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

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

Plaintiff-Respondent,

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

Defendants-Appellants.

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

District Court Case
No. 16-CV-943

The Honorable Pamela Pepper

DEFENDANTS-APPELLANTS' MOTION FOR THE EXERCISE OF PENDENT JURISDICTION

INTRODUCTION

Defendants-Appellants, Kenosha Unified School District No. 1 Board of Education and Dr. Sue Savaglio-Jarvis, in her official capacity as Superintendent of the Kenosha Unified School District No. 1 ("KUSD"), hereby move this Court to exercise pendent jurisdiction over the appeal of the District Court's Amended Order Denying Defendants' Rule 12(b)(6) Motion to Dismiss the Amended Complaint (Dkt. No. 14), issued on September 25, 2016 (Dkt. No. 35), and consolidate the appeal with the current appeal of from the District Court's Order granting Plaintiff, Plaintiff-Respondent, Ashton Whitaker, a minor, by his Mother and next friend, Melissa Whitaker ("Plaintiff"), a preliminary injunction (Dkt. No. 33).

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

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 15, 2016, Plaintiff also filed a Motion for Preliminary Injunction with supporting memorandum and exhibits. *See* Pltf.'s Motion for Preliminary Injunction (Dkt. No. 10); Pltf.'s Memo. of Law (Dkt. No. 11). On August 16, 2016, KUSD filed a motion to dismiss plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 14). 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).

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

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). 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 the District Court granted Plaintiff's motion for temporary injunction. *See Ashton Whitaker, et al. v. Kenosha Unified School District No. 1 Board of Education, et al.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016)[2]. 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). (Case No. 16-8019, App. Dkt. No. 1).

On September 23, 2016, KUSD filed a notice of appeal as of right as to the motion for temporary injunction pursuant to Fed. R. App. P. 3 and 28 U.S.C. § 1292(a)(1). (Case No. 16-3522 App. Dkt. No. 1); (Dkt. No. 34).

On Saturday, September 24, 2016, the District Court granted Plaintiff's expedited motion for reconsideration and on Sunday, September 25, 2016 issued an

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

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).

On November 14, 2016, this Court denied KUSD's petition for permission to appeal due to lack of jurisdiction. (Case No. 16-8019, App. Dkt. No. 16). This Court stated that "this petition is not properly taken from an appealable order, so there is no proper jurisdictional basis from which we may extend pendent jurisdiction. The appropriate place for the defendants to request pendent appellate jurisdiction is in the appeal form the preliminary injunction order." *Id.*

In line with this Court order, KUSD now moves this Court to exercise pendent jurisdiction over the denial of the motion to dismiss as set forth in its petition for permission to appeal, and consolidate this appeal with the current appeal of the preliminary injunction order.

ARGUMENT

I. THIS COURT SHOULD EXERCISE PENDENT JURISDICTION OF THE APPEAL OF THE DENIAL OF KUSD'S MOTION TO DISMISS BECAUSE THIS ORDER IS INEXTRICABLY INTERTWINED WIT THE ORDER GRANTING PLAINTIFF A PRELIMINARY INJUNCTION.

This Court has the discretion to exercise pendent jurisdiction of the appeal of the order denying KUSD's Motion to Dismiss in conjunction with KUSD's current

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 first 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.* When two rulings, as is evident here, concern the "same single issue", the exercise of pendent appellate jurisdiction is proper. *See Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010).

Moreover, pendent jurisdiction is especially warranted where a preliminary injunction order relied upon the same facts and reasoning as a dispositive motion. For example, in *Jones v. InfoCure Corp.*, 310 F.3d 529, 536 (7th Cir. 2002), this Court cited the Federal Circuit case, *Helifix Ltd. v. Blok–Lok, Ltd.*, 208 F.3d 1339, 1345 (Fed. Cir. 2000), in which that court exercised "discretion to invoke pendent appellate jurisdiction over the interlocutory grant of summary judgment because it is closely interrelated factually to the preliminary injunction." The Court of Appeals chose to exercise pendent jurisdiction because "the district court based its denial of the preliminary injunction request on its summary judgment ruling." *Id.*; *see also Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50, 115 S. Ct. 1203, 1212, 131 L. Ed. 2d 60 (1995) (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287, 61 S.Ct. 229, 232–233, 85 L.Ed. 189 (1940)) (stating that the court of appeals reviewing an order

granting a preliminary injunction also had jurisdiction to review an order denying motions to dismiss). As stated above, the District Court expressly acknowledged that it based its finding of a likelihood of success on the merits on its denial of the motion to dismiss. *See Whitaker*, 2016 WL 5239829, at *3.

The review of the success on the merits portion 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.

Finally, 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. *See* Exhibit A. 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 exercise of pendent jurisdiction represents an opportunity for this Court to address and resolve unsettled questions of law in this circuit which are a matter of national importance.

CONCLUSION

Therefore, KUSD respectfully requests that this Court exercise pendent jurisdiction of the District Court's order denying KUSD's motion to dismiss and consolidate this appeal with the appeal of the order granting Plaintiff's preliminary injunction. The motion to dismiss and the motion for preliminary injunction are inextricably bound and this Court should exercise jurisdiction in order to conduct a meaningful review of the order granting the injunction.

Dated this 1st day of December, 2016.

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER,	)	
Plaintiff,	)	Case No. CV 16-943
vs.	)	Milwaukee, Wisconsin
	)	September 6, 2016
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,	)	3:33 p.m.
Defendants.	)	

TRANSCRIPT OF ORAL ARGUMENT ON MOTION TO DISMISS AND MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE PAMELA PEPPER
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic recording,
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Exhibit A

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TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

* * *

THE COURT: Have a seat, everyone.

THE CLERK: Court calls Case No. 16-CV-943, Ashton Whitaker vs. Kenosha Unified School District No. 1 Board of Education, et al., for oral argument on plaintiff's motion for preliminary injunction and defendant's motion to dismiss.

May I have the appearances, please, starting with the plaintiff?

MR. WARDENSKI: Joseph Wardenski for plaintiff, Ashton Whitaker.

MS. TURNER: Ilona Turner for the plaintiff, Your Honor.

MR. PLEDL: Also for the plaintiffs, Robert Theine Pledl.

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

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

THE COURT: And do we have anyone on the phone? Nope. Okay. Just checking.

Good afternoon to everyone.

I should note, as we all discussed I think at our phone conference over the last go-around, that as you all are

aware I was out of the office for a number of days between the time that the case was filed and today. I had received all of your pleadings. I've tried to the extent that I possibly can to go through all of them. You are all very thorough. So I can't guarantee that I'll be able to give you a decision right away today because obviously I'm interested in hearing what all of you have to say and I may have some questions as well. But I appreciate all the efforts that you all put in to get things in front of me by today.

So what I would propose, unless anybody has strong objections, is that we first take up the motion to dismiss. Obviously I think there's no point in moving on to the preliminary injunction motion unless we handle the motion to dismiss first and then depending on how things go with the motion to dismiss transition to the motion for a preliminary injunction.

Mr. Stadler, it's your motion to dismiss so I think probably it makes sense to start with you and Mr. Sacks in terms of your arguments.

MR. STADLER: Thank you, Judge. And because we're using the microphones I'll say seated.

THE COURT: You can stay seated anyway. This time of day, Tuesday after a holiday, just relax.

MR. STADLER: Thank you very much. And I appreciate that the Court has told us that we're thorough, that means we

wrote a lot. And I think we have. And I think it's usually a good thing when the parties come in on a motion hearing when things have been thoroughly briefed.

You know, the Court has seen a motion to dismiss brief and response and reply, the injunction response and reply. I think oftentimes, even for counsel when we get done doing all of that, we sometimes step back and take a look at the case and it's a little more clear for us in terms of, ah, that's the issue that we're chasing after and this is what their position is and this is what our position is. And I think things do tend to crystallize when we do that.

And here when the case was filed I really thought that the plaintiff's position was that being a transgender person entitles one to protection under Title IX because the term "sex" under Title IX includes transgender.

And then as I read through the plaintiff's brief it looks more to me like they're phrasing the issue in terms of I have a right to declare my own gender and to then be entitled to protection under Title IX under "sex" because I have declared my sex under Title IX, I am male or I am female and, therefore, I'm entitled to that protection.

Those are two very distinct things and I still am not clear as to which line the plaintiff walks on those as to whether "sex" means gender or I've got this inherent right to declare my own gender.

If we're talking about the question of is there legal support for the proposition that a person can unilaterally declare their gender and then require a school district to honor that, I submit to the Court that there's just simply no precedent for that theory and it really hasn't been fully developed at all because the plaintiff has kind of blended these two concepts together. But there is no such right for a person to unilaterally declare their gender and force others then to recognize that as their gender.

If we're talking about the question is transgender protected under Title IX, I would submit to the Court that the weight of the law, especially in the Seventh Circuit, is no, it is not entitled to that kind of protection.

When we talk about Title IX we have a statute that says that you can't discriminate against someone because of sex. And when we talk about "because of sex," we don't have a lot of caselaw under Title IX itself that has dealt with that phrase and has applied that to anything.

But the one thing I want to do is to dispel the myth that plaintiffs put out there that federal courts have adopted the concept that sex equals transgender status. And they try to feed that to the Court with citations to three different cases. They cite to the *G.G.* case from the Fourth Circuit. They cite to a district court case *McCrory*. And then they cite to another case, *Schroer*, which is S-C-H-R-O-E-R, *vs. Billington*.

G.G. is not a case that stands for the proposition that a court has determined that transgender is a status that is protected under Title IX. What happened in *G.G.* is that the court deferred to the Department of Education. The court didn't come up with that on its own, it simply deferred.

And I think we have pointed out to the Court in our briefs the Texas Northern District decision has really cast doubt in regard to whether *G.G.* will ever be able to stand. It's a very thorough, very well-analyzed decision that says, you know what, the Department of Education didn't follow the Administrative Procedures Act, it's not entitled to *Chevron* deference because it's not an administrative rule and it's not entitled to *Auer* deference. And we've made those same arguments and I'll get into those in a little bit.

The other significant part that I think we have to look at in regard to *G.G.* is what the United States Supreme Court did with it. And plaintiff's explanation of that is a little bit misleading because they say that all the Supreme Court did was to delay the injunction issued by the Fourth Circuit in *G.G.* That's not necessarily accurate. What the Supreme Court did was to stay the mandate from the Fourth Circuit.

And if you go back and you read and you see what the court's mandate was, the court's mandate was when the district court found that transgender was not protected within Title IX,

it was wrong and it was wrong in granting that motion to dismiss. So the court said, district court, take this back and look at it because when we give deference to the Department of Education transgender is protected under Title IX. The Fourth Circuit didn't issue an injunction. The Fourth Circuit said, district court, you looked at the injunction under an incorrect legal standard, go back and reconsider that. And so the case went back to the district court.

The district court, then constrained by the court of appeals decision, said, okay, Title IX is there and it issued an injunction. That's the injunction that was stayed by the United States Supreme Court, that injunction and the mandate from the Fourth Circuit.

So I think it is significant that we have a United States Supreme Court on summer recess that takes the time to pull up a case and say we're going to stay that court's mandate and we're going to block the district court's injunction on this issue. The United States Supreme Court doesn't do that lightly and I think that casts serious doubt on the holding from *G.G.*

Plaintiff cites to *McCrory*. That case also sits within the Fourth Circuit. And all the district court said in that case is the Fourth Circuit has issued a decision, we're bound by that decision, we can't do anything different. Not much persuasive authority there.

The other case, the *Schroer* case, is a Title VII case

not a Title IX case, and it says Title VII encompasses transgender status. And that may be the holding in the Fourth Circuit, but we know that that's contrary to what the Seventh Circuit believes.

And in the Seventh Circuit, going all the way back to *Ulane* from 1984, the Seventh Circuit has said transgender status is not protected under Title VII. And just recently, in 2016, in *Hively*, the Court has reaffirmed that *Ulane* is good law. So we know that continues to be good law in the Seventh Circuit.

What we do know is Title VII, which reads exactly like Title IX, both state that you cannot discriminate against an individual on the basis of sex. And so the question becomes under Title IX, is transgender within the meaning of the word "sex."

We know under Title VII that our cases and our courts have said that what that means under Title VII is you can't treat men differently than women because sex equals gender. You can't treat women differently from men again because sex equals gender.

And so if we buy into this concept that transgender is encompassed within the meaning of the word "sex" and has protection under the statute, it leaves us with an awkward situation. Because if we read sex to mean male gender and we read sex to mean female gender and we read sex to mean transgender, then what do we do about the statutory and the

regulatory language that says it's entirely permissible to segregate bathrooms, locker rooms and living facilities on the basis of sex.

If we can segregate those because of someone being a male because sex means male, or because someone is female and sex means female, and then we include transgender to also be within that word "sex," it means we can segregate on the basis of male, on the basis of female, or on the basis of transgender. The statute specifically allows us to do that.

And I think when you look all the way back to the creation of the statute, it's kind of that social mores of the reasonable expectation that colleges and universities and high schools would be able to segregate locker rooms, bathrooms and living facilities based upon the different genders. And that, if you want to include transgender as falling within sex, would include that basis as well.

So to that extent I think to the extent that plaintiffs are able to even convince a court that sex equals transgender, it becomes circular and takes them right back around to losing, because even if it's within the statute we come right back to the statutory and regulatory language that says we can segregate on that basis.

We know that under Title VII the Seventh Circuit has not equated sex with encompassing transgender. *Ulane* was very clear on that. It says when we talk about "because of sex" it's

men because they're men or women because they're women. And it specifically found that it didn't encompass transgender in that case.

Hively again was not a transgender case, it was a sexual orientation case, but it was the same kind of rationale in that the plaintiff was coming in and saying I'm entitled to protection under Title VII because the term -- because "sex" includes sexual orientation.

And I think the Seventh Circuit's analysis in *Hively* was really interesting and right on point and you could pull out the word "sexual orientation" and put in "transgender" and you come to the same result.

Basically what the court said is, look, the statute is clear and unambiguous, it says "because of sex." Because of sex has never been found to be sexual orientation.

Social theory, feelings in society today may be different than they were in 1972, when Title IX was created or 1964 when Title VII came into effect, but if there is going to be a change and we are going to broaden an unambiguous statute to encompass something that isn't there, that's a change that has to come from Congress.

And they pointed that out in regard to the long line of cases that have refused to recognize sexual orientation under Title VII and have said Congress has had the opportunity to correct this and it has not.

And I would point the Court to the same argument in regard to the transgender, and again under Title VII not Title IX, because we just haven't had the issue under Title IX before.

But even going back to 1984, when we talk about the *Ulane* decision, I mean that's a case where Congress was clearly advised here is a court that has concluded that transgender is not included within Title VII, and yet in the last 32 years Congress has done nothing to alter that.

Interestingly, when the *Ulane* decision is cited in most of the briefs, it's not cited with the added citation that certiorari was denied by the U.S. Supreme Court in that case in 1985. So it's a case that was taken up further and there was an invitation to the Supreme Court to review that case and the Supreme Court refused to do that. The Supreme Court has not taken up the issue and added the status of being transgender within Title VII, Congress hasn't done it, and so far nobody has done that in regard to Title IX as well.

We do come fast-forward to 2016, and we find somebody that is trying to do that, primarily the Department of Education with its "Dear Colleague" letter, and that "Dear Colleague" letter came out in May and essentially had said that the term "because of sex" within Title IX encompasses transgender.

The "Dear Colleague" letter is not a regulation. It's absolutely clear that no process, no parcel of the

Administrative Procedures Act was ever followed, no rule was ever created.

In the plaintiff's brief they talk a lot about our -- or, I'm sorry, *Chevron* deference and the fact that it should be granted *Chevron* deference. *Chevron* deference applies to a regulation. There's no regulation here. So we're really talking about *Auer* deference. And that's how we would have to look at the "Dear Colleague" letter.

And the "Dear Colleague" letter, as the Court knows, was looked at by the Northern District of Texas and the Northern District of Texas clearly articulated reasons as to why *Auer* deference wouldn't be appropriate.

The Seventh Circuit is no fan of *Auer* deference. Certainly it's bound by Supreme Court opinion to follow *Auer*, but it has indicated that it finds it to be a flawed system. The Supreme Court itself has found *Auer* to not be very workable and has let agencies in effect run amuck. And I would venture to say that *G.G.* is probably going to be more of an *Auer* case in the history books than a transgender case. It's going to be an issue where the court probably looks at whether *Auer* is any longer appropriate.

But *Auer* deference to an administrative agency is appropriate only if the language of the statute is ambiguous and that the opinion that it's come up with is not plainly erroneous or inconsistent.

And I would submit to the Court that the language of Title IX is absolutely clear, it's not ambiguous. It says "because of sex" and "sex" means gender, gender being do you have a birth certificate that says that you are a male, or do you have a birth certificate that says that you are a female.

I don't think *Auer* deference is going to be appropriate in this case. You go all the way back to 1972. And this was pointed out in the dissent in the *Johnston* case which I thought was a very thorough and -- I'm sorry, not the dissent, the opinion in the *Johnston* case -- very thorough analysis of Title IX, its history, what it was intended to do. And it said you look at any of the dictionaries and you look at anything from 1972, and when Congress passed Title IX in 1972, "gender" and "sex" were male or female. That's what we're left with. We have an unambiguous statute.

And if we do get past that and get to the is the Department of Education's interpretation plainly erroneous or inconsistent with the regulations, I would take the Court right back to what I started with and that is the statutory and regulatory authority that allows schools and universities to segregate bathrooms, locker rooms and living facilities on the basis of sex.

And the "Dear Colleague" letter again is this twisted logic of we think Title IX protects somebody who is transgender because sex within Title IX encompasses transgender. But then

if we have the statutory authority to segregate, then how can we say and, therefore, because you have protection under Title IX, you can't segregate. It's logically inconsistent.

If there's protection as falling within sex and the statute allows us to segregate because of sex, then it allows us to segregate because somebody is male, somebody is female, or somebody is transgender, it does not matter which one. Again, it's circular and it doesn't follow through and I think it makes the Department of Education's "Dear Colleague" letter quite inconsistent with the regulations and plainly erroneous.

The last issue I'll move on to is sex stereotyping. And sex stereotyping is an avenue that plaintiff brings up because it is an avenue where to some extent individuals who identify as transgender have had some success in the courts in saying I fall within Title VII because you are sex stereotyping me because I don't conform to your gender identities.

It's very interesting that plaintiffs cite to the *Kastl vs. Maricopa County* case, and they cite that for the Court at 2004 Westlaw 2008954. It's a district court opinion from 2004, in which the district court denied a motion to dismiss filed by the university in regard to a female faculty member who was suing under Title VII and Title IX and was pursuing those claims.

The interesting part in that case was when we deal with opinions from motions to dismiss you really need to read

them and delve into them, because on a motion to dismiss the Court is constrained, has to accept the facts in the pleadings as true. With all of that said and done, the *Kastl* case ended up, the district court denied the motion to dismiss and said plaintiff might state a claim for relief under Title VII or Title IX.

Fast-forward. The district court ends up dismissing that case on summary judgment and it gets appealed to the Ninth Circuit. And the Ninth Circuit says that the college satisfied its burden of production under the second stage of the analysis set forward in *McDonnell Douglas*, it proffered evidence that it banned Kastl from using the women's restroom for safety reasons. And it found that she did not carry her Title VII claim, because there was a rational reason for having separation of men and women's rooms based upon gender.

Interestingly, the Ninth Circuit also said Kastl's Title IX and equal protection claims fail with her Title VII claim. Went right down the same road. And I've got a copy for the Court if you'd like.

(Brief pause.)

MR. STADLER: When we talk about sex stereotyping, though, look at the cases that are out there and look at the cases that have been successful in terms of being able to show a sex stereotyping. You can go all the way back to *Waterhouse* where it was recognized by the Supreme Court, you know, when

you're telling somebody you don't behave like a woman, you don't wear enough jewelry, you are too aggressive and you seem too male, those are sex stereotypes. They are where you are treating a person based upon a perception of how they should be versus what they are.

This case isn't about sex stereotypes. This case is about the plaintiff's demand to be able to use the restroom, to use living facilities like hotels based upon a unilateral declaration of gender. It's not about the school district ever coming forward and saying to Ash Whitaker you're too male or you're too female or you should do more of this or we think you should do this as a boy or you should do that as a girl. We don't have those stereotype behaviors here.

What we have here is a pure and simple conclusion of whether transgender is encompassed within Title IX, and nothing within the pleadings takes us down that path of sex stereotypes. It's just not there. It's a cause of action, it's a cause of action that could perhaps get past a motion to dismiss, but then the facts that would prove that kind of a claim simply aren't there and can't proceed.

When we look at the equal protection claim, the equal protection claim itself, plaintiff attempts to evoke heightened scrutiny and talks about again gender. But we're really not talking about a gender claim here, we're talking about something different. We're talking about transgender status. And when we

look at that, Supreme Court has never recognized transgender as being subject to a heightened review. There's no strict scrutiny involved.

The Seventh Circuit has never said that transgender is entitled to a heightened scrutiny and that we move on to strict scrutiny. The Supreme Court has cautioned all courts and said do not create additional protective classifications where we haven't created them.

We would submit to this court that it's not this court's role to make a determination that someone who is transgender is entitled to a heightened scrutiny. The basis that this court's decision has to be made upon is whether there is any rational basis to carry out the policy of saying that some people can use the men's room and some people can't and it's based upon a person's biological gender, the gender that appears on their birth certificate.

The standard, long established under the Supreme Court precedent, starting way back with *McGowan vs. State of Maryland* which was from 1961, and we see it cited every now and then, *Bowen vs. Gillard*. We see a bunch of other cases. They all come to the same conclusion. When we're talking about equal protection and we're talking about a rational basis standard, if there are any state of facts that reasonably may be conceived of to justify it, the policy can stand.

There are a host of reasons why we segregate

bathrooms, locker rooms and living facilities to males and females. And those are safety reasons, privacy reasons.

The court went on and on in *Johnston* and outlined a number of different reasons as to why such policies exist and why society demands them. I believe that under any analysis of a rational reason concept in terms of segregating bathrooms, locker rooms and living facilities on the basis of gender, that a court must find that that is a rational reason. Again it's not whether the Court could come up with different reasons, it's not whether you disagree with the reasons, it's simply whether there is a rational reason that could be conceived of.

I won't drone on further, Judge. I think that the issues have been thoroughly briefed. I wanted to make these additional points. But I think that as a matter of law this case is one which must be dismissed. I think it will probably go down to the Seventh Circuit and maybe there'll be a race to have it joined with *G.G.* at the Supreme Court.

But under Title IX, the clear meaning of the statute "because of sex" does not include someone self-identifying as being transgender. Same for the equal protection claim. There is no heightened scrutiny. There is a rational reason why we segregate on the basis of male versus female, and for those reasons we would ask the Court to dismiss the cause of action.

Thank you.

THE COURT: Thank you, Mr. Stadler. I'll probably

come back with questions, but let me hear from the plaintiffs next. So, Mr. Wardenski, Ms. Turner?

MR. WARDENSKI: Good afternoon, Your Honor.

I'd like to respond to Mr. Stadler's substantive arguments, but first I want to spend a few minutes just telling you about Ash and who he is and why he brought this lawsuit.

Ash Whitaker is a boy. He turned 17 two weeks ago. Thursday was the first day of school for his senior year at Tremper High School. Today is his third day of school.

This fall Ash was planning to try out for the male lead in the school play. He will also be applying for college. He's near the top of his class and wants to go to UW Madison to study biomedical engineering. He's taking mostly AP and honors classes. He plays the violin in the school's honors orchestra, and he will play on the boys' tennis team at school this coming spring.

In short, Ash is your typical overachieving high school student and, like his classmates who are in that same boat, he's ready for a busy, hopefully fun and inevitably stressful senior year.

Ash is also transgender. When Ash was born he was assumed to be a girl and he was raised as a girl until middle school when he realized that he is, in fact, a boy. Ash's gender identity is male. His deeply-rooted knowledge of his own gender conflicts with the sex designation that he was assigned

at birth.

Over the last three years Ash has undergone a gender transition to conform who he is and knows himself to be, a boy, with how he is known to the world. As a critical first step in that transition, Ash has undertaken a social transition. He began in eighth and ninth grade to tell his family and close friends that he's transgender and that he's a boy.

He adopted a new name, a traditionally male name, Ashton. He goes by "Ash" for short. He has asked others to refer to him using that name and by male pronouns. He wears traditionally boys' clothes. He has a short haircut. When others look at him they see a boy.

Over the last couple of years Ash has been under the care of his pediatrician, other medical providers and psychologists who agree that he is a transgender boy who should be treated as such in all aspects of his life.

This summer he began the next step in his gender transition taking hormone treatment, in his case testosterone, to further his gender transition. Over the coming weeks and months he expects to start growing facial hair, for his voice to deepen, for his body to appear more and more male than it already does.

And Ash uses boys' and men's restrooms everywhere in his life, including at school, but for the fact that the Kenosha Unified School District has said you can't use these boys'

restrooms, we don't think you're a real boy. The central question before this court is whether the school district can treat one boy differently from all other boys because he is also transgender, because his gender identity is male, even though his assigned sex at birth was female.

Despite the fact that Ash and his family know he's a boy, despite the fact that Ash lives as a boy in all aspects of his life, despite the medical consensus that transgender people like Ash must be treated in accordance with their gender identity to avoid serious medical and emotional harms from being forced to live as the gender with which they don't identify, and despite the fact that Ash's classmates know and treat him as a boy, the question is whether Kenosha Unified School District can ignore all of that and tell Ash, "no, you're not really a boy," and subject him to differential treatment at school because of it. Under federal law the answer is no.

Under Title IX "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 by a federal funding recipient." Kenosha, as a public school district, receives federal funds and is subject to Title IX's requirements. The prohibited treatment under Title IX is subjecting any person to separate or different rules of behavior, sanctions or treatment.

So I want to break this down. First the operative

phrase, "on the basis of sex." While Kenosha would have you limit that term to differential treatment between men and women, treating a man differently from women or a woman differently from men, the weight of the caselaw over the last 30 years calls for a much more broad application of Title IX's protections to include discrimination and differential treatment based on sex and gender-based characteristics.

In the 1989 decision in *Price Waterhouse vs. Hopkins*, the Supreme Court held that discrimination against a woman who was perceived to be too masculine for not conforming to gender stereotypes, for being gender nonconforming, was actionable under Title VII. So discrimination against a woman for being unlike other women was an actionable form of discrimination under Title VII.

In 1998, the Supreme Court followed with its decision in *Oncale v. Sundowner Offshore Services*, male-on-male, same-sex sexual harassment case. In that case a male employee on an offshore oil rig was subjected to pervasive sexual harassment by his male coworkers and Justice Scalia found that, in writing for a unanimous majority opinion in that case, that that too was actionable and cognizable under Title VII. And he wrote that while some courts had previously limited the reach of Title VII and analogous laws like Title IX to discrimination against a male because he's a male or a female because he's a female, citing different reasons including what Congress had in mind

when it passed Title VII or Title IX in those '60s and '70s, that Congressional intent must be disregarded in favor of the broad sweep of the statutory text to include all forms of sex and gender-based discrimination.

As Justice Scalia wrote for the majority in *Oncale*, "these statutes reached beyond the principal evil that Congress might have imagined to reasonably comparable evils."

And in line with *Price Waterhouse* and *Oncale*, many courts, including the Seventh Circuit, have recognized that discrimination based on gender broadly defined is cognizable under these sex discrimination statutes, including under Title IX. The Seventh Circuit has recognized that.

The Seventh Circuit recognized that in the *Hively* decision just a couple weeks ago when it held that although it was -- it felt constrained by its existing precedent on sexual orientation discrimination to find that sexual orientation claims are not covered by Title VII, that it reaffirmed the principle that nonconformity to gender norms, which was the phrase that Judge Rovner used in the decision, is indeed actionable under Title VII and she cited, you know, other cases that the Seventh Circuit has previously held to that effect.

What we're not asking for here is what Mr. Stadler has suggested, that transgender is somehow a third sex, something different than male or female. What we're asking is for Ash Whitaker, a boy, to be treated like all other boys and that the

district's treatment of him as different from other boys as somehow not a real boy is the sex discrimination at issue here because of his gender-related characteristics.

What has Kenosha done? They have denied him access to boys' restrooms at school. They have required that he alone use single-occupancy restrooms or girls' rooms, girls' restrooms at school, single-occupancy restrooms that only he among all 1700 students at Tremper High School has a key and must walk past countless other restrooms to get to, miss class time, use a key to go in, face scrutiny from classmates and teachers about why he's going out of his way to go to the bathroom, why he's missing so much class time, why he alone is using a key to enter the restroom. And so he hasn't done it. He doesn't want to subject himself to that stigma.

In addition, school administrators and some staff have refused to refer to Ash by the name that he goes by, "Ash." They still refer to him as "she" and "her" in front of him, in front of other students. Oftentimes substitute teachers have no information about him and the class roster has his birth name, which he is in the process of changing, and refer to him by that name which he hasn't gone by in years in front of other students in a way that calls out the fact that he's transgender, stigmatizes him for being different, subjects him to scrutiny and teasing, or just questions from other students in a way that is unwelcome and that he -- he alone has to deal with in the

school. And so he has taken it upon himself to go up to teachers and substitute teachers at the beginning of class to ask that they refer to him by the right name. He alone has the burden of asking substitute teachers whether they will respect his gender identity in class. And sometimes they comply and sometimes they don't. And he never knows -- he never knows what will happen.

The school has pulled him out of class repeatedly, as recently as this morning. The assistant principal at Tremper High School and his guidance counselor pulled him out of his third day of advanced placement calculus class to talk to him about his restroom usage.

The school district has also refused to accept his pediatrician's recommendation that Ash is a boy who suffers from gender dysphoria and that the appropriate treatment for that gender dysphoria is to use boys' restrooms.

And then on top of that Ash suffers from a condition called vasovagal syncope which is a fainting condition that causes fainting and dizziness, migraines, and that his doctor has recommended that he drink lots of water, six to seven glasses of water plus a bottle of Gatorade every day. And Ash, faced with this choice, this Hobson's choice of either using a single-occupancy restroom at the far end of the school that will subject him to unwanted stigma or not using any restroom at all because he won't use the girls' restrooms, isn't -- is trying

not to use the restroom at all. He's limiting his liquid intake. He's limiting his food intake. He has been experiencing, as a result, these very symptoms of this condition including fainting and dehydration and dizziness and migraines and other related medical conditions. Yet, despite his doctor's recommendation that letting him use the boys' restroom would fully address that concern, the district has still refused to make any -- to let him use the boys' restrooms or otherwise respect his gender identity during the school day.

In April the junior class prom advisor recommended Ash for the prom court for the junior prom; recommended that he be a candidate for prom king based upon his community service hours. And when the principal found out and saw the list, the principal told Ash's mom, who is a teacher at the school, that Ash can be on the prom court but only for prom queen.

A friend of Ash's started a petition online. 70 of his classmates rallied to his support in a sit-in at school in April, and only then did the district change its course.

But the message that they are sending to him time and time and time again is that you are not really a boy and you are somehow different and that we either need to require you to use girls' facilities or segregate you from all of your classmates because of this difference based on a gender-related characteristic. And that goes to the heart of sex discrimination and I want to tell you why.

Five circuit courts have held that transgender people are protected by the nation's sex discrimination laws including Title VII and Title IX. And these courts have gotten there in different ways, but they have all come down to the same premise that a transgender person who is discriminated against based on their gender identity, the fact that they are, quote-unquote, as transgender people, inherently gender-nonconforming people, that they don't conform to sex stereotypes, that as the Eleventh Circuit put it in *Glenn v. Brumby*, that the shear fact of the gender transition is itself the sex stereotyping that is at issue here, that these courts have all found that transgender plaintiffs in the employment context, in the prisoners' rights context, in the schools context and others, are indeed protected by these laws for the very reason that they are transgender; that their gender that they live, that they experience, that they know themselves to be does not match the gender that was assigned to them at birth by a doctor who took, you know, a 30-second look at the infant and decided this is your sex.

For most of us, 99 percent of the population, that cursory examination at birth, the sex that you're assigned at birth does match your gender identity and so it's not an issue. But for the small percentage of people like Ash who are transgender, who have a deeply felt sense of their gender that doctors, psychologists, international standards of care recognize as an immutable part of one's sex and one's gender,

they don't conform.

And so then the question then is how do you treat a transgender boy? Do you treat him like a boy or do you treat him like another? And Kenosha has chosen, incorrectly and in violation of the law, to treat him like another.

Notably, all of the decisions from the Fourth Circuit, the Eleventh Circuit, the Ninth Circuit, the Sixth Circuit, the First Circuit and countless district court cases around the country have all found that transgender people are protected in light of the doctrine articulated in *Price Waterhouse* and *Oncale*.

The district asks this court to dismiss this case in reliance on *Ulane vs. Eastern Airlines*, a 1984 case from the Seventh Circuit that was decided long before those two cases were issued by the Supreme Court, when, in fact, many other courts were also finding that transgender people weren't protected by Title VII and other sex discrimination laws.

The Seventh Circuit had a fundamental misunderstanding of what a transgender person is. In that case the judge writing the opinion referred to the plaintiff, a transgender woman, as a man who was putting on makeup, having surgery to alter parts of his body to make it appear more female.

That is at odds with the contemporary and widely accepted understanding of who transgender people are; that gender identity is a real thing; that there are appropriate

standards of care that are internationally recognized; that the Eastern District of Wisconsin has recognized as authoritative. And that make this something more than a fleeting capricious decision that, you know, I, Ash Whitaker, am a boy, but it's something that is actually true to his self; that it is his gender, it is his sex, and he's asking simply to be treated as a boy on that basis.

In recent years, in light of the weight of the caselaw in this direction, the federal government has begun to similarly interpret the sex discrimination laws that they enforce, including Title VII and Title IX, the Fair Housing Act, the Equal Credit Opportunities Act, Section 1557 of the Affordable Care Act and other statutes that prohibit sex discrimination, uniformly to include gender identity discrimination as a form of sex discrimination based on the premise that gender identity is a fundamental part of one's sex and that, therefore, discrimination based on one's gender identity because they are inherently gender nonconforming, because they are undergoing a gender transition, because they are transgender under any of those formulations, is inherently sex discrimination.

The district court in D.C. in the *Schroer* case that Mr. Stadler mentioned in 2008, it used an apt analogy which I've heard repeated many times and I think it makes a lot of sense, that the judge in that case, Judge Robertson, wrote:

There would be no question in a religious

discrimination case that if someone were discriminated against who were converting from Catholicism to Judaism that that would be a case of religious discrimination. So, too, here if the discrimination against a transgender person is based on the fact that they are, quote-unquote, changing their sex, that that too is a form of sex discrimination.

I think it's a bit of a simplistic argument in light of the fact that a transgender person like Ash is not changing his sex, he is conforming his outward identity to his internal sense of who he is. He is conforming his identity to his sex and how he presents himself to the world, not changing anything at all. He's always been a boy.

So the second question in the Title IX analysis is, has -- given the fact that the district has taken gender-related characteristics and traits into account, has that discrimination resulted in the denial of educational opportunities or has it subjected him to different sanctions or rules of behavior or treatment relative to the other boys? The answer again, yes.

He's been denied access to all shared restrooms. The option to use girls' restrooms is certainly no option at all. Other girls don't see him as a girl, they know him only as a boy. Some of his classmates might have known him in the past, but many of his classmates didn't. He is a boy to his fellow classmates. He faces the stigma of repeatedly being told by his school that you need to be treated differently than your

classmates, to the inconvenience of traveling five minutes or more away from class in order to use the single-occupancy restroom in the main office or one of the two other gender-neutral options at the far ends of the school that the district has offered to him and him alone to use.

That has called unwelcome attention both to his transgender status itself as well as scrutiny from his classmates, from school personnel and others about his gender identity, about where he is in his gender transition, about private medical information and why he alone has to use single-occupancy restrooms or stay alone on school trips.

In June, after the school year ended, he went on a several-day music orchestra camp at the University of Wisconsin's Oshkosh campus. On that campus students were all allowed to stay in suites with other students and the options were four individual bedrooms with a shared common room and individual restrooms, or two two-person bedrooms and a common room and an individual restroom. And in that case Ash asked to room with a friend of his who is a boy. The other boy knows him, is one of his best friends and would willingly have stayed with him, yet the school district said no, you either have to stay with girls -- again, he's not a girl -- and/or you have to stay alone. And so he spent the week in a suite by himself.

Students weren't allowed out at night in order to socialize, so all the socializing with each other was in their

own dorm rooms. And so he lost out on the social and educational opportunities and benefits of -- that every other student there enjoyed.

He's experienced medical harms including symptoms of the vasovagal syncope, stress-related migraines. His doctors have said that, consistent with the World Professional Association of Transgender Health's standards of care, that failure to respect his gender identity at school, including allowing him to use boys' restrooms, imposes extreme psychological and emotional harm on him which may be life-long.

For all of these reasons, when you look at the text of Title IX and it says has this student been treated differently on the basis of sex, and this is all about his sex, who is he and is it the school district's role to define for him what his sex is, and has he suffered educational consequences and other consequences as a result, the answer to both is yes. And so for purposes of surviving a motion to dismiss there are ample allegations in the complaint to survive that threshold.

Now, I want to take a moment to talk about the Seventh Circuit's *Hively* decision. *Hively* was a Title VII case brought by a lesbian against a college in Indiana. She alleged that Title VII covers sexual orientation discrimination in its own right. So she was treated differently because she's a lesbian.

Judge Rovner, although she spent a lot of time explaining why this rationale doesn't make much sense anymore,

felt constrained with regard to the sexual orientation question to abide by existing precedent. She cited *Ulane* admittedly for that purpose, but she also cited several much more recent cases issued by the Seventh Circuit on the question of sexual orientation alone that were issued after both *Price Waterhouse* and in some cases after *Oncale* as well.

This presents a different situation. First of all -- and the second factor that she weighed was that no other court of appeals in the country has yet recognized sexual orientation discrimination as a form of sex discrimination.

Here we're in a different situation. Here the Seventh Circuit has never revisited the question of whether gender identity discrimination or discrimination against a transgender person for being transgender or for undergoing a gender transition or for being gender nonconforming is actionable under any sex discrimination statute.

Every court to have discussed *Ulane*, including the five circuit courts to have gone the other way, have all addressed and discussed *Ulane* and described its reasoning, at least with respect to transgender people, as eviscerated by the principles articulated in *Price Waterhouse* and *Oncale*.

And you have five circuit court of appeals that have held that transgender people are protected by the nation's sex discrimination laws. That's an entirely different circumstance than what the Seventh Circuit was facing with regard to sexual

orientation claims.

Now, plaintiffs have filed an en banc petition in that case. Whether or not the Seventh Circuit was right or whether or not that decision stands with regard to the sexual orientation question, here all the school district has to rely on is a 32-year-old case about a transgender adult in which the court never used the word "transgender." They referred to her as transsexual, they referred to her as a man pretending to look like a woman or taking steps to look like a woman.

We're 35 years beyond that. There is the weight of scientific evidence and medical research and societal understanding that being transgender isn't merely a desire to be another sex, but is rather allowing a person to live consistently with the sex that they are, with which they identify. And that's a fundamental distinction. And that the appropriate standards of care in every case require that transgender people be allowed to live consistently with the sex that they identify with and that harm results when they're not.

The American Psychiatric Association just a couple years ago updated the Diagnostic Statistical Manual, the DSM-V, and in that case replaced the now outdated term "gender identity disorder" with "gender dysphoria." And part of the reason they did that was to recognize that being transgender is not in and of itself a disorder, but gender dysphoria, when there's a disconnect between the sex that one is living and the sex that

one identifies as, can result in a variety of conditions including in almost every case anxiety, depression, suicidal ideation. These are all things that Ash himself in this case has experienced. And that by allowing a transgender person, allowing Ash to life consistently with his sex in all aspects of his life is a fundamental part of the internationally accepted standards of care for how he should be treated.

The Seventh Circuit in a prisoner rights case that originated in this district, *Fields v. Smith* in 2011, held that denying a transgender inmate in a prison to appropriate care under the WPATH Standards of Care could itself amount to a deliberate indifference in the Eighth Amendment context. I think they actually used the word "torture" to describe withholding necessary medical treatment.

This is different in degree but not in kind, but here only Kenosha Unified School District is telling Ash that he needs to be treated differently during the day than how he is treated everywhere else in his life. And Title IX forecloses that.

I want to address the Equal Protection Clause claim and make a few points about that.

First, and before I get there, Mr. Stadler mentioned the *Gloucester* decision that has now been stayed pending a petition for writ of certiorari in [Indiscernible] Supreme Court.

THE COURT: I think the petition's actually been filed, but --

MR. WARDENSKI: Yeah. Petition was filed on August 29th. And that is when the school district represented that it would file that cert petition and several weeks in advance asked for the stay.

There was no reasoning by any justice for why they cast their vote, but -- except for Justice Breyer who in a concurrence wrote that he was casting a vote as a courtesy. He cited a death penalty case, *Medellin*. And as we pointed out in our brief, at least some scholars take this as a procedural -- view his vote as a procedural vote in order to preserve the right of death penalty capital defendants to preserve their right to petition for cert when there's not enough votes for a stay.

Whether or not he actually was motivated by that or something else we don't know and we can't know, but for the time being *Gloucester* is a good decision. It's not binding on this case, but its reasoning is certainly persuasive and it is in line with many other courts at the circuit level and district court level around the country that have held that trans people are protected by Title VII and Title IX.

The *Gloucester* case does not involve any equal protection claims. They were raised, but they have never been considered yet by even the lower court in that case. And so

whatever the outcome of that case is it will have no impact on Gavin Grimm, the plaintiff in that case, on his equal protection claims, or certainly any bearing on the equal protection claims in this case.

For all the reasons I've stated already, this case is about gender. It is -- the school district has drawn a gender-based classification. The policy they describe in their brief -- if it is, in fact, their policy -- would limit students' access to restrooms based on the sex designation on their infant birth certificate. That's a sex-based classification and it's entitled to heightened scrutiny.

The Eleventh Circuit in *Glenn v. Brumby*, which was brought on -- it was an employment case brought on equal protection grounds, applied heightened scrutiny to that plaintiff's case and -- as a form of gender-based discrimination, employment discrimination.

Under a heightened scrutiny, the district's rationale for its practices must be legitimate and, further, an important governmental interest. They have to show an exceedingly persuasive justification and speculative concerns are not enough.

Kenosha has not explained why treating a transgender student consistent with his gender identity affects any other student's privacy. In fact, until their briefs were filed this summer, they had never mentioned any privacy concerns to Ash or

his mom, to the media or to the public in justifying this policy. A post hoc response to litigation is simply not sufficient to survive the more demanding standard of review under heightened scrutiny.

Now, Kenosha mentions a concern about other students' privacy and certainly all students including Ash have a right to privacy. His right to privacy is being violated every time a school security guard or assistant principal monitors his restroom use, every time he's being called out of class to be scolded for using a boys' restroom. So his privacy matters too.

And the reality is millions of kids go to school in this country, in schools where transgender students are treated in accordance with their gender identity. They can use the correct restrooms. They are referred to by the names and pronouns that are consistent with their gender identity. They're allowed to use other facilities. Every school in California. Most of the large urban school districts in this country. School districts around the state of Wisconsin, as we've highlighted in our briefing, have all adopted reasonable policies to both protect transgender students' interests, but balance those interests against the rights of other students as well.

We are not quarreling with Kenosha's right, and it is, to segregate their restrooms. The question is not do they have to create a third restroom, it's whether Ash is entitled to use

the boys' restroom. Under that regime can he use the sex-segregated restroom that matches his gender identity, and the answer to that question must be yes. And nothing is stopping Kenosha from taking whatever reasonable steps it wants to promote the privacy interests of all students like other schools have around the country for many years.

Separately, we think that without regard to a gender-based classification Ash is entitled to heightened scrutiny for discrimination based on his transgender status alone. Other courts have begun to apply heightened scrutiny to claims by transgender people in the prison context and other contexts.

The Northern District of California issued a decision in *Norsworthy vs. Beard*, a prison case, and the Southern District of New York in the *Adkins* case. And these courts reasoned that transgender people are a discrete insular group; that they as a group are a small minority, they are politically powerless.

There's a long history of discrimination and violence against trans people. And it's not just a history, it's the reality, it's present. You can't go for a few weeks without reading another newspaper article about a trans person suffering from violence or being murdered for being transgender.

And finally, nothing about being transgender reflects on one's ability to contribute to society. These are all the

factors that courts consider in deciding whether or not to apply heightened scrutiny. And for the same reasons we think that it's appropriate to apply that standard of review here.

And I want to note that every other court to have considered the same speculative privacy concerns that Kenosha proffers here in its briefs has rejected that.

In the *Cruzan* case in the Eighth Circuit in 2002, it was an employment discrimination claim by a non-transgender woman alleging that her privacy interests were violated by a transgender female colleague's use of the shared women's staff restrooms. This was in a school district. And the Eighth Circuit found that the transgender woman's mere presence in the restroom did not violate that other woman's privacy interests or really anyone else's.

The EEOC in it's *Lusardi* decision, an administrative decision issued by the EEOC last year, also found that others' concerns or fears or biases about sharing restrooms with transgender people don't trump those transgender individuals' rights to live consistently with their gender identity including using the bathrooms.

And in *Carcaño* just, you know, a week or two ago Judge Schroeder in North Carolina took on the privacy concern head-on and said it may actually have the result of creating privacy concerns in the other direction; that these are -- the transgender students and employees in that case have used

restrooms consistent with their gender identity for a long time. There have never been any issues. There's no -- certainly nothing that was suggested by the state. But that if they were required to use -- if there were transgender men/women's restrooms that you would have women who are looking at men in the restroom and wondering why they're there. Well, that can create as much cause for concern and confusion and invasion of privacy as a transgender person simply using the restroom that they identify with and which is appropriate for them.

So even if -- for those reasons heightened scrutiny should apply and Kenosha has failed in any way to show an exceedingly persuasive justification for its policy.

But even under the more permissive rational basis standard of review, the question is can an undeveloped concern about, quote-unquote, privacy without more pass even that permissive test. And we think the answer is no.

That certainly a school district has an interest in protecting students' privacy, but the district cannot explain how excluding a transgender boy from a boys' restroom affects any other student's privacy interests.

Adopting, you know, the same rationale as the Eighth Circuit and others in reaching that conclusion that his mere presence in the restroom is not a de facto privacy violation. And it's not allowing someone of the opposite sex into the boys' restrooms, it's allowing someone of the same sex into the boys'

restrooms. And you'd have to accept the district's premise that Ash is not really a boy in order to -- you know, in order to even imagine any interest there.

Rather, even under a rational basis as the Supreme Court has articulated in *Romer* and other cases, that when treatment really just serves to disfavor a group, an unpopular group like transgender people based on misconceptions or bias or animus towards that group, that simply coming up with some interest that is not at all logically related to the treatment, the policy at issue can't stand even under the more permissive rational basis standard.

So for all of those reasons Ash has alleged lots of facts that he is being treated differently from other boys at school. That treatment is cognizable under both Title IX and the Equal Protection Clause. And we welcome the opportunity to build a factual record and prove his case. And for all of those reasons we ask the Court to deny the district's motion to dismiss.

THE COURT: Thank you, Mr. Wardenski.

Mr. Stadler, I'll give you the last word and then I actually have questions for each of you.

MR. STADLER: Thank you, Judge. And I will keep it very brief. Again, we briefed everything. You've heard a lot of argument.

Let me just talk about the privacy concerns at issue.

We cite a number of cases in the Title VII context where courts have questioned privacy interests. This is not Title VII, this is Title IX. And for Tremper High School we are talking about a group of 1700 students who are 14, 15, 16 and 17 years old. So this is not the workplace, this is school. And we're talking about allowing 14-year-olds into restrooms, locker rooms and living facilities. And counsel says, well, they don't really have privacy concerns.

They're asking to have, for example, school field trips where students share hotel rooms. Or the example that they cite from Oshkosh where they're put into a suite and the door is closed for the night and nobody comes in and nobody goes out. And they want to take a 16-year-old biological boy and a 16-year-old biological girl -- regardless of whether that girl identifies as being transgender, still a 16-year-old biological girl -- and lock them in a hotel suite for the night. Privacy concerns? You know, the 16-year-old boy had no problem with that. Well, as a former 16-year-old boy I probably wouldn't have had a problem with it either. But I bet if you went to his parents and talked to his parents, they might have had privacy concerns about that.

We're not talking about made-up beliefs. I do a lot of school law. I went to an IEP meeting for a special-ed student two weeks ago and, this is for a boy, and one of the things his parents wanted written into his individualized

education plan was that he wouldn't have to change in the locker room in front of the other boys. This is a 14-year-old boy who is uncomfortable getting undressed in front of other 14-year-old boys.

And I know that plaintiff would have you accept that plaintiff is a boy, but plaintiff is biologically a girl. The status of gender dysphoria, all of that set aside, biologically, girl. There are a host of privacy concerns involved in having 14-, 15-, 16- and 17-year-old females and males share bathrooms, locker rooms and hotel rooms. That can't be lost in the Title VII context and that can't be shrugged off as it's not really a valid concern. It is a valid concern.

Last point I would make. *Ulane*, 30-some years old, I think that's probably true.

Marbury vs. Madison, if my math is still right, is 213 years old. We still follow it because it hasn't been overruled, it hasn't been changed.

Ulane says "because of sex" does not encompass transgender. And I would take you back to *Ulane* and invite the Court to read that decision again. We weren't talking in *Ulane* about somebody who identified, a male who identified as being female, we're talking about a male who identified as being female who had a sex-change operation and even in that instance the court said transgender status is not because of sex.

That is the law within the Seventh Circuit and, based

on that, we would ask the Court to dismiss this complaint.

Thank you.

THE COURT: Let me just note probably apropos with my comments at the beginning of the hearing that I could almost guarantee you you won't get a decision today because if nothing else you people have to be out of this building before a certain time or you get locked in here and I'm guessing as much as it's a nice building you probably don't want to stay here overnight. So I'll try to avoid that on your behalves.

Mr. Stadler, you've indicated several times, if I've written it down correctly in my notes, both of you have used the word "sex," S-E-X, and the word "gender," G-E-N-D-E-R. And Mr. Stadler, you've indicated several times that sex is the -- what's reflected on the birth certificate. And I think there was one other place. Give me just a second. Sorry. Biological gender. I think that was the other reference that you made.

In *Hively*, Judge Rovner discussed this to some extent, and a number of these other cases discuss to some extent, the notion that gender is more than which chromosome one has and which genitalia one may have been born with. Do you have a direct citation for your position that it is what's reflected on the birth certificate? Biological becomes a little bit harder, it seems to me, but what's reflected on a birth certificate?

MR. STADLER: I don't believe any court has issued a proclamation saying gender means what is on your birth

certificate, but it is the only way that we as a society have ever been able to differentiate between men and women.

I think it's also interesting if you look back to *Ulane*, the plaintiff in *Ulane*, in addition to having a sex-change operation, went through the state court procedure to have her birth certificate changed to reflect that she was now female gendered.

So that court didn't say that's what happens, but that is what happens. You are born and your birth certificate lists what your gender is until you've been able to have that labeled differently through the legal process.

THE COURT: Then that brings me to my second question which is somewhat speculative. So if your answer is "that's speculative" then I'll take it.

Ulane was decided 34 years ago, 33 years ago?

MR. WARDENSKI: 2.

MR. STADLER: 32. 1984.

THE COURT: Thank you, Mr. Wardenski. I became a lawyer so I didn't have to do math and it's a good thing.

32 years later, given some of the caselaw that we've discussed and some of the comments particularly that Judge Rovner made in the most recent Seventh Circuit decision in *Hively*, do you believe that case might have come out differently 32 years later?

MR. STADLER: No, I don't believe it would come out

differently. And I don't believe it would come out differently because what the Court did at that time was to interpret the statute, looked at the statute, and concluded that it was an unambiguous statute that did not encompass transgender.

And I would submit that the *Hively* decision supports that conclusion. Because what *Hively* has said is, it may be that we as a society are changing and we may as a society be viewing things differently, but the body that should be addressing whether transgender is protected under Title VII or protected under Title IX is Congress. Congress is fully aware of it. It's not some kind of a hidden issue that no one has seen for the last 20 years. It's been there, and Congress has refused to act on it. If we're going to make a change, it is for Congress to make that change, not the courts.

THE COURT: Circling back a little bit. I'm sorry, I'm kind of going out of chronological order. But with regard to your *Auer* argument on the Title IX issue and particularly the "Dear Colleague" letter, you noted that the standard under *Auer* is, first of all, whether or not the language is ambiguous and then, second of all, whether the action is unreasonable.

But is not the fact that in this case and in others we're having this conversation about the words "gender" and in this case "sex," S-E-X, and that, as you've indicated, there isn't a case that has issued a proclamation saying this is what sex is, it's what's on your birth certificate or it's whatever,

is there not an argument to be made that that language is ambiguous; that use of the word "sex" in that context is ambiguous?

MR. STADLER: I don't think the word "sex" is ambiguous. I think the problem with the language is in 1972 or 1964 when they were talking about sex, everybody understood that to mean gender. It was gender discrimination that was being targeted through the Civil Rights Act in 1964 and through Title IX in 1972. And then we ended up having *Meritor Savings Bank* coming around in 1988 or 1989, where we created this sexual harassment which wasn't really about gender, it was about sex and hostile environment. And so then all of the sudden we had these two terms out that --

THE COURT: But you're using sex in the phrase of "the act of."

MR. STADLER: Yeah. So then, I mean, that caused some confusion in regard to the vernacular of what we were doing there.

But you go back to when the statute was created and that's what you look at, is what was created ambiguous? No. Every article, everything that was written at the time talked about the fact that when Congress created a prohibition against sex discrimination, whether we're looking at Title VII or Title IX, Congress was addressing male and female, men and women. They were talking about gender.

Now, the fact that we have come further down the road and we have kind of these new things in our society that implicate that, I mean, those things cause some confusion, but the language of that statute started unambiguously and it remains unambiguously. And the decisions that we've cited to all talk about the fact that sex means men because you're a male, woman because you're a female. I mean that comes from *Ulane* and the Seventh Circuit couldn't be any more clear on that; that there is no ambiguity in regard to because of sex male because your male, female because you're female.

THE COURT: And so how do you square that then with Judge Scalia's reasoning in *Oncale*?

MR. STADLER: Because *Oncale* --

THE COURT: The ultimate textualist.

MR. STADLER: You know, and that was what -- sadly I've been doing this long enough to remember all these cases coming around. You know, and back before *Oncale*, doing labor and employment law, you know, somebody would come in and they would say we've got sexual harassment going on because this man was being harassed by this man or this woman was being harassed because this woman was doing that to her and everybody said, ah, it's not protected at all. That's really about sexual orientation and it's not about gender so you can't do it.

But, I mean, think about what the defense is to an *Oncale* claim. If I sexually harass by male coworker and I

sexually harass my female coworker, I'm no longer sexually harassing on the basis of gender, I'm just crude. So, it doesn't create anything new and it doesn't somehow open the door to now we have all these protections that are broader.

Oncale came about because that male employee was harassing that employee because he was male and he doesn't treat females like that. It is based upon gender. Male on male, it's still based upon the fact that he is a male and not a female. The guy who harasses the male and the female doesn't violate the law. Not a very nice person, but you don't violate the law.

THE COURT: One other question, Mr. Stadler, and then I'll put Mr. Wardenski on the hot seat.

You made a point in your rebuttal comments in your discussion of privacy concerns of indicating that the cause of action here is a Title VII cause of action, obviously it's not an employment claim, that it's a Title IX cause of action, and in your comments you made a definitive point I think, if I'm hearing you correctly, that it's a school context not an employment context.

However, a number of the cases to which you've pointed me in your briefing and in your discussion today interpreting discrimination on the basis of sex are Title VII cases. And, in fact, I think you argued in one of your moving papers, I can't remember if it was with regard to the injunction or the motion to dismiss, that because the language is identical in that

sentence in both statutes that I should rely on interpretations of the language in Title VII cases.

So can you help --

MR. STADLER: And you should.

THE COURT: Okay.

MR. STADLER: Because the language is identical. My point about this is a high school and not a work environment, was as to the privacy issue in regard to equal protection. And counsel was trying to say, look, all these Title VII cases they don't worry about privacy. In Title VII we don't worry about it, it's no big deal to have women in the men's room and men in the women's room -- men in the women's room and women in the men's room, no big deal.

My comment is limited solely in regard to that privacy aspect of it; that I believe the language of the two statutes is identical. But when we talk about privacy interests, these are not 20-, 30-, 40-, 50-year-olds who are interacting with one another, they're 14- and 15-year-olds who are interacting with one another.

So although a court in a Title VII context may not have a privacy concern about men and women in the same bathroom or men and women in the same locker room, that would be entirely different in a Title IX context in terms of 14- and 15-year-olds.

THE COURT: Okay. Thank you.

MR. STADLER: Thank you.

THE COURT: So, Mr. Wardenski, I said I was going to pick on you now.

You have indicated sort of the opposite of the question that I asked Mr. Stadler. You have indicated that over the course of the last decade at least, if not longer, that the term "gender" -- and I think you specifically used the word "gender" as opposed to "sex" -- has been more broadly defined in the caselaw.

Again, I'll ask you a version of the same question that I asked Mr. Stadler. Do you have particular citations for any case that indicates that gender -- the word "gender" is defined as something other than, again, either the chromosomes we're born with or the genitalia we're born with?

MR. WARDENSKI: Yes, Your Honor. And I want to double-check this, but I believe the Seventh Circuit in the *Doe v. Belleville* case, in 1997 -- and I can get you the precise citation. If I'm not mistaken Judge Rovner also authored that opinion and she -- there's a parenthetical that says that gender -- I think it says something like gender, that is how one presents their sex.

So it does make a distinction between the concept of the -- the binary concept of sex and that gender is how one presents one's sex. I do want to confirm that that's the case I'm remembering, but I believe it's that one.

THE COURT: Okay. That's fine. And again, I realize that you're relying on your memory, but is that a holding in the case or is that language surrounding a holding --

MR. WARDENSKI: So that case involved two boys, brothers, who were -- they had a summer job with the city and they were subjected to a lot of same-sex sexual harassment by their male coworkers. And they were subjected to discrimination not just because they were boys but because they were targeted based on sex stereotyping in certain respects. And one of them was asked if he was really a boy. His gender, his sex was questioned. And the Court found that those are actionable and that it was discrimination based on sex under, in that case, Title VII.

And, you know, generally speaking, Your Honor, the -- since there is much more caselaw under Title VII than under Title IX [Indiscernible] statutes, it's, you know, a pretty uncontroversial principle that you can look to Title VII and how courts have interpreted the analogous provisions in interpreting Title IX and other sex discrimination statutes.

THE COURT: I'm sorry, to that point, Mr. Stadler has emphasized that we've got two cases, *Ulane*, which is the older case, and *Hively*, the more recent one also authored by Judge Rovner in which under Title VII she felt constrained -- she being Judge Rovner in *Hively* -- and the panel -- felt constrained by Seventh Circuit precedent and other decisions to

find that sex, at least with regard to sexual orientation, "sex," as that word is used in Title VII, was not to be defined that broadly.

MR. WARDENSKI: And nor are we asking the Court to define it that broadly in this case. The question is, Ash's sex is male. He is a boy. And Title IX prohibits him from being treated differently from other boys because of some sex-related characteristic, whether that's defined as gender nonconformity or being transgender. Or in some cases courts like the Eleventh Circuit treat those as, you know, different sides of the same coin, it's all sex-stereotyping discrimination.

But there's two distinctions I want to highlight in the *Hively* decision with regard to sexual orientation. One is, as I already mentioned, the Court was looking at decades of precedent in the Seventh Circuit that had all gone the same way on the question of sexual orientation discrimination. And the fact that no other circuit had gone out in front and yet found -- even though some district courts have -- yet found that sexual orientation discrimination is covered by Title VII.

The converse is actually true here. Here Kenosha is asking you to rely only on *Ulane*. And that's not what happened in *Hively*. They were relying on four or five different decisions that all came down the same way. Whether that was the right way is not the question for you. But here the only Seventh Circuit case that even remotely stands for the

proposition that trans people aren't covered is a pre-*Price Waterhouse* case, *Ulane*, that relied in its definition of male and female on what it perceived to be Congressional intent.

So the reason why the Seventh Circuit in 1984 felt comfortable saying this is really men for being men, women for being women, that's what Congress had in mind, that's completely blown out of the water by Justice Scalia's opinion in *Oncale* and certainly by the principles articulated in *Price Waterhouse* that gender-based discrimination in a variety of forms is covered.

Separately, the Supreme Court in several cases, *Jackson v. Birmingham*, the *North Haven* case has also held that Title IX must be construed broadly in order to protect students.

So here -- and I think, looking back, you know, at the original Congressional intent, Title IX, if nothing else, was meant to protect students from sex discrimination at school; to ensure that all students had the right to enjoy the same educational opportunities without regard to sex. And that's later been we now know to be expanded under Supreme Court jurisprudence to be based on, you know, any gender-related characteristic.

Here the school district is attempting to use Title IX to say because there's an exception that was carved out in the regs that allow schools to maintain sex segregated restrooms, that we can use that as a reason to discriminate against that student. And I think that perverts the meaning and intent of

Title IX.

And we haven't discussed it in our briefs, but I would mention that the question of Congressional intent has been at issue in several of these cases.

There was a case like *Hively* in the Second Circuit that came down a similar way -- at the district court level. The Second Circuit has yet to decide. And a number of members of Congress, senators and members of the House of Representatives filed an amicus brief in that case, the *Christianson* case, holding that the Congress's failure to change its laws or -- is not necessarily indicative of their intent and that the view -- their view is that Title VII already does protect transgender people. But it's certainly not a settled question in the courts and courts have come down different ways and -- but they are urging the Second Circuit to take that case and to find that sexual orientation in that context is covered.

Similarly, in *Hively* members of Congress issued an amicus brief urging the court to take en banc review.

More specifically to Title IX, and I think this is helpful to point out, that in the several weeks, a month or so before the Departments of Justice and Education issued the "Dear Colleague" letter in May, 40 members of the United States Senate, including the primary sponsor of the Student Nondiscrimination Act, which is a piece of legislation that's been pending for a couple of years that would specifically add

gender identity as a protection covered by Title IX, said that they're not doing that because they think the protections don't currently exist, they do, but to recognize that there is not agreement at least among the courts at this point and so to clarify Congressional intent they are, you know, seeking to have that legislation passed.

You know, we were joking before that there's, you know, a lot of complexities in how a bill becomes a law, and, you know, Congress's failure to change its laws certainly doesn't mean anything about its intent now. And you have a number of members of Congress, both on the gender identity question on transgender students under Title IX and in other contexts saying that they the laws already apply, it's their view that they do, they agree with the court decisions and the federal agency determinations that have so found, yet they are still calling for to articulate these protections specifically to avoid that ambiguity.

Now, if I may just take one second to address the ambiguity question I will, but I'll let you ask the question.

THE COURT: I still have a couple more. I don't want you to get locked up. Go ahead. If you need to, go ahead, quick-hit that.

MR. WARDENSKI: I just want to point out that the Fourth Circuit in its majority opinion went back to dictionary definitions in the '70s, just like the dissenting judge, Judge

Niemeyer did, and just like Mr. Stadler did today, and although some definitions only define sex as being in reference only to genitals or only to biological characteristics, others, even back then, were more ambiguous on that and said that it's the state of being male or female; that there are behavorial aspects to that definition of sex even in dictionary definitions back in 1972.

And it's certainly more ambiguous now. And you could take reference to any number of dictionary definitions right now and they do take a broader, certainly more ambiguous view of the term "sex" than simply being what genitals one had when they were born.

THE COURT: Okay. You mentioned briefly and Mr. Stadler has mentioned the fact that the regs promulgated under Title IX provide that school district or schools may -- and I think that's the word -- segregate -- create segregated restrooms. So one could read that permissive language to argue that it is appropriate for a school to make a determination that one group of students use one restroom and one group of students use the other.

Can you comment briefly on the impact of your argument with regard to the continuing validity of that regulation, that discretion that has been granted to schools through the reg.

MR. WARDENSKI: I think it is valid. We're not quarreling with 106.33, that regulation that allows schools to

create sex-segregated spaces.

I want to point out though that schools neither here in Kenosha or anywhere else have ever put a qualifier, an adjective, they've had boys' rooms and girls' rooms and boys' locker rooms and girls' locker rooms. Locker rooms are not at issue in this case and we want to make that very clear.

But that other than students self-reporting on their enrollment forms or the gender marker that they have on the document that they provide, which may have been changed, it's really the school's only way to know what a student's sex is. And there's no one standing at the restroom doors, certainly not now, not ever, confirming that a student's genitals conform to the sex that they're presenting as.

And so I think conceding that history properly is that schools are only now beginning to come up with these qualifiers, like biological or the gender marker on an infant's birth certificate, in order to exclude trans students from restrooms, not because that was something that was ever enforced in any way before.

And you're confronted now also with more and more transgender students coming out at earlier ages. And so this is -- this is a problem that schools are confronting not because there's more transgender students, but because more transgender students are exercising their right to live consistently with their gender identity while they're still in school.

THE COURT: Last question for you, Mr. Wardenski. With regard to again the Title IX claim, you argued that one of the factors, of course, is whether or not there have been educational opportunities denied a student based on an allegedly discriminatory action. And as I was jotting down notes you talked extensively about the plaintiff's -- Ash's use of the restroom. And I understand those arguments. I've heard all those arguments.

But you also began your discussion earlier today by talking about the fact that, apparently this young man would put many high school students to shame in terms of his academic achievements and his extracurricular achievements and things that he's involved in and what he's doing. There is at least one case out there whose name escapes me at the moment, and I apologize, in which the court indicated that it's difficult to connect use of a restroom to an educational opportunity, to a denial of an AP class maybe which it sounds like he's taken a lot of, or denial of an extracurricular activity or something.

Can you comment on specifically denial of educational opportunity.

MR. WARDENSKI: Yes, Your Honor. And so that case was *Doe vs. Clark County* in Nevada.

THE COURT: Thank you.

MR. WARDENSKI: And that case was not decided on that basis. The student had never actually enrolled in that school

district and so it was essentially dismissed on standing grounds. And so the court in dicta questioned whether a bathroom was an educational opportunity, but certainly didn't answer that question.

And the -- I believe the statute itself, I can't remember the provision but we could get it to you, makes clear that all facilities operated by a funding recipient, a school, including their restrooms, are part of the educational program and activity that they offer. The federal government has specifically stated that position in numerous amicus briefs and statements of interest filed in other cases. And so the restrooms themselves, denying access to restrooms themselves is denying equitable participation on the part of the school's program and activities.

But then beyond that, and I think this is -- this is probably the more salient point, that it really is the impact that it has on his class time, his ability to learn, you know, his focus and the stigma that Ash is facing because he can't use those restrooms is having a direct harm on his ability to be in class. The gender-neutral facilities are, you know, five minutes or more away. And so if he were leaving class he could be out of class for 10 minutes out of a 40- or 45-minute class period where another student, any other student, boy or girl, could probably walk across the hallway and be back in, you know, two or three minutes. And so that's real class time that is

depriving him, despite his talents, of the equal participation in the actual academic programs at school.

And beyond that is just the stigma that he faces by -- and the emotional harm that that causes on his ability to learn.

And, you know, I referenced Dr. Budge's declaration that we submitted in support of our PI motion. She's a psychology professor at UW Madison. And held that -- you know, she agreed with Ash's self assessment that it's amazing that he has done as well as he has given his loss of focus in class on the days that he's experienced this discrimination; the fact that he's gone home after school on many of those days and not been able to focus on his homework.

And so he's used some sort of superhuman powers to stay on the top of his class and to stay actively involved. But it's taken a toll. It's taken a -- you know, an educational toll even if that's not evident in his grades.

And it's certainly, under the language of Title IX itself, subjecting him to different conditions and sanctions for enjoying those same opportunities that every other student has.

THE COURT: Thank you. All right, what I'd like to do given the lateness of the hour --

MR. STADLER: Judge, can I just beg your indulgence for one second?

THE COURT: But that'll be the slightly more lateness of the hour. Yes.

MR. STADLER: It's just a comment that counsel made that I think I really need to address. And that is, counsel just said locker rooms are not at issue in this case. And I think that that statement is very telling and very problematic, because what counsel opened up with was how Ash will be playing tennis on the boys' tennis team the spring semester.

THE COURT: Oh, did I --

MR. STADLER: That was counsel's statement.

MR. WARDENSKI: We can answer that. So Ash completed his --

THE COURT: I'm sorry, I thought it was music, I apologize. But anyway.

MR. WARDENSKI: Music, and he's also for the first time this year being allowed to play on the boys' tennis team.

THE COURT: Oh, okay.

MR. WARDENSKI: He does not want to use the boys' locker rooms. He feels uncomfortable in the boys' locker rooms. He does not intend to use the boys' locker rooms even when he's playing tennis and is just going to, you know, change and go home after practice and after games. And so certainly not at the PI stage and not really for Ash at all are -- is locker room access an issue in this case. Restrooms and having his gender identity respected are the issues in this case.

THE COURT: Okay. Mr. Stadler was talking about the point. So thank you for clarifying that.

MR. STADLER: But that is purely posturing to avoid that issue of the locker room because the locker room is such an invasion of privacy. And there will simply be no basis, if this court concludes that being somebody who identifies as transgender is certainly within Title IX, there is then no basis for us excluding Ash from the boys' locker room or the next person from the boys' locker room.

So you can't segregate this case and say, oh, it's only about the things we want to put on the table. This case is about every one of those issues, including locker rooms. Because if you were to rule that bathrooms and living facilities like hotels are on the table, then the locker room is on the table too.

A plaintiff can say all they want, well, don't pay attention to that because we don't want that, but your ruling gives that. And that's very important. And it's very critical on the privacy interest issue and it's very important to the overall case that the decision of whether Title IX encompasses transgender is everything. It's not pieces and parts, it is bathrooms, locker rooms, overnight facilities, hotel rooms, whatever it may be.

And I appreciate the Court's indulgence in letting me make that point. Thank you.

MR. WARDENSKI: Your Honor, if I may just for five seconds respond to that. We are putting forth the issues that

are actually facing our client in school. And certainly other school districts in Wisconsin around the country do allow trans students access to restrooms and that same principle might apply in another case, it doesn't apply to this one. And if the district were to adopt a policy at the end of this, I think it gets more to the question of the scope of relief at the end of this case rather than whether or not we state a claim at this point.

THE COURT: Thank you. And that's actually a note upon which to finish because what I was about to propose before Mr. Stadler made his clarification was that a lot of argument this afternoon, but to some extent some of it is not directed related to a motion to dismiss and goes some what beyond that, understandably.

So I think probably all of us need to bring our focus back -- myself most importantly -- to the standard for a 12(b)(6) motion. And in that regard what I would like to do is to see if we can't find a time that I can come back to you and give you at least an oral decision so that you'll know whether or not we need to then move on to the preliminary injunction discussion. I don't want to drag this out. I realize that school has started. But by the same token I'd like to give you all's arguments the attention that you've clearly given them in terms of the briefing.

Let me say that when I deliver an oral decision I

always give the parties the opportunity to appear by phone to hear that decision, if you choose to do that, since it's not really an argument so to speak. On the other hand, anybody is always welcome in this courtroom. So if you wish to appear in person you're never going to get turned away by anybody here because the courtroom is open and that's what we're here for.

So I'd ask if we could to look at our calendars. And I will apologize to you ahead of time for the fact that mine is probably a bigger mess time wise.

Hold on just a second. Sorry. This is becoming -- I spend most of my life searching my calendar for a hole.

(Brief pause.)

THE COURT: I have one on the afternoon of the 16th, which is a Friday, September 16th.

MR. STADLER: Judge, I don't think I can make that. I always have to phrase this carefully, I have to go to an OLR panel as an investigator.

THE COURT: I was just going to say, I'm guessing not in the case of -- yeah.

MR. STADLER: Yes. I have to present an investigation and I'm not sure what time it will be done. And it's in Madison.

THE COURT: Yeah. Okay. The next option I have for you is that following Monday the 19th at 3:30. Same time as we started today.

MR. WARDENSKI: That would be fine. Thank you.

MR. STADLER: That's fine, Judge.

THE COURT: Okay. Then let's do that if we can. 3:30 in the afternoon on Monday the 19th. We'll put our conference line and pass code into the notice just so if you choose to call in you're more than welcome to do that. But again I have a phone hearing immediately preceding that. But you're also welcome, of course, to be here in the courtroom. So we'll check the line just like we did today to see if anybody's on the line, but if you're here then you're more than welcome to be here.

Mr. Wardenski, on behalf of the plaintiff anything else to take care of today?

MR. WARDENSKI: Your Honor, I haven't consulted with my co-counsel about this, but I wanted to raise the possibility of seeking a temporary restraining order with the same relief with regard to restroom access at least prior to the Court's decision. Obviously that would be less than 20 days from now, but it would preserve Ash's rights in the meantime if the Court were to grant that.

THE COURT: Okay. Mr. Stadler, I'm assuming you have a position on that?

MR. STADLER: Correct, Judge. We would oppose that. And I think the issue of likelihood of success on the merits is the primary issue here and needs to be resolved and doing this on a temporary basis just is not something that's workable.

THE COURT: Well, and I want to be clear that I'm not unmindful of the issues that your client is dealing with. And so I don't say this at all lightly, because what I'm about to say is given the fact that we are having the hearing in about two weeks and that the issue of the motion to dismiss will be resolved one way or the other at that point, I think it -- the better course, not the more comfortable one, but the better course is to wait until the 19th, and then at that point in time, once I've given you a ruling on the motion to dismiss, assuming that the case survives the motion to dismiss then we can discuss the issues with regard to the injunction.

And again, I realize that two weeks, particularly when one is a teenager seems like 15 years, but -- so I don't say that lightly, but I think we should wait until the 19th to make that decision.

MR. WARDENSKI: Thank you, Your Honor.

THE COURT: So I will deny that request at this point.

All right. Anything else, Mr. Stadler, from the defense?

MR. STADLER: No. Thank you, Judge.

THE COURT: All right. Thank you, everybody.

MR. WARDENSKI: Thank you.

THE COURT: Will you remember, Mr. Wardenski, to double-check that *Doe vs. Belleville*?

MR. WARDENSKI: Yes. Yes, I will.

THE COURT: See if that's -- and you can just file -- and if it's two sentences and you drop it on the docket then at least we all have it.

MR. WARDENSKI: Okay.

THE COURT: Thanks.

MR. STADLER: Thank you.

(Proceedings adjourned at 5:20:40 p.m.)

* * *

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 October 7, 2016.

/s/John T. Schindhelm

John T. Schindhelm

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United States District Court,
E.D. Wisconsin.

Ashton Whitaker, a minor, by his Mother and next friend, Melissa Whitaker, Plaintiff,

v.

Kenosha Unified School District No. 1 Board of Education and Sue Savaglio–Jarvis, in her official capacity As Superintendent of the Kenosha Unified School District No. 1, Defendants.

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

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

HON. PAMELA PEPPER, United States District Judge

I. INTRODUCTION

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

II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

III. DISCUSSION

A. Preliminary Injunction Standard

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. The Defendants' Request for a Bond

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

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

Rule 65(c) states that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The rule leaves to the court's discretion the question of the proper amount of such a bond, and tethers that consideration to the amount of costs and damages sustained by the wrongfully enjoined party.

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

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

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

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

IV. CONCLUSION

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

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

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

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

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

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

All Citations

Slip Copy, 2016 WL 5239829

Footnotes

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

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

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

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