UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

Civ. Action No. 2:16-cv-00943

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.

DEFENDANTS' CIVIL L. R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO STAY PRELIMINARY INJUNCTION (DKT. NO. 33) PENDING APPEAL

Defendants respectfully submit this expedited motion, pursuant to Civil L. R. 7(h), to stay the preliminary injunction ordered by the Court on September 22, 2016 (Dkt. No. 33), which enjoined KUSD from denying Plaintiff access to the men's bathroom. KUSD has now filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit making this motion appropriate (Dkt. No. 34). *See also* Notice of Docketing (Dkt. No. 40); Fed. R. App. P. 8(a).

The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. *In re A&F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). There are generally four factors to be considered: (1) the likelihood of the party's succeeding on the merits of the appeal; (2) whether the party will suffer irreparable injury if the stay is denied; (3) whether other parties will be substantially harmed by the stay; and (4) whether the public interest will be served by granting the stay. *United States v. Articles of Food & Drug*, 441 F. Supp. 772, 775 (E.D. Wis. 1977). As with a motion for a preliminary injunction, a "sliding scale" approach applies—the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *In re A&F Enters., Inc. II*, 742 F.3d at 766.[1]

Under this standard, the Court's injunction order should be stayed. First, KUSD has a reasonable likelihood of success on the merits in its appeal because Seventh Circuit precedent supports KUSD's interpretation of unsettled issues of law central to the merits of Plaintiff's case. The Seventh Circuit has not yet decided whether the term "sex" as used in Title IX encompasses transgender individuals. However, under Title VII, the Seventh Circuit has defined the term "sex" narrowly: "The prohibition against discrimination based on an individual's sex **is not synonymous with a prohibition against discrimination based on an individual's sexual identity**." *Ulane v.*

[1] As the standard for granting a stay are similar to those for requesting a preliminary injunction, KUSD incorporates by reference its brief in opposition to Plaintiff's motion for preliminary injunction. (Dkt. No. 17).

E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (emphasis added).[2] The Seventh Circuit has recently reaffirmed that the narrow definition of "sex" is still the standard in this circuit: "our understanding in *Ulane* that Congress intended a very narrow reading of the term 'sex' when it passed Title VII of the Civil Rights Act, so far, appears to be correct." *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703, at *3 (7th Cir. July 28, 2016).

Moreover, based on the Seventh Circuit's construct of "sex" as described above, it is likely it would follow the line of cases finding that policies concerning bathroom usage and other policies that merely reflect the anatomical differences between males and females is not sex-stereotyping as matter of law. *See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015); *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999-1000 (N.D. Ohio 2003), *aff'd*, 98 F. App'x 461 (6th Cir. 2004). Additionally, the Seventh Circuit is also likely to follow the majority of Courts that have reviewed transgender plaintiffs' equal protection claims under rational basis review. *See, e.g., Johnston*, 97 F. Supp. 3d at 668-69 (collecting cases). Finally, based on the Seventh Circuit's demonstrated skepticism of *Auer* deference, *see Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 577 (7th Cir. 2012), it is likely that the Seventh Circuit would follow the reasoning in *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), and decline giving deference to the Department of Education's Dear Colleague Letter.

Second, KUSD will suffer irreparable harm if the stay is not granted. The injunction threatens the constitutionally protected privacy interests of the approximately 22,000 students in

[2] In the absence of controlling precedent regarding Title IX in a circuit, courts may look toward cases in the Title VII context to construct the appropriate framework to answer the question. *See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015); *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012).

the school district. *See Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011). Moreover, depriving parents of any say over whether their children should be exposed to members of the opposite biological sex, possibly in a state of full or complete undress, in intimate settings deprives parents of their right to direct the education and upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 627, 67 L. Ed. 1042 (1923).

Third, Plaintiff will not be substantially harmed by the stay because the stay would act to preserve the status quo, which consisted of Plaintiff not being permitted to use the men's room for the months preceding this litigation. Plaintiff's counsels' delay in bringing the motion for an injunction—more than four months—demonstrates that a stay would not cause irreparable harm. During the stay Plaintiff will have access to a uni-sex bathroom. Moreover, while not using the bathroom may exacerbate the symptoms associated with Plaintiff's gender dysphoria, those harms have not been established to be irreparable and are unique to Plaintiff as opposed to the thousands of students negatively impacted by the issuance of the injunction. *See also In re A&F Enters., Inc. II*, 742 F.3d at 766 (sliding scale approach requires a less of an emphasis on balance of hams when there is greater probability of success on appeal).

Finally, in addition to respecting the privacy rights of students and the right for parents to control the education of their children, the public interest will be served as KUSD and the students and parents within the school district will not be subjected to an injunction that perpetuates a policy that the federal government is unable to enforce. *See Texas*, 2016 WL 4426495, at *17.

Based upon the above, KUSD respectfully requests that the Court stay the injunction issued in this matter pending the resolution of the appeal.

Dated this 28th day of September, 2016.

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