UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION, *et al.*, Petitioners, ASHTON WHITAKER, by his mother and next friend, Melissa Whitaker, Respondent.	No. 16-8019

RESPONDENT'S RESPONSE TO PETITIONERS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Respondent Ashton Whitaker ("Respondent") respectfully submits this response in opposition to the Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) filed by Petitioners Kenosha Unified School District No. 1 Board of Education, *et al.*, seeking this Court's interlocutory review of the District Court's denial of Petitioners' motion to dismiss Plaintiff's Amended Complaint. Because the District Court revoked its certification of the denial of the motion to dismiss for interlocutory review under 28 U.S.C. § 1292(b) as improperly issued, this Court lacks jurisdiction to review that decision and the Petition must be denied.

I. STATEMENT OF THE CASE

In this case, Respondent, a transgender boy, challenges Petitioners' discriminatory treatment of him under Title IX of the Education Amendments of 1972 ("Title IX") and the Equal Protection Clause of the Fourteenth Amendment. Under both claims, Respondent alleges that Petitioners treated him differently from other students, including excluding him from boys' restrooms and segregating him from other students in sex-segregated activities, based on his sex (including his gender identity and nonconformity to gender stereotypes). In addition, under the Equal Protection Clause, Respondent alleges discrimination based on his transgender status.

II. RELEVANT PROCEDURAL HISTORY

Respondent filed his Amended Complaint on August 15, 2016. Petitioners filed their Motion to Dismiss on August 16, 2016. Following briefing, the District Court heard oral argument on the Motion to Dismiss on September 6, 2016. On September 19, 2016, the District Court issued an oral decision from the bench denying the Motion to Dismiss. The next day, on September 20, 2016, the District Court heard oral argument on Petitioners' Motion for Preliminary Injunction and issued an oral decision from the bench partially granting that motion.

At the conclusion of the preliminary injunction hearing on September 20, 2016, Petitioners' counsel advised the District Court that Petitioners intended to seek an interlocutory appeal of the District Court's ruling denying their Motion to Dismiss and would submit a proposed order. Defendants filed a proposed order later that day after business hours. The District Court did not seek or entertain argument on the question of whether an interlocutory appeal before signing the proposed order, with modifications, on the morning of September 21, 2016, without Respondents having an opportunity to respond. That Order contained the following language: "The court concludes that the reasoning supporting this decision, and the decision itself, involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

On September 22, 2016, Respondent filed an expedited motion to reconsider the District Court's certification of the denial of the motion to dismiss for interlocutory review. Respondent asked the District Court to amend the September 21 Order by removing the language, quoted above, that appeared to certify the decision for interlocutory appeal. While that motion was pending, on September 23, 2016, Petitioners filed the present petition for interlocutory review of the District Court's denial of their motion to dismiss. Respondents were not served a copy of the

Petition until this Court docketed the Petition on September 26, 2016. Before this Court docketed the Petition, on September 25, 2016, the District Court issued an order granting Respondents' motion for reconsideration. It found that Petitioners failed to establish the requirements for interlocutory appeal and that it had therefore erred in initially signing Respondents' proposed order certifying the motion to dismiss denial for interlocutory review. Accordingly, it vacated the portion of the Order containing the language certifying the decision for appeal. Order, Sept. 25, 2016 ("Sept. 25 Order") (attached as Ex. A).[1] The Court issued an amended order (attached as Ex. B) denying the motion to dismiss without the certification language. This Court took notice. On October 5, 2016, this Court issued an order instructing Petitioners to file by October 11, 2016, "a statement of position in light of the district court's order of September 25, 2016, revoking certification for interlocutory appeal." Order, Oct. 5, 2016 [App. Dkt. No. 11].

III. ARGUMENT

A. This Court lacks jurisdiction to review the denial of the motion to dismiss since the District Court revoked its certification of that order for interlocutory review.

As this Court's order correctly suggested, the District Court's revocation of its erroneously granted certification language deprives this Court of jurisdiction over this petition.[2]

[1] On September 26, 2016, Petitioners filed a motion asking the court to reconsider this decision. The court denied that motion on October 3, 2016.

[2] Petitioners essentially concede this point in their Statement of Position [App. Dkt. No. 12-1] filed today. Statement of Position at 3 ("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)." However, Petitioners nevertheless urge the Court on *this* docket to exercise pendent jurisdiction to review the motion to dismiss because it raises issues related to the preliminary injunction ordered by the District Court. *Id.* Petitioners have appealed that injunction to this Circuit, which has been separately docketed from the present petition. The question of whether the Circuit may exercise pendent jurisdiction over issues raised in the District Court's motion to dismiss denial is only relevant to that separately docketed appeal—not this petition for interlocutory review under § 1292(b). The Court should disregard Petitioners' arguments at this juncture. If Petitioners properly raise similar arguments in their appeal of the preliminary injunction, Respondent will respond to the merits of that argument at that time.

A party may not appeal a denial of a motion to dismiss as a matter of right. However, under 28 U.S.C. § 1292(b), "the court of appeals in its discretion [may] hear an interlocutory appeal *if* the district court certifies that the appeal presents 'a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012) (emphasis added) (quoting 28 U.S.C. § 1292(b)); *see also Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000).

Here, the District Court has *not* certified that an appeal of its denial of the motion to dismiss meets each of the requirements of § 1292(b). Although the District Court initially issued an order containing language certifying the decision for appellate review, the court vacated that certification three days later, before the Petition was docketed in this Court. Consequently, the operative amended order denying the motion to dismiss (Ex. B) does not certify the decision for interlocutory review. Indeed, in its decision granting Respondents' motion for reconsideration, the District Court squarely held that Petitioners did *not* establish the factors that would justify interlocutory review and that the court's initial certification was issued in error. Sept. 25 Order at 6. For these reasons, this Court lacks jurisdiction to consider the District Court's denial of the motion to dismiss and Petitioners' Petition must be denied.

B. Even if this Court had jurisdiction to review the denial of the motion to dismiss, Petitioners have failed to establish the requirements for interlocutory review.

As the District Court correctly concluded, Petitioners have failed to meet their burden of justifying interlocutory review of the denial of their motion to dismiss under § 1292(b). *Id.* at 6.

> Interlocutory appeals are frowned on in the federal judicial system. They interrupt litigation and by interrupting delay its conclusion; and often the issue presented by such an appeal would have become academic by the end of the litigation in the district court, making an interlocutory appeal a gratuitous burden on the court of appeals and the parties, as well as a gratuitous interruption and retardant of the district court proceedings.

Sterk, 672 F.3d at 536. "Interlocutory appeals should only be granted when the applicant can show exceptional circumstances that justify a departure from the basic policy of postponing appellate review until after a final judgment is entered." *Alloc, Inc. v. Pergo, Inc.*, 572 F. Supp. 2d 1024, 1029 (E.D. Wis. 2008) (citing *Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir.1972)).

To meet this burden, "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz*, 219 F.3d at 675. "Unless *all* these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b). To do so in such circumstances is merely to waste our time and delay the litigation in the district court since the proceeding in that court normally grinds to a halt as soon as the judge certifies an order in the case for an immediate appeal." *Id.* at 676.

Having reviewed each of these factors, the District Court properly concluded that Petitioners failed to meet their burden of justifying an interlocutory appeal. First, "because the court based its denial of dismissal on several grounds, the order is not solely based on resolution of 'a controlling question of law as to which there is substantial ground for difference of opinion.'" Sept. 25 Order at 6. The District Court acknowledged but found it insufficient to warrant interlocutory review that the question of Title IX's application to gender identity discrimination is a matter of first impression in this Circuit. *Id.* at 7-8. While appellate review might be helpful to expedite resolution of the case if this were the *only* available theory of relief, the District Court correctly found that, "regardless of the answer to the question of whether discrimination against transgender students constituted discrimination based on sex under Title IX, the plaintiff ha[s] pleaded sufficient facts to survive a motion to dismiss on a claim of gender stereotyping" on both his Title IX and Equal Protection Clause claims. *Id.* at 7. "Even if

therefore, this court (or the Seventh Circuit) ultimately were to find against the plaintiffs on the question of whether transgender discrimination constituted discrimination based on sex under Title IX, the plaintiffs still could prevail on a claim that the defendants' treatment of Ash Whitaker constituted prohibited sex stereotyping under Title IX." *Id.* at 8. The court reached a similar conclusion on the equal protection claim. *Id.* at 8-9.[3]

For substantially the same reasons, even if this Court had jurisdiction over this petition—and it does not—it should decline to grant it. Because sex stereotyping is a well-established theory of relief, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), for which there is no "substantial ground for difference of opinion," *Sterk*, 672 F.3d at 536, an interlocutory appeal would do nothing to "speed up" the resolution of this case as a whole. *See* Sept. 25 Order at 9 ("In a situation like this one, where the appellate court's resolution of the one arguably controlling question of law would not end the litigation as to the other grounds, the appellate court's decision would not materially advance the ultimate termination of the litigation.") For these reasons, the District Court concluded that Petitioners' intention to seek interlocutory appeal "is an attempt to side-step that litigation," that Petitioners "did not properly move for certification under § 1292(b)," that "[t]he court erred in failing to solicit argument justifying certification under § 1292(b)" prior to signing the now-vacated order denying the motion to dismiss and that "[t]he court's review of the § 1292(b) standard leads the court to conclude there is no basis for certification under § 1292(b)." Sept. 25 Order at 9-10.

[3] Respondent notes that Petitioners' petition relies, in part, on the fact that "[t]he Seventh Circuit has recently reaffirmed the precedential value of *Ulane* in this Circuit" in *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 700-01 (7th Cir. July 28, 2016), which addressed the application of Title VII to claims of sexual orientation-based discrimination. Earlier today, the Circuit granted plaintiff-appellant's petition for *en banc* review and vacated the panel's decision in *Hively*. *See* Order, *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720 (7th Cir. Oct. 11, 2016).

The District Court's reasoning for denying certification is sound and this Court should therefore deny Petitioners' request for interlocutory review.

IV. CONCLUSION

Since the District Court did not certify its denial of Petitioners' Motion to Dismiss for interlocutory review under 28 U.S.C. § 1292(b), this Court lacks jurisdiction to review that order and should deny Petitioners' request for interlocutory appeal. Even if the Circuit finds it has jurisdiction based on the District Court's short-lived and since-vacated order certifying the decision for interlocutory review, Petitioners have failed to meet their burden of showing why an interlocutory appeal is appropriate here for the reasons discussed by the District Court in its September 25, 2016 Order, further warranting this Court's denial of Petitioners' request.

Dated: October 11, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

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

ORDER GRANTING PLAINTIFFS' CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO RECONSIDER CERTIFICATION FOR INTERLOCUTORY APPEAL OF ORDER DENYING MOTION TO DISMISS (DKT. NO. 30), AND VACATING CERTIFICATION

On September 19, 2016, the court issued an oral ruling denying the defendants' Rule 12(b)(6) motion to dismiss. Dkt. No. 28. At the end of the hearing, the parties briefly discussed scheduling oral argument on the plaintiffs' motion for a preliminary injunction, and settled on September 20, 2016 at 1:00 p.m. Id. at 9.

At the conclusion of the September 20, 2016 hearing on the motion for preliminary injunction, counsel for the defendant told the court that he would be submitting a proposed order memorializing the court's denial of the defendants' motion to dismiss. He told the court that he would be including in that proposed order language to the effect that the court's order involving a

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controlling question of law upon which there was substantial difference of opinion, stating that the defendants would "need" that language if they decided to file an interlocutory appeal. The court did not ask counsel for the defendants to argue in support of this request; it simply stated, "okay." Nor did it give the plaintiffs the opportunity to argue on the question of whether the court should include that language in the order of dismissal.

The defendants submitted the proposed order on September 20, 2016 at 5:28 p.m. (two and a half hours after the conclusion of the preliminary injunction hearing). Dkt. No. 27. After making some edits, the court issued the order at 11:07 a.m. the following day (September 21, 2016); the court's order included the defendants' proposed language: "The court concludes that the reasoning supporting this decision, and the decision itself, involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Dkt. No. 29 at 2.

The plaintiffs then filed the current motion, pursuant to Local Rule 7(h), asking the court to reconsider its inclusion of that sentence in the order denying the motion to dismiss. Dkt. No. 30. They make this request pursuant to Fed. R. Civ. P. 60, "Relief From a Judgment or Order." The plaintiffs argue that the defendants have not provided argument that would justify the court's certifying the decision for interlocutory appeal; that such appeals are unusual, and not favored in the Seventh Circuit; and that because the court denied the

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motion to dismiss on several grounds, interlocutory appeal on one unsettled issue of law would not serve to advance the litigation as a whole. Id.

Local Rule 7(h) for the Eastern District allows a party to seek non-dispositive relief on an expedited basis by designating the motion under that rule. The rule allows the court to schedule a hearing, or to "decide the motion without a hearing."

Fed. R. Civ. P. 60 allows a court to relieve a party from an order if one of a list of grounds exists. Those grounds include mistake, inadvertence, surprise, or excusable neglect (Rule 60(b)(1)); newly discovered evidence (Rule 60(b)(2)); fraud (Rule 60(b)(3)); the fact that the judgment from which the movant seeks relief is void (Rule 60(b)(4)) or has been satisfied (Rule 60(b)(5)); or "any other reason that justifies relief," (Rule 60(b)(6)).

The court finds that under the circumstances the plaintiffs describe (which are supported by the record), relief is justified under Rule 60(b)(6), "any other reason that justifies relief." The plaintiffs correctly characterize the series of events which led to the court including the interlocutory appeal language in the order denying the motion to dismiss. Defense counsel stated that he would submit a proposed order containing the language, but made no legal or factual argument in support of certification. The court did not ask defense counsel to provide argument in support of certification, nor did it ask the plaintiffs to respond. It simply included the language in the order, without input from either party. The court erred in failing to solicit argument on this issue.

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"As a general rule, the district court must issue a final order before an appellate court has jurisdiction to entertain an appeal." Abelesz v. Erste Group Bank AG, 695 F.3d 655, 658 (7th Cir. 2012). See also 28 U.S.C. §1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States . . . .") (emphasis added). "A party generally may not take an appeal under § 1291 until there has been a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Van Cauwenberghe v. Baird, 486 U.S. 517, 521 (1988). Generally speaking, "[a] district court's denial of a motion to dismiss is not a final decision." Cherry v. University of Wisconsin System Bd. Of Regents, 265 F.3d 541, 546 (7th Cir. 2001). This is because when the district court denies the motion to dismiss, the disputed issues remain pending before the court, see United States v. Kashamu, 656 F.3d 679, 681 (7th Cir. 2011), cert. den., Kashamu v. United States, 132 S. Ct. 1046 (2012), and thus the order of denial does not "end the litigation on its merits, Van Cauwenberghe, 486 U.S. at 522. "So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

There is a mechanism, however, which allows a party to seek review of a non-final order. Section 1292 of Title 28 allows a district court, under certain circumstances, to certify an order for appeal even though it is not final. Section 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of

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> the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of such order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(Emphasis in the original.)

> When deciding a motion for certification, the district court must consider the following factors: (1) whether the motion to be appealed involves a controlling question of law; (2) whether an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) whether there is a substantial ground for difference of opinion on that question of law. Another consideration is whether certification would only prolong the life of the litigation at all the parties' expense. Each element of the section 1292(b) test must be met before certification may be granted.
>
> The party seeking interlocutory review has the burden of persuading the court that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Courts generally disfavor piecemeal appeals in favor of a single appeal.

Boese v. Paramount Pictures Corp., 952 F. Supp. 550, 560 (N.D. Ill. 1996) (internal citations omitted). "[Section 1292] is to be invoked only in exceptional cases where a decision on appeal may obviate the need for protracted and expensive litigation . . . ." Fed. Deposit Ins. Corp. v. First Nat. Bank of Waukesha, Wis., 604 F. Supp. 616, 620 (E.D. Wis. 1985).

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It is clear, under this standard, that this court erred in including the interlocutory certification language in the order denying the motion to dismiss. The defendants did not make a formal motion for certification. At a stretch, one could argue that defense counsel's statement to the court that he was going to submit an order containing the language constituted a motion, and that the court's response—"Okay"—constituted a grant of that motion. Given the requirement, however, that the moving party prove every §1292 element, and that the moving party carry the burden of persuasion as to each of those elements, this court's cursory "granting" of such a cursory "motion" is insupportable.

This conclusion is supported by a review of the §1292 factors. The denial of the motion to dismiss, as discussed above, does constitute "an order not otherwise appealable" under §1291. But as the plaintiffs argue in the current motion, because the court based its denial of dismissal on several grounds, the order is not solely based on resolution of "a controlling question of law as to which there is substantial ground for difference of opinion." "It is generally held that a question of law is not 'controlling' merely because it is determinative of [sic] case at hand; rather, a question is controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." Fed. Deposit Ins. Corp., 604 F. Supp. at 620 (quoting Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 525 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974)). "Moreover, § 1292(b) was not intended merely to provide an avenue for review of difficult rulings in hard case, and the mere fact that there is a lack of

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authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute." Id. (citing United States ex rel. Hollander v. Clay, 420 F. Supp. 853, 859 (D.D.C. 1976).

In this case, the court denied the defendants' motion to appeal on several grounds. First, the court found that neither Title IX nor the regulations promulgated under Title IX nor the case law defined the word "sex" as used in the statute, and that the case law considering that word in the context of transgender students was contradictory. Dkt. No. 28 at 5. The court concluded, therefore, that because there was no controlling law on the issue in the Seventh Circuit, and because there were factual and legal disputes between the parties on the question, dismissal was not appropriate. Id. As to this issue, the court acknowledges that final decision on the merits regarding whether discrimination based on transgender status constitutes discrimination based on sex as defined by Title IX might contribute to the early determination of an issue in a wide spectrum of cases.

But the court also found that, regardless of the answer to the question of whether discrimination against transgender students constituted discrimination based on sex under Title IX, the plaintiff had pleaded sufficient facts to survive a motion to dismiss on a claim of gender stereotyping. Other courts, including one in this district, have refused to grant Rule 12(b)(6) motions to dismiss Title IX gender stereotyping claims. See, e.g., N.K. v. St. Mary's Springs Academy of Fond Du Lac, Wisconsin, Inc., 965 F. Supp. 2d 1025, 2034 (E.D. Wis. 2013) (citing Hamm v. Weyauwega Milk Products, Inc.,

332 F.3d 1058, 1064 (7th Cir. 2003); Doe v. Brimfield Grade School, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); Howell v. North Central College, 320 F. Supp. 2d 717, 720 (N.D. Ill. 2004); Theno v. Tonganoxie Unified School Dist., 377 F. Supp. 2d 952, 964 (D. Kansas 2005)). Even if, therefore, this court (or the Seventh Circuit) ultimately were to find against the plaintiffs on the question of whether transgender discrimination constituted discrimination based on sex under Title IX, the plaintiffs still could prevail on a claim that the defendants' treatment of Ash Whitaker constituted prohibited sex stereotyping under Title IX.

The court also denied the motion to dismiss Count Two, the plaintiffs' equal protection claim. Dkt. No. 28 at 8-9. The court found that the plaintiffs had alleged sufficient facts to survive a motion to dismiss the claim that the defendants had violated his equal protection rights. The court articulated several ways in which the plaintiff could succeed on an equal protection claim: by proving that, as a male, he'd been treated differently from other males with no justification; by proving that, as a transgender person, he was a member of a suspect class, and had been discriminated against with no justification; and by proving that he'd been discriminated against without a rational basis. Id. at 9. See also Decision and Order Granting in Part Motion for Preliminary Injunction, Dkt. No. 33 at 9.

Only one of the above bases for the court's decision to deny the motion to dismiss arguably falls into the "controlling question of law as to which there is substantial ground for difference of opinion"—the question of whether

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transgender discrimination constitutes discrimination on the basis of "sex" as used in Title IX. The other bases do not.

That conclusion dictates the conclusion as to the second element of the interlocutory injunction test—whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." This prong of the interlocutory appeal test "properly turns on pragmatic considerations." Federal Deposit Ins. Corp., 604 F. Supp. at 620. In a situation like this one, where the appellate court's resolution of the one arguably controlling question of law would not end the litigation as to the other grounds, the appellate court's decision would not materially advance the ultimate termination of the litigation. The court emphasized several times in its oral ruling on the motion to dismiss that the plaintiffs had, at this early stage in the litigation, alleged sufficient facts and law to proceed. The court acknowledged that there were many factual issues yet to be fleshed out by both parties, and legal issues to be expanded upon. The defendants' stated intention to seek interlocutory appeal as to the merits of the entire case only two months after the complaint was filed is an attempt to side-step that litigation.

Certainly there are cases in which an interlocutory appeal is an appropriate way to avoid drawn-out and costly litigation. But if that were the only basis for granting a motion for an interlocutory appeal—avoiding drawn-out and costly litigation—federal district courts would grant such motions daily. The fact, standing alone, that further district court litigation will take time, and will impose costs on both sides, is not the "exceptional case" for

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granting an interlocutory appeal and incurring the "piecemeal" appellate process disfavored by the Seventh Circuit and other courts.

To sum up: The defendants did not properly move for certification under §1292(b). The court erred in failing to solicit argument justifying certification under §1292(b). The court's review of the §1292(b) standard leads the court to conclude that there is no basis for certification under §1292(b).

Accordingly, the court **GRANTS** the plaintiff's Civil Rule 7(h) Expedited Non-Dispositive Motion to Reconsider Certification of Interlocutory Appeal of Order Denying Motion to Dismiss. Dkt. No. 30. The court **VACATES** the following language in the order denying the motion to dismiss (Dkt. No. 29): "The court concludes that the reasoning supporting this decision, and the decision itself, involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Dkt. No. 29 at 2. The court will issue an amended order of dismissal.

Dated in Milwaukee, Wisconsin this 24th day of September, 2016.

BY THE COURT:

HON. PAMELA PEPPER
United States District Judge

Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

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-00943-pp

****AMENDED** ORDER DENYING DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS THE AMENDED COMPLAINT (DKT. NO. 14)**

On September 6, 2016, the court heard argument on the defendants' Rule 12(b)(6) motion to dismiss the amended complaint (Dkt. No. 14). See Dkt. No. 26 (court minutes from oral argument). On September 19, 2016, after having reviewed the pleadings and attachments and considered the parties' oral arguments, the court delivered its oral ruling, denying the defendants' motion to dismiss the amended complaint. Dkt. No. 28 (court minutes memorializing oral ruling).

For the reasons stated on the record during that oral ruling, the court

Exhibit B

ORDERS that the defendants' Rule 12(b)(6) motion to dismiss the amended complaint is **DENIED**. Dkt. No. 14.

Dated in Milwaukee, Wisconsin this 24th day of September, 2016.

BY THE COURT:

HON. PAMELA PEPPER
United States District Judge