurely and as a result their colons do not work as they should, necessitating that they take laxatives. (L.E. Dep. 19:18-21:4 (*B.E.* Dkt. 43-3 at 6)]).

Vigo Schools rejected the request, instead indicating that B.E. and S.E. could use only the unisex restroom in the school's health office or the girls' restrooms for their toileting needs and for changing for gym. (L.E. Dec. ¶¶22-23; B.E. Dec. ¶ 14; S.E. Dec. ¶ 14 [*B.E.* Dkts. 22-3; 22-4; 22-5)]. Although B.E. and S.E. did not wish to use the showers in the boys' locker room when they had gym, and in fact many students do not shower, they did want to change clothes in private stalls that are located in the locker room. (B.E. Supp. Dec. ¶7; S.E. Supp. Dec. ¶7 [*B.E.* Dkts. 43-7; 43-8]).

Using the girls' restroom is not an option for B.E. and S.E., as they are boys, and having to use the girls' facilities is anxiety producing, upsetting, and feels wrong. (B.E. Dec. ¶22; S.E. Dec. ¶22 [*B.E.* Dkts. 22-4; 22-5]). Additionally, this would require

them to explain to students who know them only as boys that they were assigned female at birth. (B.E. Dec. ¶23; S.E. Dec. ¶23 [*B.E.* Dkt. 22-4; 22-5]). This would be upsetting not only to them, but also to female students, as B.E. and S.E. are male in appearance and becoming more so as they continue receiving testosterone. (B.E. Dec. ¶¶23-24; S.E. Dec. ¶¶23-24 [*B.E.* Dkts. 22-4; 22-5]).

The health office is also not suitable as it is far from the boys' classes and is locked at unpredictable times. (B.E. Dec. ¶¶25-28; S.E. Dec. ¶¶25-28 [*B.E.* Dkts. 22-4; 22-5]). When they need to use the restroom urgently, as they do because of their medical condition, they have difficulty in getting to the health office in time, assuming it is unlocked, and have suffered accidents, which cause stress and embarrassment. (B.E. Dec. ¶27; S.E. Dec. ¶27 [*B.E.* Dkts. 22-4; 22-5]). If it is locked, they have to wait in discomfort until it is opened. (B.E. Dec. ¶28; S.E. Dec. ¶28 [*B.E.* Dkts. 22-4; 22-5]). Because the office is so far away, they end up missing more of their classes than they would if they could use the much closer boys' restrooms. (B.E. Dec. ¶26; S.E. Dec. ¶26 [*B.E.* Dkts. 22-4; 22-5]). Moreover, using this remote restroom emphasizes to B.E., S.E., and their peers that the school believes the two brothers are different than everyone else, adding to their anxiety. (B.E. Dec. ¶¶18, 26-31; S.E. Dec. ¶¶18, 26-31 [*B.E.* Dkts. 22-4; 22-5]). For all these reasons, they simply try to avoid using the restrooms entirely while at school, although these efforts are painful, interfere with their ability to concentrate in class, and are medically dangerous. (B.E. Dec. ¶29; S.E. Dec. ¶29; Fortenberry Dec. ¶32 [*B.E.* Dkts. 22-4; 22-5; 22-2]).

Vigo Schools has an "Administrative Guideline" that purports to establish

criteria for transgender students to use the restrooms associated with their gender identities. (*B.E.* Dkt. 43-2). B.E. and S.E. meet the criteria in the Guideline, but it is Vigo Schools' position that transgender students must have surgery effecting "anatomical change" before they can use restrooms consistent with their gender identity—even though the Guideline itself includes no such absolute requirement. (Mason Dep. 18:21-24 [*B.E.* Dkt. 43-1 at 5]). Gender-affirming surgeries, however, are not performed in Indiana on minors. (Fortenberry Supp. Dec. ¶¶13-14 [*B.E.* Dkt. 43-6]).

Being excluded from the same restrooms as other boys and being denied the ability to change in private stalls in the boys' locker room has been emotionally and physically harmful to B.E. and S.E. (L.E. Dec. ¶25 [*B.E.* Dkt. 22-3]). Not only are there physical problems associated with B.E. and S.E. attempting to not use the restroom all day, but the failure to recognize them as boys in this most basic way undermines the benefits that they have received from their treatment and from family support for their gender dysphoria. (*Id.* ¶¶24-25). They suffer emotional and psychological harm every day: they dread going to school, are unable to focus, and come home depressed and humiliated. (*Id.* ¶29). Being treated as the boys that they are is crucial for their mental health, and denying them this ability makes them feel different and isolated and causes anxiety and depression as they perceive they are being punished simply for who they are. (Dec. B.E. ¶¶18, 31; Dec. S.E. ¶¶18, 31 [*B.E.* Dkts. 24-4; 22-5]).

D. Exclusion of A.C. from the restrooms

In the 2021-2022 school year, A.C. started at the John R. Wooden Middle School, which contains 7th and 8th grades. (A.C. Dep. 13:17-20 [*A.C.* Dkt. 34-2 at 2]; Kutruff Dep. 8:11-24 [*A.C.* Dkt. 29-4]). At the beginning of the school year, he did not use the restroom at all while he was at school. (A.C. Dep. 13:21-25 [*A.C.* Dkt. 34-2 at 2]). In September or early October, A.C.'s stepfather contacted the school and asked that he be permitted to use the boys' restrooms. (M.C. Dec. ¶19 [*A.C.* Dkt. 29-2]). The request was denied, and he was told that A.C. could use the girls' restrooms or the single-toilet restroom in the health clinic. (*Id;* Kutruff Dep. 49:20-22, 51:18-22 [*A.C.* Dkt. 29-4]). In order to use that restroom a student has to obtain permission, and A.C would have to sign in at the office each time to use it. (Kutruff Dep. 50:22-51:22 [*A.C.* Dkt. 29-4]).

The student restrooms at the school are designed to be used during the students' four-minute passing periods, absent teachers allowing students to leave during class. (*Id.* 48:8-23). These restrooms have multiple stalls and, as appropriate, multiple urinals. (*Id.* 48:24-49:4). There are doors on the stalls, and the urinals are separated by dividers. (*Id.* 49:4-11).

Using the girls' restrooms is not an option for A.C. as he is a boy. (A.C. Dec. ¶23 [Dkt. 29-3]). Use of the clinic restroom proved problematic, as it is far from A.C.'s classes, and using it during the four-minute passing periods caused him to be late for classes, which resulted in him being marked tardy and subjected him to discipline. (*Id.* ¶¶20-21). Moreover, it singles him out as being different and does not allow him

to be himself. (*Id.* ¶ 22). Rather than use the girls' restrooms or the restroom in the health office, A.C. tried to avoid using the restroom at all. (*Id.* ¶22). Even though this caused him physical discomfort, it was better than being singled out as different. (*Id.*).

After a meeting on November 3, 2021, Martinsville indicated that it was maintaining its position that A.C. could not use the boys' restrooms, but stated that A.C. would no longer be disciplined for being late to class. (M.C. Dec. ¶¶21-22 [*A.C.* Dkt. 29-2]). It offered him the option to attend school via on-line education. (*Id.*). Following the meeting, A.C. nonetheless began to use the boys' restrooms. (*Id.* at ¶24; A.C. Dec. ¶23 [*A.C.* Dkt. 29-3]). A.C.'s mother noticed an immediate positive change when A.C. used the boys' restrooms. (M.C. Dec. ¶24 [*A.C.* Dkt. 29-2]; M.C. Dep. 59:12-23 [*A.C.* Dkt. 38-2]). He felt more comfortable at school and felt better about himself. (M.C. Dec. ¶24 [*A.C.* Dkt. 29-2]). A.C.'s use of the restrooms, all with individual stalls with doors that close, caused no issues with other students and no student questioned his presence in the boys' restrooms. (A.C. Dec. ¶24 [*A.C.* Dkt. 29-3]). There were no student complaints. (Kutruff Dep. 65:6-21 [*A.C.* Dkt. 29-4]).

However, when a staff member noticed that A.C. was using the boys' restroom, A.C. was instructed on November 22, 2021 that he was not to use the boys' restrooms and was told that if he did so again, he could be disciplined. (*Id.* at 65:22-66:25; A.C. Dec. ¶25 [*A.C.* Dkt. 29-3]). The school's principal met with A.C. the following week and reiterated that A.C. was not allowed to use the boys' restrooms and must only use the girls' restrooms or the restroom in the health clinic and stated that A.C. would be punished if he used the boys' restrooms. (Kutruff Dep. 67:11-24 [*A.C.* Dkt. 29-4]).

Though never mentioned to A.C. or M.C., Martinsville does provide for transgender students' access to restrooms that align with their gender identity on a "case-by-case basis." (*Id.* 15:17-16:14; 23:6-15; 28:5-22; 73:10-74:7; M.C. Dec. ¶28 [*A.C.* Dkt. 29-2]). Martinsville will evaluate restroom requests based on 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 was prescribed hormones, and if the student has filed for a legal name or gender-marker change. (Kutruff Dep. at 23:12-24:5 [*A.C.* Dkt. 29-4]). Based on this unwritten policy, a number of transgender students in Martinsville's high school are allowed to use restrooms that align with their gender identities. (*Id.* 23:6-15; 28:5-22).

Once A.C. and his mother learned that Martinsville allowed some transgender students to use restrooms consistent with their gender identities, they provided Martinsville a letter from Dr. Fortenberry to demonstrate that A.C. meets Martinsville's unwritten criteria. (M.C. Dec. at 9 [*A.C.* Dkt. 29-2]). The letter specified that A.C. has consistently identified as a boy for years, is under the care of the Gender Health Clinic at Riley Hospital, and has gender dysphoria for which he is receiving treatment, including potentially hormones in the future. (*Id.*). Martinsville was also advised that the failure to allow A.C. to use the boys' restrooms, among other things, is a source of significant distress, depression, and anxiety for him. (*Id.*). As is demonstrated by this litigation, Martinsville did not change its position concerning A.C.'s restroom access.

Not being able to use the boys' restrooms worsened the anxiety and depression

caused by A.C.'s gender dysphoria, making him feel isolated and punished for who he is. (A.C. Dec. ¶27 [*A.C.* Dkt. 29-3]). Martinsville's actions signaled to students that A.C. is not a real boy, and that makes school painful for him. (*Id.*). Being treated as a boy at school is extremely important to A.C.'s mental and physical health, and it causes him a great deal of discomfort and mental distress to be at school when he is not treated as a boy. (*Id.* ¶28). It makes him unable to focus on learning, instead making him feel isolated and unable to be himself. (*Id.* ¶29). It also undermines the benefits he has obtained from his transition, family support, and medical care. (M.C. Dec. ¶32 [*A.C.* Dkt. 29-2]). A.C. is an intelligent child who gets good grades and loves learning. (*Id.* ¶36). He was formerly in the gifted and talented program, but now finds it hard to go to school because the school will not recognize him as the boy he is. (*Id.*). This is chronically disrupting both his education and his life, leaving him depressed, humiliated, angry, and suffering emotionally, psychologically, and physically. (*Id.* ¶¶35-37). His anxiety and depression from not being accepted at school follow him home where he wants to isolate himself. (M.C. Dep. 62:4-8 [*A.C.* Dkt. 38-2]).

E. Gender dysphoria and the significance of access to facilities consistent with gender identity

Transgender individuals have a gender identity that differs from their sex assigned at birth, and this incongruence can cause significant distress and may result in clinically diagnosed gender dysphoria. (Fortenberry Dec. ¶¶15, 18, 21 [*A.C.* Dkt. 29-1; *B.E.* Dkt. 22-2]). Up to 0.6% of persons in Indiana are transgender, and recent research from the Centers for Disease Control and Prevention shows that up to 1.9% of high school students identify as transgender. (Fortenberry Dec. ¶16 [*A.C.* Dkt. 29-

1; *B.E.* Dkt. 22-2]).

This distress presents through various symptoms and can, if untreated, result in clinically significant anxiety and depression, self-harming behaviors, substance abuse, and suicidality. (Fortenberry Dec ¶18 [*A.C.* Dkt. 29-1; *B.E.* Dkt. 22-2]). Research consistently demonstrates that the rates of attempted suicide for young persons with gender dysphoria are much higher than those without. (Fortenberry Dec. ¶19 [*A.C.* Dkt. 29-1; *B.E.* Dkt. 22-2]).

The standards for the treatment of gender dysphoria established by the World Professional Association for Transgender Health ("WPATH") are internationally recognized by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, the American Psychological Association, and the American Psychiatric Association, as the authoritative standards of care. (Fortenberry Dec. ¶¶24-25 [*A.C.* Dkt. 29-1]; ¶24 [*B.E.* Dkt. 22-2]). The WPATH Standards recognize that the principal treatment of gender dysphoria is to allow the young person the full expression of their gender identity. (Fortenberry Dec. ¶27 [*A.C.* Dkt. 29-1]; ¶26 [*B.E.* Dkt. 22-2]). Treatment focuses on alleviating distress through social role transition by supporting outward expression of the person's gender identity and allowing young people to express themselves through names, pronouns, and social behaviors consistent with their gender identities. (Fortenberry Dec. ¶¶27-28, 31, 34 [*A.C.* Dkt. 29-1]; ¶¶26-29 [*B.E.* Dkt. 22-2]). Counseling is often an important part of treatment, with its purpose being to assist with the depression, anxiety, and thoughts of self-harm that may flow from gender

dysphoria or not being accepted by family, friends, and society because they are transgender. (Fortenberry Dec. ¶32 [*A.C.* Dkt. 29-1]; ¶26 [*B.E.* Dkt. 22-2]).

The WPATH Standards recognize that social role transition is an essential component of the amelioration of gender dysphoria. (Fortenberry Dec. ¶¶34-35 [*B.E.* Dec. Dkt. 29-1]; ¶¶28-29 [*A.C.* Dkt. 22-2]). Research demonstrates that support for social transition, particularly from family and social institutions like schools, lessens the negative consequences of gender dysphoria. (Fortenberry Dec. ¶35 [*A.C.* Dkt. 29-1]; ¶29 [*B.E.* Dkt. 22-2]). Research also demonstrates that for transgender youth, school is the most traumatic aspect of growing up, as rejection and discrimination by school personnel lead to feelings of shame and unworthiness, creating daily stigmatizing experiences. (Fortenberry Dec. ¶36 [*A.C.* Dkt. 29-1]; ¶30 [*B.E.* Dkt. 22-2)].

The ability to use restroom facilities consistent with one's gender is a prime component of gender affirmation, and being denied the use of the appropriate facilities is experienced as a source of anxiety and distress, leading to self-harm behaviors including suicidality. (Fortenberry Dec. ¶37 [*A.C.* Dkt. 29-1]; ¶31 [*B.E.* Dkt. 22-2]). Recent scholarship notes that among transgender and nonbinary youth denied access to school restrooms consistent with their gender identities, 85% reported depression, 60% seriously considered suicide, and about 33% reported a suicide attempt in the last year. (Fortenberry Dec. ¶37 [*A.C.* Dkt. 29-1]; ¶31 [*B.E.* Dkt. 22]). Moreover, the intensity of discomfort occasioned by having to use school-assigned restrooms will cause many transgender youth suffering from gender dysphoria to

attempt to suppress their bodily functions for the entire day, which can cause physical injury. (Fortenberry Dec. ¶38 [*A.C.* Dkt. 29-1]; ¶32 [*B.E.* Dkt. 22-2]).

Reserving a specific restroom or locker room for the transgender student, when all other students may use sex-specific restrooms, does not resolve the problems caused by restroom exclusion at school. (Fortenberry Dec. ¶39 [*A.C.* Dkt. 29-1]; ¶33 [*B.E.* Dkt. 22-2]). This merely perpetuates the message that the transgender student is different from their peers and needs to be segregated, which triggers shame and contributes to feelings of isolation and low self-esteem. (Fortenberry Dec. ¶39 [*A.C.* Dkt. 29-1]; ¶33 [*B.E.* Dkt. 22-2]). These experiences of shame and discrimination have negative long-term consequences, creating a greater risk for posttraumatic stress disorder, depression, life dissatisfaction, and suicidality as an adult. (Fortenberry Dec. ¶40 [*A.C.* Dkt. 29-1]; ¶34 [*B.E.* Dkt. 22-2]).

II. Procedural history

A. *B.E.*

On November 8, 2021, B.E. and S.E. filed their Complaint for Declaratory and Injunctive Relief and Damages. (*B.E.* Dkt. 1). They sought a preliminary injunction on November 10, 2021, asking to use boys' restrooms and to be treated as male in all other respects by Vigo Schools. (*B.E.* Dkt. 12).

The District Court entered its Order on Motion for Preliminary Injunction on June 24, 2022. (A.1 [*B.E.* Dkt. 56]). The court concluded that B.E. and S.E. were likely to succeed on the merits of their Title IX claim and therefore did not address their equal protection claim. (A.5 [*B.E.* Dkt. 56]). After concluding that B.E. and S.E. had

satisfied the other requirements for the grant of a preliminary injunction, the court noted that it was issuing the preliminary injunction by separate order. (A.21, *B.E.* Dkt. 56 at 21). The separate preliminary injunction provides that B.E. and S.E. are to be provided "with access to the boys' restrooms and locker room, excluding the showers." (A.23 [*B.E.* Dkt. 57 at 2]).[3]

B. *A.C.*

A.C. filed his Complaint for Declaratory and Injunctive Relief on December 3, 2021. (*A.C.* Dkt. 1). On the same date, he filed his motion for preliminary injunction. (*A.C.* Dkt. 9).

The district issued its Order on Plaintiff's Motion for Preliminary Injunction on April 29, 2011 (A.1 [*A.C.* Dkt. 50]), followed by the stand-alone Preliminary Injunction on May 1, 2022 (A.40 [*A.C.* Dkt. 65]). The district court concluded that A.C. was likely to be able to show that Martinsville's actions violated both his Title IX and equal protection rights and that the other requirements for the grant of a preliminary injunction were met. (A.35-A.38 [*A.C.* Dkt. 65]. Accordingly, a preliminary injunction was entered enjoining Martinsville from "stopping, preventing, or in any way interfering with A.C. freely using any boys' restroom" in the middle school. (A.40 [*A.C.* Dkt. 65]).

[3] The Schools contend in their brief that the injunction grants B.E. and S.E. "unfettered access to locker rooms" and that the injunction "does not actually limit Plaintiffs' access in the boys' locker rooms to the stalls." (Appellants' Br. 30). However, the evidence is uncontested that B.E. and S.E. will be changing in the private stalls in the locker room. (B.E. Supp. Dec. ¶7; S.E. Supp. Dec. ¶7 [*B.E.* Dkts. 43-7, 43-8]).

Summary of the Argument

In *Whitaker v. Kenosha Unified School District No. 1 Board of Education,* 858 F.3d 1034 (7th Cir. 2017), *abrogation in nonrelevant part recognized by Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020), this Court held that requiring a transgender student to use a restroom that does not conform to his gender identity is discrimination "on the basis of sex," which violates Title IX, and which is subject to heightened equal-protection scrutiny. 858 F.3d at 1049, 1051. These cases cannot be distinguished from *Whitaker*, and the district courts properly concluded that B.E., S.E., and A.C. are likely to prevail on their claims that denying them access to boys' facilities violates Title IX.

Whitaker also compels the conclusion that the sex discrimination inflicted by the Schools violates equal protection as they are unable to establish the required "exceedingly persuasive justification" to justify the discrimination. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Their articulated concerns about protecting student privacy are conjectural and are wholly unsupported by the record. The record instead establishes that when the Youth were able to use boys' restrooms, there were no issues with other students. It further establishes that Martinsville allows transgender high school students to use restrooms consistent with their gender identities without any problems. The identical privacy justification raised by the Schools here was rejected not only in *Whitaker*, but by other courts as well. The Youth are likely to succeed on the merits of their equal protection claims.

Because *Whitaker* is directly on point, the Schools are left to argue that this Court should "revisit" *Whitaker*. (Appellants' Br. 26). There are no grounds to do so. In *Bostock v. Clayton County, Georgia*, –U.S.–, 140 S. Ct. 1731 (2002), the Supreme Court held that discrimination against persons because they are gay or transgender is sex discrimination under Title VII "because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." 140 S. Ct. at 1742. *Bostock* therefore supports this Court's conclusion in *Whitaker* that discrimination against a transgender student is sex discrimination. The Schools argue that *Whitaker* itself violates Title IX because the statute and its regulations allow for sex-segregated facilities. But the Youth are not challenging the maintenance of sex-segregated facilities as a general matter. They are challenging the fact that they are being excluded from the appropriate sex-segregated facilities because they are transgender. Finally, the fact that *Whitaker* used what is now an incorrect standard to assess the likelihood of success for a preliminary injunction in no way undermines this Court's legal conclusions regarding Title IX and equal protection.

The Schools also argue that the district courts erred in concluding that B.E., S.E., and A.C. met the other factors for the grant of a preliminary injunction. However, the district courts did not abuse their discretion in concluding that the Youth are suffering irreparable harm for which there is no adequate remedy at law, not just because the Schools are denying them rights guaranteed by equal protection and Title IX, but also because it is undisputed that being denied access to the boys'

facilities has caused them physical pain and serious emotional distress and has endangered them. The district courts also properly found that the balance of harms favors B.E., S.E., and A.C., as the harms postulated by the Schools are illusory. Finally, the public interest is served by supporting constitutional rights and the rights protected by Title IX.

Argument

I. Standard of review

"When reviewing the grant of a preliminary injunction, [this Court] review[s] the district court's findings of fact for clear error and its legal conclusions *de novo*." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 957 (7th Cir. 2019) (further citation omitted). The clear error standard applies to factual findings "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). "A district court may abuse its discretion by making a clear factual error or a mistake of law. But [this Court] give[s] substantial deference to the court's weighing of evidence and balancing of the various equitable factors." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) (internal citations omitted).

II. This Court held in *Whitaker* that denying a transgender student the use of restrooms consistent with his gender identity is discrimination on the basis of sex

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Schools argue at length that Title IX and its regulations give them the ability to exclude the Youth from boys' restrooms and B.E. and S.E. from the private changing areas they wish to use in the locker room. However, absent from this argument is an explicit acknowledgement that this Court held in *Whitaker* that denying a transgender student the ability to use restrooms consistent with his gender identity—the precise discrimination meted out to the Youth—is discrimination on the basis of sex. Although the Schools eventually segue into a non-meritorious argument, responded to below, that this Court should "revisit" *Whitaker*, they seek to minimize the obvious: the boys' claims cannot be distinguished from *Whitaker*.

In *Whitaker*, while affirming a preliminary injunction for a transgender boy who had been denied access to his high school's boys' restrooms, this Court determined that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth" and that "requir[ing] 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." 858 F.3d at 1048-49.[4] From an equal-protection standpoint, this is also sex discrimination, and "all gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. at 555 (internal quotation and citation omitted). A defendant's justification for such discrimination

[4] In *Whitaker,* this Court noted that numerous courts had recognized that transgender plaintiffs could bring discrimination claims based on the sex-stereotyping theory recognized in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). 858 F.3d at 1048-49 (citing cases).

must be "'exceedingly persuasive,'" requiring the defendant to demonstrate that the "'classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Whitaker*, 858 F.3d at 1050 (quoting *United States v. Virginia*, 518 U.S. at 524, 533).

In awarding the preliminary injunctions in this case, the district courts correctly applied these legal standards with regard to Title IX and Judge Pratt, in A.C.'s case, correctly applied the standard with regard to equal protection.

III. The district courts properly found that A.C., B.E., and S.E., are likely to prevail on their Title IX claims as they are being subjected to sex discrimination as determined by *Whitaker*

To prevail on their Title IX claims, A.C, S.E. and B.E. must demonstrate "that [they were] excluded from participation in an education program 'on the basis of sex'; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused him harm." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert. denied*, –U.S.–, 141 S. Ct. 2878 (2021). It is undisputed that both Martinsville and Vigo Schools are recipients of federal funding (Answer ¶44 [*B.E.* Dkt. 27]; Answer ¶55 [*A.C.* Dkt. 28]), and that restrooms are part of the educational program, *see, e.g., Grimm*, 972 F.3d at 616. Locker rooms clearly are as well. *See, e.g.*, *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 717 (D. Md. 2018) (finding that barring a transgender boy from the boys' locker room stated a claim under Title IX).

The legal question of whether the exclusion of the Youth from boys' facilities solely because they are transgender constitutes prohibited discrimination under Title

IX was answered by this Court in *Whitaker*. Like the plaintiff in that case, 858 F.3d 1040-14, the Youth are transgender boys who have lengthy and consistent histories of identifying as male; are diagnosed with gender dysphoria; are in therapy; have publicly transitioned; used the boys' restrooms in their schools without incident until threatened with discipline; are experiencing significant distress, depression, and anxiety because of not being able to use boys' restrooms; and try not to use the school restrooms at all, despite the fact that this causes them physical distress.

It is uncontested that because of not being able to use the boys' restrooms, A.C. will sometimes avoid using the restroom at school, and while this causes him physical discomfort, he believes that doing so is better than being made to feel different and singled out by being required to use the distant clinic restroom. (A.C. Dec. ¶23 [Dkt. 29-3]). B.E. and S.E. also suffer physical discomfort as they try not to use the restroom because the health office restroom may not be accessible and because its use, whether for the toilet or as a changing room for gym, emphasizes to their peers that they are different than everyone else, thereby adding to their anxiety. (B.E. Dec. ¶¶18, 26-31; S.E. Dec. ¶¶18, 26-31 [*B.E.* Dkts. 22-4; 22-5]).

Of course, the harm that can be demonstrated to prove a Title IX violation is not restricted to physical harm, but also includes "emotional and dignitary harm." *Grimm*, 972 F.3d at 618. It is undisputed that being recognized at school as the boys they are is critical to the overall wellbeing of the Youth. (B.E. Dec. ¶¶18, 31; S.E. Dec. ¶¶18, 31 [*B.E.* Dkts. 22-4; 22-5]; A.C. Dec. ¶¶27-29 [*A.C.* Dkt. 29-3]). Their exclusion from boys' facilities exacerbates their gender dysphoria, thereby increasing their

anxiety and depression. These harms will continue unabated, making them feel different and isolated unless they are treated consistently as who they are.

The distant health-office restrooms, where A.C. has to sign in and where B.E. and S.E. have no certainty that the office will be open, and where they are singled out as different from their classmates, are not viable alternatives. This is no different than *Whitaker,* where this Court noted that the fact that the plaintiff was allowed to use a gender-neutral restroom in the school's office was not a true alternative to restrooms consistent with his identity, given the distance from his classes and the increased stigmatization that the alternative caused him. *Whitaker*, 858 F.3d at 1050.

The nature of the harm here is demonstrated by the fact that for the brief period of time that A.C. used the boys' restrooms, without incident, he became more comfortable at school and felt better about himself as he was able to live as a boy. (M.C. Dec. ¶¶21-22 [*A.C.* Dkt. 29-2]). Both B.E. and S.E. noted that the boys' restrooms are "correct and more comfortable," particularly as they become more masculine as they receive testosterone. (B.E. Dec. ¶¶10, 24; S.E. Dec. ¶¶ 10, 24 [*B.E.* Dkts. 22-4; 22-5]). As Dr. Fortenberry noted, being denied the ability to use the restroom or locker room associated with one's gender identity is a constant source of anxiety and distress for a transgender person and was noted as a source of distress for the three boys. (Fortenberry Dec. ¶¶37, 39, 44 [*A.C.* Dkt. 29-1]; ¶¶31, 33, 35 [*B.E.* Dkt. 22-2]). Being denied the ability to use boys' facilities caused B.E., S.E., and A.C. harm, and will continue to cause them harm if the injunction is lifted.

Like the plaintiff in *Whitaker,* B.E. and S.E. are in high school and are

receiving testosterone, which causes significant bodily changes. Because of his age, A.C. has yet to begin receiving hormones, although he intends to receive them when they become medically available. However, he is on hormone-suppressing medications, which suppress his menstrual cycle, is male in appearance, is treated as a boy by his family, and is known as a boy. While it is true that A.C. is in middle school, this difference does not affect *Whitaker*'s applicability: the meaning of "discrimination on the basis of sex" under Title IX does not turn on an individual's age. Like the student in *Whitaker*, "this is not a case where a student has merely announced that he is a different gender. Rather, [A.C., as well as B.E. and S.E.] ha[ve] a medically diagnosed and documented condition." *Whitaker*, 858 F.3d at 1050.

This Court need go no further than *Whitaker* to conclude that the Youth have a near-certainty of success in demonstrating that they have been subjected to discrimination on the basis of sex by being denied the ability to use boys' facilities. Of course, *Whitaker* concerned restrooms, and not locker rooms, but, as noted by the district court in *B.E.*, this distinction is "immaterial." (A.11 n.2 [*B.E.* Dkt. 56]). The key is that *Whitaker* holds that denying a transgender student access to facilities consistent with their gender identity "punishes that individual for his or her gender non-conformance, which in turn violates Title IX." 858 F.3d at 1049. As noted by the district court in *B.E.*, this "reasoning applies the same to locker rooms, especially considering Plaintiffs would use the stalls in the locker room, just as they used the stalls in the restroom." (A.11 n.2 [*B.E.* Dkt. 56]); *accord M.A.B.*, 286 F. Supp. 3d at 717 (applying *Whitaker*'s reasoning to locker room). And, of course, any cisgender

student who does not want to undress near transgender students—or anyone else—is free to use the stalls as well. *See Students & Parents for Priv. v. United States Dep't of Educ.*, No. 16-CV-4945, 2017 WL 6629520, at *5 (N.D. Ill. Dec. 29, 2017) ("Nothing in [*Whitaker*'s] analysis suggests that restrooms and locker rooms should be treated differently under Title IX or that the presence of a transgendered student in either, especially given additional privacy protections like single stalls or privacy screens, implicates the constitutional privacy rights of others with whom such facilities are shared.").

The district courts properly found that the Youth are likely to prevail on their Title IX claims.

IV. B.E., S.E., and A.C are also likely to prevail on their equal protection claims

A. The exclusion of B.E., S.E., and A.C. from boys' facilities is subject to heightened scrutiny

By excluding the Youth from the boys' facilities solely because they are transgender, the Schools have discriminated against them on the basis of their sex in violation of the Equal Protection Clause. This Court already held in *Whitaker* that where a "School District's policy cannot be stated without referencing sex," the policy creates a sex-based classification for purposes of equal protection. 858 F.3d at 1051. This, of course, echoes the analysis already described in the Title IX context. This holding is not unique. *See Grimm*, 972 F.3d at 607 (applying heightened scrutiny as "the bathroom policy rests on sex-based classifications"); *M.A.B.*, 286 F. Supp. 3d at 718-19 (subjecting ban of transgender boy from boys' locker rooms to intermediate scrutiny as it represents sex-based discrimination). Here, the Schools' position that

B.E., S.E., and A.C. cannot use the boys' facilities because of their "biological sex" is a sex-based classification.

All sex-based classifications are subject to "demanding" scrutiny, requiring the Schools to demonstrate "an exceedingly persuasive justification" for their differential treatment. *United States v. Virginia*, 518 U.S. at 533. Under heightened scrutiny, the Schools carry the burden of demonstrating that the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 524. "It is not sufficient to provide a hypothesized or *post hoc* justification created in response to litigation. Nor may the justification be based upon overbroad generalizations about sex. Instead, the justification must be genuine." *Whitaker*, 858 F.3d at 1050 (internal citations omitted).

B. Excluding the Youth from boys' facilities is not substantially related to an important governmental objective

The Schools argue that their policies are justified by the "important objectives of protecting the interest of students in using the restroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex." (Appellants' Br. 22). The Schools err.

The record undermines the Schools' claim that excluding B.E., S.E., and A.C. from boys' facilities is necessary to protect the privacy interests of non-transgender students. It is uncontested that all three youth used the boys' restrooms for a period of time, without any negative reaction from students, and there is absolutely no evidence that any privacy violations generally occur in the restroom or occurred

during that time. (A.C. Dec. ¶¶ 23-24 [*A.C.* Dkt. 29-3]; B.E. Dec. ¶¶10-11; S.E. Dec. ¶¶10-11 [*B.E.* Dkts. 22-4; 22-5]). Similarly, there is no evidence that allowing B.E. and S.E. to change in private stalls in the locker room will cause any concerns. It is incumbent on the Schools to present evidence and not to rest upon "hypothesized or *post hoc* justification[s]." *Whitaker*, 858 F.3d at 1050. Yet they present only hypothesized harm.

The fact that the Schools can produce no evidence to support their hypothesized harm is not surprising. It is uncontested that Martinsville does allow some transgender students in its high school to use restrooms that are consistent with their gender identities. (Kutruff Dep. 15:17-16:14; 23:6-15; 28:5-22; 73:10-74:7 [*A.C.* Dkt. 29-4]). The Schools cannot explain why the privacy concerns that they articulate are somehow malleable enough to allow Martinsville to ignore those concerns as to some transgender students. The best they do, speaking solely of A.C., is to state that middle school students are less mature than high school students. (Appellants' Br. 23). What does this mean, and where is the evidence to support it? The fact that the Schools cannot cite any examples of actual privacy issues, even though Martinsville is allowing what it and Vigo Schools are seeking to deny here, emphasizes that the Schools' argument is not supported by any evidence.

This Court has already held that the Schools' articulated privacy concerns are not legitimate. As this Court noted in *Whitaker*, in language that bears repeating at length:

> [a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly

> curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. 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. Nothing in the record suggests that the bathrooms at [the] High School are particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line. Therefore, this court agrees with the district court that the School District's privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.

858 F.3d at 1052-53.[5] The Fourth Circuit in *Grimm* likewise emphasized that the privacy arguments typically raised in this context fall flat, highlighting that many school districts across the country allow transgender students to use restrooms matching their gender identities, without incident, and concluding that the school's concerns were merely conjectural. 972 F.3d at 614. And the *Grimm* court ultimately concluded that the school's policy, to the extent that it was based upon privacy concerns, was "marked by misconception and prejudice." *Id.* at 615.

To be sure, S.E. and B.E.'s case also involves locker rooms. But every circuit to consider the question has rejected the argument that the mere presence of a transgender student in a restroom or locker room violates cisgender students' rights

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[5] The fact that persons using restrooms tend to be discreet distinguishes the Schools' restrooms from situations, cited by the Schools, where persons are unknowingly videotaped and whose privacy has been invaded even when they have diligently attempted to protect it. (*See* Appellants' Br. 13-14, 16). It also distinguishes the situation presented in this Court's recent case of *West v. Radtke*, which involved strip searches of a prisoner, a "highly invasive intrusion on bodily privacy by prison employees." –F.4th–, No. 20-1570, 2022 WL 4285722, at *10 (7th Cir. Sept. 16, 2022).

to privacy. In rejecting such a challenge, the Third Circuit noted that transgender students' use of the facilities "does not force any cisgender student to disrobe in the presence of any student—cisgender or transgender" because there are private stalls and other "facilities for any student who does not feel comfortable being in the confines of a communal restroom or locker room." *Doe by & through Doe v. Boyertown Area Sch. Dist.,* 897 F.3d 518, 531 (3d Cir. 2018). In rejecting another challenge, the Ninth Circuit similarly noted the existence of "alternative options and privacy protections to those who do not want to share facilities with a transgender student." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020), *cert. denied*, –U.S.–, 141 S. Ct. 894 (2020); *see also M.A.B.*, 286 F. Supp. 3d at 724 (describing alternatives that can be provided to cisgender students).

Of course, if cisgender students are somehow offended by the presence of the Youth in a closed restroom or locker room stall, these students may be allowed to use the restroom in the health office. This simple remedy undercuts any justification that the School can offer for denying the Youth the ability to use the boys' facilities. *See, e.g.*, *Boyertown*, 897 F.3d at 530 ("cisgender students who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school"); *Parents for Privacy*, 949 F.3d at 1225 (noting that the school has "alternative options and privacy protections to those who do not want to share facilities with a transgender student").

This easy solution to the illusory and conjectural concerns of the Schools further demonstrates that excluding the Youth from the boys' facilities is not related

to any legitimate privacy interest. Moreover, concluded the *Boyertown* court, "the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces." 897 F.3d. at 533. *See also Parents for Privacy,* 949 F.3d at 1225 (cisgender students do not have a constitutional privacy right to not share restrooms or locker rooms with transgender students). As in *Boyertown*, "[n]othing in the record suggests that cisgender students who voluntarily elect to use single-user facilities to avoid transgender students face the same extraordinary consequences as transgender students would if they were forced to use them." 897 F.3d at 530. By contrast, forcing transgender students to use separate facilities because of someone else's objections "would very publicly brand all transgender students with a scarlet 'T.'" *Id.*

Moreover, even if the Court were to credit the Schools' stated goal of preventing "exposure of anatomical differences," that goal is not advanced by placing boys who are receiving gender-affirming treatment in the *girls'* restrooms and locker room. As a result of hormone therapy and other treatments, "a person's birth sex is not dispositive of their actual physiology." *Grimm*, 972 F.3d at 622 (Wynn, J., concurring). Indeed, as previously described, B.E. and S.E. are currently experiencing the physiological changes associated with male puberty due to their gender-affirming testosterone. It is hardly consistent with the Schools' purported justification to require boys with facial hair, lacking breast development, and with any number of

other male characteristics, to share restrooms and locker rooms with girls.[6]

The Schools also argue that they have an interest in enacting policies that "are administratively practical." (Appellants' Br. 23). They cite no authority for the proposition that administrative convenience is an interest weighty enough to overcome heightened scrutiny. Regardless, both Schools have policies that purport to allow, under unclear circumstances, transgender students to use restrooms consistent with their gender identities, so it is unclear what the notion of "administratively practical" means. This is especially so for A.C., as Martinsville allows some transgender high-school students to use restrooms consistent with their gender identities, without any reported administrative difficulties. Excluding the Youth from boys' facilities as a matter of amorphous "administrative practicality" does meet the required "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. at 533.[7]

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[6] Similarly, while the Schools cite *Tagami v. City of Chicago*, 875 F.3d. 375 (7th Cir. 2017) for the proposition that female breasts are "a basic physiological differences between the sexes" justifying sex-based distinctions in nudity ordinances (Appellants' Br. 25), they ignore that transgender girls who receive gender-affirming hormone therapy have the same typically female breasts as cisgender girls. Yet, under the Schools' policies, a transgender girl would have to use the boys' restrooms and locker rooms despite their purported "basic physiological differences."

[7] In addition to arguing that the Schools had engaged in sex discrimination, the Youth also argued in the district courts that their ban from restrooms is subject to elevated scrutiny because it represents discrimination against transgender persons who must be deemed to be a quasi-suspect class. (*A.C.* Dkts. 30 at 26 n.11, 39 at 16-17; *B.E.* Dkts. 22 at 25 n.7, 44 at 17). The district courts did not reach this issue, and this Court need not do so either. However, as noted by numerous courts, discrimination against transgender persons is subject to this elevated scrutiny. *See, e.g., Grimm,* 972 F.3d at 613; *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019); *Ray v. McCloud,* 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020); *M.A.B.*, 286 F. Supp. 3d at 719-21; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Evancho v. Pine-Richland School Dist.*, 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). The Youth reserve the right to further pursue

V. There are no grounds to revisit *Whitaker*

Faced with *Whitaker*, a recent decision that is indistinguishable from these cases, the Schools are left to argue that this Court should "revisit" that case. This Court has shown a marked reluctance to overturn its prior decisions, particularly when the decision is not an outlier, and even if there is a split in the circuits. *See, e.g.*, *Buchmeier v. United States*, 581 F.3d 561, 566 (7th Cir. 2009) (en banc) (noting that "restless movement from one side of a conflict to another" by this Court is not beneficial). Here, *Whitaker* is certainly not an outlier, and the decision is supported by intervening Supreme Court precedent. There is no reason to reconsider the decision.

A. *Whitaker* is consistent with the precedent of other circuits and *Bostock*

Whitaker is consistent with the decisions of every other circuit to address the issue. The Fourth Circuit in *Grimm* concluded that a transgender student who was denied access to boys' restrooms demonstrated a violation of Title IX. 972 F.3d at 619. In *Boyertown*, cited above, the court rejected a claim by cisgender students that a policy allowing transgender students to access bathrooms and locker rooms consistent with their gender identities violated the cisgender students' rights under Title IX. 897 F.3d 518 at 530 (noting that "requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination"). And in *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016), the

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this argument in the district court.

court, in refusing to grant the school district a stay of a preliminary injunction that ordered the district to allow an eleven-year-old transgender girl to use girls' restrooms noted that the school district could not establish the likelihood that it would succeed on appeal given, that sex-stereotyping was impermissible discrimination. *Id.* at 221; *see also Parents for Privacy*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018) ("[f]orcing transgender students to use facilities inconsistent with their gender identity would undoubtedly harm those students and prevent them from equally accessing educational opportunities and resources" and would violate Title IX), *aff'd*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, –U.S.–, 141 S. Ct. 894 (2020); *M.A.B.*, 286 F. Supp. 3d at 717 (finding that refusing a transgender student access to the locker room consistent with his gender identity stated a Title IX claim).[8]

The Schools also seek support in *Bostock* for their argument that *Whitaker* should be reexamined. (Appellants' Br. 31). Far from weakening this Court's conclusion in *Whitaker* concerning Title IX, *Bostock* supports it, and it certainly provides no basis to disturb controlling precedent.

In *Bostock,* the Supreme Court considered challenges raised under Title VII by individuals who had been subjected to adverse employment actions because of their sexual orientation or transgender status. 140 S. Ct. at 1737-38. The Court unequivocally concluded that sexual orientation and transgender status

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[8] In *Adams v. School Board of St. Johns Co., Fla.*, 3 F.4th 1299 (4th Cir. 2021), *vacated and en banc rehearing granted,* 9 F.4th 1369 (4th Cir. 2021), the panel concluded that a school policy that prevented a male transgender student from using male restrooms was subject to intermediate scrutiny as a gender-based classification. *Id.* at 1307-08. The decision has been vacated and the Fourth Circuit is conducting en banc review of the case.

> are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Id. at 1742. The Court stressed that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that should be the end of the analysis." *Id.* at 1743 (internal quotation and citation omitted).[9]

It is, of course, true that the Court in *Bostock* did not address the propriety of denying transgender persons access to facilities conforming to their gender identities under either Title VII or Title IX, 140 S. Ct. at 1753, as that question was not before it. This is not an invitation to revisit *Whitaker*. The Court certainly did not reject a sex-stereotyping approach to assessing discrimination against transgender persons, as it acknowledged that discrimination based on sex stereotyping treats a person in a manner that, but for their sex, would be different. *Id.* at 1742-43, 1749. The Supreme Court's reasoning in *Bostock* cannot be construed as even questioning *Whitaker* where the exact same conclusion was reached, regardless of the theory

[9] As in *Bostock*, Defendants' arguments about the meaning of the term "sex" are immaterial. Discrimination based on the lack of congruity between a person's sex assigned at birth and their gender identity is discrimination on the basis of "sex" under any definition of the term. "By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today." *Bostock*, 140 S. Ct. at 1746. No one denies that the Youth were assigned the sex of female at birth based on their genitalia. However, as *Whitaker* and *Bostock* demonstrate, that fact does not answer the question of whether they are being discriminated against "on the basis of sex."

utilized; discrimination against transgender persons is discrimination on the basis of sex.

After arguing that *Bostock* implicitly requires this Court to revisit its Title IX analysis, the Schools paradoxically argue that *Bostock* is limited to Title VII and does not apply to Title IX after all. To the contrary, courts have recognized that "[i]t would be logically inconsistent with *Bostock* to find that Title IX permits discrimination for being transgender." *C.P. ex rel. Pritchard v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791, 796 (W.D. Wash. 2021). In *Grimm*, the court concluded that denying a transgender student the ability to use restrooms consistent with his gender identity violated both Title IX and equal protection. 972 F.3d at 616, 619. In doing so, the court recognized that *Bostock* supported its holding that the plaintiff had been discriminated against "on the basis of sex," as *Bostock* found that "the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions." *Id.* at 616 (citing *Bostock*, 140 S. Ct. at 1741-42). In *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022), the Ninth Circuit rejected a district court's attempt to limit *Bostock*'s reasoning to Title VII: "Given the similarity in language prohibiting sex discrimination in Titles VII and IX, we do not think *Bostock* can be limited in the manner the district court suggested." *Id.* at 114.[10]

[10] Courts have routinely "used precedent interpreting the antidiscrimination provisions of Title VII in [their] analysis of comparable provisions in Title IX." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 130 n.22 (4th Cir. 2022) (en banc) (citing cases), *pet. for cert. filed*, No. 22-238 (U.S.); *see also, e.g.*, *Whitaker*, 858 F.3d at 1047 ("this court has looked to Title VII when construing Title IX" (citation omitted)); *Nelson v. Christian Bros. Univ.*, 226 Fed. App'x 448, 454 (6th Cir. 2007) ("Generally, courts have looked to Title VII as an analog for

The Supreme Court has commented that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966) (addition by the Court)). *Bostock* does nothing to minimize the broad sweep of Title IX, and it bolsters this Court's conclusion in *Whitaker* that denying Ash Whitaker access to boys' restrooms was discrimination "on the basis of sex."

B. *Whitaker* does not contravene what Title IX allows

The Schools engage in a lengthy analysis as to why Title IX and 34 C.F.R. § 106.33 purportedly allow them to exclude the Youth from boys' facilities, but nothing about the statutory text of Title IX or its implementing regulations has changed since this Court's decision in *Whitaker*. The Schools are asking this Court to ignore *Whitaker* and reanalyze the very same text and regulations to reach a different outcome. Even if this Court were to re-review the statutory text and regulations, such an analysis leads inexorably to the conclusion that the Schools violated the Youth's statutory and constitutional rights by discriminating against them on the basis of sex.

The Schools' arguments are based on the false premise that 34 C.F.R. § 106.33 and other Title IX provisions authorizing sex separation allow schools to engage in

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the legal standards in both Title IX discrimination and retaliation claims.") (internal and further citations omitted); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) ("[W]e can draw upon the substantial body of case law developed under Title VII to assess the plaintiff's claims under both section 1983 (the equal protection clause) and Title IX.") (footnote omitted).

"discrimination." Citing Black's Law Dictionary, the Schools argue that sex separation is, "by definition, discrimination," which the Schools define as "[t]he intellectual faculty of noting differences and similarities." (Appellants' Br. 28). Not so. *Bostock* expressly noted that "Title VII does not concern itself with everything that happens 'because of' sex" and explained that the ordinary meaning of "discrimination" in this context was "to treat a person worse." 140 S. Ct. at 1740; *see also id.* at 1753 (defining "discriminate against" as "distinctions or differences in treatment that injure protected individuals"). Merely "noting differences and similarities" is not "discrimination," as *Bostock* defines the term.[11] Thus, despite the Schools' assertions to the contrary, 34 C.F.R. § 106.33 does not authorize "discrimination." It authorizes schools to "provide separate toilet, locker room, and shower facilities on the basis of sex," but those facilities must be provided in a manner that complies with Title IX's underlying prohibition on "discrimination." 20 U.S.C. 1681(a); *see Grimm*, 972 F.3d at 618.

In *Grimm,* the school district made precisely the same argument, contending that Title IX, and particularly 34 C.F.R. § 106.33, authorized it to exclude a transgender boy from boys' restrooms. 972 F.3d at 618. The court's rejection of this argument is cited at length, as it also directly refutes the Schools' argument:

Grimm does not challenge sex-separated restrooms; he challenges the

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[11] The existence of harmful and unequal treatment further distinguishes this case from *West v. Radtke*, where this Court reasoned that modifying the job duties of a transgender prison guard to exempt certain strip searches would not constitute an "adverse employment action" because there was "no suggestion that a change in compensation would result, and such an insignificant change in job duties neither harms the career prospects of transgender employees nor creates a hostile work environment." 2022 WL 4285722, at *10.

> Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity. . . And the implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely in its own discriminatory notions of what "sex" means.

Id. (emphasis by the court) (footnote omitted). And, as noted, numerous other cases agree that discrimination similar to that engaged in by the Schools violates Title IX. Of course, the Youth are not challenging the existence of separate facilities, they are simply seeking access to them.[12]

The Schools' persistent attempt to justify its discrimination by citing to the language in 20 U.S.C. § 1686 authorizing separate living facilities for "the different sexes" is similarly unavailing. Restrooms are not "living facilities," and even if they were, that statutory provision, like the restroom regulation, "is a broad statement that sex-separated living facilities are not unlawful—not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities." *Grimm*, 972 F.3d at 618 n.16.

The schools erroneously attempt to portray these cases as challenging the existence of sex-separated facilities. The point is that if a transgender boy were a

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[12] The Schools' erroneous view is not shared by the United States Department of Justice, which has announced proposed amendments to Title IX regulations. *See* Proposed Rule, *Nondiscrimination on the Basis of Sex in Education Programs of Activities Receiving Federal Financial Assistance*, 87 FR 41390-01, 2022 WL 266876(F.R.) (July 12, 2022). These specifically provide that Title IX prohibits discrimination based on sex stereotypes, sexual orientation, and gender identity, and further provide that "[a]dopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." *Id.* at 87 FR 41571 (proposed 34 C.F.R. § 106.10; 34 C.F.R § 106.31(a)(2)).

cisgender boy, he could use the boys' restrooms and locker rooms. But the transgender boy is denied access solely because he is transgender. "[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. Title IX most assuredly does not authorize the discrimination that has been imposed on B.E., S.E., and A.C.[13]

C. *Whitaker* is not undermined by the fact that it articulated a since-rejected preliminary injunction standard

In *Whitaker,* this Court stated that that in order to demonstrate a likelihood of success on the merits in a preliminary injunction, the plaintiff need only establish that the chances to succeed are "better than negligible." 858 F.3d at 1046. Since then, this Court has recognized that this is not the proper standard. *See Pritzker*, 973 F.3d at 763 (noting that the "better than negligible" standard has been "retired by the Supreme Court"). The fact that *Whitaker* has been abrogated to the extent that it used what has since been declared to be an erroneous *procedural* standard does not affect this Court's *legal* conclusion that denying a transgender student the ability to use the restrooms that are consistent with his gender identity is discrimination "on the basis of sex." A court's interpretation of the substantive law remains the same whether a plaintiff seeks a preliminary or permanent injunction, regardless of whether the now-defunct "better than negligible" standard was articulated. And

[13] In support of their claims regarding § 1686, the Schools cite *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007) (Appellants' Br. 28, 36), despite the fact that the Tenth Circuit has recognized that this case is "no longer valid precedent" to the extent that it conflicts with *Bostock*. *Tudor v. Southeastern Okla. State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021).

authority remains authoritative even if it has been abrogated on a limited point unrelated to the principle for which it is being cited. *See, e.g.*, *Dhakal v. Sessions*, 895 F.3d 532, 539 (7th Cir. 2018) (citing as authority a Supreme Court case that had been "abrogated in part on other grounds" by a later case); *Skiba v. Ill. Cent. R.R.*, 884 F.3d 708, 720 (7th Cir. 2018) (citing case that had been "overruled on other grounds").

To put it simply, this Court in *Whitaker* did not determine that the plaintiff had a "better than negligible" chance of establishing what the law was; this Court stated the law. It then concluded that Ash Whitaker had a "better than negligible" chance of establishing that the school district's actions violated it. The fact that this Court used the incorrect standard for assessing whether Ash Whitaker was entitled to relief does not alter its holding that, as a matter of law, denying a transgender student the ability to use the restroom associated with his gender identity is sex discrimination. And it is this essential holding that the Schools ignore.

VI. The district courts properly found that the other requirements for the grant of a preliminary injunction are met

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

The denial of the Youth's constitutional and statutory rights is, in and of itself, irreparable harm. "Courts have . . . held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). The same is true concerning denial of rights secured by Title IX. *See, e.g., Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 973

(D. Minn. 2016) ("Plaintiffs' expectation that they may be treated unequally in violation of Title IX's terms is an irreparable harm.").

Moreover, the Schools ignore the uncontested evidence demonstrating the myriad harms being suffered by the Youth, all of whom suffer from gender dysphoria, a condition that, by definition, "is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." (*Supra* at 4 n.1). They force themselves to avoid using the restroom, causing physical discomfort in addition to the psychological pain of being forced to use a "special" restroom, thereby emphasizing that they are different and exacerbating their anxiety and depression. School has become a difficult and painful place for all three Youth. Dr. Fortenberry has noted that the Youth have all identified denial of access to boys' facilities as a source of "distress." (Fortenberry Dec. ¶35 [*B.E.* Dkt. 22-2]; ¶44 [*A.C.* Dkt. 29-1]).

The Schools are left to argue that there is no evidence that B.E., S.E., or A.C. are actively suicidal or have restricted their water intake, and that this means they have an adequate remedy at law because emotional distress can be compensated. (Appellants' Br. 38-39, 41). As an initial matter, A.C. has engaged in self-harming behavior, B.E. has attempted to suffocate himself, and L.E. has suicidal thoughts. (L.E. Dep, 35:25-38.5 [*B.E.* Dkt. 43-3]; M.C. Dec. ¶12 [*A.C.* Dkt. 29-2]). But the Schools' argument ignores the evidence that demonstrates how harmful being denied access to boys' facilities is to the Youth. It should go without saying that irreparable harm and the lack of an adequate remedy at law can be demonstrated without B.E.,

S.E., and A.C. being currently suicidal. In granting a preliminary injunction to transgender students who had been prohibited from using restrooms of their identified gender, the court in *Evancho v. Pine-Richland School Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017), noted "it is not a long leap, nor really a leap at all, to give credence to the Plaintiffs' assertions that they subjectively feel marginalized, and objectively are marginalized, which is causing them genuine distress, anxiety, discomfort and humiliation." *Id.* at 294.[14] And, as stated by Dr. Fortenberry and not contravened by the Schools, this distress and anxiety is linked to increases in self-harming behaviors and depression. (Fortenberry Dec. ¶31 [*B.E.* Dkt. 22-2]; ¶¶39-40 [*A.C.* Dkt. 29-1]). Irreparable harm is "defined as harm that cannot be repaired and for which money compensation is inadequate." *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020) (internal quotation and citation omitted). The uncontested evidence demonstrates that without an injunction the Youth will suffer irreparable harm and that they have no adequate remedy at law. The district courts' conclusions as to these factors are certainly not clearly erroneous.

B. The balance of harms favors the Youth

The Schools argue that they will be harmed by the preliminary injunction inasmuch as they will no longer be able to rely on Title IX regulations and "will be forced to navigate this new frontier without the benefit of established rules," and the

[14] The Schools note that the district court "credited A.C.'s and M.C.'s accounts that A.C. felt stigmatized and isolated and that exclusion from the boys restroom worsened A.C.'s feeling of anxiety and depression. (A.36) Yet this evidence falls short of showing irreparable harm." (Appellants' Br. 38). This, of course, is irreparable harm and the district court's determination is certainly not clearly erroneous.

privacy rights of other students will be violated. (Appellants' Br. 40). But this argument is tied to the Schools' erroneous suggestion that allowing the Youth to use the boys' facilities will lead to the collapse of all sex-separated spaces. The injunction merely mandates that the Schools conform their conduct to the requirements of the Constitution and federal law—a requirement that the Schools cannot claim is harmful. *See, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (holding that if a governmental entity "is applying [a] policy in a manner that violates [the plaintiff's] First Amendment rights…then [the] claimed harm is no harm at all").

The Schools do not explain the contours of this apparently perilous "new frontier." The Youth are boys and seek to use the boys' facilities. There is nothing new about this: it is what is required by federal law and the Constitution.[15] And, as noted above, there simply is no evidence that allowing the Youth to use boys' facilities negatively impacts the privacy of other students. As the court noted in *A.C.,* but in language that could equally apply to *B.E.,* the Schools' "concerns with the privacy of other students appears entirely conjectural. No evidence was provided to support the Schools' concerns, and other courts dealing with similar defenses have also dismissed them as unfounded." (A.37 [*A.C.* Dkt. 50]). Moreover, the Schools' "concerns over privacy are undermined given that [Martinsville] has already granted permission for other transgender students to use the restroom of their identified gender, and it has

[15] The "new frontier" argument is curious given that Martinsville conceded that at least at its high school, transgender students are allowed to use the restrooms of their gender identities, not their sexes assigned at birth. To the extent that anything must be "navigated," it appears that at least Martinsville has done so.

presented no evidence of problems when other transgender student[s] have used restrooms consistent with their gender identity." *Id.*[16] Again, the district courts' conclusions as to the balance of harms weighing in favor of the Youth are not clearly erroneous.

C. The public interest supports the issuance of the preliminary injunctions

The Schools argue that the public interest is disserved by the issuance of an injunction, as they contend that Title IX allows the discrimination imposed here. They also complain that *Whitaker* displaced congressional and administrative action and decision making. (Appellants' Br. 41-44). But, as explained in *Whitaker,* this issue has already been decided by Congress: Title IX does not allow this discrimination.

The State argues further that inasmuch as one of the amicus briefs highlights the potential fluidity of gender identity that this "previews the uncertainty and lack of any statutory mooring that school officials will be left to navigate." (Appellants' Br. 44). Again, given that Martinsville already allows transgender students to use the restrooms associated with their gender identities, it is unclear what "navigation" could be needed. In any event, as noted by the district court in *B.E.*, "the School[s] can require documentation to verify the legitimacy of a student's request," much like

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[16] In *Whitaker,* this Court concluded that the school district had failed to establish that any harm—either to the school district or to the public—would result from the issuance of a preliminary injunction. 858 F.3d at 1054. The court credited the statements made by *amici*, school administrators from twenty-one states and the District of Columbia, who "uniformly agree that the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in their combined experience, all students' needs are best served when students are treated equally." *Id.* at 1055. Similar statements by amici have been made in this case as well. *See A.C.,* Amici Curiae Brief of School Administrators, Seventh Circuit Dkt. No. 58 (No. 22-1786).

schools currently do in other areas of student life. (A.19 [*B.E.* Dkt. 56]).

The public interest is furthered by supporting rights that are protected by the Constitution and Title IX. *See, e.g., Dodds*, 845 F.3d at 222 (denying a stay pending appeal of an injunction requiring a school district to allow a transgender student to use the girls' restrooms and noting that the "public interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe's constitutional and civil rights, a purpose that is always in the public interest.").

Conclusion

For the foregoing reasons, the district courts' decisions granting the Youth preliminary injunctions must be affirmed so that they can use the facilities associated with their gender identities.

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I hereby certify that this brief complies with the type-volume limitation of Circuit Rule 32(c) insofar as it contains 13,977 words, excluding the parts of the brief exempted by Appellate Rule 32(f).

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Certificate of Service

I hereby certify that on the 11th day of October, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Service will be made on all ECF-registered counsel by operation of the Court's electronic system.

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