

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**JOAQUÍN CARCAÑO; PAYTON GREY
MCGARRY; H.S., by her next friend and
mother, KATHRYN SCHAFER; ANGELA
GILMORE; KELLY TRENT; BEVERLY
NEWELL; and AMERICAN CIVIL
LIBERTIES UNION OF NORTH
CAROLINA,**

Plaintiffs,

v.

**PATRICK MCCRORY, in his official
capacity as Governor of North Carolina;
UNIVERSITY OF NORTH CAROLINA;
BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA;
and W. LOUIS BISSETTE, JR., in his
official capacity as Chairman of the Board
of Governors of the University of North
Carolina,**

Defendants.

Civil Action No.

1:16-cv-00236-TDS-JEP

**MEMORANDUM OF LAW IN SUPPORT OF THE UNIVERSITY OF
NORTH CAROLINA DEFENDANTS' MOTION TO STAY
PROCEEDINGS**

NOW COME the University of North Carolina (the “University”); the Board of Governors of the University of North Carolina (the “UNC Board”); and W. Louis Bissette, Jr. (“Bissette”), in his official capacity as Chair of the UNC

Board (collectively referred to as “UNC Defendants”), and respectfully submit this Memorandum of Law in Support of UNC Defendants’ Motion to Stay Proceedings.

NATURE OF THE MATTER BEFORE THE COURT

In this case, Plaintiffs challenge the Public Facilities Privacy and Security Act, 2016 N.C. Sess. Laws 3 (the “Act”), (Attachment 1, Declaration of President Spellings, Exhibit 3) on grounds that it violates their statutory and constitutional rights.

The Act makes several changes to the North Carolina General Statutes. Among other things, the Act provides that all “[p]ublic agenc[ies],” including the University, “shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.”¹ The Act, Part I, Sec. 1.3. The Act defines “biological sex” as “the physical condition of being male or female, which is stated on a person’s birth certificate.” The Act, Part I, Sec. 1.3.

Plaintiff Carcaño is a transgender employee of the University of North Carolina at Chapel Hill (“UNC-CH”). First Am. Compl., D.E. #9, at ¶ 5. Plaintiff

¹ Although the University is defined as an Executive Branch Agency for purposes of the Act, the University system is not part of the executive branch of state government in North Carolina.

McGarry is a transgender student at the University of North Carolina at Greensboro (“UNC-G”). First Am. Compl. at ¶ 6. Plaintiff H.S. is a transgender student in the residential high school program at the University of North Carolina School of the Arts. First Am. Compl. at ¶ 7. (Hereinafter this Memorandum refers to Plaintiffs Carcaño, McGarry, and H.S. as the “Transgender Plaintiffs.”)²

Transgender Plaintiffs allege that the Act violates their rights to be free from sex discrimination in educational programs that receive funding under Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C § 1681(a). In particular, Transgender Plaintiffs allege the Act violates their rights under Title IX by compelling UNC Defendants to require them to only use those multiple occupancy restrooms that correspond with their biological sex, rather than their gender identity. Transgender Plaintiffs’ Title IX claims are asserted only against the University.

² There are four other nontransgender Plaintiffs. The American Civil Liberties Union of North Carolina (“ACLU of NC”) alleges it is an organization suing on behalf of its transgender members who are barred by the Act from using restrooms and other facilities in accordance with their gender identity in schools. First Am. Compl. at ¶ 7. The ACLU of NC does not allege that their transgender members’ experiences on UNC campuses or their claims against UNC Defendants are any different from those alleged by Carcaño, McGarry, or H.S. Plaintiffs Gilmore, Trent, and Newell allege they are lesbians. First Am. Compl. at ¶ 117; ¶ 127. Plaintiffs Gilmore, Trent, and Newell do not allege any claims against UNC Defendants.

Transgender Plaintiffs also assert constitutional claims against UNC Defendants and Governor McCrory on the grounds that the Act violates their rights to equal protection and due process under the Fourteenth Amendment to the United States Constitution.

The issue of whether transgender students have the right to use public restrooms that correspond to their gender identity is currently being considered by the United States Court of Appeals for the Fourth Circuit in *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 U.S. App. LEXIS 7026 (4th Cir. Apr. 19, 2016). In *G.G. v. Gloucester Cnty. Sch. Bd.*, a transgender boy (“G.G.”) claimed that he had the right under Title IX to use the boys’ restrooms in his high school. *Id.* at *11-*12 and *31. After hearing G.G.’s motion for preliminary injunction and the defendant school board’s motion to dismiss, the United States District Court for the Eastern District of Virginia dismissed G.G.’s Title IX claim and denied his motion for a preliminary injunction. *Id.* at *5.³

On appeal, the Fourth Circuit considered whether the defendant school board was bound by the Department of Education’s interpretation of its regulations, which permit the provision of “separate toilet, locker room, and shower facilities

³ The district court withheld ruling on G.G.’s Equal Protection claim and said it would hear evidence on that claim. *Id.* at *12 and *57.

on the basis of sex” if “such facilities for students of one sex” are “comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

According to a Department of Education opinion letter, under these regulations, “[w]hen a school elects to separate or treat students differently on the basis of sex in those circumstances, a school generally must treat transgender students consistent with their gender identity.” *G.G.*, 2016 U.S. App. LEXIS 7026, at *7. The Fourth Circuit held that the Department of Education’s interpretation of its own regulation must be given controlling weight as to the meaning of that regulation. *Id.* at *29 and *31. The Fourth Circuit therefore reversed the district court’s decision to dismiss *G.G.*’s Title IX claim on the basis of the regulation and remanded the case for reconsideration of *G.G.*’s motion for preliminary injunction.

The defendant school board filed a petition for rehearing en banc on May 3, 2016, and the Fourth Circuit has not yet issued its mandate. Nevertheless, the claims and issues in *G.G.* are similar to Transgender Plaintiffs’ claims in this case. Consequently, the Fourth Circuit’s resolution of the *G.G.* case, including the petition for rehearing en banc, is relevant to the resolution of the central issues in this case.

After the Fourth Circuit issued its opinion in *G.G.*, the United States filed an action against the University and the State of North Carolina in this district in

which it claims, among other things, that by “complying with and implementing [the Act’s] provisions that apply to multiple-occupancy bathrooms or changing facilities, Defendants University of North Carolina and Board of Governors of the University of North Carolina discriminate on the basis of sex in violation of Title IX.” *U.S. v. State of North Carolina et al.*, No. 5:16-cv-425 (M.D.N.C. filed May 9, 2016). The United States’ action presents the same substantive Title IX claim that Transgender Plaintiffs have raised in this case. While the United States filed its action after Transgender Plaintiffs filed their suit against the University, the United States’ action involves all of the parties responsible for the adoption and enforcement of the state and federal laws at issue here.

The interests of justice would best be served and judicial resources conserved if this action were stayed pending the final resolution of *G.G. v. Gloucester* and *U.S. v. State of North Carolina*. Therefore, UNC Defendants respectfully request that this Court exercise its inherent power to stay this case pending the final decisions in those cases.

STATEMENT OF THE CASE AND FACTS

Transgender Plaintiffs Carcaño and McGarry filed the original Complaint in the United States District Court for the Middle District of North Carolina on March 28, 2016. Compl., D.E. #1. On April 21, 2016, H.S. joined in the First Amended

Complaint. First Am. Compl., D.E. #9. Transgender Plaintiffs' First Amended Complaint asserts four causes of action.

Count I: Equal Protection Claims

Pursuant to 42 U.S.C. § 1983, Transgender Plaintiffs allege two claims under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. First, Transgender Plaintiffs allege that UNC Defendants and Governor McCrory will necessarily violate Transgender Plaintiffs' equal protection right to be free from sex discrimination when they deny them the right to use restrooms and single-sex facilities consistent with their gender identity.⁴ First Am. Compl. at ¶¶ 183-200; ¶¶ 210-214. However, Transgender Plaintiffs do not allege that any UNC Defendant has taken any action to deny them access to the restrooms of their choice on any University campus.

Counts II and III: Due Process Claims

Pursuant to 42 U.S.C. § 1983, Transgender Plaintiffs allege two claims under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Transgender Plaintiffs allege that UNC Defendants and Governor

⁴ Transgender Plaintiffs also allege that the Act violates their equal protection rights by precluding and prohibiting any unit of local government or political subdivision of the State of North Carolina from taking action to protect LGBT people from discrimination. First Am. Compl. at ¶¶ 201-209. UNC Defendants are not a party to this claim.

McCrorry will violate their fundamental right to privacy under the Due Process Clause because the Act requires Transgender Plaintiffs to disclose highly personal information regarding themselves to each person who sees them using a restroom or other facility inconsistent with their gender identity or gender expression. First Am. Compl. at ¶¶ 220-226.

Transgender Plaintiffs also contend that because N.C. Gen. Stat. § 130A-118 requires proof of sex reassignment surgery before the State Registrar will change the sex on an individual's birth certificate, the Act forces transgender people to undergo medical procedures that may not be medically appropriate or available in order to access facilities that are consistent with their gender identity. Transgender Plaintiffs complain that this violates their fundamental right to refuse unwanted medical treatment. First Am. Compl. at ¶¶ 227-234.

Count IV: Title IX Claims

Finally, Transgender Plaintiffs assert that the University will violate their right under Title IX to be free of sex discrimination in federally-funded education programs by denying them the right to use to restrooms and single-sex facilities consistent with their gender identity. First Am. Compl. at ¶¶ 235-243. In support of this claim, Transgender Plaintiffs erroneously allege the University has taken steps to enforce the Act's requirements on UNC campuses. First Am. Compl. at ¶

240. Specifically, Transgender Plaintiffs inaccurately assert that President Spellings' memorandum dated April 5, 2016, requires the University to ensure that transgender individuals use restrooms based on their biological sex and inconsistent with their gender identity. First Am. Compl. at ¶ 240. The President's memorandum, in fact, merely states the Act's requirements, and notes that the Act does not address enforcement of those requirements in any way. Attachment 1, Declaration of President Spellings, Exhibit 4. Contrary to Transgender Plaintiffs' assertions, the President's memorandum shows that the University has not changed any of its policies or practices regarding transgender students or employees; will continue to enforce all its non-discrimination policies, including those pertaining to gender identity; and, pending resolution of this case, she has no intent to attempt to enforce the Act's requirements on UNC campuses. Attachment 1, Declaration of President Spellings at ¶ 16, Exhibit 4.

Moreover, Transgender Plaintiffs do not allege that UNC Defendants or any University administrator or employee have investigated which restroom they use on campus; instructed them to use only the restrooms that match their biological sex; or disciplined or threatened to discipline them for using a restroom matching their gender identity. Notably, Transgender Plaintiffs do not allege that UNC

Defendants have any policy or practice that threatens to discipline any individual who uses the restroom consistent with his or her gender identity.

Requested Relief

Transgender Plaintiffs request that the Court enter an order: (1) declaring that enforcement of the Act violates their rights under the Fourteenth Amendment and Title IX; (2) preliminarily and permanently enjoining UNC Defendants from enforcing the Act; (3) enjoining UNC Defendants to allow all individuals to use single-sex facilities in accordance with their gender identity; and (4) awarding Transgender Plaintiffs expenses and attorneys' fees. First Am. Compl.

ARGUMENT

I. THE RELEVANT FACTORS FAVOR STAYING ANY FURTHER PROCEEDINGS AGAINST UNC DEFENDANTS IN THIS CASE.

UNC Defendants have moved to stay the proceedings against them because judicial economy favors waiting until this Court has the benefit of a final judgment in *G.G. v. Gloucester* and *U.S. v. State of North Carolina*.

“As the Supreme Court of the United States has made clear, federal district courts have an inherent power to stay proceedings before them.” *Fannie Mae v. Quicksilver LLC*, No. 1:13-cv-987, 2014 U.S. Dist. LEXIS 139792, at *6 (M.D.N.C. Oct. 1, 2014). This “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket

with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). *See also Amdur v. Lizars*, 372 F.2d 103, 106 (4th Cir. 1967) (recognizing inherent power of court to stay proceedings); *McCrorry v. North Carolina*, No. 1:14-cv-65, 2014 U.S. Dist. LEXIS 68440, at *1-*2 (W.D.N.C. May 19, 2014) (staying case pending resolution of separate Fourth Circuit case addressing “extremely pertinent, if not dispositive” issues as “the most efficient means of managing [the] proceedings”).

In *Quicksilver*, this Court noted that, while the Fourth Circuit has not enumerated the factors that should be considered in reviewing a motion for a stay, the Court should enter a stay when the record clearly shows:

- (1) the interests of justice require it;
- (2) the adjudication of the claim would be a waste of judicial effort; and
- (3) the plaintiff will not be substantially harmed by the delay.

Id. at *7.

All three of these factors are clearly present in this case. Moreover, there are other factors in this record that fully support a decision to stay any further proceedings against UNC Defendants. Therefore, the Court should grant UNC Defendants’ motion to stay these proceedings against them.

A. The Interests of Justice Require that Proceedings Against UNC Defendants Be Stayed.

While the Complaint alleges several causes of action, the only affirmative relief that Transgender Plaintiffs demand from UNC Defendants is that the Court order UNC Defendants to allow individuals, including transgender people, to use single-sex facilities in accordance with their gender identity on all UNC campuses. First Am. Compl., Prayer for Relief, ¶ C and ¶ D. As noted above, in *G.G.*, the Fourth Circuit held that it was required to defer to the U.S. Department of Education’s interpretation of its regulations. The mandate in *G.G.* has not yet issued. However, it is clear that the Fourth Circuit’s decision will be relevant to the disposition of the issues in this case. *Id.* at *9 (“[W]hen a federal action will possibly be affected by a pending decision of a federal appellate court, many courts have found stays of the later, related actions to be appropriate.”).

Furthermore, in *U.S. v. State of North Carolina* the United States has requested that this Court declare that, by complying with and implementing the Act’s provisions that apply to multiple-occupancy bathrooms or changing facilities, the University is discriminating against transgender students on the basis of sex in violation of Title IX. The parties to *U.S. v. State of North Carolina* are the governments responsible for the enforcement of the Act and Title IX. It is in the interest of justice that, to the extent possible, the claims at issue in this case be resolved in an action between the governments that administer and enforce the

relevant statutes rather than in this action between private parties and the University.

B. Adjudication of the Claim would be a Waste of Judicial Effort.

For the reasons stated above, it is clearly a waste of judicial resources to permit Transgender Plaintiffs to litigate the claims against UNC Defendants and require this Court to adjudicate their claims when the work to be done is unlikely to determine the outcome in the case. *Quicksilver*, at *8 (granting stay of federal proceedings where pending decision by North Carolina Supreme Court in another case would “affect the viability” of plaintiff’s claims and thus there was “a significant risk that a decision by this court would prove to be a waste of judicial resources”). Therefore, the Court’s interest in disposing of “the causes on its docket with economy of time and effort for itself, for counsel, and for litigants” favors issuing a stay of the proceedings against UNC Defendants. *Quicksilver*, at *6 (quoting *Landis*, 299 U.S. at 254).

C. Transgender Plaintiffs Will Not Be Substantially Harmed by a Stay.

Transgender Plaintiffs’ Complaint focuses almost entirely on the North Carolina General Assembly’s actions in passing the Act and the Governor’s actions in signing and threatening to enforce the Act. Transgender Plaintiffs have not alleged that UNC Defendants or their administrators or employees have taken any

action or have threatened to take any action against them to enforce the Act or to deny them use of UNC restrooms consistent with their gender identity.

H.S. alleges that until the passage of the Act, she “exclusively used the girls’ restroom at school.” First Am. Compl. at ¶ 106; Affidavit of H.S., D.E. #22-8, at ¶ 25. H.S. further alleges that she is unaware of any complaints about her use of the girls’ restroom. *Id.* H.S. alleges that “[s]ince the passage of H.B. 2, H.S. has limited or delayed use of the bathroom.” First Am. Compl. at ¶ 113. However, H.S. does not give any examples of how she has limited or delayed her use of the bathroom. Moreover, H.S. does not allege that she has stopped using the girls’ room at school. Finally, for purposes of the Motion for Stay, it is significant that H.S. does not allege that any action of UNC Defendants has caused her to “limit or delay” her use of the girl’s room. Like Carcano and McGarry, H.S. simply claims that it is the Act itself, not any action by UNC Defendants, that is causing her anxiety.

Carcaño alleges that he used men’s restrooms on the UNC-CH campus “without incident” for the approximately five-month period between when he first began using the men’s restroom and the passage of the Act on March 23. First Am. Compl. at ¶ 45; Affidavit of Joaquin Carcaño, D.E. #22-4, at ¶ 15. He alleges that after the passage of the Act, he “generally used a single-occupancy restroom

not designated either for men or for women in another building on campus, which was approximately a 10-15 minute walk away from his building each way.” First Am. Compl. at ¶ 49; Carcaño Aff. at ¶ 19. He further alleges that after he began using the restroom in the other building, he was “informed by administrative staff in the building where he works that they had learned of a single-occupancy restroom based on building floor plans.” First Am. Compl. at ¶ 50; Carcaño Aff. at ¶ 20. However, he does not allege that anyone at UNC-CH ordered him to use that single occupancy restroom in his building or use the multiple occupancy restroom designated for biological females. He does allege that he has been “singled out and forced” to use a separate restroom, but again does not allege that any individual at UNC-CH actually told him that he could not use the men’s restrooms. First Am. Compl. at ¶ 51; Carcaño Aff. at ¶ 21.

McGarry alleges that “[s]ince the passage of the Act, Mr. McGarry has been barred from using the men’s restrooms on campus.” First Am. Compl. at ¶ 84; Affidavit of Payton Grey McGarry, D.E. #22-9, at ¶ 24. However, he fails to identify any individual at UNC-G that ordered him not to use the men’s restrooms.

No Plaintiff has alleged that any UNC administrator or employee has taken any steps to interfere with their use of single sex multiple occupancy bathrooms or changing facilities consistent with their gender identity. Instead, it appears that

Transgender Plaintiffs claim that the Act itself requires them to use restrooms inconsistent with their gender identity. The ACLU, for its part, plainly alleges that its transgender members “are barred by H.B. 2 from using restrooms and other facilities in accordance with their gender identity in schools.” First Am. Compl. at ¶ 10. These allegations, however, substantially overstate and misrepresent the effect of the Act.

There is nothing in the Act that prevents any transgender person from using the restroom consistent with his or her gender identity. The Act is neither a criminal statute that imposes punishments on transgender persons who do not use the restroom consistent with their biological sex nor a civil statute that requires Transgender Plaintiff to secure permission from the State to use the restroom of their choice. Instead, the Act directs the University of North Carolina to require that restrooms only be used by persons based on their biological sex. The Act, Part I, Sec. 1.3. The Act contains no enforcement procedures or penalties. Therefore, until the University takes action to enforce the Act there is nothing that prevents Transgender Plaintiffs from using the restroom of their choice.

President Spellings has explicitly reminded the chancellors in the UNC system that they have the obligation to abide by University and campus policies that protect transgender students and employees from discrimination. Spellings

Dec. ¶ 8. The President has also cautioned the constituent institutions that the Act contains no provisions for enforcement. Spellings Dec. ¶ 9. The President has assured the Court that, as the chief administrative officer of the University with complete authority to manage the affairs and execute the policies of the University, pending resolution of this case, she has no intent to either change her instructions to the constituent institutions regarding their obligations under University non-discrimination policies or to exercise her authority to promulgate any guidelines or regulations that require that transgender students use the restrooms consistent with their biological sex. Spellings Dec. ¶¶ 16-17. Furthermore, before the UNC Board could amend or repeal the University's non-discrimination policy, the Board would have to give 48 hours' notice of its intended actions. Section 202 F. (1) of *The Code of the Board of Governors of the University of North Carolina*; N.C. Gen. Stat § 143-318.12(b). Plaintiff and their counsel have the statutory right to receive notice of any such meeting of the UNC Board. N.C. Gen. Stat § 143-318.12(b).

In short, Transgender Plaintiffs have not suffered, and have no reason to expect they will suffer, any harm if their claims against UNC Defendants are stayed pending the final resolution of the claims in *G.G.* and *U.S. v. State of North Carolina*. The fact that Transgender Plaintiffs are not in imminent danger of suffering any injury favors issuing of a stay in this case. *Quicksilver*, at *8

(reasoning that stay was appropriate where it would not cause substantial harm to plaintiff).⁵

D. Other Factors Specific to this Case Warrant a Stay.

Transgender Plaintiffs' claims against UNC Defendants substantially overlap with those in *G.G.* and *U.S. v. State of North Carolina*. In all three cases, the plaintiffs claim that Title IX and its controlling regulations give transgender students the right to use restrooms consistent with their gender identity. *G.G.*, at *5; First Am. Compl., at ¶¶ 237, 241-43; *U.S. v. State of North Carolina*, No. 1:16-cv-00425, at ¶¶ 25, 55. *G.G.* is currently pending in the Fourth Circuit. Consequently, the final decision in that case might affect the outcome of Transgender Plaintiffs' Title IX claims. *U.S. v. State of North Carolina* was filed after this case, but the parties in that case – the United States of America and the State of North Carolina – are responsible for the enactment and the enforcement of the statutes and have the greatest interest in the outcome of litigation involving both the Act and Title IX. Therefore, the wise administration of justice favors

⁵ Whether Transgender Plaintiffs' allegations even allege a justiciable "case or controversy" under Art. III of the Constitution is dubious. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact.") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

staying the proceedings against UNC Defendants until final judgments in *G.G.* and *U.S. v. State of North Carolina* are entered.

CONCLUSION

Therefore, for the reasons stated herein, UNC Defendants respectfully request that this Court grant their Motion to Stay Proceedings until final judgments in *G.G.* and *U.S. v. State of North Carolina* have been entered, and for any other relief the Court deems just and proper.

This the 27th day of May 2016.

/s/Thomas J. Ziko

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Attorneys for Defendants the University of North Carolina, the Board of Governors of the University of North Carolina, and W. Louis Bissette, Jr., in his Official Capacity as Chair of the Board of Governors of the University of North Carolina

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May 2016 I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF THE UNIVERSITY OF NORTH CAROLINA DEFENDANTS' MOTION TO STAY PROCEEDINGS with the Clerk of Court using the CM/ECF system which will provide service to counsel of record:

/s/ Carolyn C. Pratt
Carolyn C. Pratt