UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JANE DOE #1, a minor, by her mother and next friend, JANE DOE #2, Plaintiff, v. MUKWONAGO AREA SCHOOL DISTRICT and JOE KOCH, in his official capacity as Superintendent of the Mukwonago Area School District, Defendant.	Civ. Action No. 2:23-cv-876-LA

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, the mere possibility that Defendants may at some point in the future allow Plaintiff to return to using the girls' restrooms through a non-legal process (*i.e.*, under Policy 5514) in no way undermines her claim for equitable relief. *Cf. Mays*, 974 F.3d at 818 (evaluating the adequacy of alternative *legal* remedies); the possibility of future relief does nothing to reduce the irreparable harm right that Plaintiff is suffering right now. For example, in *Kirsch v. Racine Cnty. Sheriff*, the court enjoined defendants from denying an inmate access to prescription pain medication. No. 08-C-913, 2008 WL 4872595 (E.D. Wis. Nov. 11, 2008) (Adelman, J.). Defendants asserted that a preliminary injunction was not warranted because the plaintiff would receive his medication "provided he has a valid prescription and there are no medical contraindications to his taking the medication." *Id.* at *3. In response, the court wrote, "[D]efendants do not identify any harm that would be caused by my granting a preliminary injunction, and thus to avoid the possibility that defendants will again deny plaintiff his pain medication, I will enter a preliminary injunction[.]" *Id.* In the instant case, the assurances offered

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

CONCLUSION

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

Dated: July 5, 2023

Respectfully submitted,

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*** Application for admission to this Court forthcoming*
** Admission to this Court Pending*