

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ASHTON WHITAKER, a minor, by his
mother and next friend, MELISSA
WHITAKER,

Plaintiff,

v.

KENOSHA UNIFIED SCHOOL DISTRICT
NO. 1 BOARD OF EDUCATION and SUE
SAVAGLIO-JARVIS, in her official capacity
as Superintendent of the Kenosha Unified
School District No. 1,

Defendants.

Civ. Action No. 2:16-cv-00943-PP
Judge Pamela Pepper

**PLAINTIFF'S BRIEF OPPOSING DEFENDANTS' REQUEST
FOR PRELIMINARY INJUNCTION BOND**

Plaintiff Ashton Whitaker files this brief in response to Defendants' eleventh hour request, made at the close of the preliminary injunction hearing on September 20, 2016, for a \$150,000 injunction bond to reimburse Defendants for attorneys' fees in the event that this Court's preliminary injunction was improvidently issued.

This Court should deny Defendants' request for an injunction bond for the following reasons: (1) federal law, not state law, applies to the question of whether attorneys' fees can be recovered under an injunction bond; (2) pursuant to Fed. R. Civ. P. 65(c), attorneys' fees are not recoverable under an injunction bond; (3) as the Court observed in delivering its decision on the Motion for Preliminary Injunction from the bench on September 20, 2016, Defendants have submitted no evidence of damages to them apart from the unrecoverable attorneys' fees; and, (4) other equitable considerations, including the fact that Plaintiff is a minor and his mother lacks

the capacity to pay a \$150,000 bond, warrant waiver of any bond requirement that might otherwise apply.

As authority for the issuance of an injunction bond to recover attorneys' fees, Defendants' counsel cited *Muscoda Bridge Co. v. Worden-Allen Co.*, which states that under Wisconsin law the prevailing party can recover attorneys' fees under an injunction bond. 239 N.W. 649, 651-52 (Wis. 1931). State law, however, is inapplicable to the instant case, where all asserted claims arise under federal law. 28 U.S.C. § 1331. Moreover, even if this were an action under state substantive law—and it is not—federal law applies to the procedural question of recovery of attorneys' fees under an injunction bond. *Minn. Power & Light Co. v. Hockett*, 14 F. App'x 703, 707 (7th Cir. 2001) (applying federal law to whether attorneys' fees were recoverable under an injunction bond); *see also Fireman's Fund Ins. Co. v. S.E.K. Construction Company*, 436 F.2d 1345, 1351 (10th Cir. 1971) (when “an injunction suit is commenced in federal court and an injunction bond is issued . . . local state law, with respect to recovery of attorneys' fees in an action on the injunction bond, has no application”).

At the hearing, Defendants made no argument referring to federal law, and any such argument would fail, because federal law generally does not permit recovery for attorneys' fees under an injunction bond. Under Fed. R. Civ. P. 65(c), “the court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” The Seventh Circuit has determined that for purposes of Rule 65(c), “costs and damages” do not include attorneys' fees, unless the losing party acted in bad faith. *See Minn. Power & Light Co.*, 14 Fed. App'x at 705-09; *see also Esposito v. Piatrowski*, 223 F.3d 497, 500 (7th Cir. 2000) (adhering to “American Rule” that attorneys' fees are generally not recoverable cost of litigation). As Plaintiff has not acted in bad faith, nor do

Defendants allege that he has, this Court should deny Defendants' request for an injunction bond based solely on their unsupported prediction of unrecoverable attorneys' fees that may accrue to them during this litigation.

Beyond the unrecoverable attorney's fees, Defendants have asserted or submitted no evidence that the preliminary injunction will cost them money. During the September 21 hearing, the Court specifically rejected Defendants' unsubstantiated assertion of financial harm related to the proposed preliminary injunction raised in Defendants' briefing. For that reason alone, an injunction bond would be unwarranted. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010) (no reason to require a bond in cases where opposing party will not incur any damages from the injunction); *see also Portz v. St. Cloud State Univ.*, 2016 WL 4005665, at *11 (D. Minn. July 25, 2016) (plaintiffs need not post bond where preliminary injunction is unlikely to cost defendant anything); *see also Bader v. Wernert*, 2016 WL 1470627, at *29 (N.D. Ind. April 14, 2016) (not requiring bond where there is no danger that opposing party will incur damages from the injunction).

Further considerations merit denial of Defendants' request for an injunction bond. A \$150,000 bond is well beyond the capacity of Plaintiff, a minor, and his mother, a public school teacher and single parent, to pay in order to vindicate Plaintiff's civil rights under federal law. *Habitat*, 607 F.3d at 456 (a bond higher than plaintiff's financial capacity inflicts irreparable harm without justification).

Finally, courts have properly declined to require bond to be posted at all—or have required the posting of only a nominal bond—to secure an injunction in matters involving constitutional violations or other lawsuits brought on behalf of the public or under fee-shifting statutes. *See, e.g., Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (upholding district court's decision not to impose bond for injunction against further violations of the National

Environmental Protection Act). That is because Congress meant to empower plaintiffs to enforce these statutes regardless of their ability to pay, a purpose that would be frustrated if plaintiffs were required to post large bonds to enforce their rights. *See People ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (“requiring security would effectively deny access to judicial review . . . special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute”); *see, e.g., Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061, 1092 (W.D. Mo. 2005) (finding nominal injunction bond appropriate where case involves constitutional violations).

For these reasons, Plaintiff requests that Defendants’ request for a preliminary injunction bond be denied.

Dated: September 22, 2016

Respectfully submitted,

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* *Application for admission to this Court to follow*