UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CASE NO. 16-8019

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-Petitioners,

v.

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

Plaintiff-Respondent.

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-PETITIONERS' STATEMENT OF POSITION

INTRODUCTION

Defendants-Petitioners, 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"), respectfully submit this statement of position in accordance with this Court's October 5, 2016 Order directing KUSD to file such statement in light of the District Court's Order of September 25, 2016, revoking the certification of interlocutory appeal under 28 U.S.C. § 1292(b). (App. Dkt. No. 11).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-Respondent, Ashton Whitaker, a minor by his mother and next friend, Melissa Whitaker ("Plaintiff"), filed this lawsuit in the Eastern District of Wisconsin on July 19, 2016 and amended the Complaint on August 15. (Dkt. No. 1); (Dkt. No. 12). On August 16, 2016, KUSD filed a motion to dismiss plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 14). After considering the respective briefing and oral arguments of the parties, the District Court issued an oral decision on September 19, 2016, denying KUSD's motion to dismiss. *See* Transcript of Oral Decision on Motion to Dismiss[1]; Court Minutes (Dkt. No. 28). On September 20, 2016 KUSD orally moved for the District Court to consider certifying the Order Denying the Motion to Dismiss for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Plaintiff took no position on the issue. KUSD also, on the same day, submitted a proposed order which contained the certification language required by 28 U.S.C. § 1292(b). (Dkt. No. 27). On September 21, 2016, the District Court entered an order including the certification language. (Dkt. No. 29).

On September 22, 2016, Plaintiff filed a Civil L. R. 7(h) expedited non-dispositive motion to reconsider certification or order denying motion to dismiss for interlocutory appeal. (Dkt. No. 30). 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). (App. Dkt. No. 1).

[1] A true and accurate copy of the September 19, 2016 Transcript of Oral Decision on Motion to Dismiss is attached as Exhibit A.

Pursuant to Local Rule 7(h)(2), KUSD was entitled to seven days to reply to Plaintiff's expedited motion. However, on Saturday, September 24, 2016, the District Court granted Plaintiff's expedited motion for reconsideration and on Sunday, September 25, 2016 issued an amended order denying KUSD's motion to dismiss and removing the language certifying the order for interlocutory appeal. (Dkt. No. 35); (Dkt. No. 36).

On September 27, 2016, KUSD filed a Civil L. R. 7(h) expedited non-dispositive motion for relief from the order granting Plaintiff's motion for reconsideration, arguing that the District Court should have afforded it an opportunity to file a responsive brief before rendering its decision. (Dkt. No. 42). On October 3, 2016, the District Court denied KUSD's motion for relief from order. (Dkt. No. 47).

I. THIS COURT MAY RETAIN PENDENT JURISDICTION OF THIS APPEAL NOTWITHSTANDING THE DISTRICT COURT'S REMOVAL OF THE LANGUAGE CERTIFYING THE ORDER FOR INTERLOCUTORY APPEAL.

KUSD acknowledges that this Court's jurisdiction to hear interlocutory appeals is derived from the District Court's certification of the issue pursuant to 28 U.S.C. § 1292(b). The District Court's decision to withdraw its certification, however, does not destroy this Court's ability to exercise pendent jurisdiction to review the appeal of the non-final order.

This Court has the discretion to retain pendent jurisdiction of this appeal in conjunction with KUSD's appeal in *Ashton Whitaker v. Kenosha Unified School District, et al.*, Case No. 16-3522, which seeks review of the District Court's decision and Order granting Plaintiff's motion for a preliminary injunction pursuant to 28

U.S.C. § 1292(a)(1). When the appeal of the District Court's non-final order is "inextricably intertwined" with an appealable preliminary injunction, this Court may exercise pendent jurisdiction to review the appeal of the non-final order. *See Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883, 886 (7th Cir. 2013), *as amended* (Apr. 29, 2013) ("The appeal of the district court's denial of remand also fits within the narrow doctrine of pendent appellate jurisdiction because the preliminary injunction appeal presents precisely the same question of subject matter jurisdiction as the motion to remand."); *see also Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 700 (7th Cir. 2003) (granting pendent jurisdiction because the non-appealable order was "necessarily intertwined" with the order that was appealable as a right); *Greenwell v. Aztar Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001) (stating that it is appropriate to exercise pendent jurisdiction where the issues are intertwined and interlocutory appeal prevents rather than produces piecemeal appeal).

In other words, when appellate "jurisdiction is properly founded upon the district court's ruling on a preliminary injunction under 28 U.S.C. § 1292(a)(1) . . . [appellate] review extends to all matters inextricably bound up with the preliminary injunction." *Amador v. Andrews*, 655 F.3d 89, 95 (2d Cir. 2011) (internal citations omitted). "To be inextricably intertwined requires, for example, that review of the otherwise unappealable issue is necessary to ensure meaningful review of the appealable one." *Id.*; *see also Wedgewood Ltd. P'ship I v. Twp. Of Liberty, Ohio*, 610 F.3d 340, 348 (6th Cir. 2010) ("Pendent appellate jurisdiction refers to the exercise of

jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but, may be reviewed on interlocutory appeal if those issues are 'inextricably intertwined' with matters over which the appellate court properly and independently has jurisdiction."); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1260 (11th Cir. 2006) ("If an otherwise nonappealable interlocutory order is 'inextricably intertwined' with or 'necessary to ensure meaningful review' of an injunctive order, we may review it under our pendent appellate jurisdiction."); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002) ("Jurisdiction extends to *all* matters inextricably bound up with the order from which appeal is taken."); *Ortiz v. Eichler*, 794 F.2d 889, 892 (3d Cir. 1986) ("Where the additional elements of the district court's order are closely intertwined with those granting or denying injunctive relief, the exercise of jurisdiction over the additional elements is proper.").

Here, the District Court's Order and decision granting Plaintiff's preliminary injunction is inextricably intertwined with the order denying KUSD's motion to dismiss and review of the motion to dismiss is necessary to ensure meaningful review of the order granting the injunction. In holding that Plaintiff had shown a likelihood of success on the merits, the District Court indicated that it based its decision on the same grounds as its decision to deny the motion to dismiss. *See Whitaker*, 2016 WL 5239829, at *3. Specifically, the District Court explicitly acknowledged that the legal issues and arguments surrounding Plaintiff's likelihood of success on the merits argument are the same as those raised in the motion to dismiss:

> 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.

Whitaker, 2016 WL 5239829, at *3.

In its notice of appeal, KUSD set forth its position that the order denying the motion to dismiss is inextricably bound to the order granting the injunction:

> The District Court's Order granting the injunction relied extensively upon the Court's legal conclusions reached in denying the motion to dismiss on September 21, 2016. In denying the motion to dismiss the Court concluded that Plaintiff's status as being transgender affords relief under Title IX and the Equal Protection Clause. It was this conclusion that allowed the Court to find that Plaintiff has a reasonable probability of success on the merits in analyzing the injunction. Thus, the Order denying the motion to dismiss is inextricably bound to the injunction, and this Court therefore has limited jurisdiction to review the Order denying the motion to dismiss, as well as the injunction, to the extent necessary.

(Dkt. No. 34).

The "inextricably intertwined" element is present here. The "likelihood of success on the merits" element of a motion for preliminary injunction is a paramount consideration in whether to grant or deny such motion because it is the threshold consideration. *See Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir. 1997). The overlap between these two issues is apparent as "[o]bviously, the question of whether the plaintiff has demonstrated a reasonable likelihood of success on the merits of its claims is, to a large degree, bundled up with the issues raised by the defendants' motion to dismiss." *Wisconsin Coal. for Advocacy,*

Inc. v. Czaplewski, 131 F. Supp. 2d 1039, 1044 (E.D. Wis. 2001). If "the plaintiff's complaint, in any event, fails to state a claim upon which relief can be granted, then it follows that a preliminary injunction would be inappropriate precisely because the plaintiff would not have satisfied the first of the preliminary injunction standards." *Id.*

The review of the injunction will require this Court to consider: (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 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 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. These same issues will need to be resolved in reviewing the District Court's denial of the motion to dismiss. These two appeals are inextricably intertwined and a full and meaningful review of the preliminary injunction will require the Court to analyze the same issues raised in the motion to dismiss.

Moreover, review of the motion to dismiss is necessary to ensure meaningful review of the order granting the injunction because the District Court failed to

provide a full discussion as to its reasons for finding that Plaintiff had a likelihood of success on the merits and instead chose to cross reference its decision to deny the motion to dismiss. *See Whitaker*, 2016 WL 5239829, at *3-4. In order for this Court to undertake a meaningful review it should take into account the District Court's full reasoning in entering the injunction by reviewing the oral decision denying the motion to dismiss. Review of the motion to dismiss would also prevent piecemeal litigation, because if Plaintiff fails to state a claim upon which relief can be granted, the injunction must be denied. *See Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. 2d at 1044. Finally, the considerations set forth in KUSD's Petition for Permission to Appeal (App. Dkt. No. 1) are still evident and represent an opportunity for this Court to address and resolve unsettled questions of law in this circuit which are a matter of national importance.

CONCLUSION

In sum, KUSD respectfully requests that this Court take pendent jurisdiction of the District Court's order denying KUSD's motion to dismiss, despite the District Court's decision to reverse itself and remove the 28 U.S.C. § 1292(b) certification for interlocutory appeal from the order. The motion to dismiss and the motion for preliminary injunction are inextricably bound and this Court should retain jurisdiction in order to conduct a meaningful review of the order granting the injunction.

Dated this 11th day of October, 2016.

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendants-Petitioners hereby certifies that an electronic copy of the above document was served via ECF on counsel for Plaintiff-Respondent.

Dated this 11th day of October, 2016.

MALLERY & ZIMMERMAN, S.C.
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EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER, Plaintiff, vs. 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. CV 16-943 Milwaukee, Wisconsin September 19, 2016 3:34 p.m.

TRANSCRIPT OF ORAL DECISION ON MOTION TO DISMISS
BEFORE THE HONORABLE PAMELA PEPPER
UNITED STATES DISTRICT JUDGE

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TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

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THE COURT: Have a seated everyone, please.

THE CLERK: Court calls a civil case, 2016-CV-943, Ashton Whitaker vs. Kenosha Unified School District No. 1 Board of Education, et al.

Please state your appearances starting with the attorneys for the plaintiffs -- or for the plaintiff.

MR. WARDENSKI: Joseph Wardenski for plaintiff.

MR. ALLEN: This is Michael Allen with Relman Dane Colfax, also for the plaintiff.

THE COURT: Okay, sorry. So we have Mr. Wardenski, we have Mr. Allen and going on Mr. Pledl.

MR. PLEDL: Robert Theine Pledl also for the plaintiffs.

THE COURT: Anybody else for the plaintiffs?

MS. TURNER: This is Ilona Turner with Transgender Law Center for the plaintiff.

THE COURT: Thank you.

MS. PENNINGTON: And Allison Pennington with Transgender Law Center for the plaintiff.

THE COURT: Okay. And for the defendant?

MR. STADLER: Good afternoon, Judge. Attorney Ron Stadler on behalf of the defendants.

MR. SACKS: Jonathan Sacks on behalf of the defendants.

THE COURT: Good afternoon to everyone.

As I think everyone's aware, we had scheduled today's hearing after you all had presented -- or Mr. Wardenski and Mr. Stadler presented oral argument on the defendant's motion to dismiss. And I asked you all, especially given the lateness of the hour when we finished up those oral arguments, to give me some time to consider them prior to issuing a ruling. And I told you that I was going to issue an oral ruling today because of the fact that there's also a preliminary -- new motion for a preliminary injunction and depending on how the motion to dismiss were to go we'd need to decide whether or not to proceed further on a motion for preliminary injunction. So the purpose of today's hearing is for me to give you a ruling on the motion to dismiss.

As you all are aware, the standard for the motion to dismiss or for a ruling on a 12(b)(6) motion to dismiss is pretty straightforward. A motion to dismiss under 12(b)(6) challenges the sufficiency of the complaint, not the merits in the complaint. So in order to consider a motion to dismiss I have to accept as true all the well-pleaded facts in the complaint and whatever inferences can be drawn those have to be drawn in favor of the plaintiff.

So the complaint has to provide the defendant with

fair notice of the basis for the claim and also the allegations in it have to be facially plausible. A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct that's alleged.

And I'm quoting there from *Ashcroft vs. Iqbal*, 556 U.S. 662 at 678, 2007.

The standard for dismissal or considering a motion to dismiss, of course, is also stated in *Bell Atlantic Corporation vs. Twombly*, 550 U.S. 544, 555. Sorry, *Iqbal* is 2009. *Twombly* is 2007.

So there is the standard that has to be considered. And at the end of the oral argument a week or so ago, after the parties had gone into extensive discussions I noted that we needed to come back to that standard in evaluating the parties' arguments.

Parties discussed a lot of facts and went into some deep detail on a number of different cases, and I wanted to pull us back to the issue of a motion to dismiss and whether or not we were in a situation where the complaint had enough well-pleaded facts to sustain in reasonable inferences in favor of the plaintiff to sustain notice of the claim and facial plausibility.

In the motion to dismiss I believe the defendants -- or I would characterize the defendants' arguments as being that

in many respects regardless of the factual claims that the plaintiffs alleged that the plaintiffs could not prevail as a matter of law on the two claims raised in the complaint. And those two claims are: Number one, that the defendants violated Title IX of the Education Amendments of 1972, and; number two, that under 42 U.S.C. 1983, the defendants violated the plaintiff's constitutional rights under the Equal Protection Clause.

So those are the two claims pending in the complaint. And the defendants argued that the plaintiffs could not prevail as a matter of law on either one of those claims, and so most of defendants' arguments were with regard to those legal issues.

The plaintiffs emphasized a number of the factual allegations in the complaint in support of their arguments, but I would think that for the most part the discussions the last time we were together were in relation to the law. So I'm going to start with a discussion of the law that the parties raised and start with Title IX, which is the first cause of action in the complaint.

Title IX, as the parties both agree, indicates that 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 financial assistance.

And the plaintiffs begin by alleging that, in Count 1,

that the defendants do receive federal funding which is one of the basic starting premises for being covered by Title IX. I don't understand there to be any objection or dispute as to that issue. So the issue is really with regard to whether or not the defendants discriminated against the plaintiff, are treating him differently from other students -- and I'm now using the language of the complaint -- "based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes."

We spent a great deal of time at the oral arguments when we were last together on the word "sex," S-E-X. Title IX indicates, as I just stated, that it is prohibited for any person to be discriminated against on the basis of sex.

The defendants argued -- first of all, I think they acknowledged that there's no caselaw, there's no court in the Seventh Circuit, lower court or appellate court that has looked at the question of whether that word "sex" covers transgender persons in the Title IX context. So we don't have any guidance in Seventh Circuit caselaw on that issue.

But the defendants argued that it was clear that the word "sex" was the gender that appeared on one's birth certificate. And I think that Mr. Stadler and I discussed that in some detail several times. And I inquired of both parties whether or not either party could cite a case that defined "sex" for the purposes of Title IX, the word "sex" for the purposes of

Title IX as the gender that appeared on one's birth certificate.

The defendants, Mr. Stadler, indicated that he couldn't point to a case that said as much. Mr. Wardenski indicated that he recalled, but didn't want to be held to it, that *Doe vs. City of Belleville, Illinois*, a Seventh Circuit decision, had indicated that "sex" was not confined -- the definition of "sex" was not confined in the Title VII context to the gender that appeared on one's birth certificate. He later then submitted a letter indicating that while that decision didn't specifically say that, it did indicate that the term "sex" encompassed more than biology.

So in my mind the starting point for this discussion about whether the complaint states a claim is whether or not there is any set of circumstances or whether or not it is plausible, to use the language of *Iqbal* and *Twombly*, for the plaintiffs to argue that there's a question as to whether or not the word "sex" for the purposes of Title IX encompasses the plaintiff.

In considering that question I followed the lead of a case that the parties discussed at some length, which is the *G.G.* case out of the Fourth Circuit. And I understand that that case right now, the Supreme Court has stayed the preliminary injunction order, but that court began by looking at whether or not at the time that the law was passed the dictionary definition of "sex" confined "sex" to if -- to use the

defendant's words, the gender on one's birth certificate.

If one takes a look right now at dictionary definitions of "sex," one finds some variety. Merriam-Webster Dictionary defines "sex" as, quote, the state of being male or female, unquote. And then it defines the term "male," the word "male," as a man or boy, a male person.

Webster's New World College Dictionary, which if you look at it online is entitled, "Your Dictionary," defines "sex" as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."

And then there's a secondary definition: "the character of being male or female; all the attributes by which males and females are distinguished."

If you look at the term "male" under that dictionary, the Webster's New World College Dictionary, it says "male" as "someone of the sex that produces sperm, or something that relates to this sex," and then the secondary definition seems to be almost identical to the first one except that it adds, "as opposed to a female who produces an egg."

Dictionary.com, online dictionary, is similar to the Webster's New World College Dictionary, it defines "sex" as "either the male or female division of a species, especially as differentiated with reference to the reproductive functions."

It defines "male" as "a person bearing an X and Y

chromosome pair in the cell nuclei and normally having a penis, scrotum, and testicles, and developing hair on the face at adolescence; a boy or a man."

So those are current dictionary definitions from three different dictionaries. In the *G.G.* case, *G.G. vs. Gloucester County School Board*, 822 F.3d 709, Fourth Circuit, April 19th of 2016, at page 720 I believe it is, that quote started with dictionary definitions from the drafting era of the statute. And they had indicated that if you looked at the American College Dictionary circa 1970, you would find the definition of "sex" as "the character of being either male or female." That's the same as that Merriam-Webster definition. Or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished."

Then it also looked to Webster's Third New International Dictionary. There are 1800 different kinds of Webster's dictionaries one discovers when one engages in one of these exercises.

Webster's Third New International Dictionary defines "sex" as "the sum of the morphological, physiological and behavorial peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregations and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usually genetically controlled and associated with special sex

chromosomes, and that is typically manifested as maleness or femaleness."

The conclusion that the *G.G.* court came to when it reviewed those two definitions, the second of which was virtually unpronounceable, is "that a hard-and-fast binary division on the basis of reproductive organs -- although useful in most cases -- was not universally descriptive. The dictionaries, therefore," and by "dictionaries" it means those two to which it referred -- "used qualifiers such as reference to the 'sum of' various factors, or ' typical dichotomous occurrence,' and 'typically manifested as maleness and femaleness.'"

When the *G.G.* court concluded that none of that terminology was particularly helpful in determining what it means to have the character of being either male or female, if any of those indicators or if -- or if more than one of those indicators points in different directions.

In other words, if -- if a morphological indicator points to "maleness" and a behavorial peculiarity points to "femaleness," the *G.G.* court said that those definitions didn't really help you if you had characteristics that pointed in different directions.

And given the variety of dictionary definitions that I have just recounted between the two that are listed in *G.G.* and the three that I found myself, I agree with that court's

conclusion. None of these definitions assist in figuring out whether or not the word "sex" -- how to interpret the word "sex" if there's an individual who shows some of the characteristics that we associate with biological sex and some of the characteristics that we associate with other definitions of sex.

The Seventh Circuit has acknowledged in the Title VII context, the employment statute context, in several cases, the difficulties that arise in trying to -- to use that word "sex" -- or in some cases "gender" which we sort of tend to use interchangeably with "sex" -- to categorize individuals under Title VII.

So in *Doe vs. City of Belleville*, 119 F.3d 563, the 1997 decision to which the plaintiffs referred, the panel writing, Judges Ripple, Manion and Rovner -- Judge Rovner was the author -- went through an extended discussion and I would say a struggle to consider why it is that if a plaintiff claims to have been harassed by someone making sexual advances toward that plaintiff that have sexual overtones, the court struggled with why it should matter whether the victim was harassed on the basis of his or her sex.

The court talked about the fact that having someone make sexual advances to you when you don't want them doesn't seem so much related to what your gender is but the fact that you're being put in the position where you're being subjected to sexual advances that you don't want to be subjected to.

In the Seventh Circuit's decision in *Hively*, which we discussed at the last hearing as well, 2016 Westlaw 4039703, the *Hively* court talked about discrimination based on sexual orientation and stated that it "does not condone," and I quote: "a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry."

Now, that was related to a sexual orientation claim under Title VII. That's at page 14 of that decision, Seventh Circuit, July 28th of 2016.

There are cases out there, not necessarily binding in this court -- not binding on this court, but that discuss how sometimes absurd results can obtain by trying to fit people into biological gender boxes.

For example, *Schroer*, which we talked about at the last hearing, *Schroer vs. Billington*, 577 F Supp.2d 293, 307, that's the D.C. District Court 2008, it discussed this hypothetical:

> **Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only toward "converts." That would be a clear case, said the court, of discrimination**

"because of religion." No courts would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute -- and again this is Title VII, not Title IX -- carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

Again, statutory language of Title VII. There are other courts which reach a similar conclusion.

The defendants argued in the motion to dismiss that pursuant to or under the Seventh Circuit's decision in *Ulane vs. Eastern Airlines*, 742 F.2d 1081, which is a Seventh Circuit decision from 1984, that there was simply no way or there is no way that the plaintiffs could prevail on an argument that the word "sex" in Title IX would apply to the plaintiff. And that

case does definitively say that under Title VII, Title VII does not provide protection for "transsexual" I think is the word that's used there, or "transsexual persons."

We had some discussion at the previous hearing about the fact that that's a 1984 case. A lot of water has passed under the bridge since that time. But the defendants also argued that it hasn't been overruled by the Seventh Circuit or by the United States Supreme Court and it remains on the books as good law.

So the question is whether or not that decision from the Seventh Circuit in 1984, in the context of Title VII, mandates that the plaintiffs cannot prevail in a Title IX case as presented here today. I don't believe that that is the case sufficient to grant a motion to dismiss, for several reasons.

First, *Ulane* stated at page 1085:

> **It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning.**

Quoting *Perrin vs. United States*, 444 U.S. 37, 42, 1979.

> **The phrase in Title VII prohibiting 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.**

> The words of Title VII do not outlaw discrimination against a person who halls 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.

That's a quote from the *Ulane* decision.

Interestingly, though, *Ulane* does not dig into the definition of the word "sex" any more than some of its contemporary decisions do. Instead it says that the "plain meaning" of the word "sex" implies that it's unlawful to discriminate against women because they're women and men because they're men. It doesn't actually state a definition of the word "sex."

Second of all, the court in *Ulane* conceded that -- and again, *Ulane* is a Title VII case -- that there's almost no legislative history regarding the prohibition of sex discrimination in Title VII.

And the court goes into some discussion about how the prohibition in Title VII was originally designed to prohibit

discrimination based on race and that at the last minute there were some what I think the *Ulane* court might have characterized as machinations to throw sex in for political reasons, but that there really is no legislative history regarding what the legislator meant by -- the legislature meant by "sex" when it included it in Title VII.

That discussion, of course, is unique to Title VII. This is a Title IX case. So the issue of legislative history or lack thereof relating to Title VII, doesn't really apply in the Title IX context. There may be reasons, there may not be reasons for looking at the word "sex" differently under Title IX and under Title VII. We haven't gotten that far yet because again we're at the motion-to-dismiss stage.

In addition, there were some discussion during oral argument between the parties or disagreement between the parties about whether or not the fact that Congress has not put a further gloss on the definition of the word "sex" in either Title VII or Title IX indicates a legislative intent either to exclude or to include, or something else, transgender persons. And both sides had arguments with regard to what the failure of the statute to change might mean.

In my mind that simply illustrates that there are two different arguments to be made on that topic and we haven't gotten to the point of flushing out those arguments as of yet.

Third, with regard to *Ulane*. As we did discuss at the

last hearing, *Ulane* predates the Supreme Court's decision in *Price Waterhouse vs. Hopkins* by five years. The Seventh Circuit has stated in the *Hively* decision that Congress intended, and I quote, "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." And it quotes Price Waterhouse at page 251 in support of that statement.

So *Price Waterhouse* does exist, it does say what it says, and it came along five years after the *Ulane* decision.

And I've already noted, finally, that the *Ulane* decision deals with Title VII and not with Title IX.

Ulane also, I note -- the court in *Ulane* also indicated -- the district court in *Ulane* had made a finding that the plaintiff in that case was female. And the *Ulane* court, toward the end of the decision, indicated that even if the court accepted the district court's finding that the plaintiff is female, the court had not made factual findings relating to whether or not the defendant had actually discriminated against her based on the fact that she was female.

The *Ulane* case, therefore, was in a different procedural posture than this one, because at this point there has not even been a legal determination made, although I think the parties have urged me to do so, as to whether or not the plaintiff is male pursuant to whatever the definition of sex is under Title IX.

So, to sum up, there is no case in the Seventh Circuit

that defines "sex" under Title IX. No court has specifically addressed whether or not the prohibition of discrimination on sex that's described in Title IX encompasses transgender students. The caselaw is scattered, I would say.

In the Title VII context, if that is, in fact, the appropriate context to draw from in interpreting Title IX, there is a dispute -- one can assume, although it may not be specifically stated but there were arguments to this effect at the last hearing -- with regard to whether or not the plaintiff is male or female, an issue that would need to be resolved in order to get to the question of discrimination. And as I indicated, I don't believe that *Ulane* prohibits a cause of action at the motion-to-dismiss stage.

I'd also like to briefly address the *G.G.* case. As the defendants pointed out, the Supreme Court took the step to stay the issuance of the preliminary injunction that the Fourth Circuit had approved. And I am not relying on *G.G.* as being binding precedent. It wouldn't be binding precedent on this court even if the Supreme Court had not stayed the issuance of the preliminary injunction, of course, because the Seventh Circuit law binds this court not the Fourth Circuit.

But I note that one of the defendant's arguments was that aside from the Supreme Court's action, perhaps casting doubt on some of the holding in *G.G.*, and there are a number of holdings in *G.G.*, that *Texas vs. United States*, 2016 Westlaw

4426495 in the Northern District of Texas, August 21st, 2016, might also cast doubt on *G.G.*

The Texas case was the case in which the State of Texas attempted to push back against a request for national injunctive relief. That case may or may not cast doubt on the reasoning in *G.G.* I think that is an issue that is beyond the scope of the motion to dismiss because, again, *G.G.* is not the binding precedent here.

Even if we reach a stage at some point where I were to conclude or some other judge in this district were to conclude that Title IX does not project -- protect transgender persons -- and I note that I haven't reached a decision one way or the other. I think it's premature to reach that decision. But if a court were to reach that decision in this instance, I believe that the plaintiffs have alleged sufficient facts to sustain a gender stereotype claim.

And again, I would refer back to *Price Waterhouse vs. Hopkins*, 490 U.S. 228 at 251, 1989. Price Waterhouse discussed clearly and in detail the legal relevance of sex stereotyping and the fact that sex stereotyping is not allowed, at least again in the Title VII context.

Also, the *Kastl*, K-A-S-T-L, *vs. Maricopa County* case, 325 F.Appx. 492 at 493, Ninth Circuit, a 2009 case, finding that after *Price Waterhouse* and a Ninth Circuit decision, *Schwenk vs. Hartford*, 205 F.3d 1187, at 1201-02, year 2000, Ninth Circuit

case, "it is unlawful to discriminate against a transgender or any other person because he or she does not behave in accordance with an employer's expectations for men or women."

Again, in Title VII context that's the reference to employers.

And so regardless of what conclusion a court might come to with regard to the word "sex" and whether it covers the plaintiff in the Title IX discrimination context in terms of discrimination, there are facts pleaded in the complaint, and I think they're clear enough to place the defendants on notice that the defendants -- or the plaintiff alleges that the defendants treated him differently because they didn't conform to gender stereotypes associated with being a biological female.

So for those reasons, I believe that there is sufficient -- there are sufficient legal claims alleged here that would be in dispute to survive a motion to dismiss.

As an aside, I also want to indicate -- I had asked the defense some questions -- or the plaintiff, I'm sorry -- some questions about denial of educational opportunities. Obviously one of the things that Title IX prohibits, the major thing that Title IX prohibits is that an educational institution deny someone educational opportunities based on one's sex. And I did ask the plaintiffs with regard to the fact that this is an allegation that the plaintiff cannot use bathrooms, the boys' bathroom, whether or not the use of a restroom facility

constituted an educational opportunity.

There are cases out there which indicate that clearly the ability to be able to conduct one's bodily functions impacts on one's educational opportunities. The plaintiff cited some in the supplemental letter that was filed after the hearing.

So, again, in order to survive a motion to dismiss the question is whether there is any plausible or there are plausible claims that the plaintiff could make in support of that argument. I believe the caselaw that exists out there shows that at least, yes, there is a plausible argument to be made there.

In addition, there was some argument at the last hearing with regard to whether the Department of Education's "Dear Colleague" letter should be accorded any deference in terms of the Court's consideration of Title IX and whether or not the word "sex" encompasses the plaintiff.

I do agree with the defendants in their first two arguments in that regard and then that that "Dear Colleague" letter does not constitute a statute or a law. And, second of all, that it's not entitled to *Chevron* deference because it isn't a regulation either, it is a letter and the defendants are correct about that.

However, I find that there is reason to consider that the letter ought be granted *Auer* deference. And again, while I'm not relying on *G.G.*, I think that its reasoning in that

regard is persuasive when it points out that again the relevant regulation promulgated under Title IX allows schools -- and it gives them the discretion actually, the language is "may" -- gives educational institutions the discretion to create segregated bathrooms, male/female bathrooms, and it actually uses the same word that the statute uses which is the word "sex." It allows them to create separate bathrooms based on sex.

For the same reasons that I just discussed with regard to the word "sex" in Title IX, I think the use of the word "sex" in the regulation could be considered ambiguous based on the varying definitions of sex. The regulation, just like Title IX, does not address how that word applies to transgender persons.

And if, in fact, that word is ambiguous because it doesn't address transgender persons and it doesn't define "sex" for the purposes that I iterated above, then I have to grant a deference to the agency's consideration of that language. And at this point I can't conclude -- at this stage in the proceedings, at the motion-to-dismiss stage -- that the agency's interpretation is plainly erroneous or inconsistent with the regulation.

In particular the defendants argued that if -- if "sex" were to cover transgender persons, if a transgender person could use the restroom with which he or she identifies, that this would gut a school's ability to create segregated -- to use

its discretion under the regulation and to create segregated facilities.

I don't follow the argument that there's nothing there that would prohibit a school from continuing to create segregated facilities, a boys' bathroom and the girls' bathroom or men's bathroom and a women's bathroom. And as I understand the plaintiff's argument at this stage, the plaintiff's argument is that it could continue to allow boys who identify as boys to use the boys' restroom and girls who identify as girls to use a girls' restroom, that the plaintiff's arguing -- the plaintiffs are arguing that the plaintiff should be able to use the boys' restroom because he identifies as a boy and, therefore, boys should use the boys' restroom.

I don't see that argument, whether or not ultimately it prevails, as being an argument that if accepted would gut a school's ability to create segregated restrooms.

The defendants also argue that the only way to keep that letter from being at odds with the regulation is to change the statutory definition of "sex." That we circle back around to my original point, the statute doesn't define "sex." The regulation doesn't define "sex."

The defendants also argue that if sex were to include transgender persons that it would be left up to the schools then to try to assume gender identity based on appearances, social expectations or explicit declarations of identity. The dissent

in *G.G.* raise that issue as well.

That may or may not be, and that's an issue I guess to be -- a bridge to be crossed for another day. But the question of whether or not that makes the interpretation that the plaintiffs urge inconsistent with the regulation is a separate question. You can still have segregated facilities.

So for all of those reasons with regard to the defendants' argument that there is not a plausible basis for the plaintiffs to succeed at law, I disagree.

That leaves then only the question of whether or not the plaintiffs have alleged sufficient facts to indicate that they could make a plausible claim for discrimination. I think that is -- that question is less in dispute at the motion-to-dismiss stage.

There are a number of allegations that the plaintiffs make in the complaint that Ash is not allowed to use the boys' restroom; that he -- that there are -- have been teachers or other school personnel that have been assigned the task of watching him to make sure that he doesn't use the boys' restroom; that he's been given the key to a single-use restroom which only he is directed to use and only he has the key to use; that he was denied the ability to put his name in or run for prom king initially, although I think that then changed.

There are a number of facts alleged in the complaint that -- that would indicate discrimination if, in fact, there

were a conclusion that the statute did cover the plaintiff. So I think it's clear that there are sufficient facts alleged in the complaint to support a claim at the motion-to-dismiss stage.

The second allegation in the complaint, the second count, alleges that the defendants violated a 1983 and the Fourteenth Amendment Equal Protection Clause. Under 1983, in order to prove a claim under 1983, the plaintiff has to allege:

Number one, that he was deprived of a right that was secured by the Constitution or laws of the United States;

And, number two, that that deprivation was caused by a person or persons acting under color of state law.

And I am obligated to review that claim pursuant to the Fourteenth Amendment which is the constitutional provision that the plaintiff claims.

In this case the complaint clearly states both the 1983 requirements:

Number one, the plaintiff does claim that he was deprived of equal protection under the Fourteenth Amendment, that is an acknowledged constitutional right, and;

Number two, that the declaration was caused by a person or persons acting under color of state law, in this case the school district -- employees at the school district.

So the 1983 elements are alleged in the complaint. And that takes us to the question of whether or not the elements of an equal protection claim have been alleged in the complaint.

In order to make out an equal protection claim a plaintiff must present evidence that the defendants treated him differently from others who were similarly situated.

He also has to present evidence that the defendants intentionally treated him differently because of his membership in a class to which he belonged.

And I'm citing *Personnel Administrator of Massachusetts vs. Feeney*, 442 U.S. 256 at 279, 1979; also *Nabozny*, N-A-B-O-Z-N-Y, *vs. Podlesny*, P-O-D-L-E-S-N-Y, 92 F.3d 446 at 453, Seventh Circuit 1996.

The complaint alleges that the school treated the plaintiff differently from, and I quote, "other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes." That's from the complaint at Docket No. 1 at pages 32 to 33.

So, if at a later stage in the proceedings the factual conclusion is that the plaintiff is male, it is clear that he has alleged sufficient facts to indicate discrimination relative to other males. Other males are allowed to use the boys' bathroom; other males don't have teachers monitoring them; other males presumably are allowed to run for prom king if they wish to do so or if they're nominated or however that process works, et cetera.

There doesn't seem to be any dispute that the plaintiff is transgender. And if the court were to conclude at

a later stage in the proceedings that that is a suspect class, then he's also alleged sufficient facts to show discrimination on that basis. Now, at this point, because again we're at the motion-to-dismiss stage, I don't have to make a finding as to whether or not transgender constitutes a suspect class.

And finally, as I indicated earlier, the plaintiff has alleged sufficient facts at the motion-to-dismiss stage to show discrimination based on gender stereotypes.

Now, I noted earlier, I don't have to decide whether transgender is a suspect class at the motion-to-dismiss stage. And for that I refer you to *Durso*, D-U-R-S-O, *vs. Rowe*, R-O-W-E, 579 F.2d 1365 at page 1372. It's a Seventh Circuit decision from 1978. That was a case that involved an incarcerated plaintiff alleging an equal protection claim. But the court stated:

"A state prisoner need not allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the Equal Protection Clause. The lack of a fundamental constitutional right or the absence of a suspect class merely affects the court's standard of review; it does not destroy the cause of action."

Now, the parties argued in their pleadings on the motion to dismiss rather extensively the question of whether or not in reviewing an equal protection claim the court ought to use the rational basis standard of review or it ought to use a

strict scrutiny or a heightened scrutiny -- or not strict scrutiny. Neither party ought think his argument with strict scrutiny, but a heightened scrutiny standard of review.

And again, at the motion-to-dismiss stage I don't have to make that determination. What I have to determine at this stage is whether or not the plaintiff has stated a claim, stated sufficient facts in support of a claim that would entitle him to proceed on an equal protection cause of action. And as I've indicated both under the elements of a 1983 claim and under the elements of an equal protection claim, he has asserted those facts taking or construing those facts in the light most favorable to the plaintiff.

So for all of those reasons I am denying the motion to dismiss. And as I had indicated at the last hearing, I wanted to take up the motion to dismiss because if the case were not going to proceed then there wouldn't be any reason for the parties to then continue to discuss the preliminary injunction. The denial of the motion to dismiss obviously means that the case is going to proceed beyond this point and, therefore, it looks like there is a need then to be able to discuss the issue of the preliminary injunction.

Now, I want to -- I'm going to turn to the parties in just a second to talk about how to proceed with that, but one thing I did want to note is that the motion for the preliminary injunction was filed back about the same time that the motion to

dismiss was filed, give or take. It was filed before the school year started and there were some questions I think raised by the defendants with regard to whether some of the activities that the plaintiffs had predicted or some of the actions that the plaintiffs had predicted the defendants might engage in would actually be taking place in this school year. By the time we held a hearing I believe that Mr. Whitaker had started school and Mr. Wardenski argued that at least with regard to the use of the restroom issue that that seemed to remain the same as it had last year. But there were no discussions about whether any of the other issues were going on and what was happening.

I bring all that up to indicate that in terms of what actions the plaintiff may be seeking to enjoin, I understand that that may have morphed or developed since the time the original motion for the preliminary injunction was filed so I just wanted to note that.

So, Mr. Wardenski, with regard to the motion for a preliminary injunction, suggestions for moving forward?

MR. WARDENSKI: Yes, Your Honor. Given the hour we could try to present argument briefly today, but we're also happy to come back soon if that would be easier on both sides.

The scope of the relief we're seeking is still the same.

THE COURT: Okay.

MR. WARDENSKI: The restroom policy and practice has

not changed. We would like to advise the court that Ash, as we had noted in our briefs, had petitioned the Kenosha County Court for a name change and that was granted on Thursday. So he has requested that his student records be updated with regard to his name. It's my understanding that that request has been approved and they're in the process of figuring out what that means in terms of his records.

But I think we would still seek the relief of the staff not referring to him by his birth name or by the female designation, by female pronouns which may still occur regardless of what's on his official records.

As far as I know there's been no further talk of the green wristbands issue, which is fine, but we certainly would like to leave in that piece of the PI motion that would enjoin the districts from identifying in any sort of physical manner or visible manner a transgendered student through something along those lines.

So the primary issue is restrooms, although names and pronouns may still be an issue and otherwise identifying Ash as anything other than Ash or [Indiscernible] while the [Indiscernible] determination proceeds.

THE COURT: Thank you. Mr. Stadler?

MR. STADLER: Thank you, Judge. I would agree that certainly the bathroom policy is still at issue. The issue of the name I don't believe is going to be at issue at all because

we have a court order that has changed the name so that is clear.

I do want to be clear, though, that a circuit court's change of name order orders that a birth certificate be amended to reflect a new name, it does not change the gender on the birth certificate. So we will continue to have a birth certificate that lists Ashton Whitaker as female. So if the plaintiff is asking for us to be enjoined from ever referring to Ashton as female, I think that's probably going to be an issue in this matter as well because we're between a rock and a hard place in regard to having a legal document that says the gender of this student is female versus the student's desire to say otherwise. So I think that still is at issue.

The issue in regard to somehow identifying transgender students in any manner is not an issue, it's never happened, it's never been done, it's never been proposed.

THE COURT: Oh, but what do you mean it's never happened? Do you mean the wrist --

MR. STADLER: This wristband thing?

THE COURT: Okay.

MR. STADLER: Never happened. Never been a policy of the district. Has never been the intent of the district to do that.

THE COURT: Okay.

MR. STADLER: I don't believe they can make any

allegation that anyone has come forward to Ash or any other transgender student and insisted that they wear a green wristband or identify themselves in any other manner.

THE COURT: Well, it sounds like one way or the other obviously it sounds like the plaintiffs still are requesting that the district not refer to Ash by a female name or a female pronoun regardless of what the birth certificate -- and I understand your point, Mr. Stadler, that the birth certificate is not necessarily going to change gender -- the reference on the birth certificate is not going to necessarily change.

So it does sound like that is being requested and so you're indicating that you're opposing that. So the question is -- and as for the green wristband issue or any other form of identifying the plaintiff as a transgender student, I think this is where we get into a discussion of the evidence that needs to be presented with regard to a preliminary injunction.

So the question is, you know, I realize the defense may want to process a little bit of what the decision is today and perhaps the plaintiffs may also want to take a little bit of time to do that. I realize not a lot but a little bit. So the question and let me just ask you guys practically because you know how we've been working in terms of scheduling here, how much time in terms of minutes/hours -- I'm assuming hours -- do you think you would need to be able to present your evidence in support of the preliminary injunction? And given that it's the

plaintiff's motion, Mr. Wardenski, I'll ask you first.

MR. WARDENSKI: We think the argument can be brief. You know, frankly I think we presented our evidence in our filings and so if the court, you know, wished to rule on the papers we wouldn't be opposed to that.

But to the extent that a hearing would be helpful I'm prepared to present argument in 10 or 15 minutes. We've already gotten into, you know, some discussion of the merits on the motion-to-dismiss arguments so there's no need to rehash those. So I think it can be a shorter proceeding than the last one was. And it's just a matter of me flying back out here. So -- and I can be -- either tomorrow before I leave or sometime soon with 12 hours' notice.

THE COURT: Let me ask you this. Well, okay, Mr. Stadler. Sorry, I asked Mr. Wardenski a question about time so I'll ask you the same question.

MR. STADLER: I think 10 to 15 minutes is a little light on the time. But I would agree that the issues for an injunction hearing have certainly been narrowed because I think one of the primary issues was reasonable probability of success. I don't see us revisiting that in depth beyond of what we've already argued with regard to the motion to dismiss. So I think we've covered a lot of that ground already.

I think irreparable harm is going to be an issue that gets a lot of attention. I would think we probably need an hour

to an hour and a half.

THE COURT: Okay. Then let me go back to what I was going to ask Mr. Wardenski. Mr. Wardenski, you indicated that you felt like you all had pretty much made most of your arguments in your motion-to-dismiss papers and the pleadings on the preliminary injunction. But of the three forms of injunctive relief -- or the three actions you're asking to enjoin, I think the one I'm still a little bit short on information on is the green wristband argument, if that's the form of identification that you all are seeking to have enjoined.

I believe that your papers indicated that there was some talk or some reference to the fact that the school might consider doing that, that your client had heard that. Mr. Stadler has responded that's never been required, it's never been requested, it's not being requested now. So I guess that's the one piece of information.

I understand what you're arguing on the restroom. I understand what you're arguing on the use of his name and pronouns. But the wristband I'm -- I mean is it taking place right now? It doesn't sound like --

MR. WARDENSKI: No -- and I can -- as far as I know. And I can try to, you know, respond to Mr. Stadler's argument. We did present evidence in the form of the testimonial -- the declarations from Ash and his mother Melissa Whitaker as well as

a photograph of the wristband that was distributed to guidance counselors.

That said, we, you know, are taking the district at its word that that was something that was never -- even if it was proposed it was not implemented and it's not being implemented this school year. So our focus and certainly the timeliness of our motion for a preliminary injunction is on the restroom access and on the name and pronoun usage.

So, you know, we could always -- if there were, you know, some development later where there was some other signifier separate and apart from the green wristband or if that somehow materialized again we could come back to the court, but I think the relief we're seeking is primarily the first two issues. And there seems to be a little dispute on those as to the facts.

And, you know, and I would just note that the district did not present any affidavits or declarations or any other evidence with its filings, so that's part of the reason why we think that the time needed for that hearing does not need to be extensive.

THE COURT: Okay. I would -- I would -- I think at this point I would deny any request for injunctive relief as it relates to the green wristband issue given the fact that I'm not sure how one can argue irreparable harm if, in fact, it's not being implemented right now. Now, if -- if there is some sort

of process that's put in place later in the school year, whether it be a green wristband or anything else, then you obviously have the ability to come back and seek injunctive relief. But at this point we don't have it. And so I'm not sure what I would be enjoining other than enjoining something that might or might not happen in the future.

So given that, I think the two issues, as Mr. Stadler said, the [Indiscernible] issues then are the question of the restroom policy and practice and the use of the name. And if that's the case then I guess the next question -- and, Mr. Stadler, you indicated that you thought 10 or 15 minutes was a little short shrift, are the defendants anticipating presenting any kind of evidence or is this more argument with regard to whether or not the practices alleged would give rise to irreparable harm?

MR. STADLER: I anticipate mostly argument on that issue.

THE COURT: Okay.

MR. STADLER: I want to give some thought to whether we would present evidence on the issue.

THE COURT: Okay.

MR. STADLER: But I also want to be clear on one other thing and that is the name issue. With a court order changing a student's name, the district will be changing Ash Whitaker's name on all of its documentation. It will get changed. So

there is no issue about name. My hang-up was pronoun. And I say that only because I need to give some thought to that issue as well. Regardless of whether your name has been changed, the gender hasn't been changed and so the district has to give thought as to what it does with a student who has a male-sounding name but a female birth certificate. And I can't speak for the district right now on that issue. It's gonna have to do some thinking itself. That's more the issue. It's not the name issue, it's just the pronoun, and then, you know, are we going to have people thrown in jail because they slip on a pronoun.

THE COURT: I don't think I have the ability to throw anybody in jail in this civil case.

MR. STADLER: That is good.

THE COURT: Unless somebody knows about an indictment that I don't know about.

MR. STADLER: You do have contempt power so --

THE COURT: I try not to use those if I can possibly avoid it.

Then if that's the case, if it's going to mostly be -- I mean I want to give everybody the time that they need to consult with clients and do what they need to do. I also, if I don't have to make Mr. Wardenski get on another airplane -- if any of us don't have to get on airplanes I think our lives are highly improved given the state of flight in the United States

these days. But we could also schedule -- if it's mostly going to be argument and not really presentation of evidence in terms of what's going on here, we could do that by telephone because, you know -- otherwise, I mean, I don't know what time you're leaving in the morning, Mr. Wardenski, but I got a nine o'clock hearing, I got a 10:30, I have a gap between noon and 2:00 and then I got a couple more hearings.

MR. WARDENSKI: Well, I actually -- I have a hearing in Chicago first thing in the morning, but I'm not flying home until later in the day so if there was something in the afternoon that would be possible.

THE COURT: Well, I guess then it depends, Mr. Stadler, on how much time you're going to need to touch base with your client and talk to your client.

MR. STADLER: The problem with my client is there's seven of them.

THE COURT: Yeah, no. It's -- I understand.

MR. STADLER: So I need a little more than 24 hours to be able to round up a school board and to be able to talk to them on those issues.

THE COURT: Okay. So tell me when you think you may be able to do that and perhaps what we can do is take the argument by phone.

MR. STADLER: I'm sorry, I didn't hear the last part.

THE COURT: I ask you to tell me when you think you

may be able to get with your peeps and then we can do the argument by phone.

MR. STADLER: Again, this is an assumption on my part but I would suspect that I can confer with them sometime this week. So if we were back next week sometime I think that would be sufficient.

THE COURT: Okay. Hold on a second.

(Brief pause.)

MR. WARDENSKI: Your Honor, if I may, if the issue is the pronouns that Mr. Stadler needs to consult with this whole district about, I wonder if there's a way that we could address the restroom arguments first and then to the extent that there is still a dispute over the name and pronoun use, which may be resolved in the next few days, the name change just happened, you know, two days ago, that we could address that separately.

THE COURT: Do you need, Mr. Stadler, to consult with your clients with regard to the restroom policy?

MR. STADLER: I do not.

THE COURT: Okay.

MR. STADLER: I mean, I have so I do not need further.

THE COURT: Would you all be able to make arguments on the restroom policy now in terms of irreparable harm? Or -- or at some point tomorrow?

MR. WARDENSKI: Either way.

MR. STADLER: I can do tomorrow. I've got -- your

morning I believe, Judge, was you said fairly packed?

THE COURT: Well, yeah. I mean, I've got a 9:00 a.m. and a 10:30.

MR. WARDENSKI: Yeah, it would probably be afternoon that I could get here.

THE COURT: I could do one o'clock.

MR. WARDENSKI: That would be great.

MR. STADLER: I've got a one o'clock phone conference on a different case, but I will move that to a different time.

THE COURT: Are you sure?

MR. STADLER: Yup.

THE COURT: Okay. Shall we say one o'clock tomorrow?

And the arguments -- just so I'm clear so everybody is on the same page, the arguments tomorrow will be on the restroom use policy. We'll set aside the issue of this district's position on pronouns until Mr. Stadler has had an opportunity to talk with his clients. And maybe we can -- you know, if we need further argument on that we can set up a phone hearing on that.

MR. WARDENSKI: Thank you, Your Honor.

MR. STADLER: Thank you.

THE COURT: Okay.

MR. STADLER: That's fine.

THE COURT: Anything else then that we need to get taken care of this afternoon?

MR. WARDENSKI: No, Your Honor.

MR. STADLER: No. Thank you.

THE COURT: All right. Thank you all.

THE CLERK: All rise.

(Audio file concluded at 4:38 p.m.)

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C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified September 27, 2016.

/s/John T. Schindhelm

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