NO. 16-3522

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiff-Appellee,

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-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin
Case No. 2:16-cv-00943-PP
The Honorable Judge Pamela Pepper

PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR THE EXERCISE OF PENDENT JURISDICTION

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INTRODUCTION

Having failed to convince the District Court to certify for interlocutory appeal an order denying their motion to dismiss, Defendants-Appellants 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 ("KUSD") (collectively, "Defendants"), now ask this Court to review it anyway as an exercise of pendent appellate jurisdiction. This Court should not do so, as the stringent requirements for such jurisdiction are not met.

This is an appeal from a preliminary injunction barring Defendants from taking certain actions against Plaintiff-Appellee Ashton Whitaker ("Plaintiff" or "Ash"), a transgender boy, during the pendency of the litigation below. Prior to issuing the injunction, the District Court denied Defendants' motion to dismiss. It found it unnecessary to rule on much of the parties' legal disputes regarding what protections transgender students receive under Title IX of the Education Amendments of 1972 ("Title IX") and the Equal Protection Clause of the Fourteenth Amendment. The court noted that Ash had multiple theories of relief for each claim and found that, at the pleading stage, it could find his claims viable depending on what facts emerged through discovery regardless of the proper resolution of some unsettled legal issues.

Consistent with that reasoning, the District Court then declined to certify the order denying Defendants' motion to dismiss for interlocutory review under 28 U.S.C. § 1292(b). Order, Sept. 25, 2016 [Dist. Ct. Dkt. No. 36] ("September 25 Order"). It concluded that, far from expediting resolution of this case, Defendants' attempt to gain interlocutory review simply disregarded the "many factual issues yet to be fleshed out by both parties, and legal issues to be expanded upon" during the litigation. *Id*. at 9. Defendants asked this Court to accept their petition for review anyway, and this Court denied the petition.

Undeterred, Defendants now repackage essentially the same arguments into their present Motion for the Exercise of Pendent Jurisdiction ("Motion"), requesting that this Court exercise pendent appellate jurisdiction over the District Court's motion to dismiss decision as it reviews the preliminary injunction. Defendants have failed to explain how the two orders are "inextricably intertwined" so as to warrant the exercise of pendent jurisdiction. This Court can determine whether the District Court acted within its discretion in issuing the injunction without engaging in plenary, *de novo* review of the denial of the motion to dismiss; it certainly does not need to answer the unsettled legal questions raised in the Motion, which the District Court properly found might be unnecessary to resolve for Plaintiff to ultimately prevail on his claims.

Exercise of pendent jurisdiction here would subject virtually every motion to dismiss denial followed by an appealable injunction decision to interlocutory review. Such a result would amount to an unwarranted expansion of the narrow exception to the final-judgment rule represented by the pendent jurisdiction doctrine. Rather, Congress has appropriately determined that denials of motions to dismiss ordinarily should be subject to interlocutory review only where a district court certifies that doing so would expedite resolution of the litigation. Here, the District Court found that it would not. This Court should deny Defendants' Motion.

STATEMENT OF THE CASE

Ash Whitaker is a 17-year-old boy who attends high school in KUSD, a public school district operated by Defendants. Ash is transgender. He challenges Defendants' discriminatory treatment of him under Title IX of the Education Amendments of 1972 ("Title IX") and the Equal Protection Clause of the Fourteenth Amendment.

Ash alleges that Defendants treated him differently from other students until enjoined from doing so. This differential treatment included excluding him from boys' restrooms and actively monitoring his use of restrooms; segregating him from other students in overnight

accommodations on school trips; intentionally referring to him by female pronouns and by his traditionally female birth name rather than his chosen male name; and proposing that he and other transgender students be given green wristbands to help track their restroom use. These actions stigmatized and humiliated Ash; exacerbated his symptoms of Gender Dysphoria, including anxiety, depression, and suicidal ideation; resulted in physical health problems due to his avoiding restroom use at school; and impacted his education.

Under both Title IX and the Equal Protection Clause, Ash alleges that, in taking the actions catalogued above, Defendants treated him differently from other students and singled him out for unlawful gender-based discrimination based both on (1) his male gender identity, and (2) his nonconformity to gender stereotypes. Separately, he alleges that Defendants violated the Equal Protection Clause by subjecting him to discriminatory and differential treatment because of his transgender status.

PROCEDURAL HISTORY

Ash filed his complaint on July 20, 2016, followed by an amended complaint on August 15, 2016. [Dist. Ct. Dkt. Nos. 1, 12]. Also on August 15, 2016, Ash filed a motion for preliminary injunction [Dist. Ct. Dkt. No. 10] requesting that the court order Defendants to, *inter alia*, permit him to resume his previous use of boys' restrooms during the pendency of this litigation, without fear of discipline by school officials, by the start of the new school year. In addition to arguing that he had a sufficient likelihood of success on the merits, Ash presented the District Court with considerable evidence that Defendants' refusal to permit him to use boys' restrooms had caused and would continue to cause him irreparable educational, emotional, and physical harm, and that Defendants would face no harm by allowing him to use boys' restrooms. Mem. in Support of Mot. for Prelim. Inj. [Dist. Ct. Dkt. No. 11], at 10-12, 28-30. Ash submitted declarations from himself; his mother; three experts in gender identity and transgender youth

development; and educators with experience implementing policies allowing transgender students to access restrooms matching their gender identity. [Dist. Ct. Dkt. Nos. 10-1-10-9]. By contrast, Defendants submitted no evidence either rebutting Ash's showing of irreparable harm or demonstrating that they would be harmed in any way by the requested injunction.

On August 16, 2016, Defendants filed their motion to dismiss. Following briefing, the District Court heard oral argument on the motion to dismiss on September 6, 2016. On September 19, 2016, the District Court issued an oral decision from the bench denying the motion. Tr. of Oral Dec. on Mot. to Dismiss, Sept. 19, 2016 (attached as Ex. A) ("September 19 Transcript"); Court Minutes, Sept. 19, 2016 [Dist. Ct. Dkt. No. 28] ("September 19 Court Minutes") (attached as Ex. B). The court explained that Ash had alleged sufficient facts to state plausible Title IX and Equal Protection Clause claims under multiple theories of relief for each claim. Sept. 19 Court Minutes at 7-9.

Specifically, the District Court concluded that Ash alleged sufficient facts under Title IX to state a plausible claim for gender-based discrimination under two theories: (1) that discrimination against him based on his gender identity was *per se* sex discrimination; and, alternatively, (2) that he was treated differently for nonconformity to gender stereotypes. Sept. 19 Court Minutes at 7-8. The District Court "emphasized at the motion-to-dismiss stage, [that] it had made no finding as to whether the plaintiff (Ash Whitaker) was male or female, a determination that would need to be made after further litigation before addressing the question of discrimination." *Id.* at 5. It found that question to be properly deferred until later in the case, since neither Title IX itself nor any controlling case law in this Circuit defines the word "sex," the dictionary definitions of "sex" often refer both to biological and behavioral factors, and "none of these definitions are helpful when some of those various factors—genes, or

chromosomes, or character, or attributes—point toward male identity, and others toward female," *id.* at 3, *i.e.*, when a person is transgender.

In any event, the court concluded, it was unnecessary to resolve all of the parties' legal disputes to decide the motion before it because, regardless of its ultimate findings on these questions, Ash stated a claim under the firmly established theory of gender stereotyping. *Id.* at 8. The court, therefore, concluded that Ash presented sufficient facts and legal authority "to overcome the defendants' argument that [Plaintiff] had no possibility of prevailing as a matter of law" and denied the motion to dismiss the Title IX claims. *Id.*

With respect to the Equal Protection Clause claims, the District Court concluded that Ash "alleged sufficient facts to indicate that he was discriminated against relative to other males" and also "to show discrimination based on gender stereotypes." *Id.* at 8. "[P]laintiff is transgender, and if the court concludes at a later stage in the proceedings that transgender persons constitute a suspect class, then the plaintiff has alleged sufficient facts to show discrimination on that basis." *Id.* The court noted that, at this juncture, it did not need to determine whether transgender persons are a suspect class or the appropriate level of scrutiny to apply in order to conclude that Ash alleged sufficient facts to survive a motion to dismiss his constitutional claim. *Id.* at 9 (citing *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978)).

The next day, September 20, 2016, the District Court held a hearing on Ash's motion for preliminary injunction, which sought to enjoin several of Defendants' discriminatory practices, including enforcement of their policies regarding Ash's restroom use. Following argument, the

court ruled from the bench, partially granting the motion.[1] The court enjoined Defendants from denying Ash access to boys' restrooms; preventing him from using boys' restrooms at school or while attending school-sponsored events; disciplining him for using boys' restrooms; and monitoring his restroom use in any way. The court explained its reasoning at length during the oral decision, Tr. of Oral Arg. on Mot. for Prelim. Inj., Sept. 20, 2016 (attached as Ex. C), at 50:19-68:21 ("September 20 Transcript"), followed by a written decision issued on September 22, 2016 [Dist. Ct. Dkt. No. 33] ("Preliminary Injunction Order"). In reaching its decision, the court relied on the evidence that Ash submitted with his motion for preliminary injunction. Specifically, "[r]elying primarily on the plaintiff's declaration (which the defendants did not challenge at the hearing), the court has no question that the plaintiff's inability to use the boys' restroom has caused him to suffer harm." Prelim. Inj. Order at 11. The court further found that Defendants provided no evidence that an injunction would harm them or the public interest. *Id.* at 13-15.

Following the September 20, 2016 injunction hearing, Defendants filed a proposed order denying the motion to dismiss, which contained language to certify the decision for interlocutory appeal under 28 U.S.C. § 1292(b). The next morning, September 21, 2016, the District Court entered a dismissal order containing that certification language. [Dist. Ct. Dkt. No. 29]. On September 22, 2016, Plaintiff filed an expedited motion to reconsider the interlocutory certification. [Dist. Ct. Dkt. No. 30]. While that motion was pending, on September 23, 2016,

[1] The Court deferred ruling on Ash's request that Defendants refer to him by his chosen male name and male pronouns in light of Defendants' representation that they had amended Ash's student records due to his recent legal name change. The Court denied without prejudice Ash's request that Defendants be enjoined from implementing the proposed green wristband policy based on the parties' agreement that the policy had not been implemented in the new school year.

Defendants petitioned this Court for interlocutory review of the motion to dismiss denial. [Case No. 16-8019 Dkt. No. 1].

On September 25, 2016, the District Court granted Plaintiff's motion for reconsideration. Sept. 25 Order. It found that Defendants failed to establish the requirements for interlocutory appeal and that it had therefore erred in entering the proposed order containing the interlocutory certification. *Id.* at 6. The court found that appellate resolution of the unsettled legal question that Defendants wanted to appeal—whether discrimination based on "sex" includes discrimination against a transgender student based on gender identity under Title IX or the Equal Protection Clause—could not definitively resolve this case because Ash had "pleaded sufficient facts to survive a motion to dismiss on a claim of gender stereotyping" under both his statutory and constitutional claims. *Id.* at 7. The court specified a number of distinct bases by which Ash could succeed on his claims, most of which do not involve a "controlling question of law as to which there is substantial ground for difference of opinion." *Id.* at 8. Accordingly, the court vacated the portion of the order containing the certification language, *id.* at 10, and issued an amended order of dismissal. [Dist. Ct. Dkt. No. 35]. On September 27, 2016, Defendants moved the District Court to reconsider this decision [Dist. Ct. Dkt. No. 42], which the court denied. Order, Oct. 3, 2016 [Dist. Ct. Dkt. No. 47].

On October 5, 2016, this Court instructed Defendants to file a position statement "in light of the district court's order of September 25, 2016, revoking certification for interlocutory appeal." Order, Oct. 5, 2016 [App. Case 16-8019 Dkt. No. 11]. On October 11, 2016, Defendants filed their statement and Plaintiff filed a response. [App. Case 16-8019 Dkt. Nos. 12-1, 12-2]. On November 14, 2016, this Court denied Defendants' petition for interlocutory review. Op., Nov. 14, 2016 [Case No. 16-8019, Dkt. No. 16]. The Court held that it lacked appellate jurisdiction to

review the petition in light of the District Court's withdrawal of the interlocutory certification prior to any action on the petition by this Court. *Id.*

On December 1, 2016, Defendants filed the present motion. They once again seek appellate review of the District Court's denial of their motion to dismiss, this time through the exercise of pendent appellate jurisdiction under 28 U.S.C. 1292(a)(1). Defendants assert that, in order to resolve their appeal of the District Court's preliminary injunction order, this Court necessarily must review as well the District Court's findings in its order denying Defendants' motion to dismiss. Mot. at 6. In particular, Defendants assert that, to review the preliminary injunction order, this Court must conclusively resolve contested legal issues including, *inter alia*, whether a transgender boy has the right under Title IX to use restrooms consistent with his male gender identity; whether Defendants' conduct is actionable as sex-stereotyping discrimination; and whether "transgender" [sic] is a suspect class under the Fourteenth Amendment. Mot. at 9.

LEGAL STANDARD

Except with respect to specifically delineated interlocutory orders, such as the preliminary injunction properly on appeal here, *see* 28 U.S.C. § 1292(a)(1), this Court only has jurisdiction to hear appeals from "final decisions" of a federal district court. *See* 28 U.S.C. § 1291; *Nanda v. Bd. of Trs. of Univ. of Ill.*, 303 F.3d 817, 821 (7th Cir. 2002). A district court's denial of a motion to dismiss is not a final judgment and is not appealable as a matter of right. *See Nanda*, 303 F.3d at 821. Normally, such a decision is only appealable if the district court certifies the question for interlocutory review under 28 U.S.C. § 1292(b) and the appeals court accepts jurisdiction. *See In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002). This "dual gatekeeper system" is designed to ensure that an otherwise unreviewable decision denying a motion to dismiss "is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden." *Id.*

In rare cases, this Court may exercise pendent appellate jurisdiction over a non-final judgment when that decision is "inextricably intertwined" with an order that is immediately appealable under 28 U.S.C. § 1292(a)(1). *See Abelesz v. OTP Bank*, 692 F.3d 638, 647 (7th Cir. 2012). Pendent appellate jurisdiction "is a narrow doctrine" that has been "sharply restricted" in the years following the Supreme Court's decision in *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35 (1995). *Id*. "[P]endent appellate jurisdiction may be invoked only if there are compelling reasons for not deferring the appeal of the former order to the end of the lawsuit. . . . [A]ny laxer approach would allow the doctrine of pendent jurisdiction to swallow up the final-judgment rule.'" *Montaño v. City of Chicago*, 375 F.3d 593, 599 (7th Cir. 2004) (internal citations and quotation marks omitted). This Court "approach[es] the § 1292(a)(1) exception somewhat gingerly lest a floodgate be opened that would deluge the appellate courts with piecemeal litigation." *Albert v. Trans Union Corp.*, 346 F.3d 734, 737 (7th Cir. 2003) (internal quotation marks and citations omitted).

Pendent jurisdiction "should not be stretched to appeal normally unappealable interlocutory orders that happen to be related—even closely related—to the appealable order." *Abelesz*, 692 F.3d at 647. To meet the high bar needed to invoke pendent jurisdiction, "it must be *practically indispensable* that [the Court of Appeals] address the merits of the unappealable order to resolve the properly-taken appeal." *Id.* (emphasis added) (quoting *Valders Stone & Marble, Inc. v. C-Way Const. Co.*, 909 F.2d 259, 262 (7th Cir. 1990)). In other words, the issues presented in the two orders must concern "the same single issue" or be "the head and tail of the same coin." *Id.* at 648. Judicial economy is not an appropriate basis for exercising pendent jurisdiction. *Id.* at 647 n.3.

ARGUMENT

I. The District Court's Unappealable Order Denying the Motion to Dismiss is not "Inextricably Intertwined" with its Order Granting the Preliminary Injunction.

A. The District Court denied Defendants' motion to dismiss because Plaintiff alleged sufficient facts to state both of his claims under multiple legal theories.

Defendants incorrectly assert that the District Court "based its [preliminary injunction] decision on the same grounds as its decision to deny the motion to dismiss" and 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." Mot. at 6-7. Even if true, this assertion would be insufficient to justify exercise of pendent jurisdiction, for the reasons stated below in Point I.B. But Defendants' argument also fails on its own terms, as it is based on a mischaracterization of the District Court's rulings. Defendants' argument is based on the premise that both orders below are based on the same "conclu[sion] that Plaintiff's status as being transgender affords relief under Title IX and the Equal Protection Clause." *Id.* at 7. That premise is incorrect.

As the District Court explicitly stated in denying certification—in language that Defendants quote but then ignore—the court "denied the motion to dismiss because it found that there were *several avenues* by which the plaintiff might obtain relief." *Id.* at 7 (quoting and citing the September 25 Order) (emphasis added). The District Court further explained, in language directly on point, that "the court based its denial of dismissal on several grounds," so "the order is not solely based on resolution of 'a controlling question of law as to which there is substantial ground for a difference of opinion.'" Sept. 25 Order at 6.

In particular, the District Court granted the preliminary injunction and denied the motion to dismiss without purporting to resolve the unsettled issues that Defendants now seek to appeal. It found it unnecessary to resolve, at this juncture, whether Title IX's protections extend to discrimination against transgender students based on their gender identity, because resolution of

that issue involves questions of both law and fact that are properly answered later in the litigation. *Id.* Moreover, it found, "regardless of whether Title IX provides protections for transgender persons, the plaintiffs have also alleged sufficient facts to sustain a gender stereotyping claim" under both Title IX and the Equal Protection Clause. Sept. 19 Court Minutes at 7-8. Thus, even if the District Court or this Court were to ultimately conclude that Title IX's reach does not extend to gender identity discrimination, Plaintiff still states a claim through his allegations that Defendants' actions were rooted in impermissible gender stereotypes. It is firmly established that a plaintiff of either sex can bring sex discrimination claims based on gender stereotyping under Title IX and the Equal Protection Clause. Sept. 19 Court Minutes at 7-8; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1996); *N.K. v. St. Mary's Springs Acad. of Fond Du Lac, Wis., Inc.*, 965 F. Supp. 2d 1025, 1034 (E.D. Wis. 2013); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008).

Thus, the issues that Defendants seek to appeal immediately—some of which pose unsettled questions of law in this Circuit—did not yet need to be resolved by the District Court and do not need to be reached by this Court in reviewing Defendants' appeal from the preliminary injunction. Rather, as the District Court found, this case may instead turn on mixed questions of law and fact that cannot be resolved at this stage of the case. Sept. 19 Court Minutes at 5-9. In sum, as the District Court concluded, resolution of any unsettled questions of law at this juncture is not controlling on the outcome of either of Plaintiff's claims, and so they cannot possibly be "inextricably intertwined" with this Court's review of the preliminary injunction.

B. The District Court's decision to grant the preliminary injunction correctly concluded that Plaintiff had "some likelihood of success on the merits" based on the factual and legal authority presented by Plaintiff with his motion for preliminary injunction.

Even if the preliminary injunction order actually were based on resolution of the issues Defendants seek to appeal—and it is not—the requirements for exercising pendent jurisdiction still would not be met. As a preliminary matter, Defendants never state the actual question properly before this Court, which is whether the District Court abused its discretion in entering the injunction. *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986). By failing to even argue in their motion that the issues they hope to raise in this appeal are "inextricably intertwined" with whether the District Court abused its discretion, Defendants have waived any such argument. Such an argument would fail in any event, because this Court need not march comprehensively through the various legal issues Defendants presented in their motion to dismiss and again in their motion papers, *see* Mot. at 9, in order to affirm the District Court's grant of a preliminary injunction as a proper exercise of its broad discretion.

This Court's "review of a district court's grant of a preliminary injunction is deferential." *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). This Court "review[s] the court's legal conclusions *de novo*, its findings of fact for clear error, and its balancing of the injunction factors for an abuse of discretion." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). This Court "accord[s], absent any clear error of fact or an error of law, 'great deference' to the district court's weighing of the relevant factors." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 896 (7th Cir. 2001) (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

In granting the preliminary injunction, the District Court concluded that Ash met the threshold question of demonstrating "some likelihood of success on the merits" of his claims. Prelim. Inj. Order at 7-10. As the court correctly observed, "[t]he threshold for this showing is low" in this Circuit. *Id.* at 8, 10; *Cooper*, 196 F.3d at 813 (citing *Roland Mach. Co. v. Dresser*

Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984)). "Plaintiffs need only demonstrate 'a better than negligible chance of succeeding.'" *Cooper*, 196 F.3d at 813 (quoting *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 824 (7th Cir. 1998)). Accordingly, the court correctly concluded that Ash presented sufficient factual evidence and legal authority to exceed this threshold, but made no definitive finding on the merits. Prelim. Inj. Order at 7-10. Having determined that Ash has several paths to success under both of his claims, the court then found that the balance of harms overwhelmingly favored Ash. *Id.* at 13-15. Specifically, the court found that the available evidence showed that Ash was harmed by Defendants' actions and that Defendants had failed to present any evidence that they would be harmed by an injunction. *Id.* The court also found that the injunction would not harm the public interest. *Id.* at 15. The court noted that under this Circuit's "sliding scale" approach, "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.* at 7. Applying this analysis, the court issued the injunction. *Id.* at 18.

Because the Seventh Circuit does not require a Plaintiff to show that he *will* succeed on the merits—only that he has *some* chance of success—this Court can review and ultimately affirm the lower court's decision granting the injunction without definitively resolving each of the merits-based issues that Defendants claim, incorrectly, are "inextricably intertwined" with the preliminary injunction order. With respect to the merits, this Court need only find, as the District Court did, that Plaintiff demonstrated a "more than negligible" likelihood of success on the merits for at least one of Plaintiff's claims to affirm the preliminary injunction. This is especially so where, as here, the balance of harms weighs heavily in Plaintiff's favor. The proposition that this Court must review the motion to dismiss denial "[i]n order . . . to undertake a meaningful review" of the preliminary injunction, Mot. at 10, is simply wrong.

In their Motion, Defendants lean heavily on the unremarkable fact that the District Court employed similar reasoning in first denying the motion to dismiss and then finding a sufficient likelihood of success as part of granting the preliminary injunction. Defendants argue that this is an indication that the court "based its finding of a likelihood of success on the merits on its denial of the motion to dismiss." Mot. at 9. But that only makes the two orders related, not "inextricably intertwined" or "two sides of the same coin" for purposes of pendent jurisdiction. To the extent the District Court cross-referenced its oral decision on the motion to dismiss when issuing the preliminary injunction, it was to reiterate its conclusions that Plaintiff's claims were plausible under multiple theories of relief and that no single legal question was controlling on the outcome of the case. Indeed, it would be peculiar if the court's analysis of the legal issues in the case varied from one motion to the next.

By Defendants' logic, every denial of a motion to dismiss followed by the granting of a preliminary injunction—which presumably will always rest on some limited merits determination—would be immediately reviewable on appeal. This is plainly at odds with this Court's precedent and narrow application of pendent jurisdiction. Indeed, Defendants have not cited a single post-*Swint* case in which this Court or any federal appeals court has exercised pendent jurisdiction over a district court's denial of a motion to dismiss, let alone one in which such an order was deemed inextricably intertwined with a discretionary grant of a preliminary injunction. Rather, in the only post-*Swint* case cited by Defendants in which a party sought pendent jurisdiction to review a motion to dismiss order in an appeal of a preliminary injunction, the court *denied* that request. *See Amador v. Andrews*, 655 F.3d 89, 95 (2d Cir. 2011) (finding the court lacked jurisdiction to review dismissal of plaintiffs' damages claims in an appeal of the district court's denial of a preliminary injunction). Defendants do not argue that the orders at

issue here are more "intertwined" than any other orders in the same procedural posture, and they are not.

The post-*Swint* cases cited by Defendants in which this Court has exercised pendent jurisdiction are all easily distinguishable from this case. In *Northeastern Rural Electric Membership Corporation v. Wabash Valley Power Association, Inc.*, the Court exercised pendent jurisdiction over the denial of a motion to remand since it presented "precisely the same question of subject matter jurisdiction" as a preliminary injunction appeal. 707 F.3d 883, 886 (7th Cir. 2013). Another case, *Research Automation, Inc. v. Schrader-Bridgeport International, Inc.*, also involved a common jurisdictional question between an appealable denial of an injunction and an unappealable order granting a motion to transfer venue. 626 F.3d 973, 977 (7th Cir. 2010). In *Heartwood, Inc. v. U.S. Forest Service*, the Court exercised pendent jurisdiction to review orders vacating a consent decree and granting third-party intervention to avoid the "serious, perhaps irreparable consequence of defeating the parties' ability to settle their claims." 316 F.3d 694, 699 (7th Cir. 2003). In *Montaño*, which appears to be the only other post-*Swint* case in which this Court has exercised pendent jurisdiction, the Court reviewed an unappealable order relinquishing supplemental jurisdiction over state claims with a subsequent appealable order dismissing the federal law claims. 375 F.3d at 600.

Unlike these cases, here, there are no common jurisdictional questions at issue in the District Court's motion to dismiss and preliminary injunction orders. Nor does denying immediate review pose any "irreparable consequences" on Defendants. Accordingly, Defendants' appeal of the motion to dismiss order must await the District Court's final judgment, consistent with the Seventh Circuit's strong preference against piecemeal litigation.

II. Defendants Attempt to Relitigate Their Failed Petition For Interlocutory Appeal In Urging the Court to Exercise Pendent Jurisdiction to "Prevent Piecemeal Litigation" and to "Resolve Unsettled Questions of Law . . . Which Are a Matter of National Importance."

In addition to arguing, incorrectly, that the issues raised in the denial of the motion to dismiss and preliminary injunction orders are "inextricably intertwined," Defendants also suggest that this Court may exercise pendent jurisdiction to "prevent piecemeal litigation" and to "resolve unsettled questions of law . . . which are a matter of national importance." Mot. at 10. Neither of these is a permissible basis for pendent jurisdiction. Rather, they are reasons for certifying interlocutory appeals, should the District Court find them convincing—and it did not.

In support of the proposition that pendent jurisdiction may be used to prevent piecemeal litigation, Defendants cite this Court's decision in *Greenwell v. Aztar Ind. Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001). However, this Court has since observed that, in light of the Supreme Court's decision in *Swint*, *Greenwell*'s reliance on "judicial economy" as a basis for exercising pendent jurisdiction was incorrect. *See Abelesz*, 692 F.3d at 647 n.3. Rather, consideration of such concerns is properly left to the sound discretion of the District Court. Here, the District Court expressly decided that the ultimate termination of this litigation would not be advanced by interlocutory review of the motion to dismiss and that interlocutory review likely would *result* in piecemeal litigation, not prevent it. Sept. 25 Order at 9-10.

Similarly, resolving some legal issues that may be unsettled in this Circuit, no matter how important they may be, is not a basis for the exercise of pendent jurisdiction. This is especially so where, as here, resolution of those issues was not controlling on either the motion to dismiss or the motion for preliminary injunction.

CONCLUSION

Defendants' Motion to Exercise Pendent Jurisdiction should be denied.

Dated: December 12, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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EXHIBIT

A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER,	)	
Plaintiff,	)	Case No. CV 16-943
vs.	)	Milwaukee, Wisconsin
	)	September 19, 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,	)	3:34 p.m.
Defendants.	)	

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

APPEARANCES:

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Proceedings recorded by electronic recording,
transcript produced by computer aided transcription.

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TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

* * *

THE COURT: Have a seated everyone, please.

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

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

MR. WARDENSKI: Joseph Wardenski for plaintiff.

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

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

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

THE COURT: Anybody else for the plaintiffs?

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

THE COURT: Thank you.

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

THE COURT: Okay. And for the defendant?

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

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

THE COURT: Good afternoon to everyone.

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

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

So the complaint has to provide the defendant with

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

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

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

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

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

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

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

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

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

Title IX, as the parties both agree, indicates that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First, *Ulane* stated at page 1085:

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

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

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

constituted an educational opportunity.

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

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

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

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

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

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

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

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

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

its discretion under the regulation and to create segregated facilities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. WARDENSKI: The restroom policy and practice has

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

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

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

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

THE COURT: Thank you. Mr. Stadler?

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

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

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

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

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

MR. STADLER: This wristband thing?

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

to an hour and a half.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

MR. STADLER: That is good.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Hold on a second.

(Brief pause.)

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

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

MR. STADLER: I do not.

THE COURT: Okay.

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

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

MR. WARDENSKI: Either way.

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

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

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

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

THE COURT: I could do one o'clock.

MR. WARDENSKI: That would be great.

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

THE COURT: Are you sure?

MR. STADLER: Yup.

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

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

MR. WARDENSKI: Thank you, Your Honor.

MR. STADLER: Thank you.

THE COURT: Okay.

MR. STADLER: That's fine.

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

MR. WARDENSKI: No, Your Honor.

MR. STADLER: No. Thank you.

THE COURT: All right. Thank you all.

THE CLERK: All rise.

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

* * *

C E R T I F I C A T E

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

Signed and Certified September 27, 2016.

/s/John T. Schindhelm

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EXHIBIT

B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Court Minutes

DATE:	September 19, 2016
JUDGE:	Pamela Pepper
CASE NO:	2016-cv-943
CASE NAME:	Ashton Whitaker v. Kenosha Unified School District No. 1 Board of Education, *et al.*
NATURE OF HEARING:	Oral decision on motion to dismiss
APPEARANCES:	Joseph J. Wardenski – Attorney for the plaintiff Ilona Turner – Attorney for the plaintiff Alison Pennington – Attorney for the plaintiff Michael Allen – Attorney for the plaintiff Robert Pledl - Attorney for the plaintiff Ronald S. Stadler – Attorney for the defendants Jonathan E. Sacks - Attorney for defendants
COURTROOM DEPUTY:	Kristine Wrobel
TIME:	3:34 p.m. – 4:38 p.m.

The court began by reviewing the standard for determining whether to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6). A motion to dismiss challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). When evaluating a motion to dismiss under Rule 12(b)(6), the court accepts as true all well-pleaded facts in the complaint and draws all reasonable inferences from those facts in the plaintiff's favor. AnchorBank, FSB v. Hofer, 649 F.3d 610, 614 (7th Cir. 2011). To survive a Rule 12(b)(6) motion, the complaint must provide the defendant with fair notice of the basis for the claim and also must be facially plausible. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

The court then moved on to analyze the plaintiff's claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. This statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. §1681.

The court noted that Count One alleged that defendant Kenosha Unified School District ("KUSD") is a federal funding recipient, and thus is covered by Title IX. Dkt. No. 1 at 30. Count One of the complaint alleged that KUSD discriminated against the plaintiff by treating him differently from other students "based on his gender identity, the fact that he is transgender, and his non-conformity to male stereotypes." Id.

The court noted that during oral argument on the motion to dismiss, the parties had each discussed what the word "sex" meant in the context of Title IX. No court in this circuit has decided that question. The court recalled that KUSD had argued that "sex" referred to the gender on one's birth certification, while the plaintiff had argued that "sex" was more than biological, birth gender. The court told the parties that it had looked in three different dictionary definitions of the word "sex." The *Merriam-Webster Dictionary* defined "sex" as "the state of being male or female." It defined the word "male" as being "a man or a boy: a male person." *Webster's New World College Dictionary ("Your Dictionary")* defined "sex" as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions." It provided a secondary definition: "the character of being male or female; all the attributes by which males and females are distinguished." That dictionary defined the word "male" as being "someone of the sex that produces sperm, or is something that relates to this sex . . . ." The secondary definition added, "as opposed to a female who produces an egg." The on-line dictionary *Dictionary.com* defined "sex" as "either the male or female division of a species, especially as differentiated with reference to the reproductive functions." It defined the word "male" as "a person bearing an X and Y chromosome pair in the cell nuclei and normally having a penis, scrotum, and testicles, and developing hair on the face at adolescence; a boy or man."

In noting the variations among these definitions, the court looked at the Fourth Circuit's decision in G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. April 19, 2016). The court stated that it was not relying on the G.G. decision; the Supreme Court has stayed the issuance of the preliminary injunction the district court issued as a result of that decision. But the court pointed out that that court, like this one, had found varying definitions of the word "sex":

> Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished . . . ." *American College Dictionary* 1109 (1970). The second defines "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . ." *Webster's Third New International Dictionary* 281 (1971).

Id. at 721.

Given this array of differing definitions of the word sex, the court agreed with the G.G. court's reasoning that

> the definitions . . . suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive. The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness."

Id. None of these definitions are helpful when some of those various factors—genes, or chromosomes, or character, or attributes—point toward male identity, and others toward female. And, the court noted, none of those definitions describe "sex" as the gender on a person's birth certificate.

The court opined that some of the Seventh Circuit's decisions have acknowledged the difficulties of trying to cram the analysis of the word "sex" in the Title VII context into the binary construct. For example, in Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), Judges Ripple, Manion and Rover (Rovner writing) struggled with the question of why, in a case where a plaintiff claimed to have been harassed under circumstances involving sexual overtones (as in the act of sex), it should matter whether the victim was harassed because of his or her sex. (That decision was vacated and remanded; the final disposition is sealed. City of Belleville v. Doe, 523 U.S. 1001 (1998).) In Hively v. Ivy Tech Community College, South Bend, Case No. 15-1720, 2016 WL 4039703 at *15 (7th Cir., July 28, 2016), the court stated in the context of discrimination under Title VII based on sexual orientation that it "does not condone" "a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry."

Some cases have discussed the absurd results of trying to cabin people into categories based on gender at birth. In Schroer v. Billington, 577 F.Supp.2d 293, 306-307 (D. D.C. 2008), the court reasoned that a "plain-language" reading of the word "sex" in the Title VII context would, under certain circumstances, mandate a strange result:

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

> seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

The court turned to the Seventh Circuit's decision in Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), upon which the defendants had relied in their moving papers and at oral argument. In finding that Title VII did not provide protection to people who had "sex identity disorder," the court stated:

> It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 . . . (1979). The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

Id.at 1085.

The court agreed with the defendants that neither the Supreme Court nor the Seventh Circuit had overruled Ulane. But in the context of the struggles the court had outlined above with defining "sex" in evolving contexts, the court noted several things. First, the Ulane conceded that there was little legislative history regarding the decision to include protections against discrimination based on "sex." The Ulane court explained that the statute originally was "primarily concerned" with race discrimination, and that "sex" was "added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." Id., quoting Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662 (9th Cir. 1977). The court stated that "[t]his sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added

to the statute's prohibition against race discrimination." Id. (citing Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 434-35 & n.1 (W.D. Pa. 1973)).

This court observed that Title IX does not share the same legislative history (or lack thereof), and that there may be reasons why a court may interpret the word "sex" more broadly in a Title IX context than in Title VII. The court also stated that the defendants' argument that, because Congress not shed light on the definition of the word "sex" in Title VII in the years since its passage was not necessarily determinative, noting the plaintiffs' reference, in argument and in their supplemental authority, to recent efforts by members of Congress to, among other things, pass the Student Non-Discrimination Act. (Dkt. No. 23).

Second, the court pointed out, as the plaintiffs had discussed at oral argument, that the decision in Ulane predated the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) by five years, as well as other decisions the parties had discussed at oral argument. As the Seventh Circuit acknowledged in Hively, the Supreme Court stated in Price Waterhouse that "Congress intended to strike at the *entire* spectrum of disparate treatment of men and women resulting from sex stereotypes." Hively, 2016 WL 4039703 at *13 (emphasis the Seventh Circuit's) (quoting Price Waterhouse, 490 U.S. at at 251).

Third, the court stated, Ulane held that Title *VII* does not protect trans-gender persons; it did not interpret Title IX. As the court noted above, at the motion to dismiss stage, the court cannot conclude that there may not be reasons to interpret the word "sex" in the Title IX context differently.

Finally, the court pointed out that the Ulane court had stated that even if it had accepted the district court's finding that the plaintiff was female, the district court had not made factual findings relating to whether the defendant had discriminated against her on that basis. Ulane, 742 F.2d at 1087. The court emphasized that at the motion-to-dismiss stage, it had made no finding as to whether the plaintiff (Ash Whitaker) was male or female, a determination that would need to be made after further litigation before addressing the question of discrimination.

Thus, the court summarized, (1) there was no case providing definition of word "sex" as it appear in Title IX, and the statute does not define the word; (2) no court in the Seventh Circuit has specifically addressed whether Title IX's prohibition of discrimination on the basis of sex encompasses transgender students; (3) the case law considering whether "sex" in the Title VII context includes transgender persons is contradictory; (4) there clearly are factual and legal disputes between the parties, and support for each parties claims in the case law; (5) Ulane does not gut the Title IX cause of action, because it did not interpret the word "sex" under Title IX, it provided no basis for its definition of

the word "sex," and it does not take into account cases such as Price Waterhouse and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

The court acknowledged that the plaintiffs had argued that Texas v. USA, 2016 WL 4426495 (N.D. Tex. August 21, 2016) may cast doubt on the reasoning the Fourth Circuit employed in G.G. (although the court opined that that case was unusual in its broad scope of the defendant's request for national injunctive relief, and noted the fact that it was a district court decision, while G.G. is an appellate decision). The court again emphasized, however, that at the motion-to-dismiss stage, the court need only determine whether the plaintiff's claims are plausible, not whether the plaintiffs eventually will succeed.

The court also reminded the parties that at oral argument, it had asked the plaintiff about how a student's inability to use a restroom constituted a denial of educational opportunities. The court stated that, since argument, it had determined that there is support in the case law for the conclusion that a student's inability to use the restroom of his/her choice impacts his/her educational opportunities. The court reiterated that the facts around that claim would be fleshed out in further litigation, but concluded that there was a sufficient basis for the plaintiffs to make that claim under the law.

The court touched on the defendants' argument that it owed no deference to the Department of Education's "Dear Colleague" letter (Dkt. No. 10-6). The court agreed with the defendants that the letter was not a statute (and therefore was not binding law), and that it wasn't entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), because it did not constitute an agency regulation. The court agrees with the G.G. court's reasoning, however, that the letter should be accorded deference under Auer v. Robbins, 519 U.S. 452 (1997). G.G., 822 F.3d at 720.

The defendants first argued that the regulation providing schools with the discretion to segregate bathrooms based on sex was unambiguous. (While the defendants did not specifically identify that regulation, the court expects that they referred to 34 C.F.R. §106.33, which states that "[a] recipient [of federal funding] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.") A court does not grant Auer deference to an agency which interprets an unambiguous regulation. G.G., 822 F.3d at 719-720.

The court disagreed, finding that, for the reasons discussed above, the word "sex" in the regulation was ambiguous. It does not address how schools must consider or treat transgender students within the discretionary scheme it provides. Once the court determined that the regulation was ambiguous, the

court then turned to whether the Department of Education's interpretation of that regulation in the "Dear Colleague" letter was plainly erroneous or inconsistent with the regulation or with Title IX. Id. at 721 (citing Auer, 519 U.S. at 461). The "Dear Colleague" letter stated that, "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identities," and that schools "may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so." Dkt. No. 10-6 at 5. The court stated that it could not conclude that the Department's interpretation requiring schools to allow transgender persons to use the restroom comporting with their gender identities would prevent schools from exercising their discretion to provide separate bathrooms. Rather, the court indicated, it allowed students identifying as boys to use the bathroom segregated for boys, and those identifying as girls to use the bathroom segregated for girls.

The defendants also argued that the only way the Department's letter would not be at odds with the regulation would be to change Title IX's definition of the word "sex," and that that task was reserved to Congress. The court disagreed, noting—as it had throughout its ruling-that neither the statute nor the regulation define the word "sex."

The defendants argued that to defer to the Department's interpretation would leave schools in the position of trying to "assume gender identity based on appearances, social expectations or explicit declarations of identity," citing the dissent in G.G. The court stated that whether or not that turned out to be the case was not relevant to whether the Department's letter was inconsistent with the regulation, and the court determined that it was not. For those reasons, the court found, it was appropriate to accord the letter Auer deference.

The court also stated that regardless of whether Title IX provides protection for transgender persons, the plaintiffs have alleged sufficient facts to sustain a gender stereotyping claim. See Price Waterhouse, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'") (citations omitted). See also, Kastl v. Maricopa Count, 325 F. Appx. 492, 493 (9th Cir. 1009) (finding that after Price Waterhouse and Schwenk v. Harford, 204 F.3d 1187, 1201-02 (9th Cir. 2000), "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women.")

In regard to sex stereotyping, the court stated, the defendants clearly treated the plaintiff differently because he did not conform to the gender stereotypes associated with being a biological female. The school suggested that he use bathrooms that other students were not required to use, endure surveillance to police his bathroom use, and initially refused to allow him to stand for prom king (although it later changed that decision).

For all of the above reasons, the court concluded that the plaintiffs had submitted sufficient factual evidence to survive a motion to dismiss, and sufficient legal authority to overcome the defendants' argument that they had no possibility of prevailing as a matter of law. Thus, the court denied the motion to dismiss as to Count One.

The court then turned to the claim in Count Two—that the defendants had violated 42 U.S.C. §1983 by violating the plaintiffs' Fourteenth Amendment right to equal protection. The court began to stating that to state a claim for relief under §1983, a plaintiff must allege that (1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was visited on him by a person or persons acting under color of state law. Buchanan-Moore v. Cnty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009) (citing Kramer v. Village of North Fond du Lac, 384 F.3d 856, 861 (7th Cir. 2004)). The court found that the plaintiff had satisfied these elements—he had alleged that his equal protection rights under the Fourteenth Amendment had been violated by the defendants, who are state actors.

With regard to the Fourteenth Amendment claim, the court stated that "[i]n order to make out an equal protection claim . . . [the plaintiff] had to present evidence that the defendants treated [him] differently from others who were similarly situated. [He] also had to present evidence that the defendants intentionally treated [him] differently because of [his] membership in the class to which [he] belonged." Hedrich v. Bd. of Regents of Univ. of Wisconsin Sys., 274 F.3d 1174, 1183 (7th Cir. 2001) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Nabozny v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996). The plaintiff alleged in the complaint that the defendants treated him differently from the "other male students based on his gender identity, the fact that he is transgender, and his nonconformity to male stereotypes . . . ." Dkt. No. 1 at 32-33. The court stated that, if one assumed for the purposes of the argument that Ash is male, he had alleged sufficient facts to indicate that he was discriminated against relative to other males, because he had alleged that he was not allowed to use the facilities that the defendants allow other males to use. In the alternative, the court stated, the plaintiff is transgender, and if the court concludes at a later stage in the proceedings that transgender persons constitute a suspect class, then the plaintiff has alleged sufficient facts to show discrimination on that basis. Finally, the court again concluded that the plaintiff had alleged sufficient facts to show discrimination based on gender stereotypes.

The court pointed out that it did not have to decide, at the motion to dismiss stage, whether transgender persons constituted a suspect class. Durso v. Rowe, 579 F.2d 1365, 1372 (7th Cir. 1978) ("A state prisoner need not allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the Equal Protection Clause. The lack of a fundamental constitutional right or the absence of a suspect class merely affects the court's standard of review; it does not destroy the cause of action.") The court noted that the defendants argued that the court should employ a rational basis standard of review, while the plaintiffs had argued for heightened scrutiny, but the court reiterated that it did not need to make a decision on that issue in order to conclude that the complaint contained sufficient allegations to survive the motion to dismiss.

For all of these reasons, the court also denied the motion to dismiss Count Two.

In light of its decision to deny the motion to dismiss, the court turned to the motion for a preliminary injunction. Counsel for the plaintiff told the court that the plaintiff's application for a legal name change had been granted, and that the relief the plaintiffs were seeking in the injunction consisted of enjoining the defendants from prohibiting the plaintiff from using the boys' restrooms, enjoining the defendants from calling the plaintiff by female names and female pronouns, and enjoining the defendants from identifying the plaintiff as transgender (in ways such as requiring him to wear a colored arm band). Counsel for the defendants acknowledged that the defendants were aware of the official name change and were in the process of changing school records, but indicated that he'd need time to talk with his clients before acceding to any request never to refer to the plaintiff by a female pronoun. He also told the court that there was no wristband policy, that there never had been, and that the plaintiffs' request for relief on that ground was speculative.

Counsel for the plaintiff asked if the court would hear argument right away on the request for injunctive relief as to the restrooms, and reserve for a later time the request regarding pronoun reference. The court, after conferring with counsel for the defense, agreed. The court also stated that it would not entertain a request for injunctive relief regarding the armband at this time, given that no such policy appeared to be in force.

The court scheduled a hearing on the motion for preliminary injunction for September 20, 2016 at 1:00 p.m. in Room 225. Parties wishing to appear by phone may do so by calling the court's conference line at 888-557-8511 and using the access code 4893665#. The hearing will address only the plaintiffs' request for injunctive relief as to the prohibition against his using the boys' restrooms.

EXHIBIT

C

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 20, 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,	)	1:05 p.m.
Defendants.	)	

TRANSCRIPT OF ORAL ARGUMENT ON
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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TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

* * *

THE COURT: Have a seat everyone, please.

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

Can you state your appearances starting with the attorneys for the plaintiff that are present in the courtroom.

MR. WARDENSKI: Joseph Wardenski for plaintiff.

MR. PLEDL: Robert Theine Pledl, also for the plaintiff.

THE COURT: And now for the attorneys for the plaintiff by phone?

MR. ALLEN: (VIA TELEPHONE) Michael Allen with the firm of Relman Dane & Colfax for the plaintiffs.

MS. TURNER: (VIA TELEPHONE) Ilona Turner with Transgender Law Center for the plaintiff.

MS. PENNINGTON: (VIA TELEPHONE) Allison Pennington with Transgender Law Center for the plaintiff.

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

MR. SACKS: Jonathan Sacks for the defendants.

THE COURT: Good afternoon to everyone.

As you know, yesterday when we were together we

decided to set the preliminary injunction arguments over until today to give everybody an opportunity to kind of process yesterday's decision and to gather your thoughts about any arguments you wanted to make.

And I just want to clarify before we get started, I think my understanding was correct at the end of the hearing yesterday, but you all tell me if I'm wrong, that we're basically confining the arguments today to the bathroom policy issue.

Mr. Stadler wanted to have an opportunity to speak with his clients with regard to the name change and use of pronouns issue. There may be some other things as well. And so the plaintiffs had asked that at least we address the bathroom issue which it didn't sound like anybody wanted to necessarily modify their evidence that they had produced.

So, my understanding is that that is going to be the focus of today's arguments unless anybody recalls differently than I do. Mr. Wardenski?

MR. WARDENSKI: Yes, Your Honor, that's correct.

THE COURT: Okay. Mr. Stadler?

MR. STADLER: The only clarification I would add, Judge, is again we don't have an issue with the name change because there is a circuit court order changing the name.

THE COURT: Right, sorry.

MR. STADLER: It was just the pronoun issue.

THE COURT: Use of, right, the pronouns. I apologize. Okay. Thank you. All right. So this is the plaintiff's motion for preliminary injunction. So, Mr. Wardenski, I will start with you.

MR. WARDENSKI: So I spent some time at the motion to dismiss hearing talking about Ash and his experience at school both last year and the first few days of this school year. His senior year started about two weeks ago and in terms of the restroom access issue the situation is essentially unchanged from what it was at the end of the year, which is that the school has instructed him not to use the boys' restrooms. He is given the option of using girls' restrooms or one of several single-occupancy restrooms and does not feel comfortable using either of those options.

He hasn't used any female-designated facilities probably for almost over a year and a half of his life in school or elsewhere. He's only used boys' and men's facilities outside of school. And is very uncomfortable with using the gender-neutral single-occupancy options at school because, as the Court recognized yesterday, he is the only student who has been given a key to access those restrooms, they are still somewhat out of the way from his classes, it calls unwanted attention to himself and causes him feelings of humiliation and embarrassment even at the idea of having to use a segregated facility that is limited to him only.

So in response, his response has been essentially the same as it was last year which is to try to avoid using the restroom as much as possible, which isn't always possible, but he goes long stretches without using the restroom.

He has tried to limit his fluid intake during the day. And on some of the hot days in the last two weeks that's been virtually impossible.

On top of the medical condition that we've discussed before, the vasovagal syncope which requires him to stay hydrated throughout the day, have six to seven glasses of water and Gatorade. That's a fainting condition that can also result in, you know, migraines and dizziness.

On top of that just the heat has been pretty bad so it's been hard for him to limit his fluid intake in the way that he might otherwise do in order to avoid having to use the restroom at school.

All this to say the situation is basically the same. He's going through a lot of the same distress and stress over the situation at school. Remains concerned and humiliated about being treated differently and singled out for this type of treatment when he uses male-designated facilities everywhere else in his life and just wants to do so at school so that he can have a normal year.

He's already diving into the school activities like drama club and other things that we have discussed before. And

so his days are long and they're gonna get longer as he gets further into those activities. And so not using the restroom at all is -- isn't really an option now, but it's certainly not going to be an option as he gets further into the school year.

So, with that we are seeking a preliminary injunction on allowing -- well, restraining the school district from enforcing any policy that might otherwise limit him from using the boys' restrooms, which includes the use of any discipline, formal or informal, that can involve pulling him out of class to discuss his restroom use or to chastise him for using boys' restrooms on the occasions that he does. But really to enjoin any policy that would single him out for differential restroom use and allow him essentially to use the boys' restrooms while the merits of this case proceed.

This is narrowly targeted relief that is more limited in scope than the ultimate relief Ash will seek in this case later, but its primary purpose is to prevent harm to him. And that is, as this district court has recognized in the past, targeted at the central core purpose of a preliminary injunction which is to prevent irreparable harm on a party.

So, in the Seventh Circuit the analysis, and I'll walk through a summary of our points under each of these steps in the analysis, is that a moving party must show irreparable harm for which there is no adequate remedy at law and show some likelihood of success on the merits.

And as we have stated in our briefs, the threshold for the likelihood of success is low in this circuit. It just has to be better than negligible. And assuming that those three factors are met, the special factors, then the Court may proceed into a balancing analysis where the Court weighs the irreparable harms on the moving party versus irreparable harms on the nonmoving party, if any, and then also considers the effect, if any, on the public interest.

The Seventh Circuit uses a sliding scale that has been articulated many times including in the *Turnell* case, the *Girl Scouts of Manitou Council* case, and others dating back many, many years, and that sliding-scale analysis the higher the likelihood of success the lower the showing of harm has to be, but conversely the higher the showing of irreparable harm is the lower the likelihood of success needs to be in order for an injunction to be granted.

Here we think that Ash has both presented a strong likelihood of success on the merits, but it also has presented an unquestioned proof of irreparable harm based on the defendant's conduct over the last year and their ongoing conduct this year. And I want to walk through that.

As we have demonstrated in our motion and supporting affidavits from Ash himself, from his mother Melissa Whitaker, from Stephanie Budge who is an assistant professor at the University of Wisconsin-Madison and a specialist in transgender

youth development and also a practicing clinical psychologist who has treated many transgender youth between at the age of adolescence and early adulthood over the years. She met with Ash and his mom for several hours. She also reviewed all of his medical records including from his pediatrician and from his psychotherapists. She confirmed a diagnosis made by his pediatrician that:

He meets the criteria for a diagnosis of gender dysphoria.

That he has experienced significant and constant distress related to the discriminatory conduct by the Kenosha school district in limiting his restroom use and the other forms of discrimination we've alleged in our suit.

That as a result of the meetings he's had with administrators and the stigma and humiliation he has suffered as a result of being singled out with regard to restroom use, he has demonstrated symptoms of posttraumatic stress disorder which include flashbacks, panic attacks.

And he's also presented symptoms of depression and anxiety, all of which are certainly unique and specific to him in this case and have been corroborated by his own medical providers and by Professor Budge, but are also consistent with the standards of care under the World Professional Association of Transgender Health standards and the prevailing medical consensus that if a transgender person, especially a transgender

young person, is denied the ability to live in accordance with their gender identity, these types of symptoms are highly related and correlated to gender dysphoria, things like anxiety and depression.

So what he's experiencing himself is very much in line with what the medical community has concluded are symptoms related to an individual's inability to live in accordance with their gender identity.

Dr. Budge further concluded that:

Limiting his access to restrooms at school has caused Ash physical discomfort.

He's experienced tearful nights after school, difficulty sleeping, loss of focus on his academics.

That his drive and staying a high achiever has been to get through his senior year and go to a college environment where he'll be more accepted for who he is, but that he has nevertheless suffered educational harms and psychological harms and certainly the medical harms as well with regard to his medical condition from limiting his fluid intake as a direct response to the district's policies.

I'm going to quote Dr. Budge here. She says that the district's actions have resulted in "deeply harmful and stigmatizing effects, causing Ash to feel constant isolation, shame, humiliation, anxiety and depression." And that while therapy may be helpful in remediating the effects of that

discrimination, it's not sufficient. That unless he -- unless the discrimination is stopped that these practices will result in long-term harm.

And I'll quote her again. She wrote:

"KUSD's treatment of Ash and its policies regarding his bathroom use and other actions that single him out as transgender and treat him differently from other boys are directly causing significant psychological distress," and I want to emphasize this part, "place Ash at risk for experiencing life-long diminished well-being and life function."

So this finding goes at the heart of why a preliminary injunction is appropriate in this case; that the harm to Ash is happening both in real time but it has and will come to create permanent effects that can't be remediated by damages or therapy or anything else; that these are affecting his life goals, his ability to get into college, succeed in college later.

And so we presented other evidence from other experts including Dr. Nick Gorton who is a medical doctor who has treated many transgender patients. He has written in his declaration that there is medical consensus that the only effective and ethical treatment for gender dysphoria is for a transgender person to live in accordance with their gender identity, and that an early social transition that is unimpeded by the negative externalities, things like discrimination when an individual transgender youth is allowed to live in accordance

with their gender identity uninterrupted by harassment or discrimination or differential treatment, that that results in better longer term health and medical/mental health outcomes.

We also presented social science research evidence in Dr. Jenifer McGuire's declaration that also confirms that the type of exclusionary treatment that Ash has experienced at school creates a negative school environment that hurts both the students directly affected like Ash, but also has harmful effects on the school climate and the whole school community. And she goes on at some length, as does Dr. Budge, about the research links between school climate and academic performance, a transgender student's safety and well-being and their long-term outcomes.

So, in sum, Ash has experienced and is experiencing highly stigmatizing treatment that have exacerbated his symptoms of gender dysphoria and are continuing to do so this school year.

He's experiencing physical health effects separate from his gender identity but as a result of the defendant's actions based on his efforts to try to not use the restroom at all, to try to comply with the district's policy, and he has experienced educational effects in terms of loss of focus, lost class time, less enjoyment in activities that he has previously enjoyed like orchestra where he has heard some comments from the adult volunteer last year with regard to his case and his gender

identity.

So we think and I posit that the irreparable harm on Ash is clear and the district has not in its briefs rebutted that that harm is true. They haven't presented any evidence that that harm isn't happening.

And so Ash has, as we've said before, one senior year. He has, you know, one opportunity this fall to apply to college, to do well in his AP classes, to be in the school play and everything else this year, and that's the senior year he wants. He doesn't want to spend another whole year having to spend a lot of mental energy and experience a lot of distress around which bathroom he can use when last year he used it for seven months before the school district told him he couldn't. And he continued to use it when absolutely necessary for the rest of the year and there's never been any evidence and nor has the district put forth any evidence that any other student has ever been affected by his use.

And that's where we get into the balancing of harms. The district has mentioned a few, you know, highly speculative harms, hypothetical harms in its brief including, you know, undefined financial costs or other things. But they have offered nothing to bolster that and those claims are undermined by the experiences of many other school districts in Wisconsin and across the country who allow and have allowed transgender students to use restrooms consistent with their gender identity

for many years. And we've also presented evidence to you of that.

We've given you a sampling, and it is just a sampling of transgender-inclusive policies from Wisconsin school districts that allow/permit transgender students to use restrooms consistent with their gender identity and make clear that requiring a transgender student to use a gender-neutral facility is not acceptable because of the stigmatizing harm that it poses on that student.

We have presented declarations from the principal of Shorewood High School in Shorewood, Wisconsin, Tim Kenney, as well as the superintendent of that school district. Shorewood adopted a transgender-inclusive restroom policy about two years ago. And while both of those administrators acknowledge that they themself had fears about what might happen, whether they would get complaints from other students, whether families would complain or that, you know, something else might go wrong, but those fears have been completely unsubstantiated. And they've had three transgender students that they know of in their high school since that policy was adopted and are quite pleased with the policy and have acknowledged and told the Court that it's much easier to have an inclusive policy than to have an exclusive one. That confirms the experience of districts that have been doing this for much longer.

We have a declaration from Judy Chiasson who is the

director of the Office of Human Relations Equity and Diversity for the Los Angeles Unified School District, LAUSD. LAUSD is the I believe second-largest school district in the country that has 1200 schools, 732,000 students, and they adopted a transgender-inclusive policy that Dr. Chiasson helped write in 2005. So for the past 11 years in this tremendously large school district with hundreds of thousands of students, many transgender students over the years, they have experienced in her words "no issues at all." And they've actually revised their policy several times to become -- to makes it more inclusive and less case by case as the years have gone on.

So the evidence, the clear evidence, the practical common-sense experiences of other school districts show that allowing transgender kids to use restrooms consistent with their gender identity is not a big deal. Allowing Ash to use boys' restrooms wasn't a big deal for most of last school year. And the only people that have made it an issue have been the school administrators at his school and the district itself.

There's nothing about the boys' restroom or Ash's use of the restroom that affects any other student's privacy. Ash using the restroom to do his business and leave is all he wants to do, all he has done last year, all he does outside of school, and that's all he's asking for the Court to do this year.

The last piece is the effect on the public interest, if there is any. And there are several arguments in favor of a

preliminary injunction helping the public interest, advancing the public interest in this case.

As Dr. McGuire stated in her declaration, fostering safe and inclusive nondiscriminatory school environments helps all students. It helps the academic performance and sense of well-being both for, as I said, for the LBGT students and others who feel the effects of living and going to school in a nondiscriminatory environment.

Dr. Chiasson in her declaration provided a useful example of that from her own experience in Los Angeles where a new student to the school district who was a transgender boy was using the girls' rooms because he thought he had to, and the girls felt uncomfortable, he felt uncomfortable. And when the school district told him that he could actually use the boys' restrooms, everyone was happier and it became a nonissue very quickly.

That I think is an experience that's been echoed in the experiences of many school districts around the country, including those that have been chronicled in the examples of emerging practices that the U.S. Department of Education put out simultaneously with the "Dear Colleague" letter in May. And it's the experience of school districts that have been under enforcement actions for Title IX in -- that have been brought by the federal government, by the Department of Education or by the Department of Justice.

The Arcadia Unified School District in California, for example, was the first school district to enter into a settlement agreement with both departments, Education and Justice, in 2013, for a transgender middle school boy. The district, though reluctant, entered into a settlement agreement in which they agreed to treat him as a boy in all respects for the rest of his time in school restroom access, locker room access and everything else. And their superintendent now, their current superintendent, who was an assistant superintendant at the time the settlement agreement was entered, has spoken publicly, he has signed onto amicus briefs, he has helped administrators around California and elsewhere by saying this was the right thing to do and it has -- you know, it was very little impact on the school district but he realized that this was actually -- was good for the school, good for the school district and good for the student and he has now gone around making the case to other school districts for how to do this.

So, in conclusion, the showing of irreparable harm is very high. We also think, for all the reasons that we have discussed and briefed on the motion to dismiss and this present motion, that our likelihood of success is high.

This certainly is, as the Court recognized yesterday, a matter of first impression in this circuit, but for all the reasons that we've argued we think that the chance of success on his Title IX and equal protection claims is strong. And the

district has presented nothing other than the hypothetical speculative harm to the school district which isn't borne out by their own experience with Ash or by the similar experiences of other school districts and the public interest would actually be advanced by an injunction in this case.

So for those reasons we ask you, Your Honor, to grant the injunction permitting Ash to use the boys' restrooms for the duration of this case.

Thank you.

THE COURT: Thank you, Mr. Wardenski.

Mr. Stadler.

MR. STADLER: Thank you, Judge.

I would take issue with counsel's statement that this is not a big deal. This is a big deal. And this is a big deal in regard to whether a school district can set rules and policies for its district.

And I will submit to you that Kenosha is not Shorewood. And I will certainly submit to you that Kenosha is not Los Angeles. And when counsel says that it's just the administrators in the district that have made this decision, that's because that's where the decision lies. It's a policy and policies are set by the school board, not by individual students, not by plaintiffs in lawsuits. And unless it's something that's illegal, that policy remains with the district and not with the court.

The burden here is very high for one particular reason. And counsel kind of glossed over that. They did address it in their brief. But what they've tried to do is to paint this that they're seeking to enforce a status quo of Ash using the boys' restroom. But we know from Ash's affidavit, or declaration rather, and mom's declaration at paragraph 8, that they went to the school administration in April of 2015, and asked if Ash could use the boys' room. Ash and his mother were told at that point in time that it was district policy that he could not use the boys' room, he had to continue to use the restroom.

When counsel says that for seven months Ash used the boys' room and there were no problems, it's because nobody knew about it. Ash willingly said and counsel even in their brief says Ash did what he wanted to do, he ignored the directive, he violated school rules and the policy that the administration had informed him of and he used the boys' room. When he was caught doing that again in February of 2016, he was again advised school policy is that you have to use the girls' restroom and you can't use the boys' restroom.

The status quo in this case is that Ash has not been allowed to use the boys' room. What plaintiffs seek in this preliminary injunction is the ultimate relief in this lawsuit. They are asking this court to order at the front part of the case that they get what they want at the end of the case, well

before the parties have had the opportunity to present a full case, well before everything has been defined in this case. So I want that to be absolutely clear that the status quo here is being changed as a result of the injunction that plaintiff seeks.

The factors that we have to address in dealing with a preliminary injunction include the reasonable probability of success on the merits. I know the Court denied the motion to dismiss yesterday, but I don't think that the denial of the motion to dismiss means that we gloss over the reasonable probability of success on the merits.

The troubling part for me in this case continues to be this. And that is, plaintiffs are not claiming that transgendered status is protected by Title IX. And yet that's the argument that we see in all the other cases that we've talked about. Whether it's even the Title VII cases or the Title IX cases like *Johnston* or *G.G. vs. Gloucester*, all of those cases have talked about a plaintiff who wants to say transgender is within the scope of because of sex within the statute.

But that's not what they say here. What they say here and what they continue to take as a position is that a student has the unilateral right to declare his or her sex. I am male or I am female. They don't claim that there's a right to say I am transgender and, therefore, I am protected under Title IX.

And I think that's significant here. Because when you look at it, it means that a school district must take a look at a student and say, okay, even though you have a birth certificate that tells us you are female, and even though you may have complete female genitalia, you can tell us you are male and we must honor that. There is simply no support in the law for that proposition.

Even yesterday as we talked about the motion to dismiss, I think the Court's analysis dug into this issue of does the term "because of sex" encompass transgender. And I think that is the issue to be looked at, but that is not what plaintiff presents in this case.

Plaintiff presents this claim of a unilateral right to declare one's sex. No basis in law for that. There is no case out there that says someone has the right to tell the world that their gender is different or is one versus the other. There's just no basis for that.

So I think that's a significant issue here when we talk about reasonable probability of success on the merits. Do they have a reasonable probability of success on the merits of saying to this court or any other court students have the right to unilaterally declare their sex. I think they're going to lose on that issue. I think that's a hands-down loser.

I think the other issue does "because of sex" encompass transgender is certainly, as the Court pointed out,

it's an open question. There's courts on both sides of the fence on that issue and it's subject to debate. If that's the avenue they were going up they might have a little bit more chance of success. But that is not their avenue. And I would submit to the Court that there isn't support in the law for the position that they have taken.

I believe that the plaintiff takes that route because of the logic argument that we've advanced. And I think I haven't done a good job of explaining that to the Court.

But if the term "sex" under Title IX includes male and female and transgender, transgender is encompassed within that meaning of sex, which is what *G.G.* and *Johnston* and the other cases have all talked about, then you have to go and look at the statutes and the regulations which say that you can provide separate toilet, locker room and shower room facilities on the basis of sex as long as they're comparable.

If transgender falls within the term "because of sex," we can have separate locker rooms, toilets and shower facilities on the basis of people being male, female, or transgender. That's the problem plaintiff runs into if they try and say that the status of being transgender falls within "because of sex."

And so they have pushed that away and instead declared this right to unilaterally say I am either male or female and you must live with that. I don't think there's a basis in the law for that.

I think if transgender is encompassed within the meaning of sex, there is still a basis to segregate locker rooms, toilets and some other facilities on the basis of male, female or transgender. For that reason I think plaintiffs lose on the issue of reasonable probability of success.

I think that the issue presented by this injunction also creates problems. If Ash can use the boys' restroom is he required to? Is he making an irrevocable choice at this point that moving forward he must use the boys' restrooms, he can't use the female restrooms, the girls' rooms? Can he change his mind?

It's an interesting question. If the Court says that Ash has the right to say I can use the boys' restroom, does that mean that Ash now has the right to say to the district and I can use the boys' locker room? Because if my right to use the bathroom is encompassed within Title IX, then certainly that includes the right to use the locker room.

If we have to accept the unilateral declaration that Ash is male, can he use the female locker room? If we are bound to accept his designation "I am male," will he be able to go in the female locker room? Can he be required to use one or the other? What do we do in the future in regard to a locker room? Plaintiff wants to take one little issue here out of context in terms of the overall effect of this, and it just leads to unanswered questions.

The biggest stumbling block I think that plaintiff faces in terms of requesting this injunction is trying to meet the standard of irreparable harm. And plaintiff's counsel says, well, the district hasn't brought forward anybody. True, we didn't drag Ash in to have an examination by a psychiatrist or a psychologist. We didn't want to do that. And we didn't want to do that because when you look at the evidence that the plaintiff has presented, it doesn't show irreparable harm. There's no need for us to come forward with anything on irreparable harm because the plaintiff hasn't.

Plaintiff presents a declaration from Ash, a declaration from Ash's mother, a declaration from Stephanie Budge, declaration from Dr. Gorton, the declaration from Ms. McGuire and the declarations from Tim Kenney, Bryan Davis and Judy Chiasson. Let me start with the last three.

Mr. Kenney, Mr. Davis and Ms. Chiasson's declarations say nothing about Ash Whitaker. They talk about what happened in their school districts. They talk about policy decisions they made. They talked about whether the people living in their school district have had an issue with those policies. But they say nothing about Ash Whitaker. They don't speak to harm. They don't speak to irreparable harm. They add nothing to this analysis.

I looked at Dr. Gorton's declaration. He explains the concept of gender dysphoria. He tries to define the term "sex."

Nothing about Ash. He didn't meet Ash. He didn't review Ash's records. He says nothing about harm. He says nothing about whether any such harm is irreparable. He contributes nothing to this.

What plaintiff does present is the declarations from Dr. Budge and Dr. McGuire. I think the most interesting part about looking at those two declarations is not anything about either of those declarations, it's what the plaintiff hasn't presented to the Court. Who knows Ash best from a medical and psychological perspective? I doubt it's Dr. McGuire who's never met Ash, never talked to Ash.

In fact, the people that probably know Ash best from a medical and psychological perspective would be Dr. Sheryn Abraham, who has been Ash's medical doctor since 2014, and Tara Rullman who has been Ash's therapist since 2014. And Dr. Budge identifies that both of those hold those roles at paragraph 48 of her declaration.

There's no affidavit, there's no testimony from the medical person and the therapy provider who have worked for Ash for the last several years. They would be the most logical people to come into this court and explain to the Court here's who Ash is; I've known this person for two years; here's where their psychological and medical history started from; here's what's happened along the way. They'd be able to correlate kind of that roadmap of as this happened that happened and to be able

to explain those things to the Court. We're left with someone who's never talked or met Ash and somebody who's spent a grand total of maybe 12 hours developing a report. So I think it's critical that we're missing those things.

Let's talk about the declarations from Dr. Budge and Dr. McGuire. I know that on a permanent injunction we're less rigorous about the admissibility in a declaration. I accept that.

And so when you have declarations, though, that are filled with double and triple hearsay, the Court can still consider them, but it certainly affects the credibility of what has been presented in the declaration. And I would submit to the Court that the declarations from Dr. Budge and Dr. McGuire lack a lot of credibility. They lack a lot of personal knowledge. They speak extensively about generalities and studies of other people, other schools, other cities, other countries, but they speak very little of Ash.

As I said before, much of what they identify about Ash is double or triple hearsay. I think Dr. McGuire's declaration couldn't be any less credible. She states in her declaration at paragraph 8, that the facts of her declaration are based upon two things: Number one, the complaint that she assumes to be true.

Now, if she were a judge ruling on a motion to dismiss that would probably be great, because then we'd have to accept

all of the things in the complaint as being true. At no other time do we accept all the allegations of a complaint as being true. And that's the factual basis for her knowledge about Ash.

She does have one other area where she said she got information from Ash and his mother. It was in a telephone interview conducted with two of plaintiff's advocates. They were plaintiff's attorneys. So to formulate her opinions this expert called plaintiff's counsel and got their version of what Ash and/or his mother believed the facts to be. Double hearsay coming through an advocate. There's a complete lack of credibility.

If we set aside the credibility issue and say, okay, let's go and take these two experts at what they've opined on, what do they tell us? I thought it was very interesting that in counsel's presentation he kinda summarized what Dr. Budge and Dr. McGuire testified to and then said they talked about permanent harm that can't be remediated. I wrote that down and put quote marks around it.

And I found that to be extremely significant because if you look to both of those declarations, there are no words in there that talk about permanent harm. They certainly both talk about their perception of harm, and we'll talk about that in a little bit, they say nothing about permanency. Beyond the permanency part of it they say nothing about the lack of an ability to be remediated.

Neither of them provides an ounce of testimony through their declaration about whether any harm is irreparable. On a motion like this where we're in front of the Court on an injunction that seeks to change the status quo, I can guarantee you there will always be harm. If there wasn't harm we wouldn't be in court. There would have been a motion to dismiss that the case was moot because nobody had suffered an injury.

Of course there is injury. But the standard on granting an injunction is not whether plaintiff has been harmed, it's whether plaintiff has suffered irreparable harm. Neither Dr. McGuire or Dr. Budge say anything about that. Paragraph 37, Dr. McGuire says: "These things have marginalized and stigmatized Ash. It's harmful to Ash and other transgender students."

Harmful in what way? I mean, it's a nice conclusion, but she doesn't say what the harm is, just that it's harm. What's the quantum of that harm? Don't see that.

Same paragraph, Dr. McGuire says that Ash has had stress over the bathroom issue.

Okay. How much? Is it intolerable stress? Can you quantify it? Again, there's nothing there other than a bald conclusion of harm, but nothing about how much harm or whether it's irreparable.

Dr. Budge's opinions fair no better. She says Ash suffers from depression. Okay. She also says that that

depression predates any bathroom issue. Goes all the way back to when Ash began to come out and having the struggles over the identification issues of her gender -- of his gender -- and having the internal conflict caused by that.

That's a causation issue. What causes the stress. Certainly if Ash has had stress for four years, the bathroom issue is not the cause of the stress.

Paragraph 47, Dr. Budge says: "There's distress related to how treated by staff and peers."

Well, what part of that is segregated to something done by staff and what part is segregated to something done by peers? Because the peers have nothing to do with the bathroom issue.

Dr. Budge talks in her declaration about Ash has faced criticism and comments from peers at school. Is that the right thing for peers to be doing? Absolutely not. Is that the reality of what happens in high schools regardless of what the issue is? Regardless of what the issue is, peers in high schools criticize one another.

Again, paragraph 47, Dr. Budge talks about the internal stress from dealing with gender identity issues.

Ash does have issues. And I'm sure there are mental health issues. We don't disagree with that. But do those relate to the bathroom issue? Dr. Budge doesn't say so and Dr. McGuire doesn't say so.

Paragraph 49, from Dr. Budge: "Ash has PTSD," posttraumatic stress disorder, "in part due to verbal harassment at school."

Verbal harassment by whom? Peers? We don't know. It's simply a conclusion: verbal harassment at school. And that's what happens when you get hearsay and things of that nature involved, we get conclusions that aren't necessarily fleshed out.

Paragraph 51, "Ash has anxiety. Ash avoids social situations. Ash avoids changing in locker rooms. Ash avoids strangers. Ash has avoided asking anyone on a date."

Those aren't tied to the bathroom. The access to the bathroom isn't causing anxiety, the anxiety is in regard to having to deal with people in social situations, locker rooms, strangers, and dating relationships.

Also in paragraph 51 from Dr. Budge: "Ash has some panic issues and has had those for the last four years."

Predates the bathroom issue. Doesn't tie panic and bathroom together.

In fact, paragraph 52, Dr. Budge says: "Anxiety and depression started when he began to internalize shame about gender identity."

The issues that affect Ash are the issues that everybody with gender identity struggles with. It's not the bathroom issue that is causing that harm at all. There's no

link between the two.

We finally get to Dr. Budge's ultimate conclusions. Dr. Budge talks about the way Ash has been treated. By who? Students? Teachers? Community members? Does it relate to the bathroom issue? That's not explained.

Dr. Budge says again, paragraph 53: "The way Ash has been treated has negatively impacted mental health."

Okay. How much? Where's the quantified amount of harm? Is it that it has completely debilitated Ash? Dr. Budge doesn't say that. What's the cause? Dr. Budge doesn't say that. How about irreparable? Does Dr. Budge say that the negative impact on Ash's mental health is irreparable? No.

Paragraph 55, Dr. Budge says that when the district doesn't allow Ash to be treated like all other boys "it's deeply harmful and stigmatizing."

Well, how harmful is deeply harmful? Is that irreparable? Dr. Budge doesn't say it is.

"There may be immediate and long-term consequences," according to Dr. Budge. Again, is it quantified? No. Is it irreparable? Dr. Budge doesn't say that. May be long term. Well, sometimes harm is long term. It doesn't mean it's irreparable. Neither of them talk about that. They use words like "distress," "at risk," all of those things, and "harm," but they don't talk about irreparable harm.

That's the problem in this case. Plaintiff can't show

irreparable harm. Since April of 2015, Ash has been required to use the girls' restroom. Since April of 2015, Ash has excelled at Kenosha Unified School District; top 5 percent of his class; active in everything; is going to college to be a biomedical engineer. If the status quo has not caused irreparable harm, there is no right for the plaintiff to change the status quo.

This is a big deal. There are privacy issues involved in using restrooms. The Court in *Johnston* did a good job of documenting that. I would ask the hypothetical question of whether you've been in a boys' room in the last year or two in the high school, and I know the Court has not been --

THE COURT: You do?

MR. STADLER: I assume so. In older school buildings restrooms are not nice and pretty like they are in a lot of our newer buildings. I've been in two high schools this week. There's no dividers between the urinals. There is a line of urinals and everybody is standing there.

Privacy issues? There are privacy issues. And the school board represents the community and the community has said we have issues with allowing somebody to go into the boys' room whose gender is not that of being a boy. That's a policy decision, it's not violative of the law. The plaintiff is trying to force a change on that issue and has simply not shown that getting that ultimate relief at the beginning of the case will cause irreparable harm.

For all of those reasons we would ask the Court to --

THE COURT: I think we lost somebody off the phone, but so be it.

MR. STADLER: For those reasons we would ask the Court to deny the injunction.

To the extent the Court considers granting an injunction, we would ask the Court to require the plaintiff to post a bond as is required under Rule 65. Wisconsin common law clearly provides that if an injunction has been improvidently issued that the other side is entitled to recover its attorney's fees and costs in seeking to overcome that injunction.

In a case of this magnitude and this importance, I can easily see attorney's fees in this case running into the 100 or $150,000 range. And on that basis we would ask the Court, if it's going to consider granting the injunction, to require a bond in the amount of $150,000. I don't think the Court has to get there because I think the conclusion in this case is that plaintiff hasn't shown irreparable harm and the injunction should be denied.

Thank you.

THE COURT: Thank you, Mr. Stadler.

Mr. Wardenski, response, and then I have a couple of questions.

MR. WARDENSKI: Yes, Your Honor.

Mr. Stadler has decided that he is both a medical

doctor, clinical psychologist, a social scientist and is an expert on both Ash Whitaker, Ash Whitaker's life and gender dysphoria, all of which is belied by his actual comments today.

Rather than reading the declarations including from Ash and Melissa Whitaker themselves, as well as the other declarations that we have provided in toto, let alone reading Dr. Budge's declaration from start to finish, he has spent the last half an hour cherry picking quotes out of context from all of the declarations to make it seem that irreparable harm is a nonissue.

If you go to paragraph 56, which is right after where Mr. Stadler stopped in quoting from Dr. Budge's declaration, I'll reiterate:

"It is my professional opinion that the Kenosha Unified School District's treatment of Ash and its policies regarding his bathroom use, separating him from other students during school trips, refusal to require consistent use of his male name and pronouns by school staff, and other actions that single him out as transgender and treat him differently from other boys, are directly causing significant psychological distress and place Ash at risk for experiencing life-long diminished well-being and life-functioning."

That's the irreparable harm. But on top of the irreparable harm that's been demonstrated by Dr. Budge's independent clinical evaluation of Ash, she met with him for

several hours, reviewed his entire medical history. If the Court would like we can submit his medical records under seal, but Dr. Budge accurately summarizes the diagnoses that he has made.

The school district, in fact, received a letter from Dr. Abraham, Ash's pediatrician, in the spring recommending that he use boys' restrooms, stating that he is a transgender boy who has gender dysphoria, discussing his diagnosis of vasovagal syncope and recommending that he use boys' restrooms. And we're happy to provide that further evidence in terms of documents to the Court if that would be helpful. But Dr. Budge reviewed all of those records including from his treating therapists and confirmed those diagnoses and confirmed the harm that he was suffering.

Dr. McGuire had a telephone conversation at some length with both Ash and his mother with two attorneys present on the phone. If that was ambiguous in her declaration, which I concede it might be, we're happy to provide a one-line supplemental declaration confirming that she did, in fact, speak with them at length and confirmed both that the allegations in the complaint are true to Ash's knowledge and talked through much of those in greater detail including with respect to his restroom access.

All of the expert declarations from Dr. Budge, from Dr. Gorton, from Dr. McGuire have cited the DSM, the Diagnostic

Statistical Manual from the American Psychiatric Association, the World Professional Association of Transgender Health Standards of Care, and a wealth, a consensus of social science and medical research about the effective treatment of transgender people who suffer from gender dysphoria. And as the American Psychiatric Association recognized when it changed the classification in the DSM-V from gender identity disorder to gender dysphoria, it is not the gender dysphoria itself -- it's not being transgender itself that results in the problems, it's gender dysphoria which can be compounded when an individual is not permitted to live in full accordance with their gender identity.

That is something that courts in this jurisdiction in the Seventh Circuit have recognized before in the prison context and others that depriving in the prison context a prisoner of medical treatment related to the prisoner's gender transition is both at odds with the standards of care and can amount to deliberate indifference on the part of a prison.

You know, by analogy, a similar principle applies here, that by depriving Ash the right to undergo his full social transition, that's where he is in his transition, it's a critical part of his long-term gender and human development to live as a boy in all respects. He is a boy. He will continue to be a boy. He will be a man. And his gender identity is male. That is who he is. That is how he lives his life. That

is how he has lived his life and will continue to live his life moving forward.

Mr. Stadler again quoted an incorrect standard for the probability of success. He again said "reasonable probability of success" which is a standard that he had quoted in his -- the district's brief from the D.C. Circuit, it's not the standard in the Seventh Circuit. It is "some likelihood of success," and that that likelihood of success may be low where the showing of irreparable harm is high. And vice versa.

Although we do not dispute that a school district generally has the ability to set its own rules and policies, neither a school district itself or a state can enact or enforce policies that conflict with federal law which is what we are alleging and expect to prove in this case.

As the Eastern District of Wisconsin noted in the *Praefke Auto Electric* case in 2000, while sometimes status quo is a useful way to conceive of the relief being sought in a preliminary injunction, it doesn't always work.

Here the status quo is Ash's use of restrooms for seven months. Mr. Stadler admitted that no one noticed. No one noticed because it wasn't affecting anyone. The only person who noticed was a male school teacher who saw Ash washing his hands in the sink in the restroom and brought it to the administrator's attention.

Ash understood his federal right as a transgender

person to use restrooms consistent with his gender identity. He acted in accordance with that for the first seven months of the last school year.

The present dispute started in February of 2016, when the school intervened and began to discipline him, called him out of class repeatedly, scold him for using the boys' restrooms.

But here the -- we can quibble about what the status quo is, but that's why the *Praefke Auto Electric* case is helpful in its discussion of the purpose of a preliminary injunction to prevent irreparable harm. And I think that's much more apt for the situation that we're -- that we're facing here. That providers who have treated Ash, providers who have met and consulted with Ash and others who confirm that his experience is parallel, consistent with what other transgender youth go through in analogous circumstances, all show that he risks life-long permanent harm, he has experienced significant harm, and that there's a real risk that his ability to enjoy and take advantage of the full educational opportunities and benefits of his senior year in high school will forever be jeopardized. He can't get this year back. No matter what happens in this case he can't get this year back.

But the long-term psychological and emotional and medical harms will compound on themselves. And while he may be a successful adult, that doesn't undercut the fact that these

are significant harms that he may live with and suffer with and has, in several experts' opinions, a high likelihood of experiencing if he every day of this school year has to think about restroom access, to be reminded every time he has to go to the bathroom that his school does not think he's a boy, that they're treating him differently from other boys, that he has to either hold it in or experience the stigma and humiliation of being different from other boys. That's [Indiscernible]. That is real for him.

And I think Mr. Stadler used a phrase that we've turned this little issue into something bigger. This isn't little for Ash. This is huge for Ash. And that's what this preliminary injunction is about.

And that brings me to the last point which is this notion that Ash's gender identity isn't real; that it's capricious; that this opens a can of worms; that a preliminary injunction in this case would create a host of problems that the school district would need to deal with. And, in fact, that's just not true.

Ash, in seeking to use the restroom at this juncture, is not seeking the alternative in this case. As stated in his complaint, he is seeking injunctive relief, policy changes, damages, and indeed that may affect facilities and other treatment beyond restroom access which goes to show that this is not the ultimate relief that he is seeking in this case. But

it's laughable to think that Ash would be going through all this to only -- go back and say tomorrow that I want to use the girls' locker rooms or the girls' restrooms.

This is his gender identity, it's a gender identity that has been documented and confirmed. And while we can work out over the course of this litigation what type of policy would satisfy federal law as more broadly applied to transgender students in general, in this case there is no question that this is a transgendered student who has a male gender identity and experts and his own treating providers have advised the school district to give him access to boys' restrooms to prevent harm and the district in all of that has yet to show how any other students' privacy would be violated.

Practically speaking, Ash uses restroom stalls. And whether they're pretty or not, they have doors and they lock. And so the question of any other students' privacy is just unfounded. And the experiences of Shorewood and Los Angeles and the State of California and Menasha, Wisconsin and multiple other school districts including Racine, the school district next door, all show that trans students can use restrooms every day, they do use restrooms every day, restrooms there are no different, no nicer or probably in many cases less nice than the restrooms that might be at Tremper High School, and uniformly there has been no documented evidence anywhere in the country of any student experiencing a problem from using a restroom

consistent with their gender identity or that any other student has their privacy violated as a result of that student's mere presence and use of the restroom.

That's a principle that was affirmed in the Eighth Circuit case *Cruzan* that I discussed last time and other cases that mere discomfort with a transgender person in the restroom is not itself a privacy violation.

So with that I'll stop. I would, you know, refer the Court to the full body of the evidence that we have submitted in conjunction with our preliminary injunction, including the statements from Ash and Melissa themselves rather than the cherry-picked quotes that Mr. Stadler [Indiscernible].

Thank you.

THE COURT: Mr. Wardenski, if you could comment on this things.

Number one, Mr. Stadler and the district made reference both in the written pleadings and then in arguments today about the fact that [Indiscernible] as of April of last year, the district had indicated that Ash was not supposed to use the boys' restroom and their request for the injunction came several months later.

So can you comment on that timeframe in relation to the irreparable-harm piece of the standard for preliminary injunction.

MR. WARDENSKI: So he was actually referring to the

previous year, Ash's sophomore year when they first approached the school and asked him -- asked whether if he could use the boys' restrooms and the school said no.

THE COURT: Okay.

MR. WARDENSKI: That was in April or May of 2015. And then the events of the summer are when Ash discovered the federal government and others have said, hey, this is my right to be able to use restrooms consistent with my gender identity so I don't think I need to ask permission when I go back to school for my junior year, in September, and he didn't.

And that's when he proceeded to use those restrooms for approximately seven months before the school district again told him that he couldn't. And then occasionally thereafter when it was absolutely necessary to use the restroom and he had no other choice. Using the girls' restrooms was not a choice and neither, frankly, was using the gender-neutral facilities.

And so, but he deliberately took steps as, you know, we have documented to avoid using the restrooms altogether. And so his use of restrooms was the exception last year and not the rule. And that is -- that continues to be true today where he, you know, spends most if not all of the school day not using the restroom, limiting his fluid intake, you know, going out of his way not to use the restrooms in order to avoid being disciplined because he has still -- although he has not been formally disciplined, he has been pulled out of class a number of times,

he's been threatened with further discipline multiple times, and he's concerned that that may still occur. And so that -- that in and of itself is contributing to the distress that he's experiencing during the school day and after.

As I told the Court at the motion to dismiss hearing two weeks ago, on his third day of school his guidance counselor and an assistant principal pulled him out of his calculus class to again talk to him about their expectations for his restroom use for this school year. It was done during class time where he was pulled out for a decent portion of that class. And so his fear that that may recur is real. It happened 10 days ago. It may happen again. Particularly under the circumstance that he does use the boys' restroom in an emergency.

So that is compounding his distress and fueling his symptoms of gender dysphoria which are resulting from the discrimination, not from being transgender. And the gender dysphoria is a result of him not being allowed to be a boy at school in all ways. And that is what the medical community, his own treating providers have recommended that he and every other transgender person be able to do, to live consistent with one's gender identity all day long in all aspects of your life.

And the restroom issue, although it's not the only issue that he has faced at school, is the constant, daily, multiple-times-a-day reminder that my school does not think that I am a boy, they don't treat me as a boy, they think that I'm

something other, they think that it's acceptable to offer me use of the girls' restrooms, it's embarrassing, it's humiliating, it is causing a lot of emotional distress.

And just because Ash is a good student and a strong person doesn't mean that he's not going home and crying at night, losing focus, not able to, you know, devote the attention that he might to his academics and to his extracurricular activities. And that's been documented. It's in his declaration, it's in his mother's declaration, and it's in the declarations of the others who spoke with him like Dr. Budge.

And so, you know, this -- this is real. And it's happening in real time. But -- but I think Dr. Budge's conclusion sums it up very clearly that if this is left unchecked, this is what he will remember from high school. These are the problems that he will suffer. We don't know how this is going to distract him from his college application process or his ability to participate fully in school activities.

Last year was bad. This year, you know, may very well get worse. And the reason why we are seeking this injunction is to allow him to have a senior year where he can think about being a kid, without being a student, without applying for college. And to have his senior year, not to have to think about his gender identity all day long every day. He wants to think about being a boy.

THE COURT: And then the second question -- I told you I had two -- was with regard to bond. Mr. Stadler mentioned that if the Court was inclined to issue an injunction that the defendants are requesting $150,000 bond.

MR. WARDENSKI: We would oppose that, Your Honor. This case is not controlled by Wisconsin common law. Any fees that would be awarded under federal statutory law are typically not awarded to defendants. They would be awarded in this case to Ash. If he prevails on Title IX there's a fee-shifting provision that would award attorney's fees and costs to him.

It would be extraordinary and I think uncalled for to expect a family of moderate means to post a bond of $150,000 to vindicate their statutory and constitutional rights. So we would absolutely oppose that.

THE COURT: Anything further? Mr. Stadler, anything further?

MR. STADLER: If I could just respond to those two. And I'll take the first question first.

The first one I think Mr. Wardenski missed the question from the Court. The Court's question was: Ash was told in February of 2016, you must use the girls' restroom. His attorney, Ms. Turner from the Transgender Law Center, sent a letter to the district in April of 2016, saying you must allow him to use the boys' restroom, you can't force him to use the girls' restroom. And then from April of 2016 to May to June to

July to August, the injunction didn't come. So it's the five-month delay that the Court was asking about.

THE COURT: And that was my question.

MR. STADLER: I know that --

MR. WARDENSKI: If I may respond to that briefly.

MR. STADLER: When I'm done, if you don't mind.

So, I mean, that is the question. And that is the delay. When you let five months go by and don't file for relief, it takes away the issue in regard to irreparable harm. So I just wanted to get back to that question.

And then the second one. And again I think the answer was kind of different than the question on the bond part. We're not saying there's a fee-shifting statute. Wisconsin common law -- and Wisconsin common law does address the things that are not statutory when we're here in federal court -- says that if an injunction is improvidently issued the person the injunction was issued against is entitled to recover their fees and their costs.

So, we're certainly not saying that if the plaintiff were to prevail in this case ultimately that somehow the district would be entitled to fees or costs. Our position is that if the injunction is to be overturned in the future, the district's fees and costs would be recoverable.

The common law case that provides that is *Muscoda Bridge Company vs. Worden*, which is W-O-R-D-E-N, it's a

Wisconsin Supreme Court case from 1922. There are other cases following that --

THE COURT: 1922?

MR. STADLER: 1922.

THE COURT: The Wisconsin Supreme Court -- is it the Supreme Court? I'm sorry.

MR. STADLER: Yes. Wisconsin Supreme Court. I can provide the Court with the cite. I had it in my notes and I can't find it at the moment.

THE COURT: That's fine.

MR. STADLER: It's 270 something Wis, but I'll find that for the Court. And there have been cases subsequent to that that have upheld that right as well.

So again, we're not saying that there's a fee-shifting statute that would allow the district to recover its fees. And certainly even under the *Muscoda Bridge* holding if they prevailed in the case obviously the injunction wouldn't have been improvidently issued and there would be no fee issue.

But if we are to prevail in the case or to prevail on an appeal on the injunction issue and get that overturned because it was improvidently issued, there is common law precedent for us seeking attorney's fees and costs.

Thank you.

THE COURT: Now, Mr. Wardenski.

MR. WARDENSKI: Thank you. So on the point about

irreparable delay -- or, I'm sorry, unreasonable delay. Ash learned of the district's decision in the 2015-16 school year. His mother learned of it at the end of March. He learned about it -- end of February. He learned about it the beginning of March.

THE COURT: Of 2016.

MR. WARDENSKI: Of 2016, this most recent decision. After he had been using the restrooms for seven months. He reached out to counsel within several weeks. A demand letter was sent from the Transgender Law Center to the school district asking for the district to give him access to boys' restrooms. The school district declined and shortly thereafter the Transgender Law Center filed a complaint with the U.S. Department of Education, an administrative complaint, alleging a Title IX violation.

That happened -- I don't have the exact dates in front of me, but --

MR. STADLER: May 13.

MR. WARDENSKI: May 13th. And so when you look at that, between the family learning that the district had doubled down on a supposed policy they had previously articulated a year before but hadn't enforced for the first seven months of this school year, and taking action, filing an administrative complaint with the Department of Education, less than two months had gone by. After the school year ended in mid June and the

discriminatory actions had continued including with respect to the overnight accommodations at the orchestra camp in Oshkosh, the family decided to pursue a Title IX and constitutional complaint in federal court instead of the administrative action, administrative complaint through the Department of Education.

Those things can't happen simultaneously. And so the family decided to withdraw their complaint with the Department of Education and file this lawsuit several days later, in July.

And 20 days later, as I believe the district has calculated, the motion for preliminary injunction was filed, during which time we, as his attorneys, were marshaling the affidavits in evidence to make the requisite showings of irreparable harm and his likelihood of success on the merits.

It's worth emphasizing that all of this was happening over summer break. So his harm between the last day of school on or around June 10th and the first day of school on September 1st, was abated because he wasn't in school.

And so there was no -- I think it's hard to characterize this as a delay at all, but certainly not an unreasonable delay given the need to marshal your evidence up front in a preliminary injunction motion and doing it in advance of the school year where he would continue to be affected by this policy.

And as we wrote in our briefs, unreasonable delay is only an issue if the other side was lulled into some sense of

security. And the cases that the school district cited were cases between two businesses, sophisticated players in the corporate or commercial context. It's certainly not the circumstances here.

And nothing that -- nothing that could have happened by filing the motion a month or two or three months earlier would have changed the fact that his -- that he suffered harm last year. That's been documented and he's continuing to suffer harm this year. So we think that any delay, if you can even call it that, is immaterial.

As to the bond issue, it's my understanding that common law only applies in diversity actions, not where there's a federal claim like this one. And again, the district has made no showing of harm on itself that would require this family, a schoolteacher, a single mom and her son to post bond in order to vindicate their rights which have been articulated by the federal government and other [Indiscernible].

THE COURT: Thank you, Mr. Wardenski.

So I'll briefly go over the standard. The parties both have emphasized it so I don't want to spend too terribly much time on it.

But under *Planned Parenthood of Indiana vs. Commissioner of Indiana State Department of Health*, 669 F.3d 962 at 972, as well as some of the cases that the parties have cited, *Turnell* and others, the standards for the issuance of a

preliminary injunction or the elements for the issuance of a preliminary injunction are the following:

Number one, the plaintiff has to show -- or the movement I should say has to show a reasonable likelihood of success on the merits.

Number two, that there's no adequate remedy at law.

And number three, that in the absence of the issuance of an injunction there would be irreparable harm.

And as the plaintiffs have noted, in the Seventh Circuit the standard for reasonable likelihood of success on the merits is relatively low compared to other circuits. If the plaintiff sustains proof on those three elements, then in the Seventh Circuit there's a separate consideration only after reaching those three elements requiring the Court to weigh the balance of harms to each of the parties if the injunction is either granted or denied, and also to evaluate the effects of the injunction on the public interest. Some circuits combine all that into one test, Seventh Circuit divides it.

And finally, as I think the plaintiffs have argued, the Seventh Circuit has held in several cases that the more likely it is that the moving party will win its case on the merits the less the balance of harms need weigh in its favor if one reaches the balance of harms test. But that's again *Planned Parenthood* quoting *Girl Scouts of Manitou Council vs. Girl Scouts USA*.

So in looking as those three, the first three elements, likelihood of success on the merits, as Mr. Stadler indicated there are cases survived a motion to dismiss, does that mean that the plaintiffs will ultimately be successful? There's no way to predict that necessarily, other than getting past the motion to dismiss. However, the standard as the plaintiffs have argued is a low one here.

Mr. Stadler argued that the reason that he believes that it is unlikely that the plaintiffs will succeed on the merits is, number one, because as the district interprets Ash's argument and the plaintiff's argument, the district interprets it as "I have a right to pick what gender I want to be" argument. And the plaintiffs have argued that instead, they characterize the argument as a question of whether or not the school district has a right to treat a boy differently than other boys simply because he is transgender as opposed to perhaps having been born as a boy.

So there are different characterizations of the claim. But the district also argued that it doesn't believe that the plaintiffs can survive the logic argument. And Mr. Stadler indicated that he thinks maybe he hasn't been as clear in making this argument to me. Maybe it's me not being as clear understanding the argument, I could certainly consider that to be a likelihood as well.

But the argument, as I understand it, is that under

the regulations promulgated under Title IX, schools have the discretion, if they want to, to segregate bathrooms and have a boys' bathroom and a girls' bathroom. And as I understand Mr. Stadler's argument, if transgender is protected under Title IX, then basically the school is going to have to provide boys' bathroom, girls' bathroom, transgender bathroom, and it kind of guts the school's -- the discretion that's now granted under the regulation.

Again, we're not talking today about whether or not the plaintiffs ought to prevail on the merits. As I said yesterday several times, we're not there yet. However, my failure in understanding I think probably still exists as relates to that argument.

The grant under the regulations is discretionary. Schools have the discretion to segregate restrooms. They don't have to, they're not mandated to. It appears that lots of schools do. But they're not required to. And allowing a transgender -- I'm missing the piece where allowing a transgender student to use the boys' restroom if he identifies as a boy or the girls' restroom if she identifies as a girl, I'm missing how that somehow guts the school's discretion to have boys' and girls' restrooms. So I will totally confess that perhaps it's my understanding, but I'm not sure that that argument is one that indicates that there's no way that the plaintiffs can prevail.

We had an extensive discussion -- okay, I singular had an extensive monologue yesterday about the fact that there is caselaw on either side of the issue of how Title IX defines or should define the word "sex" and what it includes. And again I think because there is a low showing and {Indiscernible} only to the low standard established by the Seventh Circuit for showing reasonable likelihood of success on the merits I believe the plaintiff has met that first standard.

Now, that's the first element.

The second element of the preliminary injunction standard is that there is no adequate remedy at law. This is the factor that the parties have provided the least argument and information on.

The plaintiffs argue basically that if -- if Ash has to go through this year not being able to use the restroom with which she identifies, basically he'll never be able to get that year back, he'll never be able to go back and recoup that. And even if he wins at the end of the lawsuit, the year will be gone and that experience will have occurred the way it occurred.

So I understand that to be basically the plaintiff's argument that whatever legal remedy might lie at the end of the case should the plaintiffs prevail, it won't change whatever Ash will be dealing with throughout the course of this year if the injunction doesn't issue.

The defendants didn't really address adequate remedy

at law in their pleadings. Most of the argument today has been focused on irreparable harm in the absence of injunction.

I should go back and say, therefore, I do find that the plaintiffs met the standard, met the element of no adequate remedy at law.

So that leaves the question of irreparable harm. And I will tell you that in preparing for today's hearing most of my focus was on the declaration that Ash filed. I did also look at all the other declarations and I'll comment on that in a moment.

Let me first address, though, just briefly, from a legal standpoint Mr. Stadler's argument in which he discussed the fact that there were some credibility issues he believed particularly with Dr. McGuire and Dr. Budge's declarations. I will note, and Mr. Stadler did concede this in his argument, that under Seventh Circuit law the evidentiary rules in terms of admissible evidence for a preliminary injunction are different. And I'm quoting *Ty, Incorporated vs. GMA Accessories, Inc.*, 132 F.3d 1167 at 1171, that's Seventh Circuit 1997.

"Affidavits are ordinarily admissible at trials, but they're fully admissible in summary proceedings, including preliminary injunction proceedings."

I didn't understand Mr. Stadler to argue that these declarations were not admissible, he was simply commenting on the weight that the Court should give them. But I did want to note that the declarations are admissible evidence for the

purposes of preliminary injunction proceedings.

So I did review those declarations and in particular in looking at Ash's, there are a number of issues that he raises in his declaration.

Number one, the fear that he has suffered and continues to suffer of being stigmatized. He's the only person in the school who has been told he has to use the individual bathrooms that are locked and to which he's been provided a key. He's been trying not to use the bathroom at school at all. And Mr. Wardenski has gone into detail and Ash went into detail even more than Mr. Wardenski did about the extent to which he's supposed to keep hydrated because of the condition that he has with regard to fainting and the dizziness. However -- and I guess he's supposed to drink six or seven glasses of water a day plus Gatorade, I assume for electrolytes -- but if he does that then he has to use the restrooms more frequently and so he doesn't do that and then when he doesn't do that he suffers increased episodes of fainting, migraines, dizziness, the physical effects of the condition that he has.

He talks about the fact that he is constantly worried that he'll be disciplined for using the wrong restroom, at least in the district's view. And apparently in line with his school efforts, he's worried that if he is disciplined that that will somehow show up on his record and will impact his college application process.

He talks about the fact that the school indicated to him when I believe he and his mother met with the school, with the administrator, that they were not going to agree to allow him to use the boys' restroom because the gender that was listed in all of his school records was female and without legal or medical documentation to the contrary, they weren't going to make that change.

And he recounts how he provided the school -- or his mother did provide the school with a letter from his pediatrician, from Dr. Abraham, but that nonetheless he was not allowed to use the boys' restrooms.

He talks about panic attacks. He talks about anxiety attacks. He talks about his headaches, dizziness, fainting. He talks about the fact that he's thinking of transferring to an online school because of the embarrassment and the humiliation and the physical problems that he has been suffering as a result of the policy of not allowing him to use the boys' restrooms.

So certainly there is an allegation of harm in that affidavit. And Mr. Stadler argues, of course, though, that the standard is not harm, the standard is irreparable harm.

And to that end there are the affidavits of Dr. Budge and Dr. Gorton and there McGuire. I agree that none of them are Ash's treating physician or therapist or sociologist or whatever position they hold. Dr. Budge did spend some time with Ash and with his mother and went over his medical file.

I had already -- I knew from the pleadings that Dr. Abraham had submitted a letter to the school back when this issue was going on. And so I understand that while Dr. Budge does not know Ash as well as perhaps his own treating physicians, her letters based on her view of his treating physician's file -- I appreciate that plaintiff is indicating that they can get a copy of Dr. Abraham's letter if we need it, but I think that despite the fact these individuals, the professionals, doctors and otherwise who submitted affidavits may not necessarily know Ash, what their comments go to is, and what their opinions go to, is the medical likelihood or the psychological likelihood that someone with gender dysphoria who is not allowed to be able to live his or her identity will suffer long-term effects.

Now, it is true none of those affidavits said Ash Whitaker will suffer long-term effects. I think it probably would have been irresponsible of anybody to say that. They don't have the ability to say that. What they can predict is a likelihood of risk that that will occur. And they do. They do predict that there is a risk involved that will occur.

So the question is, has the harm that Ash has already suffered and will the harm that he presumably will continue to suffer in the same way irreparable? Can it never be fixed? And I'm not sure that the word "irreparable" in the context of a preliminary injunction motion means that something never ever

can get better or never ever can be repaired. I think the question is where the damage be done and it won't be able to go back and be undone.

In other words, you can't put somebody back in the place where they were before the damage occurred. I think there is no question, at least there doesn't seem to be any question based on the affidavits that are on file, that Ash has already suffered harm; that he has already had physical repercussions from the policy as well as emotional repercussions from the policy.

So it's safe to assume that if he continues not to be allowed to utilize the boys' restroom that those same sorts of harms will continue. And I don't believe under the caselaw that I need to make a finding that there's no possibility ever in any world where he could overcome whatever suffering he has in order to prevail on a request for preliminary relief.

For example, in *Washington vs. Indiana High School Athletic Association*, 181 F.3d 840 at 854, the Seventh Circuit was dealing with a handicapped student, a student with a physical disability who was arguing that part of the treatment -- part of the impact of the treatment of that student was diminished academic motivation. And the Seventh Circuit recognized that that is, in fact, a harm that could be suffered -- an irreparable harm that could be suffered in the context of a preliminary injunction.

Certainly from everything that is indicated in the paperwork Ash has done extremely well in school and is successful in school, but he's being pulled out of school when he uses the restrooms, the boys' restrooms and someone sees it. He's being asked to use different restrooms than those that are available to the other boys. And he has recounted in his own affidavit the stress, the depression, the anxiety, the inability to concentrate. He's recounted all of those things in his affidavit.

So on that basis, on the basis of what Ash has stated in his own affidavit, as well as the information that's provided from the professionals who submitted affidavits, I do find that there has been a sufficient allegation of irreparable harm in the absence of the injunction.

And having made that finding then I'm required under Seventh Circuit law to move to the next piece of the equation which is to weigh the balance of the harms to the parties if the injunction is granted or denied. And I think in discussing irreparable harm and no adequate remedy at law I've probably covered the harm to the plaintiffs and to Ash, so balanced against that is the harm to the defendants if the injunction is granted.

There's been some discussion, both in the pleadings and today in argument, about whether or not the issuance of an injunction would preserve the status quo or disturb the status

quo.

In some respects it appears it would do both under these factual circumstances. The status quo right now is that the school has indicated and has been indicating since at least April that Ash is not to use the boys' restroom. That is the status quo in terms of the school's policy as to Ash.

The status quo also appears to be that Ash has tried not to use the restrooms if he can help it, and that when he can't help it he's been using the boys' restrooms even though he's aware of the policy that the school has told him on several occasions.

So the status quo is yes, there's a policy in place that says that Ash can't use the restrooms. And also there's a practice in place where Ash uses them to the extent that he absolutely has to. So in this instance it is a bit of a circumstance in which talking about preservation of the status quo doesn't really get you very far because it's a mixed status quo and a decision either way would preserve some status quo of some sort.

The school has indicated that again -- and I talked about this earlier -- the school district has indicated that this would impinge on the school's right to exercise its discretion to have separate facilities, but I've indicated that I'm not entirely clear on how that would happen.

A further gloss on that argument, though, is

Mr. Stadler's argument that the school has the right -- it's up to school districts to implement school policies and to be able to decide how best to implement their educational roles and also to protect and provide for their students. And I agree with that.

But, of course, that discretion to school districts is not unfettered. There are all sorts of things that school districts can't do under the law. There are all sorts of things that they can't do under Department of Education regulations. There are all sorts of things that they can't do. There is not unfettered discretion to set policy or to make decisions on behalf of students.

So the argument that it is their right to make their policy is absolutely true as far as it goes. Mr. Stadler argued that as long as there's no violation of the law it is okay for the school to have separate facilities and they have a right to have that as their policy. I agree with that statement as asserted.

But one of the purposes of this lawsuit is to determine whether or not denying a transgender person the ability to use the restroom with which he or she identifies is in violation of the law. And second of all, an injunction is not going to require the school to not have separate facilities, again going back to that argument that I didn't quite follow.

The school argues that there would be financial

consequences that would be imposed if the injunction were to be granted. I don't know what those are. Those have not been identified.

It argues that there would be -- the school wouldn't have time to implement facility changes. I'm not sure what the facility changes would be. As I understand this, Ash is asking to walk into the boys' restroom and use the boys' restroom. He's not asking to have another restroom built or designated; in fact, that's what he doesn't want. So I'm not sure what additional facilities are necessary.

The school argues that the injunction would deprive parents of their rights to protect their children. So far I have not heard any evidence with regard to injuries to other children from Ash using the restroom.

I also do note that from a practical standpoint it sounds like there are a number of restrooms around the school, if a student is uncomfortable if one walks in and finds Ash in the restroom then, of course, they're free to make other choices; that's just the choice that Ash doesn't have. Ash is not free to make those choices.

I understand that this will -- the issuance of an injunction -- a preliminary injunction I should say, will force the school to think about its policies; however, I'm not sure that the issuance of the injunction is what would do that. It sounds like they're already involved in a lawsuit. Clearly the

school already has had to consider its policies. Presumably there are schools all over the country that are considering their policies given the litigation that's happening around the country, given the Department of Education's "Dear Colleague" letter, given the Department of Justice position. So I'm not sure that issuing the injunction is necessarily what will cause schools to consider their policies rather than simply the current activities in the climate.

So for those reasons, balancing the harm to Ash versus balancing the harm to the school district, that balance of harm -- balance of harms weighs in Ash's favor. That is not to say that there was some back and forth between Mr. Wardenski and Mr. Stadler about whether or not this issue, the one that we've been discussing for the last two days, is, quote, a big deal, end quote. I'm not sure how one characterizes big deal or not big deal one way or the other. And perhaps that's legalese to which I've not been initiated. But if the parties are arguing that this isn't important to somebody I'm not gonna sit here and tell either one of you that I don't think it's important to either one of your clients. You wouldn't be here if it weren't.

The school district has reasons and they are expressed to some extent in the pleadings, but we haven't gotten far enough to hear them entirely as to why it is taking the positions that it's taking. And Ash and his mother have reasons they're taking the positions they're taking. And if this were

some minor scuffle I am assuming that talented counsel such as yourselves wouldn't be here. I've never met anybody during my entire career as a judge who has said to me "I can't wait to go in your courtroom and litigate in front of you, I like going to court."

Nobody likes going to court. Nobody wants to be here. And so the discussion of whether or not what Ash is dealing with and what the Kenosha school district is dealing with is a big deal I think is a nonstarter. The question is whether or not the standards of the preliminary injunction rule have been met.

So the last issue after balance of harms is that the Court has to weigh the -- evaluate the effect of an injunction on the public interest. And perhaps that is where a big deal discussion becomes most relevant if there is such a thing. This is an important thing. People have strong views and strong feelings on issues like this and they're entitled to have those strong views and those strong feelings.

The question is whether or not at this stage allowing Ash Whitaker -- and that's all we're talking about right now. I understand the slippery slope argument. But right now we're talking about allowing Ash Whitaker to utilize the boys' restroom without being disciplined or punished or utilizing the boys' bathroom -- restroom, whether or not that poses a harm to the public interest. And at this moment I don't see a harm to the public interest.

I certainly see that people will feel strongly about it, people will have concerns about it. They already have done and likely already have expressed them even before this lawsuit was filed. But I don't see at this point in time a negative impact on the public interest that would outweigh the first three elements in the preliminary injunction test.

The last thing I'll note is that, as the parties are aware from earlier arguments and discussions, the district court in Virginia, the lower court in the *G.G.* case *vs. Gloucester*, issued -- or, I'm sorry, declined to issue a preliminary injunction similar to the one that the plaintiffs are requesting here. The court declined because it understood that the affidavits that were submitted in that case were not of sufficient evidentiary value or weren't admissible and, therefore, didn't consider them.

When that issue went up to the Fourth Circuit, as the parties are aware, the Fourth Circuit concluded that the district court had erred in its consideration of what evidentiary standard was necessary at the preliminary injunction stage and, therefore, overruled the decision not to issue a preliminary injunction.

As Mr. Stadler pointed out at an earlier hearing, the United States Supreme Court has stayed the issuance of that injunction. On the one hand I understand the school district, I believe the school district's argument was if the Supreme Court

has said that that injunction shouldn't issue then an injunction such as this shouldn't issue. I do certainly understand that there are concerns that are raised by the court's decision to stay the *G.G.* injunction.

Unfortunately, we don't have much way of knowing why the court decided to do that. There's a two-paragraph decision, one paragraph is the majority, quote-unquote, which is four justices -- and now that they're in a four-to-four situation, or eight justices, four justices voting in favor of stay, three justices dissenting, and then Justice Breyer adding a paragraph indicating that because the court was in recess and because there was a preservation of status quo issue he would vote in favor as a courtesy.

So it's difficult to know at this stage what it is that the court was concerned about that caused it to stay the preliminary injunction in that case. I make that note only to indicate that I am certainly not unaware of the fact that the Supreme Court has stayed the ruling in that case and that I am not making this decision in a vacuum or ignoring that. What I am doing is looking at the factors that have been laid out by the Seventh Circuit and the evidence that is in front of me based on -- in this case.

And so for those reasons I am going to grant the request for a preliminary injunction. That injunction, as we indicated at the beginning of the hearing, relates only to Ash's

use of the boys' restroom. It will enjoin the school from prohibiting Ash from using a boys' restroom. It will enjoin the school from disciplining him for using the boys' restroom.

Now, I'm assuming there are other kinds of trouble he can get himself into if he tries and the school, of course, has the right to discipline students for misbehavior. But for using the boys' restroom, we're enjoining the school from disciplining him for doing that. And that includes pulling him out of class to talk to him or taking action to monitor his use of the restroom or prohibit him from going into a boys' restroom.

That is the limit of the injunction. It doesn't go any more broadly than that. There are a number of other forms of relief that have been requested in this case, I make no ruling on any of those. This is solely to do with the use of the restroom.

With regard to the requirement to post a bond, there wasn't much argument on that until we got in here today and you've both presented some opposing arguments. I'd like to take a look at those and then I'll let you know if I'm going to require a bond and if I am, how much. But I am going to issue the injunction.

So, that being said, Mr. Wardenski, other issues, questions, things that need to be taken care of?

MR. WARDENSKI: No, Your Honor. Thank you. We will confer with the school district regarding the pronoun use and if

that remains an issue we may come back to you for that issue. But otherwise, no, not right now.

THE COURT: Okay. And I understand that Mr. Stadler's gonna talk to the district about that.

Mr. Stadler.

MR. STADLER: Thank you, Judge. I do have a couple of issues.

THE COURT: Sure.

MR. STADLER: One is we would ask the Court to stay the implementation of the injunction until October 1. That'll provide us 10 days and that will allow us to take an appeal to the Seventh Circuit without having to come back to the Court and filing a motion to stay the injunction while we pursue that appeal. That's one issue.

THE COURT: Okay.

MR. STADLER: Second issue is we will submit an order this afternoon for the Court's signature indicating that it denied the motion to dismiss yesterday for the reasons stated on the record yesterday.

But we would also include in there and ask the Court to approve a statement that the issues involved are unsettled, issues of law and review by the Seventh Circuit will expedite the litigation. We intend to pursue an interlocutory appeal on that issue, but we need that language from the Court in order to pursue the interlocutory appeal.

THE COURT: Okay.

MR. STADLER: And we'll join those two issues together.

THE COURT: Okay. With regard to the second issue, what I normally do in a hearing where I make an oral ruling is to do a minute order which kind of recounts what I said in court and then -- but in that instance if you're going to submit that order with that language in it, I hadn't finished editing the minutes yet so what I'll do is I'll just simply leave them as minutes. It will say the Court denied the motion to dismiss, but it won't have the signature line at the bottom and we'll utilize that order.

With regard to the stay until October 1st, Mr. Wardenski, they have a right to appeal obviously and we're either gonna get a stay now or come back and ask for one.

MR. WARDENSKI: We would oppose the stay right now. As we've already discussed, Ash, you know, has used the boys' restrooms even after he, you know, has been told of their policy. There's simply no harm from him using it pending an appeal.

And we will -- you know, we'll oppose the stay right now and we'll oppose a stay later if they seek one pending appeal, with full knowledge that an appeal is likely here.

THE COURT: [Indiscernible].

All right. I'm going to deny the motion to stay until

October 1st, although understanding that the school can come back and request a stay at the time that it files its notice of appeal as everybody does, which I assume it will.

Mr. Stadler, anything else then?

MR. STADLER: I guess the only other issue I have, and I know the Court has said that its ruling only applies to the restrooms, it's just a practical issue, which locker room do we send Ash Whitaker to?

THE COURT: I was not asked to rule on that, I have not been asked to issue an injunction on that, and I -- you've got a school board and I assume they're going to discuss it and talk about it and -- but the ruling that I was asked to make was on the restroom, that's the ruling that I've made. I hear you.

MR. STADLER: Nothing further. Thank you.

THE COURT: Okay.

MR. WARDENSKI: Your Honor, may I ask, will there be a written decision on either motion or will it be just the minutes?

THE COURT: The minute order is going to -- the minutes for the motion to dismiss contain the reasoning and that'll be what will appear on the docket.

And then there will be a written order explaining the factors and why I reached the decision that I did with regard to the preliminary injunction.

MR. WARDENSKI: Thank you, Your Honor.

THE COURT: Okay. Thank you.

MR. STADLER: Thank you.

THE CLERK: All rise.

(Proceedings concluded at 3:04 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

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CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on December 12, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Joseph J. Wardenski

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I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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