UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CASE NO. 16-3522

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

Plaintiff-Respondent,

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-Appellants.

Appeal from the United States
District Court for the Eastern
District of Wisconsin

District Court Case
No. 16-CV-943

The Honorable Pamela Pepper

DEFENDANTS-APPELLANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

INTRODUCTION

Defendants-Appellants, Kenosha Unified School District No. 1 Board of Education and Dr. Sue Savaglio-Jarvis, in her official capacity as Superintendent of the Kenosha Unified School District No. 1 ("KUSD"), hereby move this Court pursuant to Fed. R. App. P. 8(a)(2), for an Order staying the preliminary injunction issued by the United States District Court for the Eastern District of Wisconsin in *Ashton Whitaker, et al. v. Kenosha Unified School District No. 1 Board of Education, et al.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016) (Dkt. No. 33)[1], pending this appeal.

This case is about whether a public school is required by law to permit any student that self- identifies themselves as "transgender" to use a bathroom designated for students of the opposite biological sex. Specifically, the issues underling the District Court's decision to grant the motion for preliminary injunction filed by Plaintiff-Respondent, Ashton Whitaker, a minor, by his Mother and next friend, Melissa Whitaker ("Plaintiff"), are: (1) whether a biological female student has the unilateral right to declare her gender as "male" and then has a right under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX") to be treated as a male student, and in particular to use the men's bathroom; (2) whether a policy that reflects the anatomical differences between biological men and women is actionable "sex-stereotyping" under *Price Waterhouse*

[1] A copy of *Ashton Whitaker, et al. v. Kenosha Unified School District No. 1 Board of Education, et al.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), is attached as Exhibit A.

v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); (3) whether the May 12, 2016, guidance letter from the U.S. Department of Education (the "Dear Colleague Letter") is entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) ("*Auer* deference"); and (4) whether "transgender" is a suspect class under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. A stay is appropriate in this matter as the weight of Seventh Circuit precedent supports KUSD's positions as to the substantive legal issues central to this case; KUSD will suffer irreparable harm if the stay is not granted; Plaintiff will not be substantially harmed by the stay; and the public interest will be served by the issuance of a stay.

JURISDICTIONAL STATEMENT

Jurisdiction is proper before this Court pursuant to Fed. R. App. P. 8(a)(2), as KUSD has first moved before the District Court for a stay of the order granting the preliminary injunction pending appeal pursuant to Fed. R. App. P. 8(a)(1)(A) and the District Court denied the motion to stay for the reasons set forth in the District Court's October 3, 2016 Order (Dkt. No. 46)[2] denying KUSD's motion to stay pending appeal (Dkt. No. 44). *See* Fed. R. App. P. 8(a)(2)(A)(ii).

BACKGROUND

Plaintiff is a sixteen-year-old student in the Kenosha Unified School District No. 1. Pltf.'s Amended Comp. (Dkt. No. 12)[3] at ¶1. Plaintiff was born a biological female with a birth certificate that designates gender as "female". *Id.* Plaintiff

[2] The Order denying KUSD's motion to stay is attached as Exhibit B.
[3] Plaintiff's Amended Complaint is attached as Exhibit C.

identifies as being transgender and currently identifies as male. *Id.* In Plaintiff's freshmen and sophomore years of high school, Plaintiff slowly began transitioning more publicly to identifying as male. *Id.* at ¶22-24. Plaintiff has not undergone any sex change surgeries. *Id.* at ¶45.

KUSD requires its students to use the bathroom that corresponds with his or her birth gender or to a single user, gender neutral bathroom. *Id.* at ¶27. KUSD also requires that when students travel on school-sponsored trips that students may only share rooms with other students who share the same birth gender. KUSD's policy of requiring the use of sex-segregated bathroom and locker room facilities based on a students' birth sex, rather than their gender identity, was set in place in order to respect the privacy rights of all students to undress and perform personal bodily functions outside the presence of the opposite gender.

This lawsuit was filed on July 19, 2016. *See* Pltf.'s Comp. (Dkt. No. 1). On August 15, 2016, Plaintiff filed an Amended Complaint and Motion for Preliminary Injunction with supporting memorandum and exhibits. *See* Pltf.'s Amended Comp. (Dkt. No. 12); Pltf.'s Motion for Preliminary Injunction (Dkt. No. 10); Pltf.'s Memo. of Law (Dkt. No. 11). On August 16, 2016, KUSD filed a Motion to Dismiss Plaintiff's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Def.'s Motion to Dismiss (Dkt. No. 14); Def.'s Brief in Support of Motion to Dismiss (Dkt. No. 15). On September 21, 2016 the District Court denied the motion to dismiss (Dkt. No. 29)[4]. On September 22, 2016 the District Court granted

[4] On September 24, 2016 the District Court issued an Amended Order denying KUSD's motion to dismiss removing the language certifying the order for interlocutory appeal.

Plaintiff's motion for temporary injunction. *See Whitaker*, 2016 WL 5239829 (Dkt. No. 33). On September 23, 2016, KUSD filed a Petition for Permission to Appeal the order denying the motion to dismiss pursuant to 28 U.S.C. § 1292(b). (Case No. 16-8019, App. Dkt. No. 1). On September 23, 2016, KUSD filed a notice of appeal as of right as to the motion for temporary injunction pursuant to Fed. R. App. P. 3 and 28 U.S.C. § 1292(a)(1). (Case No. 16-3522 App. Dkt. No. 1); (Dkt. No. 34).

The temporary injunction issued by the District Court provides that KUSD is enjoined from:

> (1) denying Ash Whitaker access to the boys' restrooms;
> (2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boy's restroom during any time he is on the school premises or attending school-sponsored events;
> (3) disciplining the plaintiff for using the boy's restroom during any time that he is on the school premises or attending school-sponsored events; and
> (4) monitoring or surveilling in any way Ash Whitaker's restroom use.

Whitaker, 2016 WL 5239829, at *8.[5]

ARGUMENT

The purpose of a stay is to "maintain the status quo pending appeal, thereby preserving the ability of the reviewing court to offer a remedy and holding at bay the reliance interests in the judgment that otherwise militate against reversal." *In re CGI Indus., Inc.*, 27 F.3d 296, 299 (7th Cir. 1994). The standard for granting a

(Dkt. No. 35). The Amended Order was issued after KUSD had filed a Petition for Permission to Appeal pursuant to 28 U.S.C. § 1292(b) on September 23, 2016. *See Kenosha Unified School District, et al. v. Ashton Whitaker*, Case No. 16-8019 (App. Dkt. No. 1).

[5] KUSD does not appeal the portion of the Court's Order denying KUSD's request that the court require plaintiff to post a bond pending appeal. *See Whitaker*, 2016 WL 5239829, at *8.

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.

I. KUSD HAS A REASONABLE LIKELIHOOD OF SUCCESS ON APPEAL BECAUSE SEVENTH CIRCUIT PRECEDENT SUPPORTS A FINDING THAT PLAINTIFF'S COMPLAINT FAILS AS A MATTER OF LAW.

KUSD has a reasonable likelihood of success on the merits as Seventh Circuit precedent forecloses Plaintiff's central claims: (1) the term "sex" under Title IX does not encompass transgender status; (2) policies that merely acknowledge the anatomical differences between men and women are not "sex-stereotyping" under *Price Waterhouse*; (3) the Dear Colleague Letter is not entitled to *Auer* deference; and (4) transgender is not a suspect class entitled to heightened scrutiny.

A. The Term "Sex" In Title IX Should Be Narrowly Construed.

Title IX prohibits sex discrimination in educational programs that receive federal funding and states: "No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

assistance." 20 U.S.C. § 1681(a) (emphasis added). It is clear that the term "on the basis of sex" as used in the statute does not include being transgender. "Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute." *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

Moreover, Title IX and its implementing regulations clearly suggest that "transgender" is not protected. They specifically permit educational institutions subject to Title IX to provide separate bathrooms on the basis of gender: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The clear language of Title IX shows that it applies to one's gender, i.e., being male or female, and, because the language of the statute specifically permits schools to provide students with gender-segregated spaces, i.e., one for men and another for women, there is no room for an interpretation that transgender is also protected under the law. *See Johnston*, 97 F. Supp. 3d at 678.

While this Court has not yet specifically addressed whether Title IX encompasses transgender students, courts have considered it appropriate and instructive to rely on cases analyzing Title VII of the Civil Rights Act of 1964 ("Title VII"), in interpreting Title IX. *See id.* at 674 (providing that when there is a lack of controlling precedent on a question of Title IX, parties necessarily rely on cases in

the Title VII context to construct the appropriate framework to answer the question); *see also Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012).

In analyzing whether transgender status is protected under Title VII this Court has held that:

> The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.,* a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex **is not synonymous with a prohibition against discrimination based on an individual's sexual identity** disorder or discontent with the sex into which they were born.

Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984), *cert denied*, 471 U.S. 1017 (1985) (emphasis added). This Court has also recently reaffirmed that the narrow definition of "sex" under Title VII is still the standard in this circuit, stating: "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).[6]

[6] Other courts, including one's within this circuit, have followed *Ulane*'s proclamation that Title VII's prohibition against gender discrimination does not encompass transgender status. *See Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual."); *Creed v. Family Exp. Corp.*, 2009 WL 35237, at *6 (N.D. Ind. Jan. 5, 2009) ("Although discrimination because one's behavior doesn't conform to stereotypical ideas of one's gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not."); *Sweet v. Mulberry Lutheran Home*, 2003 WL 21525058, at *2 (S.D. Ind. June 17, 2003) (stating that "discrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not sexual orientation or sexual identity, including an intention to change sex").

The precedent in this Circuit establishes that transgender status cannot be encompassed by the term "sex" in Title IX. This Court has stated that it will not depart from past precedent unless instructed to do so by the Supreme Court or by new legislation, *see id.*, at *14-15, and past precedent holds that discrimination based on an individual's "sex" is not synonymous with a prohibition against discrimination based on an individual's sexual identity. *Ulane*, 742 F.2d at 1085.

B. Bathroom Policies, And Other Conduct, That Merely Acknowledges The Anatomical Differences Between Men And Women Are Not Sex-Stereotyping.

In light of the narrow definition of "sex" articulated above, this Court should follow the line of cases finding that policies concerning bathroom usage and other policies that merely reflect the anatomical differences between males and females are not sex-stereotyping as matter of law. *See Johnston*, 97 F. Supp. 3d at 680-81 (finding that plaintiff failed to state a claim under *Price Waterhouse* because the pleadings established that the University treated plaintiff in conformity with his male gender identity in all other respects besides bathroom usage and had not alleged that the defendants discriminated against him because he did not "behave, walk, talk, or dress in a manner inconsistent with any preconceived notions of gender stereotypes"); *see also Etsitty*, 502 F.3d at 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).

There are cases that claim that <u>any</u> alleged discrimination against transgender individual constitutes sex-stereotyping, reasoning that a person is

defined as transgender because of the perception that his or her behavior transgresses gender stereotypes. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). These cases, however, run contrary to the decisions of other courts issued after *Price Waterhouse* that evidence of gendered statements or acts that target a plaintiff's conformance with traditional conceptions of masculinity or femininity are required to state a claim for sex-stereotyping. *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014); *see, e.g.*, *E.E.O.C. v. Boh Bros.*, 731 F.3d 444, 454 (5th Cir. 2013) (finding that evidence that the plaintiff's coworkers taunted him with "sex-based epithets" "directed at [his] masculinity," as well as physical acts of simulated anal sex, simulated male-on-male oral sex, and genital exposure was sufficient to prevail on a gender-stereotyping theory); *Nichols v. Azteca Res. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (finding that evidence that the male plaintiff was "attacked for walking and carrying his tray 'like a woman'—i.e., for having feminine mannerisms," that coworkers called the plaintiff names "cast in female terms," and that coworkers and supervisors referred to him as "she" and "her" was sufficient to prevail on a sex stereotyping theory).

Plaintiff has alleged that KUSD engaged in sex-stereotyping because: KUSD had a policy of requiring students to use bathrooms and overnight accommodations consistent with their birth gender; some employees of KUSD used the name on Plaintiff's birth certificate and used female pronouns to address Plaintiff; and KUSD initially did not let Plaintiff run for junior prom king. *See* Pltf.'s Amended

Comp. (Dkt. No. 12) at ¶¶ 114-116.[7] From these few allegations Plaintiff alleges that KUSD is "treating [Plaintiff] differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes." *Id.*

These limited factual allegations do not formulate a cause of action for sex-stereotyping. These allegations do not plausibly suggest that KUSD discriminated against Plaintiff because of the way Plaintiff dressed, spoke, or behaved, or that Plaintiff was treated adversely for not dressing, acting, or speaking like a woman. *See Johnston*, 97 F. Supp. 3d at 681. The allegations stated above, even if assumed true, only relate to Plaintiff's birth gender and the recognized anatomical differences between men and women. In this Circuit "discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane*, 742 F.2d at 1085. Even in light of *Price Waterhouse*, requiring a biological female to use the woman's bathroom, requiring a biological minor female to share overnight accommodations on school sanctioned outings with other biological females, and sporadically referring to a biological female by the name on her birth certificate or using female designated pronouns is not sex-stereotyping as a matter of law.

[7] Plaintiff also alleged in the Complaint the existence of an unsubstantiated future policy of requiring Plaintiff to use a green wristband. However, at oral argument, the District Court stated that it did not need to enjoin KUSD from issuing green wristbands, because there was a lack of evidence indicating that KUSD was enforcing a policy requiring Plaintiff to wear a green wristband. *See* Court Minutes, at 1 (Dkt. No. 31).

Therefore, the limited allegations in the Complaint cannot be read to state a claim for sex-stereotyping.

C. The Dear Colleague Letter Should Not Be Given *Auer* Deference.

The Dear Colleague Letter is merely the Department of Education's interpretation of Title IX, and its proclamation that "sex" under title IX encompasses transgender status is not entitled to deference by this Court.

An agency's opinion letter interpreting its own regulation may be given deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Under *Auer* deference, an agency's interpretation of its own regulation is entitled to deference only when the language of the regulation is ambiguous and the interpretation is not plainly erroneous or inconsistent with the regulation. *Christensen v. Harris Cty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621 (2000); *Auer*, 519 U.S. at 461. When a regulation is not ambiguous, to defer to the agency's position "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." C*hristensen*, 529 U.S. at 588.

The Supreme Court has been skeptical of federal agencies' interpretations of their own regulations, because by giving those interpretations *Auer* deference, the agency can make binding regulations without notice and comment. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212, 191 L. Ed. 2d 186 (2015) (Scalia, J., concurring); *see also United States v. Raupp*, 677 F.3d 756, 765 (7th Cir. 2012) ("Indeed, there are signs on the horizon that the Supreme Court may be about to revisit *Auer* and endorse a more skeptical review of agency interpretations of their

own regulations."). "Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212. "To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime." *Id.*[8]

This skepticism is shared by this Court. *See Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 577 (7th Cir. 2012) (holding that *Auer* deference does not apply to guidance documents the agency itself has "disclaimed . . . as authoritative or binding interpretations of its own rules"); *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (providing that in light of *Christensen*, *Auer* likely did not apply to agency determinations that do not have "the force of law" and that "[p]robably there is little left of *Auer*").

The regulations implementing Title IX state that: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. However, "§ 106.33 is not ambiguous." *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495, at *14 (N.D. Tex. Aug. 21, 2016).

> It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by [Department of Education] following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth . . . [a]dditionally, it cannot reasonably be disputed that [Department of Education] complied with Congressional intent when drawing the

[8] It is likely that the Supreme Court will be revisiting *Auer* in the near future. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016).

> distinctions in § 106.33 based on the biological differences between male and female students . . . this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33 . . . This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts, and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy.

Id. at *14-15 (internal citations omitted). Therefore, the Dear Colleague Letter's interpretation of Title IX is clearly at odds with the plain, unambiguous meaning of "sex" as used in that statute and its regulations, and it is not entitled to deference.

D. Transgender Is Not A Suspect Class Entitled To Heightened Scrutiny And KUSD's Policy Is Presumptively Constitutional Under Rational Basis Review.

Governmental action is presumed to be valid if it is evaluated under the rational-basis standard of review. *See Smith v. City of Chicago*, 457 F.3d 643, 650 (7th Cir. 2006). Only if the level of scrutiny to be applied is strict or intermediate scrutiny does the review become subject to a heightened standard. *See id.*

The Supreme Court has admonished lower courts to not create new suspect classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 3255, 87 L. Ed. 2d 313 (1985). The Supreme Court and this Court have also never recognized transgender status as a suspect classification entitled to heightened scrutiny under the Equal Protection clause. *See Johnston*, 97 F. Supp. 3d at 668 (as to the Supreme Court). Likewise, numerous courts across the country

have considered the allegations of transgender plaintiffs under rational basis review.[9]

Under rational basis review, a non-suspect classification is "accorded a strong presumption of validity" and "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Richenberg v. Perry*, 909 F. Supp. 1303, 1311

[9] *See, e.g.*, *Johnston*, 97 F. Supp. 3d at 668 (maintaining that "neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. Accordingly, Plaintiff's discrimination claim is reviewed under the rational basis standard"); *Etsitty*, 502 F.3d at 1227-28 (maintaining that transsexual is not a protected class under the Fourteenth Amendment); *Brown v. Zavaras*, 63 F.3d 967, 970-71 (10th Cir. 1995) (holding that transsexuals are not a protected class); *Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981) (stating that transsexuals do not constitute a suspect class); *Braninburg v. Coalinga State Hosp.*, No. 1:08-CV-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012); (stating "it is not apparent that transgender individuals constitute a 'suspect' class); *Jamison v. Davue*, No. CIV S-11-2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012) (holding "that transgender individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review"); *Kaeo-Tomaselli v. Butts*, No. CIV. 11-00670 LEK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013) (explaining that plaintiff's transgender status does not qualify "her as a member of a protected class. Nor has this court discovered any cases in which transgendered individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05 CIV. 10321(NRB), 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009) (noting that "plaintiff points to no court decision that has found transgender individuals a protected class for the purposes of Fourteenth Amendment analysis, and the Court has found none"); *Starr v. Bova*, No. 1:15 CV 126, 2015 WL 4138761, at *2 (N.D. Ohio July 8, 2015) (stating that transgender status has not been identified as a suspect classification in the Sixth Circuit); *Murillo v. Parkinson*, No. CV 11-10131-JGB VBK, 2015 WL 3791450, at *12 (C.D. Cal. June 17, 2015) ("Transgender is not a protected or suspect class giving rise to equal protection."); *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) ("To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims."); *Stevens v. Williams*, No. 05-CV-1790-ST, 2008 WL 916991, at *13 (D. Or. Mar. 27, 2008) ("Transsexuals are not a suspect class for purposes of the equal protection clause."); *Doe v. U.S. Postal Serv.*, No. CIV.A. 84-3296, 1985 WL 9446, at *4 (D.D.C. June 12, 1985) (stating that "we agree that transsexuals do not comprise a suspect class"); *Rush v. Johnson*, 565 F. Supp. 856, 868 (N.D. Ga. 1983) ("Examining the traditional indicia of suspect classification, the court finds that transsexuals are not necessarily a discrete and insular minority.").

(D. Neb. 1995), *aff'd,* 97 F.3d 256 (8th Cir. 1996) (citing *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257 (1993)). The subject action, policy, or statute is presumed constitutional and the government has no obligation to produce evidence to sustain the rationality of the classification." *Heller*, 509 U.S. at 320.

Requiring students to use facilities that correspond to their birth gender in order to provide privacy to all students has been recognized as a rational basis by multiple courts. *See Johnston*, 97 F. Supp. 3d at 669-70 (citing *Etsitty*, 502 F.3d at 1224; *Causey v. Ford Motor Co.,* 516 F.2d 416 (5th Cir. 1975)). KUSD's policy treats all student equally—men and women alike cannot use a bathroom that does not correspond to his or her birth gender. "[S]eparating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause." *Johnston*, 97 F. Supp. 3d at 670. Plaintiff has not set forth facts sufficient to overcome this conceivable and plausible reasoning.

II. KUSD WILL SUFFER IRREPARABLE INJURY IF THE STAY IS DENIED.

If the injunction is not stayed, KUSD, and the students and parents it serves, will suffer irreparable harm as continued compliance with the injunction will have the effect of forcing policy changes, imposing financial consequences, and stripping KUSD of its basic authority to enact polices that the accommodate the need for privacy of all students.

The injunction has put parents' constitutional rights in jeopardy. 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) (stating that it is the fundamental right of parents to make decisions concerning the care, custody, and control of their children); *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 627, 67 L. Ed. 1042 (1923) (acknowledging the right for parents to control the education of their children).

Likewise, individual students' constitutionally protected right of privacy is being violated by compliance with the proposed injunction. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734-35 (4th Cir. 2016) *mandate recalled and stay issued pending cert. petition by Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (Niemeyer, Circuit Judge, concurring in part and dissenting in part) ("An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex" and "courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind."). The injunction also sets the stage for a situation where any student who verbally identifies as being transgender would claim to be entitled to use any bathroom, locker room, or overnight accommodation, regardless of their biological sex.

Moreover, KUSD as a public school district and extension of the state, has the right to apply Title IX, and 34 C.F.R. § 106.33, in a manner consistent with the unambiguous language of those laws. An injunction that prevents a government actor from applying federal law constitutes irreparable harm:

> the authorities hold, 'any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.' *See Coalition for Econ. Equity v. Wilson,* 122 F.3d 718, 719 (9th Cir. 1997) (stating, whenever an enactment of a state's people is enjoined, the state suffers irreparable injury); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ('When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.'); *Maryland v. King*, —— U.S. —— —, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., *in chambers*) ('[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.').

Texas, 2016 WL 4426495, at *16. Therefore, continued compliance with the injunction will irreparably harm KUSD.

III. PLAINTIFF WILL NOT BE SUBSTANTIALLY HARMED BY THE STAY.

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. *See In re CGI Indus., Inc.*, 27 F.3d at 299. 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. Moreover, in light of the high likelihood of KUSD's appeal on the merits of this case, the balance of the respective harms requires less emphasis. *See In re A&F Enters., Inc. II*, 742 F.3d at 766.

IV. THE PUBLIC INTEREST WILL BE SERVED BY THE GRANTING OF A STAY.

The public interest will be served by staying the requirement that KUSD implement a policy that has been significantly questioned by the courts, including the Supreme Court of the United States. The current injunction has the effect of enforcing the Dear Colleague Letter. That policy statement has been found to violate federal law and not entitled to deference. *See Texas*, 2016 WL 4426495, at *13, 15. The district court in *Texas* issued a nationwide injunction enjoining the Department of Education from enforcing the guidelines set forth in the Dear Colleague Letter. *Id.* at *17-18. The federal government is currently enjoined from enforcing any of the policies set forth in the Dear Colleague Letter against any school district in Wisconsin. *See id.* at *1 n.2.

Furthermore, an identical injunction was stayed by the Supreme Court in *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016). The standards for granting a stay in the Supreme Court are substantially similar to those utilized in this circuit. *Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010) (per curiam) (noting that a stay is appropriate if there is "a fair prospect that a majority of the Court will vote to reverse the judgment below."). The Supreme Court or a Circuit Justice rarely grant a stay application, but they will do so if they "predict"

that a majority of "the Court would . . . set the [district court] order aside." *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302-03 (2006) (Kennedy, J., in chambers).[10]

Furthermore, the injunction is now forcing school districts in Wisconsin and within the Seventh Circuit to contemplate whether they must change their policies and alter their facilities or risk being found out of compliance with Title IX. The *Texas* decision has made matters even more difficult for these school districts as the policy changes demanded by the Executive Branch cannot be enforced until the stay is lifted in the *Texas* case.

CONCLUSION

KUSD respectfully asks this Court to grant its motion to stay the injunction pending appeal. A stay is appropriate in this matter as the weight of Seventh Circuit precedent supports KUSD's positions as to the substantive legal issues central to this case; KUSD will suffer irreparable harm if the stay is not granted; Plaintiff will not be substantially harmed by the stay; and the public interest will be served by the issuance of a stay.

[10] The Supreme Court takes such actions only on the rarest of occasions. *See Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) ("On such an application, since the Court of Appeals refused the stay . . . this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari."); *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) ("If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted.").

Dated this 4th day of October, 2016.

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendants-Petitioners hereby certifies that on October 4, 2016, an electronic copy of the above captioned documents was served on counsel for Plaintiff-Respondent via the ECF system.

Dated this 4th day of October, 2016.

MALLERY & ZIMMERMAN, S.C.
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EXHIBIT A

2016 WL 5239829
Only the Westlaw citation is currently available.
United States District Court,
E.D. 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.

Case No. 16-CV-943-PP
|
Filed 09/22/2016

DECISION AND ORDER GRANTING IN PART MOTION FOR PRELIMINARY INJUNCTION (DKT. NO. 10)

HON. PAMELA PEPPER United States District Judge

I. INTRODUCTION

***1** On July 19, 2016, the plaintiff, Ashton Whitaker, filed this action against the defendants, Kenosha Unified School District and Sue Savaglio-Jarvis, in her official capacity as the Superintendent of the Kenosha Unified School District. Dkt. No. 1. In his complaint (amended on August 15th), the plaintiff alleges that the treatment he received at Tremper High School after he started his female-to-male transition violated Title IX, 20 U.S.C. § 1681, et seq., and the Equal Protection clause of the Fourteenth Amendment. Dkt. Nos. 1, 12. On August 15, 2016, the plaintiff also filed a motion for a preliminary injunction. Dkt. No. 10. The defendants filed a motion to dismiss the next day. Dkt. No. 14. Both motions were fully briefed by August 31, 2016. Dkt. Nos. 11, 15, 17, 19, 21, 22. Following oral arguments on the motions on September 6, 19 and 20, the court issued an oral ruling denying the defendants' motion to dismiss. Dkt. No. 28. See also, Dkt. No. 29 (order denying motion to dismiss). For the reasons stated at the September 20, 2016 hearing, and supplemented here, the court grants in part the plaintiff's motion for preliminary injunction. Dkt. No. 10.

II. BACKGROUND

The plaintiff, Ash Whitaker, is a student at Tremper High School, a public high school in the Kenosha Unified School District (KUSD). Dkt. No. 12 at ¶6. The plaintiff's mother, Melissa Whitaker, brought this action as his next friend. Id. at ¶7. She is also a high school teacher at Tremper. Id.

The plaintiff's birth certificate identifies him as female, and he lived as a female until middle school. Id. at ¶21. Around seventh grade, in late 2013, the plaintiff asked his mother about treatment for transgender individuals. Id. at ¶¶21-23; Dkt. 10-2 at 17. He later was diagnosed by his pediatrician with Gender Dysphoria. Dkt. No. 12 at ¶¶15, 25. "Gender Dysphoria is the medical and psychiatric term for gender incongruence." Dkt. No. 10-2 at 6. Individuals with gender dysphoria suffer extreme stress when not presenting themselves and living in accordance with their gender identity. Id. Treatment for gender dysphoria consists of transitioning to living and being accepted by others as the sex corresponding to the person's gender identity. Dkt. No. 12 at ¶17. To pursue medical interventions, a person with gender dysphoria must live in accordance with their gender identity for at least one year. Id. at ¶18. If left untreated, gender dysphoria may result in "serious and debilitating" psychological distress including anxiety, depression, and even self-harm or suicidal ideation. Dkt. No. 10-2 at 6-7; Dkt. No. 12 at ¶15. The plaintiff currently is under the care of a clinical psychologist, and began receiving testosterone treatment in July 2016. Id. at ¶25.

During the 2013-2014 school year, the plaintiff began telling close friends that he was a boy, and transitioning more publicly to live in accordance with his male identity. Id. at ¶23. At the beginning of his sophomore year (Fall 2014), the plaintiff told all of his teachers and peers about his transition, and asked that they refer to him using male pronouns and by his male name. Id. at ¶24. In the spring of 2015, the plaintiff asked to be allowed to use the boys' restrooms at school. Id. at ¶27. The school administrators denied the request, stating that the plaintiff was allowed to use only the girls' restroom or the single-user, gender-neutral restroom in the school office. Id. The plaintiff did not want to use the office restroom because it was far from his classes and only used by office staff and visitors. Id. at ¶28. Consequently, the plaintiff avoided drinking liquids, and using the bathroom at school for fear of being stigmatized as different. Id. at ¶29. During

his sophomore year, the plaintiff experienced vasovagal syncope [1], stress-related migraines, depression, anxiety and suicidal thoughts. Id. at ¶31.

*2 Upon learning, over the summer of 2015, that the US Department of Justice had concluded that transgender students have the right to use restrooms in accordance with their gender identity, the plaintiff began using the male-designated bathrooms at school starting his junior year, September 2015. Id. at ¶35. He used the male bathroom without incident until late February 2016. Id. at ¶36-37. Despite the lack of any written policy on the issue, the school informed the plaintiff, in early March, that he could not use the boys' restroom. Id. at 38. Nevertheless, to avoid the psychological distress associated with using the girls' restroom or the single-user restroom in the office, the plaintiff continued to use the boys' restrooms when necessary. Id. at ¶42.

The plaintiff and his mother met with an assistant principal and his guidance counselor on or about March 10, 2016 to discuss the school's decision. Id. at 44. The assistant principal told him that he could use only the restrooms consistent with his gender as listed in the school's official records, and that he could only change his gender in the records only if the school received legal or medical documentation confirming his transition to male. Id. Although the plaintiff's mother argued that the plaintiff was too young for transition-related surgery, the assistant principal responded that the school needed medical documentation, but declined to indicate what type of medical documentation would be sufficient. Id. at 45. The plaintiff's pediatrician sent two letters to the school, recommending that the plaintiff be allowed access to the boys' restroom. Id. at 46. Despite lacking a written policy on the issue, id. at ¶60, the school again denied the plaintiff's request, because he had not completed a medical transition, but failing to explain why a medical transition was necessary. Id. at 47.

The plaintiff generally tried to avoid using the restroom at school, but when necessary, he used the boys' restroom. Id. at 48. Consequently, the school directed security guards to notify administrators if they spotted students going into the "wrong" restroom. Id. at ¶56. The school re-purposed two single-user restrooms, which previously had been open to all students, as private bathrooms for the plaintiff. Id. at ¶61. The plaintiff refused to use these bathrooms, because they were far from his classes and because using them would draw questions from other students. Id. Despite several more confrontations with the school administration, id. at ¶¶49, 51, 54, the plaintiff continued to use the boys' restroom through the last day of the 2015-16 school year. Id. at ¶54. [2]

The plaintiff started his senior year of high school on September 1, 2016. As of the date of oral argument on this motion (September 20, 2016), the school still refused to allow him to use the boys' restroom, and the plaintiff continued to avoid the restrooms generally, using the boys' restroom when needed.

The plaintiff seeks the following relief: an order (1) enjoining the defendants from enforcing any policy that denies the plaintiff's access to the boys' restroom at school and school-sponsored events; (2) enjoining the defendants from taking any formal or informal disciplinary action against the plaintiff for using the boys' restroom; (3) enjoining the defendants from using, causing or permitting school employees to refer to the plaintiff by his female name and female pronouns; (4) enjoining the defendants from taking any other action that would reveal the plaintiff's transgender status to others at school, including the use of any visible markers or identifiers (e.g. wristbands, stickers) issued by the district personnel to the plaintiff and other transgender students. Dkt. No. 10 at 2.

*3 As discussed in the oral arguments before the court, this decision only addresses the first two requests; the court denied the orally denied the fourth request without prejudice at the September 19, 2016 hearing, and the court defers ruling on the third request to allow counsel for the defendants to discuss with his client recent developments, such as the plaintiff's legal name change and this court's denial of the defendants' motion to dismiss.

III. DISCUSSION

A. Preliminary Injunction Standard

"A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need." Turnell v. CentiMark Corp., 796 F.3d 656, 661 (7th Cir. 2015) (citing Goodman v. Ill. Dep't of Fin. and Prof'l Regulation, 430 F.3d 432, 437 (7th Cir. 2005)). "[A] district court engages in a two-step analysis to decide whether such relief is warranted." Id. (citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc., 549 F.3d 1079, 1085–86 (7th Cir.2008)). The first phase

requires the "party seeking a preliminary injunction [to] make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." Id. at 661-62.

If the movant satisfies the first three criteria, the court then considers "(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the 'public interest')." Id. at 662. When balancing the potential harms, the court uses a 'sliding scale': "the more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." Id.

B. The Plaintiff Has Shown a Likelihood That His Claims Will Succeed on the Merits.

"The most significant difference between the preliminary injunction phase and the merits phase is that a plaintiff in the former position needs only to show 'a likelihood of success on the merits rather than actual success.' " Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 782 (7th Cir. 2011) (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)). In the Seventh Circuit, the court "only needs to determine that the plaintiff has some likelihood of success on the merits." Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 896 (7th Cir. 2001). As the plaintiffs argued, this is a relatively low standard.

The arguments the parties made on September 20, 2016 regarding the motion for preliminary injunction mirror the arguments they made on September 19, 2016 regarding the motion to dismiss. Essentially, the defendants argue that gender identity is not encompassed by the word "sex" in Title IX, and the plaintiff disagrees. The defendants also argue that under a rational basis standard of review, the plaintiffs cannot sustain an equal protection claim; the plaintiffs respond that they can, and further, that the court should apply a heightened scrutiny standard.

The court denied the motion to dismiss because it found that there were several avenues by which the plaintiff might obtain relief. Dkt. No. 28. The court found that, because no case defines "sex" for the purposes of Title IX, the plaintiff might succeed on his claim that that word includes transgender persons. The court found that, while the defendants raised a number of arguments in support of their claim that the word "sex" does not encompass transgender persons, much of that case law came from cases interpreting Title VII, a different statute with a different legislative history and purpose. The court also found that there was case law supporting the plaintiff's position, as well as the Department of Education's "Dear Colleague" letter, which, the court found, should be accorded Auer deference.

***4** The court also noted that the plaintiff had alleged sufficient facts to support a claim of gender stereotyping, alleging that the defendants had discriminated against him because he did not fit standard stereotypes of girls (the sex the school insists is his).

The court also found that the plaintiff had alleged sufficient facts to support his claims that the defendants had violated his equal protection rights. While the court did not, at the motion to dismiss stage, and does not now have to decide whether a rational basis or a heightened scrutiny standard of review applies to the plaintiff's equal protection claim, at this point, the defendants have articulated little in the way of a rational basis for the alleged discrimination. The defendants argue that students have a right to privacy; the court is not clear how allowing the plaintiff to use the boys' restroom violates other students' right to privacy. The defendants argue that they have a right to set school policy, as long as it does not violate the law. The court agrees, but notes that the heart of this case is the question of whether the current (unwritten) policy violates the law. The defendants argue that allowing the plaintiff to use the boys' restroom will gut the Department of Education regulation giving schools the discretion to segregate bathrooms by sex. The court noted at both the September 19 and September 20 hearings that it did not agree.

Because of the low threshold showing a plaintiff must make regarding likelihood of success on the merits, see Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir.1999), and because the plaintiff has articulated several bases upon which the court could rule in his favor, the court finds that the defendant has satisfied this element of the preliminary injunction test.

C. The Plaintiff Has Shown that He Has No Adequate Remedy at Law.

The court observed at the September 20 hearing that neither party focused much attention, either in the moving papers or at oral argument, on the question of whether the plaintiffs had an adequate remedy at law. The plaintiffs argued that plaintiff Ash Whitaker has only one senior year. They argued that even if, at the end of this lawsuit, the plaintiffs were to prevail, no recovery could give back to Ash the loss suffered if he spent his senior year focusing on avoiding using the restroom, rather than on his studies, his extracurricular activities and his college application process. The defendants made no argument that the plaintiffs have an adequate remedy at law. The court finds, therefore, that the plaintiffs have shown that they have no adequate remedy at law.

D. The Plaintiff Has Shown That He Will Suffer Irreparable Injury If The Court Does Not Enjoin The School's Actions.

The parties focused most of their arguments on the element of irreparable harm. While alleged irreparable harm does not need to occur before a court may grant injunctive relief, there must be more than a mere possibility. United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); Bath Indus., Inc. v. Blot, 427 F.2d 97, 111 (7th Cir. 1970). Put another way, the irreparable harm must be *likely* to occur if no injunction issues. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 21–23 (2008).

***5** During the oral arguments, the plaintiff argued that the defendants' denial of access to the boys' restroom has caused and will continue to cause medical and psychological issues that his present and future health. In support of this argument, the plaintiff pointed to the declarations from Dr. Stephanie Budge and Dr. R. Nicholas Gorton, M.D., which explain gender dysphoria and discuss, both in terms specific to the plaintiff (Dr. Budge) and terms general to persons suffering from gender dysphoria (Dr. Gorton) the effects on persons with gender dysphoria of not being allowed to live in accordance with their gender identity. See Dkt. Nos. 10-2, 10-3. The defendants responded that the court should grant little weight or credibility to these affidavits, because Dr. Budge barely knew Ash Whitaker, Dr. Gorton did not know him at all, and neither affidavit quantified the harms they described. [3]

Relying primarily on the plaintiff's declaration (which the defendants did not challenge at the hearing), dkt. no. 10-1, the court has no question that the plaintiff's inability to use the boys' restroom has caused him to suffer harm. The plaintiff's declaration establishes that he has suffered emotional distress as a result of not being allowed to use the boys' restrooms. While the school allows him to use the girls' restrooms, his gender identity prevents him from doing so. He has refused to use the single-user bathrooms, due to distance from his classes and, more to the point, the embarrassment and stigma of being singled out and treated differently from all other students. Because the defendants do not allow him to use the boys' restrooms, he has begun a practice of limiting his fluid intake, in an attempt to avoid having to use the restroom during the school day. Lack of hydration, however, exacerbates his problems with migraines, fainting and dizziness. He describes sleeplessness, fear of being disciplined (and having that impact his school record ahead of his efforts to get into college), and bouts of tearfulness and panic.

The plaintiff also attested to the fact that the emotional impact of his inability to use the restrooms like everyone else, and his being pulled out of class for discipline in connection with his restroom used, impacted on his ability to fully focus on his studies. The Seventh Circuit has recognized that discrimination that impacts one's ability to focus and learn constitutes harm. See e.g., Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 853 (7th Cir. 1999).

To reiterate, the court finds that Ash has suffered harm. The defendants intimated in their arguments, however, that such harm was not irreparable, because the plaintiffs had not provided any evidence that the harm would be long-lasting, or permanent. It was in this context that the defendants challenged the professional declarations the plaintiffs had provided from experts in the field of gender dysphoria and gender transition. As the court stated at the September 20, 2016 hearing, however, the plaintiffs are not required to prove that Ash will be forever irreversibly damaged in order to prove irreparable harm. The Seventh Circuit has noted that irreparable harm is harm that "would [not] be rectifiable following trial." Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc., 549 F.3d 1079, 1088 (7th Cir. 2008). It has held that irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial." Roland

Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386 (7th Cir. 1984).

*6 The plaintiff's spending his last school year trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized, being subject to fainting spells or migraines, is not harm that can be rectified by a monetary judgment, or even an award of injunctive relief, after a trial that could take place months or years from now. The court finds that the plaintiffs have satisfied the irreparable harm factor.

E. The Plaintiff's Irreparable Harm Outweighs Any Harm The Defendants Might Experience and the Effects Granting the Injunction Will Have on Nonparties.

The balancing of the harms weighs in the plaintiffs' favor. The court has found that Ash Whitaker has suffered irreparable harm, and will continue to do so if he is not allowed to use the boys' restrooms. The court must balance against that harm the possible harm to the defendants.

In their moving papers, the defendants argued that requiring them to allow Ash to use the boys' restrooms would subject them to financial burdens and facility changes. They did not identify why allowing Ash to use the boys' restrooms would create a financial burden; the court cannot, on the evidence before it, see what cost would be incurred in allowing Ash to use restrooms that already exist. The defendants provided no evidence regarding any facilities that they would have to build or provide.

The defendants also argued that a requirement that they allow Ash to use the boys' restrooms would violate the privacy rights of other students. They provided no affidavits or other evidence in support of this argument. The evidence before the court indicates that Ash used the boys' restroom for some seven months without incident or notice; the defendants prohibited him from using them only after a teach observed Ash in a boys' restroom, washing his hands. This evidence contradicts the defendants' assertions that allowing Ash to use the boys' restroom would violate other students' privacy rights.

The defendants argued that granting the injunctive relief would deny them the ability to exercise their discretion to segregate bathrooms by sex, as allowed by the regulations promulgated by the Department of Education. This argument is a red herring; the issuance of the injunction will not disturb the school's ability to have boys' restrooms and girls' restrooms. It will require only that Ash, who identifies as a boy, be allowed to use the existing boys' restrooms.

The defendants argued that the injunctive relief would require the defendants, in the first month of the new school year, to scramble to figure out policies and procedures to enable it to comply with the order of relief. This relief, however, does not require the defendants to create policies, or review policies. It requires only that the defendants allow Ash to use the boys' restrooms, and not to subject him to discipline for doing so.

The court finds that the balance of harms weighs in favor of the plaintiff.

F. Issuance of the Injunction Will Not Negatively Impact the Public Interest.

Finally, the court finds that issuance of the injunction will not harm the public interest. The defendants argue that granting the injunction will force schools all over the state of Wisconsin, and perhaps farther afield, to allow students who self-identify with a gender other than the one reflected anatomically at birth to use whatever restroom they wish. The defendants accord this court's order breadth and power it does not possess. This order mandates only that the defendants allow one student—Ash Whitaker—to use the boys' restrooms for the pendency of this litigation. The Kenosha Unified School District is the only institutional defendant in this case; the court's order binds only that defendant. The defendants have provided no proof of any harm to third parties or to the public should the injunction issue.

G. The Defendants' Request for a Bond

*7 At the conclusion of the September 20, 2016 hearing, the defendants asked that if the court were inclined to grant injunctive relief, it require the plaintiffs to post a bond in the amount of $150,000. The defendants first cited Rule 65, and then cited the Wisconsin Supreme Court's decision in Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931). The defendants argued that, in the event that events revealed that this court had improvidently granted the injunction, the Muscoda case provided that the court should impose a bond sufficient to reimburse the defendants' costs and attorneys' fees, and

counsel estimated that those fees could reach $150,000. The plaintiffs objected to the court requiring a bond, citing the plaintiffs' limited means.

Rule 65(c) states that "[t]he 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 rule leaves to the court's discretion the question of the proper amount of such a bond, and tethers that consideration to the amount of costs and damages sustained by the wrongfully enjoined party.

Counsel for the defendants argued that under Wisconsin law, "costs and damages" includes the legal fees the defendants would incur in, presumably, seeking to overturn the injunction, and argued that those fees could amount to as much as $150,000. In support of this argument, he cited Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931), which held that "[i]t is the established law of this state that damages, sustained by reason of an injunction improvidently issued, properly include attorney fees for services rendered in procuring the dissolution of the injunction, and also for services upon the reference to ascertain damages." Id. at 651. The problem with this argument is that Seventh Circuit law says otherwise.

> [T]he Seventh Circuit has determined that, for purposes of Fed. R. Civ. P. 65(c), "costs and damages" damages do not include attorneys' fees. Rather, in the absence of a statute authorizing such fees ... an award of attorneys' fees is only proper where the losing party is guilty of bad faith."

Minnesota Power & Light Co. v. Hockett, 14 Fed. App'x 703, 706 (7th Cir. 2001), quoting Coyne-Delany Co. v. Capital Dev. Bd. Of State of Ill., 717 F.2d 385, 390 (7th Cir. 1983)). See also, Int'l Broth. Of Teamsters Airline Div. v. Frontier Airlines, Inc., No. 10-C-0203, 2010 WL 2679959, at *5 (E.D. Wis. July 1, 2010). When there is a "direct collision" between a federal rule and a state law, the Seventh Circuit has mandated that federal law applies. Id. at 707.

The defendants did not identify any statute authorizing an award of attorneys' fees should they succeed in overturning the injunction. Thus, in order to determine the amount of a security bond under Rule 65(c), the court must consider the costs and damages the defendants are likely to face as a result of being improvidently enjoined, but not the legal costs they might incur in seeking to overturn the injunction. It is unclear what damages or costs the defendants will incur if they are wrongfully enjoined. As discussed above, the defendants have not demonstrated that it will cost them money to allow Ash to use the boys' restrooms. Because it is within this court's discretion to determine the amount of a security bond, and because the defendants have not demonstrated that they will suffer any financial damage as a result of being required to allow Ash to use the boys' restrooms, the court will not require the plaintiffs to post security.

IV. CONCLUSION

*8 For the reasons explained above, the court **GRANTS IN PART** the plaintiff's motion for a preliminary injunction. Dkt. No. 10. The court **ORDERS** that defendants Kenosha Unified School District and Sue Savaglio-Jarvis (in her capacity as superintendent of that district) are **ENJOINED** from

(1) denying Ash Whitaker access to the boys' restrooms;

(2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;

(3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and

(4) monitoring or surveilling in any way Ash Whitaker's restroom use.

The court **DENIES** the defendants' request that the court require the plaintiffs to post a bond under Rule 65(c).

BY THE COURT:

All Citations

Slip Copy, 2016 WL 5239829

Footnotes

1 "Vasovagal syncope ... occurs when you faint because your body overreacts to certain triggers, such as the sight of blood or extreme emotional distress. It may also be called neurocardiogenic syncope." http://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/home/ovc20184773 (last visited September 21, 2016).

2 The plaintiff alleges other instances of discrimination: that the defendants refused to allow him to room with male classmates during two summer orchestra camps, resulting in his having to room alone, id. at ¶¶33-34, 86; that the defendants directed guidance counselors to give transgender students a bright green bracelet to wear (the defendants dispute this, and as of this writing, the school has not implemented such a policy), id. at ¶¶80; and the school initially refusing to allow the plaintiff to run for prom king, id. at ¶¶71-72. For the reasons the court discussed on the record at the September 19, 2016 hearing, th decision decides only the request to enjoin the defendants from prohibiting the plaintiff from using the boys' restrooms.

3 While "[a]ffidavits are ordinarily inadmissible at trial ... they are fully admissible in summary proceedings, including preliminary-injunction proceedings." Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997)(citing Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995).

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EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER,
By his mother and next friend,
Melissa Whitaker,

Plaintiff,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1
BOARD OF EDUCATION and
SUE SAVAGLIO-JARVIS,

Defendants.

Case No. 16-cv-943-pp

ORDER DENYING DEFENDANTS' CIVIL L.R. 7(h) EXPEDITED, NON-DISPOSITIVE MOTION TO STAY PRELIMINARY INJUNCTION (DKT. NO. 33) PENDING APPEAL (DKT. NO. 44)

The plaintiff filed his complaint on July 19, 2016, Dkt. No. 1, and less than a month later, filed a motion for preliminary injunction, Dkt. No. 10. A day after the plaintiff filed the motion for preliminary injunction, the defendants filed a motion to dismiss the complaint. Dkt. No. 15. A few days later, they filed a brief in opposition to the motion for preliminary injunction. Dkt. No. 17.

On September 6, 2016, the court heard oral argument on the motion to dismiss. Dkt. No. 26. On September 19, 2016, the court issued an oral ruling denying the defendants' motion to dismiss. Dkt. No. 28. The court scheduled a hearing on the motion for preliminary injunction for the following day, September 20, 2016. Id. at 9.

On September 20, 2016, the parties presented their oral arguments on the motion for preliminary injunction. Dkt. No. 31. In considering the question of whether the plaintiffs had a likelihood of success on the merits, the court relied in good part on its decision from the previous day denying the motion to dismiss.[1] At the conclusion of the hearing, the court granted in part[2] the plaintiff's motion for a preliminary injunction, and enjoined the defendants from prohibiting the plaintiff from using the boys' restrooms at his high school; from taking punitive action against the plaintiff for using the boys' restrooms; and from taking any action to monitor his restroom usage. Dkt. No. 31 at 1. Counsel for the defendants asked the court to stay the injunction until October

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[1] There is a bit of a procedural morass surrounding that decision. Counsel for the defendants informed the court at the end of the hearing that he would be submitting a proposed order, denying his motion to dismiss but containing the necessary findings for certification of an interlocutory appeal. He did not make any argument in support of that proposal; the court did not elicit any, nor did it ask for the plaintiff's position. The court entered the order, with the interlocutory appeal certification language, on September 21. Dkt. No. 29. The next day, the plaintiff filed a motion asking the court to reconsider including the interlocutory appeal certification language. Dkt. No. 30. On September 23, 2016, before the court ruled on that motion, the defendants filed a notice of appeal with the Seventh Circuit, appealing both the order denying the motion to dismiss and the order granting the preliminary injunction (an order the court had issued on September 22, 2016, Dkt. No. 33). Dkt. No. 34. On September 25, 2016, the court issued an order granting the plaintiff's motion to reconsider, Dkt. No. 36, and entered an amended order denying the motion to dismiss but removing the interlocutory appeal certification language, Dkt. No. 35. The next day, the Seventh Circuit ordered the plaintiff to respond to the defendants' request for interlocutory appeal by October 11, 2016.

[2] The plaintiff's complaint requests other relief: it asks the court to prohibit the defendants from referring to the plaintiff by his birth name, and from using female pronouns to identify him; to require the school to allow him to room with other boys on school trips; to prohibit the school from requiring the plaintiff to wear identifying markers, such as a colored wristband; and other relief. The court did not grant injunctive relief on those requests—some were not ripe, and others speculated actions that had not yet occurred.

1, 2016, to allow the defendants time to appeal. Id. The court declined. Id. at 2. The defendants also asked the court to require the plaintiff to post a bond; the court took that request under advisement. Id.

On September 22, 2016, the court issued its written order granting in part the motion for preliminary injunction. Dkt. No. 33. In particular, the court weighed the balance of harms, and concluded that the harms suffered by the plaintiff if the court did not grant the injunctive relief outweighed any potential harms suffered by the defendant if the court were to impose the injunction. Id. at 13-15. The court also found that the issuance of the injunction would not negatively impact the public interest. Id. at 15. Finally, the court declined to require the plaintiff to post a bond. Id. at 15-17.

The defendants again have asked the court to stay the preliminary injunction. Dkt. No. 44. The defendants point out that they have appealed the court's decision to the Seventh Circuit (both appealed as of right regarding the order granting the motion for preliminary injunction, and sought interlocutory appeal regarding the court's denial of the motion to dismiss the complaint). Id. at 2. They argue, as they did in their motion to dismiss, that the Seventh Circuit's decision on Ulane v. Eastern Airlines, Inc., 742 F.2d 1081) (7th Circuit) mandates a ruling in their favor on the Title IX issue (despite conceding that the court has not decided the precise issue in question in this case). Id. at 1-2. They argue that they will suffer irreparable harm from the injunction, because the injunction "threatens the constitutionally protected privacy interest of the approximately 22,000 students in the school district." Id. at 2-3.

They argue that the plaintiff will not be harmed by staying the injunction, because a stay would maintain the *status quo* and would not worsen the plaintiff's health. Id. at 3. Finally, they argue that the public interest would be served by a stay of the injunction, because it will prevent the school district's students and parents from being "subjected to an injunction that perpetuates a policy that the federal government is unable to enforce," citing State of Texas v. United States, Case No. 16-cv-54, 2016 WL 4426495 (N.D. Tex., August 21, 2016).[3]

As the defendants state in their motion, the factors a movant must satisfy to obtain a stay pending appeal are similar to the factors a movant must satisfy to obtain injunction relief. Hinrichs v. Bosma, 440 F.3d 393, 396 (7th Cir. 2006) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The moving party must demonstrate that "1) it has a reasonable likelihood of success on the merits; 2) no adequate remedy at law exists; 3) it will suffer irreparable harm if it is denied; 4) the irreparable harm the party will suffer without relief is greater than the harm the opposing party will suffer if the stay is granted; and 5) the stay will be in the public interest." Id. (citing Kiel v. City of Kenosha, 236 F.3d 814, 815-16 (7th Cir. 2000)).

[3] The defendants' statement that Texas district court's injunction prohibits the federal government from enforcing its policies at all is overbroad. The Texas court's order prohibits the federal government from enforcing certain Department of Education policies (relevant to this case) against the plaintiffs in that case "until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals." Texas v. United States, 2016 WL 4426495 at 17.

Every argument which the defendants raise in their motion for stay pending appeal was raised in their objection to the motion for preliminary injunction, and the parties argued every one of those issues at the September 20, 2016 hearing. The court found in favor of the plaintiff, and against the defendants, on each factor. The defendants give no explanation for why the court should find in their favor now, when eight days prior to their filing this motion to stay, the court found against them on exactly the same issues they raise here.

The court **DENIES** the defendants' motion Civil L.R. 7(h) Expedited, Non-Dispositive Motion to Stay Preliminary Injunction. Dkt. No. 44.

Dated in Milwaukee, Wisconsin this 3rd day of October, 2016.

BY THE COURT:

HON. PAMELA PEPPER
United States District Judge

EXHIBIT C

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 **AMENDED COMPLAINT**

INTRODUCTION

1. Plaintiff Ashton ("Ash") Whitaker, a 16-year-old boy, is a rising senior at George Nelson Tremper High School ("Tremper") in the Kenosha Unified School District No. 1 ("KUSD") in Kenosha, Wisconsin. Ash is a boy. He is also transgender. Ash was assumed to be a girl when he was born, and was designated "female" on his birth certificate, but has a male gender identity and lives as a boy in all aspects of his life. Ash's family, classmates, medical providers, and others recognize Ash as a boy, respect his male gender identity, and support his right to live and be treated consistent with that gender identity.

2. Defendants Kenosha Unified School District No. 1 Board of Education (the "Board"), Superintendent Sue Savaglio-Jarvis, and their agents, employees, and representatives, have repeatedly refused to recognize or respect Ash's gender identity and have taken a series of discriminatory and highly stigmatizing actions against him based on his sex, gender identity, and transgender status. The actions, as described more fully herein, have included (a) denying him

access to boys' restrooms at school and requiring him to use girls' restrooms or a single-occupancy restroom; (b) directing school staff to monitor his restroom usage and to report to administrators if he was observed using a boys' restroom; (c) intentionally and repeatedly using his birth name and female pronouns, and failing to appropriately inform substitute teachers and other staff members of his preferred name and pronouns, resulting in those staff referring to him by his birth name or with female pronouns in front of other students; (d) instructing guidance counselors to issue bright green wristbands to Ash and any other transgender students at the school, to more easily monitor and enforce these students' restroom usage; (e) requiring him to room with girls on an orchestra trip to Europe and requiring, as a condition of his ability to participate in a recent overnight school-sponsored orchestra camp held on a college campus, that he stay either in a multi-room suite with girls, or alone in a multi-room suite with no other students, while all other boys shared multi-room suites with other boys; and (f) initially denying him the ability to run for junior prom king, despite being nominated for that recognition based on his active involvement in community service, instructing him that he could only run for prom queen, and only relenting and allowing him to run for prom king after a protest by many of those same classmates.

3. Through these actions, Defendants have discriminated against Ash on the basis of sex, including on the basis of his gender identity, transgender status, and nonconformity to sex-based stereotypes, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and on the basis of sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants' actions have denied Ash full and equal access to KUSD's education program and activities on the basis of his sex.

4. Plaintiff, through his mother and next friend, Melissa Whitaker, brings this action against Defendants based on these unlawful and discriminatory actions.

5. Plaintiff seeks a declaratory judgment, preliminary and permanent injunctive relief, and damages resulting from Defendants' discriminatory actions.

PARTIES

6. Plaintiff Ash Whitaker is a 16-year-old boy. He was born in 1999. He resides in Kenosha, Wisconsin and is a student at Tremper High School, a public high school in the Kenosha Unified School District No. 1. He will begin his senior year at Tremper on September 1, 2016.

7. Melissa Whitaker is Ash's mother and brings this action as his next friend. Ms. Whitaker resides in Kenosha, Wisconsin and is employed by the Kenosha Unified School District No. 1 as a high school teacher at Tremper.

8. Defendant Kenosha Unified School District No. 1 Board of Education is a seven-member elected body responsible for governing the Kenosha Unified School District No. 1, a public school district serving over 22,000 students in kindergarten through 12th grade who reside in the City of Kenosha, Village of Pleasant Prairie, and Town and Village of Somers. The Board derives its authority to govern KUSD directly from the Wisconsin Constitution and state statutes. The school district is a recipient of federal funds from the U.S. Department of Education, the U.S. Department of Agriculture, and the U.S. Department of Health and Human Services, and, as such, is subject to Title IX of the Education Amendments of 1972, which prohibits sex discrimination against any person in any education program or activity receiving Federal financial assistance. The Board designates responsibility for the administration of KUSD to its Superintendent of Schools, currently Dr. Sue Savaglio-Jarvis, who oversees a number of district-

level administrators. KUSD operates 42 schools, including six high schools. One of the high schools is Tremper, a 1,695-student public high school located in Kenosha, serving students in grades 9 through 12. Tremper's administration includes a principal and three assistant principals. The Board is vicariously liable for the acts or omissions of its employees, agents, and representatives, including those of the other Defendant Savaglio-Jarvis and other Tremper administrators, staff, and volunteers.

9. Defendant Sue Savaglio-Jarvis is the Superintendent of the Kenosha Unified School District and is sued in her official capacity. At all times relevant to the events described herein, Savaglio-Jarvis acted within the scope of her employment as an employee, agent, and representative of the Board. In such capacity, she carried out the discriminatory practices described herein (a) at the direction of, and with the consent, encouragement, knowledge, and ratification of the Board; (b) under the Board's authority, control, and supervision; and (c) with the actual or apparent authority of the Board.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343(a)(3), and is authorized to order declaratory relief under 28 U.S.C. §§ 2201 and 2202.

11. Venue is proper in the Eastern District of Wisconsin under 28 U.S.C. § 1391(b) because the claims arose in the District, the parties reside in the District, and all of the events giving rise to this action occurred in the District.

FACTS

Gender Identity and Gender Dysphoria

12. Sex is a characteristic that is made up of multiple factors, including hormones, external physical features, internal reproductive organs, chromosomes, and gender identity.

13. Gender identity—a person's deeply felt understanding of their own gender—is the determining factor of a person's sex. Gender identity is often established as early as two or three years of age, though a person's recognition of their gender identity can emerge at any time. There is a medical consensus that efforts to change a person's gender identity are ineffective, unethical, and harmful. A person's gender identity may be different from or the same as the person's sex assigned at birth.

14. The phrase "sex assigned at birth" refers to the sex designation recorded on an infant's birth certificate. For most people, gender identity aligns with the person's sex assigned at birth, a determination generally based solely on the appearance of a baby's external genitalia at birth. For transgender people, however, the gender they were assumed to be at birth does not align with their gender identity. For example, a transgender boy is a person who was assumed to be female at birth but is in fact a boy. A transgender girl is a person who was assumed to be a boy at birth but is in fact a girl.

15. Gender Dysphoria is a condition recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th edition ("DSM-5"). It refers to clinically significant distress that can result when a person's gender identity differs from the person's assumed gender at birth. If left untreated, Gender Dysphoria may result in profound psychological distress, anxiety, depression, and even self-harm or suicidal ideation.

16. Treatment for Gender Dysphoria is usually pursuant to the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("Standards of Care"), published by the World Professional Association for Transgender Health ("WPATH") since 1980. WPATH is an international, multidisciplinary, professional association of medical providers, mental health providers, researchers, and others, with a mission of promoting

evidence-based care and research for transgender health, including the treatment of Gender Dysphoria. WPATH published the seventh and most recent edition of the Standards of Care in 2011.

17. Consistent with the WPATH Standards of Care, treatment for Gender Dysphoria consists of the person "transitioning" to living and being accepted by others as the sex corresponding to the person's gender identity. A key stage in that process is a "social transition," in which the individual lives in accordance with his gender identity in all aspects of life. A social transition, though specific to each person, typically includes adopting a new first name, using and asking others to use pronouns reflecting the individual's true gender, wearing clothing typically associated with that gender, and using sex-specific facilities corresponding to that gender. Failing to recognize or respect a transgender person's gender is contrary to established medical protocols and can exacerbate an individual's symptoms of Gender Dysphoria.

18. Medical treatments, such as hormone therapy or surgical procedures, may also be undertaken to facilitate transition and alleviate dysphoria, typically after an individual's social transition. Under the WPATH Standards of Care, living full-time in accordance with one's gender identity in all aspects of life for at least one year is a prerequisite for any medical interventions. Medical treatments are not necessary or appropriate in all cases.

19. A social transition requires that a transgender boy be recognized as a boy and treated the same as all other boys by parents, teachers, classmates, and others in the community. This includes being referred to exclusively with the student's new name and male pronouns, being permitted to use boys' restrooms and overnight accommodations on the same footing as other male students, and having the right to keep information about the student's transgender status private. Singling out a transgender student and treating him differently than other boys

communicates the stigmatizing message to that student and the entire school community that he should not be recognized or treated as a boy, simply because he is transgender. This undermines the social transition and exposes the student to the risk of renewed and heightened symptoms of Gender Dysphoria such as anxiety and depression. It also frequently leads transgender students to avoid using school restrooms altogether, often resulting in adverse physical health consequences such as urinary tract infections, kidney infections, and dehydration, and other consequences such as stress and difficulty focusing on classwork.

Plaintiff's Background

20. Ash has been a student in KUSD's schools since kindergarten. On September 1, 2016, he will begin his senior year at Tremper High. Ash is an excellent student: he has a high grade point average and is currently ranked in the top five percent of his class of over 400 students. All of his academic classes in his junior year were either Advanced Placement or Honors level classes. He is also very involved in many school activities, including the school's Golden Strings orchestra, theater, tennis team, National Honor Society, and Astronomical Society. After graduation, he hopes to attend the University of Wisconsin-Madison and study biomedical engineering. Ash also works part-time as an accounting assistant in a medical office.

21. Ash is a boy. He is also transgender. He was designated "female" on his birth certificate and lived as a girl until middle school, when he recognized that he is, in fact, a boy, and he began to experience profound discomfort with being assumed to be a girl by others.

22. At the end of eighth grade, in the spring of 2013, Ash told his parents that he is transgender and a boy. Shortly thereafter, he told his older brothers.

23. During the 2013-2014 school year, Ash's freshman year of high school at Tremper, Ash began confiding to a few close friends that he is a boy. He slowly began

transitioning more publicly to live in accordance with his male identity: he cut his hair short, began wearing more traditionally masculine clothing, and began to go by a typically masculine name and masculine pronouns.

24. At the beginning of his sophomore year, in the fall of 2014, Ash told all of his teachers and peers that he is a boy, requesting that he be referred to using male pronouns and his new name. On Christmas, 2014, Ash told his extended family, including grandparents, aunts, uncles, and cousins, that he is a boy.

25. Ash has undertaken his gender transition under the guidance and care of therapists and medical doctors. He was diagnosed with Gender Dysphoria by his pediatrician. Around the time of his public transition, Ash began seeing a gender specialist therapist to support him in his transition. He is currently under the care of clinical psychologist, who is also a gender specialist. In April 2016, he began consulting with an endocrinologist at Children's Hospital of Wisconsin to discuss hormonal therapy. Ash began receiving testosterone treatment under the care of an endocrinologist in July 2016.

26. Since Ash's transition at school, he has been widely known and accepted as a boy by the school community. At a Golden Strings orchestra performance at a hotel on January 17, 2015, Ash wore a tuxedo, just like all the other boys, with the support of his orchestra teacher, Helen Breitenbach-Cooper. Students and teachers who did not know Ash prior to his transition did not and would not have recognized him as different from any other boy until the discriminatory events described in this complaint took place.

KUSD's Refusal to Permit Plaintiff Access to Restrooms Consistent with His Gender Identity

27. In the spring of 2015, during Ash's sophomore year, Ash and his mother had several meetings with Ash's guidance counselor, Debra Tronvig, during which they requested

that Ash be permitted to use the boys' restrooms at school. The counselor spoke to the school's principal, Richard Aiello, and one of its assistant principals, Brian Geiger, and she advocated that Ash be permitted to use the boys' restrooms. However, at a meeting in March 2015, she reported back to Ash and his mother that the school administrators had decided that Ash would only be permitted to use the girls' restrooms or the single-user, gender-neutral restroom in the school office. Tronvig and the school administrators did not suggest or indicate any circumstance under which Ash might be permitted to use the boys' restrooms in the future.

28. After that meeting, Ash felt overwhelmed, helpless, hopeless, and alone. Both of the restroom options offered by Defendants were discriminatory, burdensome, or unworkable. Ash was deeply distressed by the prospect of using the girls' restrooms, as it would hinder and be at odds with his public social transition at school, undermine his male identity, and convey to others that he should be viewed and treated as a girl. He was also deeply distressed by the prospect of using the office restroom, which is located in the rear of the office, behind the office secretaries' work stations—far out of the way from most of his classes—and is only used by office staff and visitors. It is Ash's understanding that no other students are allowed to use the office restroom. Ash feared the questions he would face from students and staff about why he was using that particular restroom; the inconvenience of traveling long distances from (and missing time in) his classes to use that restroom; and the fact that he would be segregated from his classmates and further stigmatized for being "different."

29. At the same time, Ash was fearful of the potential disciplinary consequences if he failed to comply with the administrators' directives not to use the boys' restroom. He worried that such a disciplinary record could potentially interfere with his ability to get into college, as he had no prior record of discipline. As a result of that fear and anxiety, seeing no plausible

options, Ash largely avoided using any restrooms at school for the rest of that school year, and, when absolutely necessary, he only used a single-user girls' restroom near his theater classroom.

30. In order to avoid using restrooms at school, Ash severely restricted his liquid intake. This was particularly dangerous because Ash suffers from vasovagal syncope, a medical condition that results in fainting upon certain physical or emotional triggers. The triggers cause a person's heart rate and blood pressure to drop suddenly, reducing blood flow to the brain and resulting in a loss of consciousness. Because dehydration and stress trigger his fainting episodes, Ash's primary care doctor requires him to drink 6-7 bottles of water and a bottle of Gatorade daily.

31. In addition to vasovagal syncope, Ash also suffers from migraines triggered by stress. During his sophomore year, while avoiding using restrooms, Ash experienced greatly heightened symptoms of both vasovagal syncope and stress-related migraines. He also experienced increased symptoms associated with Gender Dysphoria, including depression, anxiety, and suicidal thoughts.

32. Ash also worried that the emotional and physical toll caused by the school's treatment of him would lead to medical or psychological harm that would delay or make it unsafe for him to begin hormone treatment as part of his transition. This anxiety further increased his symptoms of Gender Dysphoria.

33. In July 2015, Ash took a trip to Europe with his school orchestra group, Golden Strings. In response to Ash's request to room with other boys, his orchestra teacher, Breitenbach-Cooper, checked with school administrators and then informed him that he would not be permitted to do so. Ash felt hurt and embarrassed when he learned of the school's decision. Once again, he understood the school's decision to be based on a perception that he is

not really a boy, and he felt degraded and humiliated by the administrators' continued failure to recognize and respect his gender identity.

34. As a result of the school's decision, Ash was forced to share a room with a girl. During the trip, the students were frequently grouped by gender while traveling between destinations, and Ash was consistently grouped with girls.

35. In July 2015, while on the trip to Europe, feeling less scrutinized, Ash began to use male-designated bathrooms. During that trip, Ash saw a news story about a lawsuit against the Gloucester County School District in Virginia by another transgender student who was denied access to boys' restrooms at his high school. That story reported that the U.S. Department of Justice had concluded that transgender students have the right to use restrooms in accordance with their gender identity under Title IX and had filed a brief in the Virginia case, *G.G. v. Gloucester County School Board*, asserting that the school district's policy violated transgender students' rights under Title IX. Ash was elated to learn that he did, in fact, have the legally protected right to use the restroom consistent with his gender. For the rest of the trip, Ash exclusively used male-designated bathrooms, and he continued to do so upon returning to the United States.

36. When he returned to school for his junior year, in September 2015, Ash continued exclusively using boys' restrooms, including at Tremper. He did so for the first seven months of the school year without any incident. No other students ever made an issue of Ash using the boys' bathroom. Ash did not discuss this decision with administrators or teachers, because he understood it to be his legal right.

37. In late February 2016, after observing Ash using a boys' bathroom, a Tremper teacher advised two assistant principals, Geiger and Wendy LaLonde, of that fact. Geiger then

informed the other administrators of Ash's restroom use and asked them what the school's policy was.

38. Aiello, LaLonde, Geiger, and the third assistant principal, Holly Graf, agreed that, although neither KUSD nor Tremper had any existing written policy on students' restroom usage, the school's policy should be that transgender students, including Ash, would not be permitted to use school restrooms corresponding to their gender identity. Consistent with the school's previous decision in spring 2015, they decided that Ash would not be permitted to use the boys' restroom and, instead, would only be permitted to use the girls' restrooms or the single-user restroom in the school office.

39. Following that decision, Graf emailed Ash's guidance counselor, Tronvig, and requested that Tronvig relay the school's restroom policy to Ash and his mother. Tronvig responded by email that she did not know what that policy was. Graf and Tronvig then met in person and Graf explained to Tronvig that Ash would not be permitted to use the boys' restrooms.

40. In late February 2016, Tronvig called Ms. Whitaker to inform her of the administration's decision that Ash would only be permitted to use the girls' restrooms or the single-user restroom in the school's main office.

41. When Ash learned about the school's decision, in early March 2016, he was distressed. He felt humiliated and deeply uncomfortable by the idea of using a girls' restroom, even more so than the previous year—because he is not a girl, he had not used female-designated restrooms at school or elsewhere for a long time, and because using the girls' restrooms as a boy risked subjecting him to ridicule, scrutiny, stigma, and harassment by other students and school staff. For the reasons alleged above, he also felt deeply uncomfortable with using the single-user

main office restroom. He believed that either alternative would imply his status as a transgender boy required him to be segregated from other students, despite the fact that he had used the boys' restrooms regularly and otherwise been treated as a boy by nearly everyone in the school community for many months.

42. Ash was also afraid of what disciplinary consequences he might face if he failed to comply with the school's policy. Faced with two unacceptable options proposed by the school administrators, Ash continued to use the boys' restrooms, as he had been doing already. That approach was the only way Ash felt he could mitigate the physical harm that he would suffer if he refrained from all restroom use during the school day and during his after-school extracurricular activities. Because of his active involvement in after-school activities, a typical school day for Ash lasts from 7 a.m. to 4 or 5 p.m., *i.e.*, 9 or 10 hours. Some activities require him to be on Tremper's campus until as late as 10 p.m., a 15-hour day. These long days at school make avoiding restrooms altogether impossible.

43. Ash's decision to use the boys' restroom consistent with his legal right, though in defiance of school policy, nevertheless exacted an emotional toll. Ash became more depressed and anxious, grew distracted from his school work, and began to have trouble sleeping.

44. On or about March 10, 2016, Ash and his mother met with Graf and Tronvig. During that meeting, Graf referred to Ash exclusively by his birth name. In that meeting, Graf told Ms. Whitaker that the reason Ash could not use the boys' restrooms was because he could only use restrooms consistent with his gender as listed in the school's official records. Graf said that the only way the school could change Ash's gender in its records would be if the school received legal or medical documentation confirming his transition to male.

45. Ms. Whitaker explained that, to her knowledge, Ash was too young for transition-related surgery. Graf repeated that the school would need some kind of medical documentation, but declined to indicate what type of medical "documentation" would be sufficient to demonstrate that Ash's gender marker should be changed on his school records and that he could use boys' restrooms.

46. In response, Ms. Whitaker contacted Ash's pediatrician. The pediatrician faxed a letter to the school on or about March 11, 2016, confirming that Ash is a transgender boy and recommending that Ash be allowed to use male-designated facilities at school. At Ms. Whitaker's request, the pediatrician subsequently sent the school a second letter, reiterating her recommendation about Ash's restroom usage.

47. Despite the letters from Ash's doctor, Aiello emailed Ms. Whitaker that the school would continue to deny boys' restroom access to Ash because he had not completed a medical transition.

48. Ash continued to use the boys' restrooms when needed, but he mainly attempted to avoid using restrooms altogether by not drinking or eating while at school, in order to avoid the scrutiny, fear, and humiliation he faced when he had to use a restroom at school. His anxiety and depression increased further. He also experienced increased physical symptoms relating to his vasovagal syncope, including dizziness, nearly fainting, and migraines. Ash returned to see his pediatrician in late March 2016 to have his symptoms evaluated. The pediatrician again instructed him to eat and drink regularly to avoid those symptoms. Nonetheless, Ash was unable to comply with those instructions, out of fear of using the restrooms at school. Concerned about his physical health, his mother would regularly hand him a bottle of water and tell him to drink it

to avoid dehydration, and he would refuse, saying that he did not want to have to use the restroom.

49. On or about March 17, 2016, Geiger observed Ash as he entered a boys' restroom, and reported that fact to Graf. Minutes later, Graf insisted that Ash leave his acting class and come to her office, and met with him alone for half an hour, lecturing him about his use of the boys' restrooms.

50. During that same meeting, Graf asked Ash why he was not using the girls' restroom or single-user restroom as directed. He informed her that the school's policy violated his rights as a transgender student under Title IX. When Ash made clear he could not use girls' restrooms because he is not a girl, she again asked him to compromise and use the single-user restroom in the main office. He again refused because of the humiliation, stigma, and lost class time that he would face using that bathroom. Graf then reiterated her instruction that Ash cease his use of boys' restrooms.

51. During that March 17 meeting—as well as at virtually all other times—Graf consistently referred to Ash using his traditionally female birth name and female pronouns, despite Ash's request that she use his new name and male pronouns. In that meeting, when Ash became upset by Graf's restroom directive and refusal to respect his male gender, Graf said, "S----, calm down," using his birth name. Ash, angry and embarrassed, said, "No, I'm leaving," and left the office.

52. During that meeting, Graf directly threatened that Ash would be subject to disciplinary action if he continued to use the boys' restrooms. Specifically, she indicated Ash would have to "go down to 109 or 203"—referring to Room 109, the in-school suspension room, and Room 203, the school's disciplinary office.

53. Following the meeting with Graf, Ash began to cry in the hallway. He had difficulty concentrating in his classes for the remainder of the day, holding back tears. He skipped work that afternoon and did not do any homework. Instead, he just went home after school and lay in bed feeling terrible.

54. When he absolutely needed to use the restroom, Ash continued to use the boys' restrooms exclusively through June 9, 2016, the final day of the school year. As a result, Graf continued to call Ash, his mother, or both into her office for periodic meetings. At those meetings, Graf would inquire about Ash's restroom use, and, when told he was still using the boys' restrooms, would repeat the school's policy that he must use the girls' restroom or a single-user restroom. During these meetings, Graf continued to refer to Ash by his birth name and female pronouns.

55. Ash grew increasingly embarrassed by Graf's repeated inquiries about his restroom use, which he felt to be an invasion of his privacy. Since each meeting with administrators occurred during class time, Ash was also concerned about the effect of these repeated meetings on his academic performance and feared that he would face scrutiny from other students and teachers about why he was being removed from class so frequently. Ash, who continued to have no disciplinary record at the school, also became more worried about the increasingly real prospect of disciplinary consequences that might affect his ability to participate in extracurricular activities and negatively impact his college application process in the upcoming school year.

56. In April 2016, Ms. Whitaker learned that school administrators had sent an email to all of the school's security guards, instructing them to notify administrators if they spotted any

students who appear to be going into the "wrong" restroom. Individual security guards later told Ms. Whitaker that they understood the directive to be targeted at Ash.

57. Ash felt very uncomfortable and distressed knowing that security guards and administrators were actively monitoring his restroom use.

58. On April 5, 2016, Ms. Whitaker was pulled out of her Tremper classroom and summoned to a meeting with two KUSD district-level administrators: Dr. Bethany Ormseth, KUSD's Chief of School Leadership, and Susan Valeri, KUSD's Chief of Special Education and Student Support.

59. In that meeting, Ms. Whitaker asked Ormseth and Valeri whether KUSD had adopted any policy concerning transgender students and restroom use. They provided no answer to Ms. Whitaker's question, other than to say that a policy was in the process of being created by a committee of the school board. Ms. Whitaker responded, "You don't need a policy—it's a federal law." Later in the school year, Ms. Whitaker learned that Rebecca Stevens, a KUSD school board member, had contradicted Ormseth and Valeri's account, stating to another board member that no committee had yet been formed and no policy was being written.

60. In fact, despite repeated requests by Ms. Whitaker to see the written policy about transgender students' restroom use during the course of the 2015-2016 school year, no Tremper or KUSD official has ever provided such a policy. Ms. Whitaker reasonably believes no such policy exists. Rather, the Tremper administration developed and enforced a school "policy" in direct and specific response to those administrators' discomfort with the restroom usage of one student: Ash.

61. The next day, on April 6, 2016, Ash and Ms. Whitaker attended a meeting with Aiello, Graf, and Valeri. At that meeting, the administrators offered Ash a further

"accommodation" regarding his restroom use: they informed him that he would also be allowed to use two single-user restrooms located on the far opposite sides of campus. Those restrooms had previously been available for any student's use, but new locks had been installed and Ash alone was given the key to open them. The stigma of being assigned personal, segregated restrooms—to which he alone of all the 1,695 students in the building had a key—caused Ash additional significant emotional distress. In addition, neither of these single-occupancy restrooms was convenient to Ash's classes and would have required him to miss more class time than his peers if he used those restrooms during class.

62. At the April 6 meeting, Ash asked Valeri for KUSD's rationale for prohibiting his use of the boys' restrooms. Valeri replied with a statement to the effect of, "Well, we've never had a student who identifies as male but was born female."

63. Ash replied by asserting that Title IX prohibits discrimination based on sex, which protects transgender students and requires schools to permit them to use restrooms consistent with the student's gender identity.

64. Valeri denied that Title IX protects transgender students' access to bathrooms consistent with their gender identity.

65. When Ash asked Valeri to explain her understanding of Title IX, she refused to do so, stating words to the effect of, "I don't think I'm going to give you any reasons."

66. In order to avoid disciplinary sanctions from Tremper administrators for using boys' restrooms on the one hand, and the scrutiny and embarrassment that would result from using individually assigned restroom facilities on the other, Ash continued to avoid using school restrooms as much as possible. He has never used the designated locked single-user restrooms, as doing so would call unwanted attention to himself by using a key to enter a restroom to which

no other student has access, and because of his desire not to spend unnecessary time out of class traveling to those inconveniently located restrooms.

67. As a result of the stress caused by the school's discriminatory actions, and his attempts to avoid using any restrooms at school, Ash's migraines and episodes of fainting and dizziness continued to worsen. His depression, anxiety, and dysphoria also deepened. He became severely depressed and lethargic, and no longer wanted to get out of bed in the morning.

68. Due to the serious consequences the school's actions were having on Ash's physical and psychological well-being, he considered withdrawing from Tremper and transferring to an online school to finish high school. He ultimately decided not to withdraw at that time, due to his involvement in activities like the school orchestra that would not be available if he were enrolled in an online school, and because changing schools would put him further behind in his classwork.

School's Refusal to Permit Ash to Be Considered for Junior Prom King

69. Tremper High's junior prom was scheduled for May 7, 2016. In late March, the faculty advisor for the junior prom, Lorena Danielson, submitted the names of candidates for the prom court to Aiello. Candidates for prom king and queen are required to earn volunteer hours in order to participate and whoever earns the most hours is selected for prom court. Based on his community service hours, the junior prom advisor designated Ash as a candidate for prom king and then met with Aiello to confirm the list.

70. After meeting with the junior prom advisor, Aiello called Ms. Whitaker in for a meeting with him and Graf on or about March 22, 2016, during which he told her that Ash could be on the prom court, but could only be a candidate for prom queen, not prom king. When Ash learned about this, he was devastated. He was humiliated at the prospect of running for prom

queen, when all his classmates knew him to be a boy. He felt deeply disrespected and angry that the administrators failed to recognize how hurtful and unfair this additional form of discrimination was.

71. On April 4, 2016, Ash and his friends presented a MoveOn.org petition to Tremper administrators demanding that Ash be allowed to run for prom king and to use the boys' restrooms at school, which was signed by many members of the Tremper community and thousands of others around the country. When administrators failed to respond, on April 5, 2016, 70 students participated in a sit-in at Tremper's main office to show their support for Ash. The students held signs expressing the view that transgender students should be treated equally, and supporting Ash's right to be allowed to run for prom king and to use the boys' restrooms at school.

72. Following the sit-in and media attention about KUSD's treatment of Ash, in the April 6, 2016 meeting referenced above, Aiello, Graf, and Valeri informed Ash and Ms. Whitaker that Ash would be permitted to run for prom king.

73. Although Ash was pleased to have the opportunity to run for prom king and heartened by the outpouring of support from his classmates, he continued to feel deeply distressed as a result of the school administrators' initial decision that he could only run for prom queen and their continued pattern of refusing to recognize or respect his male gender identity.

Name and Gender in School Records

74. KUSD has not changed Ash's name on his official records and other documents, including classroom attendance rosters used by his teachers. Although most of Ash's teachers refer to him by his male name, substitute teachers have frequently referred to him by his birth name in front of his classmates because that is the name that appears on the attendance rosters.

In response, and in order to avoid embarrassment or discomfort from his classmates, Ash has been compelled to approach all of his teachers at the beginning of each term to advise them of his preferred name and pronouns and request that they do not refer to him by his birth name. He similarly must approach substitute teachers before class every time a teacher is absent. Although some teachers note his correct name on the class roster, others have not documented that name on the roster, and occasionally substitute teachers still refer to him by his birth name in class. Being called a traditionally female name in front of all his classmates reveals that he is transgender to all of his peers and makes Ash feel embarrassed and distressed. The practice has resulted in Ash experiencing increased symptoms of Gender Dysphoria, including anxiety and depression.

75. In the meetings with administrators on March 6 and March 22, Ms. Whitaker requested that the school change Ash's name and gender in its official records to avoid those problems. In both meetings, Graf told Ms. Whitaker that in order to change Ash's name or gender in the school's official records, the school would need to see legal or medical documentation. The medical documentation Ash's pediatrician sent was deemed insufficient, although Graf and Aiello refused to specify what the contents of acceptable documentation would be, despite repeated requests for clarification. They also failed to specify what type of "legal documentation" would be necessary to update the school records.

76. In August 2016, Ash filed a petition in Kenosha county court seeking a court-ordered name change, which is pending as of the date of this Amended Complaint. Even if KUSD is unable to change Ash's name or gender in its official school records because Ash has not yet obtained a legal name change, KUSD can and should take steps to avoid intentional or inadvertent disclosure of Ash's birth name or sex assigned at birth to KUSD employees or

students, including by modifying informal or public-facing documents, such as attendance rosters, to reflect Ash's male name and male gender.

Other Harassing and Stigmatizing Treatment Faced by Ash at School

77. After news broke about the petition for Ash to run for prom king and use boys' restrooms at school, some parents and other Kenosha residents began to speak out in opposition to Ash's right to use boys' restrooms. On May 10, 2016, shortly after the junior prom, at a meeting of the Board, several community members spoke in opposition to allowing transgender students to use restrooms in accordance with their gender identity. One parent told the Board that he was opposed to permitting transgender students to use gender-appropriate restrooms because such a policy would permit sexual predators to enter women's restrooms and put his daughters at risk.

78. That person's wife, who volunteers as a pianist with the school orchestra, has created and maintains a public Facebook group called "KUSD Parents for Privacy," which contains numerous posts critical of transgender students' rights. Several posts on that page have mentioned Ash and his mother by name, accompanied by their photographs. One post, on May 14, 2016, linked to an article about Ash, contains a photograph of him and his mother, and describes him as a "pawn."

79. At an orchestra rehearsal at the school on May 11, 2016, the day following the Board meeting at which her husband spoke, this woman approached Ash, put her hands on his shoulders, and said words to the effect of, "A----, honey, this isn't about you, this is bigger than you. I'm praying for you." Ash was extremely uncomfortable and embarrassed, and did not respond. Ms. Whitaker and Ash later brought this incident to Aiello's attention. Aiello requested that Breitenbach-Cooper, the orchestra teacher, call the volunteer to advise her not to

talk to students like that, but took no further action. Nothing changed as a result. She is still a regular volunteer with the school orchestra and has continued to attend every rehearsal. Her constant presence substantially diminishes Ash's enjoyment of an extracurricular activity that has formed an important part of his educational experience at Tremper.

Green Wristbands to Mark Transgender Students

80. In May 2016, Ash's guidance counselor, Tronvig, showed Ms. Whitaker what appeared to be a bright green wristband (comprised of green adhesive stickers). Tronvig told Ms. Whitaker that a school administrator had given her these wristbands with the instruction that they were to be given to any student who identified himself or herself as transgender. Ms. Whitaker understood this to mean that the school intended to use the wristbands to mark students who are transgender and monitor their restroom usage. Upon information and belief, other guidance counselors were also provided these wristbands and instructed them to give them to transgender students.

81. Branding transgender students in this way would single them out for additional scrutiny, stigma, and potentially harassment or violence, and violate their privacy by revealing their transgender status to others.

82. Upon learning about the school's proposed green wristband practice, Ash felt sickened and afraid. He was aware of the prevalence of violent attacks against transgender people nationwide, and grew very afraid that the school would attempt to force him to wear the wristband on penalty of discipline. If he did wear the wristband, he knew that other students would likely ask him repeatedly why he was wearing it, and he would have to explain over and over that he is transgender. He expected that some students would stare, and others would outright ridicule him. He felt like his safety would be even more threatened if he had to wear this visible badge of his transgender status.

83. To Plaintiff's knowledge, the green wristband practice proposed at the end of the school year may be implemented in the new school year, such that guidance counselors will be expected to provide these wristbands to transgender students in the upcoming school year.

Overnight Accommodations at Summer Orchestra Camp

84. Ash participated in a five-day, school-sponsored summer orchestra camp from June 12-16, 2016. The camp was held on the campus of the University of Wisconsin-Oshkosh, and students stayed in dormitories on campus. The dorms used for the camp were suites with two to four bedrooms and a common living room, kitchenette, and two single-occupancy restrooms. Each suite had either four separate, single-occupancy bedrooms, or two double-occupancy rooms. During the evenings, school chaperones placed tape across each of the bedroom doorways to prevent students from leaving the bedrooms at night. The suites were designated either male or female.

85. In advance of the camp, the school allowed students to sign up for dorm rooms with their friends. Ash had signed up to stay in a boys' suite with one of his best friends, a male student.

86. Breitenbach-Cooper, the orchestra teacher, told Aiello about Ash's request to stay in the same suite as his friend and other male students. Aiello replied that Ash could not do so because, under Tremper's policy, he could not stay with other boys. Aiello told Breitenbach-Cooper that Ash would have to stay in a suite with girls or alone in a suite, segregated from all of his peers.

87. In order to participate in the orchestra camp, Ash reluctantly agreed to stay in double-bedroom suite all alone, with no other students sharing the suite. He rejected the "option" to stay in a suite with girls because he is a boy and he felt uncomfortable staying with girls.

88. This arrangement excluded Ash from socializing with other students during the entire five-day camp. Students were prohibited from entering other suites, and could only socialize within their own suite or in common areas of the building. Since almost all the other students remained in their suites to socialize in the evenings, Ash stayed in his room alone each evening while the other students enjoyed time to socialize with their friends. He felt lonely and depressed, and disappointed that he was not able to have the same good memories of his final year at camp as all the other students.

89. The school's decision to segregate Ash from the other boys also left him feeling hurt and embarrassed. He understood the school's decision to be based on a perception that he might engage in sexual activity with another boy, and he felt degraded and humiliated by the idea that administrators were thinking about him in those terms.

District's Failure to Change its Discriminatory Policies after Notice of Legal Obligations

90. Ash and Ms. Whitaker have repeatedly advised KUSD officials that their actions violate Ash's right to attend school free from sex discrimination, as required by Title IX and the Equal Protection Clause. Despite being put on notice of the violations of Ash's statutory and constitutional rights, KUSD has refused to change its policies to date.

91. On April 19, 2016, through his attorneys, Ash sent a letter to Superintendent Savaglio-Jarvis demanding that KUSD permit him to use boys' restrooms at school.

92. By letter of April 26, 2016, KUSD's attorneys responded, acknowledging their awareness of U.S. Department of Education guidance documents interpreting Title IX to protect students from discrimination based on their gender identity—as well as the Fourth Circuit's April 19, 2016 opinion in *G.G. v. Gloucester County School Board*, a Title IX case brought by a transgender high school student who was denied access to boys' restrooms at school, in which

that appeals court deferred to the Department of Education's interpretation of Title IX and held that the plaintiff student was entitled to restroom access consistent with his gender identity. The letter nevertheless maintained that KUSD is not bound by these authorities and would not change its position on Ash's restroom use.

93. On May 12, 2016, Ash filed an administrative complaint with the U.S. Department of Education Office for Civil Rights ("OCR"), alleging that KUSD's actions violated Ash's rights under Title IX. Shortly before filing this lawsuit, Plaintiff's attorneys contacted OCR and requested to withdraw that complaint, without prejudice.

94. On May 13, 2016, the U.S. Department of Education and U.S. Department of Justice issued a joint guidance letter to all public schools, colleges, and universities in the country receiving Federal financial assistance, reiterating the federal government's previously stated position that, pursuant to Title IX, all public schools are obligated to treat transgender students consistent with their gender identities in all respects, including regarding name and pronoun usage, restroom access, and overnight accommodations.

95. Following the issuance of the federal guidance on May 13, 2016, KUSD officials publicly acknowledged the guidance but stated that they did not believe they were required to comply with it. KUSD issued a statement declaring, "[t]he Department of Education's . . . letter is not law; it is the Department's interpretation of the law," suggesting that it would not change its policy absent a court order.

96. To date, the Board has not articulated or adopted any formal policy regarding transgender students in KUSD's schools.

97. Based on the statements and actions of KUSD officials, Ash feels deep anxiety and dread about experiencing continued discrimination during his senior year and the effect that it will have on him during the college application process.

INJURY TO PLAINTIFF

98. Through their actions described above, Defendants have injured and are continuing to injure Plaintiff.

99. Defendants have denied Ash full and equal access to KUSD's education programs and activities by denying him the full and equal access to student restrooms and overnight accommodations during school-sponsored trips offered to other male students.

100. Ash has experienced and continues to experience the harmful effects of being segregated from, and treated differently than, his male classmates at school and during school-sponsored events, including lowered self-esteem, embarrassment, social isolation, and stigma, as well as heightened symptoms of Gender Dysphoria, including depression and anxiety.

101. When school administrators and staff intentionally used his birth name or female pronouns (or allowed others to do so), instructed him not to use the boys' restrooms, instructed security personnel to surveil his movements, and otherwise undermined his male identity and singled him out as different from all other boys, he has felt deeply hurt, disrespected, and humiliated.

102. Defendants' discriminatory actions, and the efforts Ash has made to comply with the directive not to use the boys' restroom—limiting food and drink while at school—have led to a host of physical symptoms, including dehydration, dizziness, fainting, and migraines. All of those symptoms virtually disappeared once Ash returned home from the orchestra camp and

summer break began, and Ash was no longer facing daily scrutiny and anxiety and could eat and drink at a healthy level.

103. As a direct and continuing result of Defendants' discriminatory actions, Ash has suffered increased and continuing emotional distress over the last six months. He has experienced escalating symptoms of depression and anxiety, and his self-esteem has suffered, as a result of the discrimination he has experienced at school. Although he cried very little in the past, he frequently cries and fights back tears.

104. As a result of the depression and anxiety Defendants' actions caused, Ash has also had difficulty eating and sleeping properly, and difficulty concentrating in classes and on his homework.

105. As a result of Defendants' actions, and the feelings of fear and scrutiny he has grown used to, Ash now feels unsafe being outside of the house, afraid that he will be targeted for an assault by someone who knows he is transgender. He will typically only go out in groups of friends, and tries to avoid ever going out with only one other friend or alone.

106. Ash has also missed significant class time due to being compelled by KUSD officials to participate in repeated, lengthy meetings during class time to discuss his use of restrooms, his name and gender in school records, and the school's determination that he would be prohibited from running for prom king.

107. All of the above discriminatory treatment has undermined the efficacy of the social transition component of his gender transition and heightened his symptoms of Gender Dysphoria.

108. If Defendants refuse to grant Ash access to boys' restrooms by the time his senior year begins on September 1, 2016, he will likely experience the same social stigma, emotional

distress, academic harm, and detrimental impediments to his gender transition resulting from Defendants' conduct that he experienced during his junior year.

CAUSES OF ACTION

First Cause of Action
Violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

109. Plaintiff realleges and incorporates the facts and allegations contained in paragraphs 1 through 108 as fully set forth herein.

110. Under Title IX and its implementing regulations, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31 (Department of Education Title IX regulations); 7 C.F.R. § 15a.31 (Department of Agriculture Title IX regulations); 45 C.F.R. § 86.31 (Department of Health and Human Services Title IX regulations). Title IX's prohibitions on sex discrimination extend to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient" of federal funding. 34 C.F.R. § 106.31; 7 C.F.R. § 15a.31; 45 C.F.R. § 86.31.

111. Title IX's prohibition on discrimination "on the basis of sex" encompasses discrimination based on an individual's gender identity, transgender status, and gender expression, including nonconformity to sex- or gender-based stereotypes.

112. Conduct specifically prohibited under Title IX includes, *inter alia*, treating one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; providing different aid, benefits, or services in a different manner; denying any person any such aid, benefit, or service; or otherwise

subjecting any person to separate or different rules of behavior, sanctions, or other treatment. 34 C.F.R. § 106.31; 7 C.F.R. § 15a.31; 45 C.F.R. § 86.31.

113. As a Federal funding recipient, Defendant Kenosha Unified School District No. 1 Board of Education, including the academic, extracurricular, and other educational opportunities provided by the Kenosha Unified School District and Tremper High School, is subject to Title IX's prohibitions on sex- and gender-based discrimination against any student.

114. As set forth in paragraphs 28 to 98 above, Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from accessing male-designated restrooms at school, and requiring that he use female-designated restrooms or single-occupancy restrooms, have discriminated and continue to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, and thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex, in violation of Title IX.

115. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from staying in male-designated overnight accommodations on school-sponsored trips, and requiring him to stay in female-designated overnight accommodations or segregated accommodations on those trips, has discriminated and continues to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, and thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational

opportunities offered by KUSD and Tremper High School, on the basis of sex, in violation of Title IX.

116. Defendants have further violated Title IX by failing to recognize fully and respect Plaintiff, a transgender boy, as a male student, including through administrators' repeated and intentional use of Plaintiff's traditionally female birth name and female pronouns to address him and refer to him to others; the failure to take necessary and appropriate action to update or modify Ash's official and/or informal student records, including classroom attendance rosters, to prevent teachers, substitute teachers, and other school staff from referring to him by his female birth name and female pronouns in the presence of other students; Tremper administrators' initial refusal to permit Ash to run for junior prom king and directive that he run for prom queen instead, withdrawn only after a student protest and media attention; and Tremper administrators' instruction to school guidance counselors to provide green wristbands to transgender students. Through these actions, individually and collectively, Defendants have and continue to exclude Plaintiff from participation in, deny him the benefits of, and subject him to discrimination in KUSD's education programs and activities, on the basis of sex, in violation of Title IX.

117. Defendants, through instructing Tremper staff to report the restroom use of any student who "appears" to be using the "wrong" restroom, operates an unlawful policy or practice of profiling Plaintiff and other students who are transgender and/or do not conform to sex- or gender-based stereotypes, and thereby deprive Plaintiff and similarly situated students of their rights under Title IX to be free from discrimination on the basis of sex, including on the basis of gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, in further violation of Title IX.

118. Plaintiff has been, and continues to be, injured by Defendants' discriminatory conduct and has suffered damages as a result.

Second Cause of Action
Violation of 42 U.S.C. § 1983 Based on
Deprivation of Plaintiff's Rights under the
Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

119. Plaintiff realleges and incorporate the facts and allegations contained in paragraphs 1 through 108 as fully set forth herein.

120. Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, discrimination based on sex, including gender, gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, as well as discrimination based on transgender status alone, is presumptively unconstitutional and is therefore subject to heightened scrutiny.

121. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from accessing male-designated restrooms at school, and requiring that he use female-designated restrooms or single-occupancy restrooms, have discriminated and continue to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

122. Defendants, by adopting and enforcing a policy or practice of prohibiting Plaintiff, a transgender boy, from staying in male-designated overnight accommodations on school-sponsored trips, and requiring him to stay in female-designated overnight

accommodations or segregated accommodations on those trips, has discriminated and continues to discriminate against Plaintiff in his enjoyment of KUSD's education program and activities by treating him differently from other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes, thereby denying him the full and equal participation in, benefits of, and right to be free from discrimination in the educational opportunities offered by KUSD and Tremper High School, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

123. Defendants have further violated Plaintiff's rights under the Equal Protection Clause by failing to recognize fully and respect Plaintiff, a transgender boy, as a male student, including through administrators' repeated and intentional use of Plaintiff's traditionally female birth name and female pronouns to address him and refer to him to others; the failure to take necessary and appropriate action to update or modify Ash's official and/or informal student records, including classroom attendance rosters, to prevent teachers, substitute teachers, and other school staff from referring to him by his female birth name and female pronouns in the presence of other students; Tremper administrators' initial refusal to permit Ash to run for junior prom king and directive that he run for prom queen instead, withdrawn only after a student protest and media attention; and Tremper administrators' instruction to school guidance counselors to provide green wristbands to any student who identified himself or herself as transgender. Through these actions, individually and collectively, Defendants have and continue to exclude Plaintiff from participation in, deny him the benefits of, and subject him to discrimination in KUSD's education programs and activities, on the basis of sex and transgender status, in violation of the Equal Protection Clause.

124. Defendants, through instructing Tremper staff to report the restroom use of any student who "appears" to be using the "wrong" restroom, operates an unlawful policy or practice of profiling Plaintiff and other students who are transgender and/or do not conform to sex- or gender-based stereotypes, and thereby deprive Plaintiff and similarly situated students of their rights to be free from discrimination on the basis of sex, including on the basis of gender identity, transgender status, and nonconformity to sex- or gender-based stereotypes, in further violation of the Equal Protection Clause.

125. Defendants' discrimination against Ash is not substantially related to any important governmental interest, nor is it rationally related to any legitimate governmental interest.

126. Defendants are liable for their violation of Ash's Fourteenth Amendment rights under 42 U.S.C. § 1983.

127. Plaintiff has been, and continues to be, injured by Defendants' conduct and has suffered damages as a result.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Ash Whitaker, by and through his mother and next friend, Melissa Whitaker, requests that this Court:

(a) enter a declaratory judgment that the actions of Defendants complained of herein are in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(b) issue preliminary and permanent injunctions (i) directing Defendants to provide Plaintiff access to male-designated restrooms at school, and otherwise to treat him as a boy in all respects for the remainder of his time as a student in Defendants' schools or until resolution of

this lawsuit, whichever is later; (ii) restraining Defendants, their agents, employees, representatives, and successors, and any other person acting directly or indirectly with them, from adopting, implementing, or enforcing any policy or practice at the school or District level that treats transgender students differently from their similarly situated peers (*i.e.*, treating transgender boys differently from other boys and transgender girls differently from other girls); (iii) directing Defendants to clarify that KUSD and Tremper's existing policies prohibiting discrimination on the basis of sex apply to discrimination based on gender identity, transgender status, and nonconformity to sex- and gender-based stereotypes; (iv) ordering Defendants to provide training to all district-level and school-based administrators in the Kenosha Unified School District on their obligations under Title IX and the Equal Protection Clause regarding the nondiscriminatory treatment of transgender and gender nonconforming students; and (v) ensuring that all district-level and school-based administrators responsible for enforcing Title IX, including Defendants' designated Title IX coordinator(s), are aware of the correct and proper application of Title IX to transgender and gender nonconforming students;

(c) order all compensatory relief necessary to cure the adverse educational effects of Defendants' discriminatory actions on Plaintiff's education;

(d) award compensatory damages in an amount that would fully compensate Plaintiff for the emotional distress and other damages that have been caused by Defendants' conduct alleged herein;

(e) award Plaintiff his reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

(f) order such other relief as this Court deems just and equitable.

Dated: August 15, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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* *Application for admission to this Court to follow*
** *Application for admission to this Court pending*