Case 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. 16-CV-943
The Honorable Judge Pamela Pepper

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND SUE SAVAGLIO-JARVIS' REPLY BRIEF

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INTRODUCTION

Plaintiff-Respondent, Ashton Whitaker ("Plaintiff"), implores this Court to not answer the difficult questions that the District Court avoided on Plaintiff's motion for an injunction. The District Court found that because the legal issues in this case were unresolved that Plaintiff "might" ultimately succeed. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *3 (E.D. Wis. Sept. 22, 2016). The legal issue of whether Plaintiff states a claim for relief under Title IX and the Equal Protection Clause should not be avoided because it shows that Plaintiff's injunction was improvidently issued.

Plaintiff also seeks to dodge a ruling on whether the Defendants-Appellants, Kenosha Unified School District and Dr. Sue Savaglio-Jarvis' ("KUSD") motion to dismiss should have been granted. It is axiomatic that if a complaint fails to state a claim upon which relief can be granted, then an injunction based on that complaint will fail for lack of a likelihood of success on the merits. *See Wisconsin Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1044 (E.D. Wis. 2001). The legal issues related to the injunction are inexplicably intertwined with those raised in the motion to dismiss. It would be an incredible waste of resources to have this Court rule that the injunction fails as a matter of law because Plaintiff's claims are legally invalid and then simply remand the matter for further proceedings.

This appeal establishes as a matter of law that Title IX cannot be read beyond the plain language of the statute. Title IX protects against discrimination on the basis of sex—being male or female. It does not encompass one's gender

identity. This distinction between sex and gender also leads to the conclusion that bathroom policies that recognize the anatomical differences between men and women are not "sex-stereotyping."

Finally, Plaintiff's attempt to invoke the Equal Protection Clause also fails as a matter of law. Transgender individuals have never been deemed a suspect class in this Circuit or by the Supreme Court. Thus, because KUSD has identified a rational reason for separating restrooms—privacy and dignity—its policy easily withstands rational basis scrutiny.

As a matter of law the injunction must be dissolved and Plaintiff's Amended Complaint must be dismissed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF STATED A CLAIM FOR RELIEF UNDER TITLE IX OR THE EQUAL PROTECTION CLAUSE.

A plaintiff fails to allege a plausible claim for relief when the claim is not cognizable under the law. *See Papasan v. Allain*, 478 U.S. 265, 283, 106 S. Ct. 2932, 2943, 92 L. Ed. 2d 209 (1986). If the claim is not cognizable under the law the plaintiff cannot demonstrate a likelihood of success on the merits for purposes of an injunction. *Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. 2d at 1044. Here, Plaintiff does not have a cognizable claim under Title IX or the Equal Protection Clause. The injunction should have been denied and the Amended Complaint dismissed.

A. Title IX Prohibits Discrimination Based Upon Sex, Not Gender, Not Transgender, and Not Other Aspects of Gender Identity.

1. Title IX Does Not Extend Its Anti-Discrimination Protections Beyond Sex, i.e., Being Male Or Female.

Plaintiff seeks to establish that sex under Title IX encompasses gender identity. Plaintiff's argument ignores the language of the statute and ignores the undisputed biological markers that distinguish the sexes, such as chromosomes and genitalia. Plaintiff asks this Court to read into Title IX a definition of sex well-beyond the language of the statute. This expansive reading would require this Court to depart from interpretation of the laws and enter the realm of legislating.

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Plaintiff would have this Court believe that "on the basis of sex" must necessarily include gender identity, but such an interpretation wildly departs from the commonly understood, plain meaning of the term "sex".

"Sex" and "gender" cannot be read interchangeably. Plaintiff suggests that the only true meaning of "sex" is the internalized sense (one's own interpretation) of whether one is a man or a woman. Plaintiff completely disregards the immutable biological makeups that distinguish males and females. *See Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, American Psychologist, Jan. 2012, p. 11 (stating that "[s]ex refers to a person's biological status", "[g]ender refers to the attitudes, feelings, and behaviors that a given

culture associates with a person's biological sex" and "[g]ender identity refers to one's sense of oneself as male, female, or transgender").

Plaintiff's argument that the text of Title IX supports a finding that sex means gender identity is unfitting. Title IX does not define "sex", but "[s]tatutory terms or words will be construed according to their ordinary, common meaning unless these are defined by the statute or the statutory context requires a different definition." *Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir. 2001). The ordinary meaning of the term "sex" as envisioned by congress is the traditional concept of two separate sexes based on biological and anatomical differences. *See Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495, at *14–15 (N.D. Tex. Aug. 21, 2016); *see also Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (stating that "the legislative history does not show any intention to include transsexualism in Title VII"); *Dobre v. Nat'l R.R. Passenger Corp. (Amtrak)*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (stating that the "term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity").

This Court has long-held that sex-based discrimination means discrimination because a man is man or a woman is a woman. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("[D]iscrimination 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."). Sex discrimination does not encompass

discrimination because a woman believes that she is a man regardless of the sincerity of that belief.

2. The Fact That "Sex" Discrimination Encompasses Same-Sex Discrimination Does Not Mean That "Sex" Can Be Expanded To Encompass Gender Identity.

Title VII's prohibition against same-sex discrimination does not lead to a conclusion that "sex" includes gender identity. In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–79, 118 S. Ct. 998, 1001–02, 140 L. Ed. 2d 201 (1998), the Supreme Court explained that "Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women" and that it "would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." The Court stated that: "we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex." *Id.*

It is logical that discrimination "because of sex" can encompass men discriminating against men. This is not an expansion of the definition of "sex." Rather, the *Oncale* holding is an acknowledgement of the realities of same-sex discrimination in the workplace. Sometimes men will discriminate against men because they are men. This is still discrimination because a man is a man —i.e., "but for" sex. The fact that either sex may discriminate against either sex does not cause the term "sex" to somehow encompass gender identity. The validity of a claim for "same sex" discrimination does not breathe life into Plaintiff's claim.

3. Sex-Stereotyping Is "But-For Sex" Discrimination, And It Offers Protection To Transgender Men And Women, But Only To The Extent The Discrimination Is "But-For" Their Sex, Not Their Gender.

Plaintiff makes an enormous leap and asserts that because the Supreme Court recognized claims of sex-stereotyping in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), that "sex" encompasses gender identity. Plaintiff's premise—that a transgender person may assert a sex-stereotyping claim—is correct, but Plaintiff's conclusion—that "sex" therefore encompasses gender—is vastly misguided.

Plaintiff is correct that if a transgender person is discriminated against through sex stereotyping, they can bring a claim for sex discrimination. This premise is consistent with current jurisprudence, because since *Price Waterhouse*, "a line of cases emerged in which courts began to recognize claims from gay, lesbian, bisexual, and transgender employees who framed their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity." *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 704 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated,* No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016). Likewise, Title IX claims from gay, lesbian, bisexual, and transgender students who frame their Title IX sex discrimination claims in terms of discrimination based on gender non-conformity would also state a claim for sex discrimination. Plaintiff misses the point, however, in concluding that because sex-stereotyping is sex discrimination, that therefore gender identity is encompassed in "sex."

In *Price Waterhouse*, the Supreme Court held that employers violate Title VII's prohibition of "sex" discrimination when they take actions against employees based on male or female stereotypes. 490 U.S. at 251. Price Waterhouse had insinuated that sex-stereotyping was not actionable under Title VII. In rejecting that argument, the Court stated: "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, in 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." *Id.* (internal citations omitted) (emphasis added).

The primary fallacy in Plaintiff's logic is the conclusion that somehow requiring individuals to use the bathroom that corresponds to their birth sex is sex stereotyping. The District Court in *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, cited numerous cases that debunk this myth and conclude that requiring individuals to use the bathroom that corresponds to their birth sex was not sex stereotyping:

> Furthermore, courts that have considered similar claims have consistently concluded that requiring individuals to use bathrooms consistent with their birth or biological sex rather than their gender identity is not discriminatory conduct in violation of federal and state constitutions and statutes. *See, e.g., Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) *aff'd,* 98 Fed. Appx. 461 (6th Cir. 2004) (explaining that employer did not transgress Title VII because it 'did not require Plaintiff to conform her appearance to a particular gender stereotype, instead, the company only required Plaintiff to conform to the accepted principles established for gender-

> distinct public restrooms'); *Hispanic Aids Forum v. Bruno*, 16 A.D. 3d 294, 792 N.Y.S. 2d 43 (2005) (holding complaint failed to allege a claim for relief under New York Human Rights Laws because plaintiff did not allege that transgender individuals were selectively excluded from bathrooms, but that they were excluded from certain bathrooms on the same basis as all biological males and females—biological sexual assignment, which is not impermissible discrimination); *Goins v. West Group*, 635 N.W. 2d 717 (Minn. 2001) (holding defendant's designation of restroom use, applied uniformly, on the basis of biological gender rather than gender identity was not discrimination under the Minnesota Human Rights Act). Similarly, courts have concluded that sex-segregated bathrooms are not impermissible sex discrimination. *See, e.g., Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975).

97 F. Supp. 3d 657, 681–82 (W.D. Pa. 2015). A bathroom policy that merely reflects the anatomical differences between men and women, is not "sex-stereotyping." Such a policy is applied uniformly to the sexes. No one is required to conform their appearance to a particular gender stereotype. Instead, men and women are required to conform to the accepted principles established for sex-distinct public restrooms. Differential treatment based on sex is permissible when the treatment is based on physical differences between men and women. *See United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

Plaintiff's position that being required to use the woman's restroom amounts to sex-stereotyping because Plaintiff identifies as a boy is inconsistent with cases that require a claim of sex stereotyping to identify gendered statements and acts that target one's conformity with stereotypical conceptions of what is male and female. *See, e.g.*, *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014). Here, KUSD made no statements and engaged in no acts that target Plaintiff's conformity with stereotypical conceptions of what is male and female. KUSD did

not prohibit Plaintiff from using the men's bathroom because Plaintiff did not look like a man, or act like a man, or speak like a man—Plaintiff was not permitted to use the men's bathroom solely because Plaintiff is anatomically a female. *See Johnston*, 97 F. Supp. 3d at 680 (holding that prohibiting plaintiff from using "the bathrooms and locker rooms consistent with his gender identity" was "insufficient to state a claim for discrimination under a sex stereotyping theory"). For Plaintiff to succeed on a sex-stereotyping claim would require this Court to ignore the anatomical differences between men and women. The anatomical differences between men and women cannot be ignored, and this Court should not accept this invitation.

Plaintiff's contention that a bathroom policy that distinguishes between the anatomical differences between men and women is sex stereotyping relies upon Plaintiff's claim that Plaintiff has been treated differently than "other boys" because Plaintiff is transgender. To accept this position, this Court will have to accept the claim that Plaintiff is male, and Plaintiff is not. Plaintiff may feel like a boy. Plaintiff may truly identify as a boy. Plaintiff's psychologist and psychiatrist may honestly conclude that Plaintiff is gender dysphoric. Nevertheless, Plaintiff's birth certificate lists Plaintiff's sex as "female", Plaintiff has female genitalia, female reproductive organs, and female hormones. In no uncertain terms, Plaintiff is a girl under the law. KUSD cannot treat Plaintiff like "other boys" because Plaintiff is not a boy. Applying a bathroom policy that is based upon the anatomical

differences between men and women and requiring Plaintiff to use the bathroom that corresponds to Plaintiff's anatomy is not sex-stereotyping.

4. *Ulane's* Distinction Between Sex And Gender Identity Has Never Been Overruled And Is Unaffected By The Holdings In *Price Waterhouse* And *Oncale*.

Plaintiff disputes the significance of *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), claiming that it has been implicitly overruled by the decisions in *Price Waterhouse* and *Oncale.* Plaintiff fails to appreciate the distinctions between the holdings in those cases versus the holding in *Ulane.* When one recognizes these distinctions, one must conclude that this Court has not recognized that "sex" discrimination includes discrimination based upon one's gender identity, and to do so, this Court would have to depart from its precedent and overturn *Ulane* on that issue.

The central holding in *Ulane*, 742 F.2d at 10, is that the "prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity." No decision from this Court or the Supreme Court has ever deviated from this principal. And, as pointed out *supra*, while the decisions in *Price Waterhouse* and *Oncale* have recognized that "sex" discrimination has many forms, neither has ruled that discrimination based on sex encompasses one's gender identity.

Courts have recognized that *Price Waterhouse* permits Title VII claims by transgender employees who frame their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity. While a transgender individual

may be able to state a claim for sex discrimination based upon sex-stereotyping, it does not follow that discrimination based on an individual's sex is synonymous with a prohibition against discrimination based on an individual's gender identity. *Price Waterhouse* has done nothing to affect this aspect of the holding in *Ulane.*

The holding in *Oncale* has also done nothing to affect the central holding in *Ulane.* The *Oncale* Court stated that: "we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex." 523 U.S. at 79. The Court found that same sex discrimination is discrimination because a man is a man or a woman is a woman—i.e., "but for" sex. It did not pass upon the issue of whether discrimination based on an individual's gender identity is synonymous with discrimination based on sex. The holding in *Oncale* does not impact or affect the holding in *Ulane* that sex and gender identity are different.

"Principles of stare decisis require that [this Court] give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling." *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006). Neither Congress nor the Supreme Court have overruled or undermined the holding in *Ulane*.

5. Title IX Specifically Permits Separate Bathrooms Based On Sex, And Therefore If "Sex" Includes Gender Identity, The District Can Provide Separate Bathrooms Based Upon Gender Identity.

The Title IX regulations specifically permit separate bathrooms on the basis of "sex." "A recipient may provide separate toilet, locker room, and shower facilities

on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. KUSD's provision of separate bathrooms for boys and girls simply does not violate Title IX.

Plaintiff offers a path around this compelling conclusion that separate bathrooms are permissible, but it is not convincing. Plaintiff asserts that "transgender" is encompassed by the regulations because "gender identity" is synonymous with "sex," and therefore one cannot provide separate bathrooms based upon gender because that is sex discrimination.[1] What Plaintiff fails to recognize, however, is that if gender identity is synonymous with "sex," and the regulations specifically allow separate bathrooms for the separate sexes, then a school can provide for separate bathrooms on the basis of gender identity. "If then" logic does not allow for Plaintiff's interpretation.

To avoid this conclusion, Plaintiff asserts an Orwellian argument that refusing Plaintiff access to the boy's bathroom is discrimination based upon sex because "Plaintiff is a boy" and is not being treated like "all other boys." Plaintiff can say it many times, but Plaintiff is not a boy. That claim is belied by Plaintiff's birth certificate and anatomy. Plaintiff cannot demand to be treated like a boy when in fact Plaintiff is a girl.

[1] Plaintiff's premise that "sex" means "transgender" under Title IX has been rejected. "It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by [Department of Education] following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth." *Texas*, 2016 WL 4426495, at *14.

The well-found reasoning for segregating men and women in private places where bodily functions are performed and individuals undress goes out the door if anyone who self-identifies as the opposite gender is allowed in such a private place. Plaintiff's continuous argument that genitalia, reproductive organs, hormones, and other immutable characteristics do not matter is inconsistent with common sense. Similarly, even though Plaintiff has taken steps to transition to living as a man, to say that Plaintiff is not unilaterally declaring to be a man is equally disingenuous and ignores common sense.

B. Plaintiff's Equal Protection Claim Fails, Because KUSD Has Identified A Conceivable, Logical Reason For Its Policy And This Is Sufficient To Defeat Plaintiff's Claim On A Rational Basis Review.

Plaintiff claims that KUSD's policy requiring separate bathrooms for boys and girls should be subjected to some sort of heightened review under an Equal Protection analysis. Plaintiff ignores the Supreme Court's direction to lower courts to not create new suspect classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 3255, 87 L. Ed. 2d 313 (1985). Moreover, the majority of courts have not found transgender to be a protected class.[2] Thus, there is no question that KUSD's actions must be viewed under rational basis review.

Governmental action is presumed to be valid if it is evaluated under the rational-basis standard of review. *See Smith v. City of Chicago*, 457 F.3d 643, 650 (7th Cir. 2006). The inquiry under rational basis review starts with the question: is

[2] *See, e.g.*, KUSD's Appellate Brief, at n.12.

there any reasonably conceivable state of facts that could provide a rational basis for a rule or regulation. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211 (1993). If a rational basis for the government's actions remains "conceivable and plausible" in the face of plaintiff's allegations, a plaintiff's equal protection claim should be dismissed for failure to state a claim. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 639 (7th Cir. 2007). The challenging party has the burden to "negative every conceivable basis which might support it." *Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 2643, 125 L. Ed. 2d 257 (1993) (internal citations omitted) (emphasis added).

Protecting students' right of bodily privacy is a legitimate rational reason for not allowing anatomical females to use the men's bathroom. The District Court erred in concluding that it was not clear how allowing the Plaintiff to use the men's bathroom violates other students' rights to privacy. *See Whitaker*, 2016 WL 5239829, at *4. This shallow inquiry abandons common sense and ignores the practical impacts of allowing females to share bathroom facilities with males engaged in personal bodily functions.

There is clearly a conceivable basis which supports the right to bodily privacy. Students should not be forced to perform personal bodily functions and expose themselves in stages of undress to members of the opposite sex. "Shielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex is impelled by elementary self-respect and personal dignity." *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988). The right to bodily

privacy is so important because most people have "a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating." *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (internal citations omitted).

Moreover, courts have found that allowing one to use the bathroom that corresponds with the opposite sex can infringe on privacy rights. *See Sommers*, 667 F.2d at 750 (stating that allowing a transgender man that identifies as a woman into the women's restroom would threaten the privacy interests of its female employees); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D.W. Va. 1982) (holding that a female would violate a man's legitimate privacy right by entering a men's bathroom while the man was using it).

Even prisoners, who have diminished privacy rights, have the right to use bathrooms and changing areas without exposure to viewers of the opposite sex. *See Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (finding that a prison violated an inmate's right to privacy by forcing them to use dormitory and bathroom facilities regularly viewable by guards of the opposite sex and stating that "[b]asic human dignity requires some minimal protection of privacy, at least from the opposite sex"); *Miles v. Bell*, 621 F. Supp. 51, 67 (D. Conn. 1985) (recognizing that courts have found a constitutional violation where guards "regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities or showering") (internal citations omitted).

There are any number of ways that a male's privacy rights are infringed upon when a member of the opposite sex is present in a bathroom while that man is engaging in bodily functions. For example, a man necessarily exposes his genitals to urinate. Regardless of what activity a man is engaging in in the designated men's bathroom, the presence of a women in that private space alone is enough to infringe upon his privacy rights. As evident in the prisoner context, the mere presence of the opposite sex, the mere ability to observe, is an infringement on bodily privacy. Plaintiff's presence in the boy's bathroom alone is an infringement on the bodily privacy rights of KUSD's male students. As such, the protection of this privacy right is clearly a rational, plausible, conceivable, and reasonable reason for not allowing women into the men's bathroom.

To say that such fundamental privacy concerns are not in play here would be to ignore the anatomical differences between men and women. Just because Plaintiff self-identifies as male, does not mean that anatomical, biological boys no longer have privacy rights. To accept the District Court's conclusion would require this Court to completely and unequivocal state that a female student that self identifies as male is a man under the law and is entitled to observe boys while they perform bodily functions as a matter of law. This result is not practical or conceivable and a policy that prevents this does not deny equal protection as a matter of law.[3]

[3] Even if intermediate scrutiny is utilized, and KUSD's policy is subjected to a heightened standard or review, it has been recognized that providing for separate bathrooms is substantially related to important governmental interests. *See Johnston*, 97 F. Supp. 3d at 669 (holding that even under a heightened standard of review, the transgender plaintiff's

II. A BALANCING OF THE EQUITIES DOES NOT WEIGH IN PLAINTIFF'S FAVOR.

If the threshold requirement of success on the merits is not satisfied, the Court's inquiry ends. *See O'Connor v. Bd. of Ed. of Sch. Dist. No. 23*, 645 F.2d 578, 580 (7th Cir. 1981). If a plaintiff crosses this threshold, the Court will consider whether the injunction must do more good than harm—"which is to say that the balance of equities favors the plaintiff." *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). Here, even if Plaintiff demonstrated a likelihood of success on the merits, a balancing of the respective harms weighs in favor of denial of the temporary injunction.

A. Plaintiff May Have Demonstrated Subjective Harm, But Has Not Shown Legally Irreparable Harm.

KUSD does not dispute that Plaintiff has set forth personal affidavits and affidavits from experts to provide reasonable evidence that not being permitted to use a men's bathroom has led to emotional harm. Irreparable harm is defined as "harm that cannot be fully rectified by final judgment after trial." *Ichiyasu v. Christie, Manson & Woods Int'l, Inc.*, 630 F. Supp. 340, 342 (N.D. Ill. 1986). The subjective harms complained of by Plaintiff do not raise to the level of irreparable harm.

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amended complaint must still be dismissed as the policy of separating bathrooms, on the basis of birth sex is "substantially related to a sufficiently important government interest").

First, emotional distress is generally remedied by monetary damages, not injunctive relief. *See Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, No. 10 C 8296, 2011 WL 221823, at *5 (N.D. Ill. Jan. 24, 2011).

Second, Plaintiff's articulation of "educational harm" is not supported by *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 853 (7th Cir. 1999). In *Washington*, this Court found that diminished academic motivation was irreparable harm, but in that case, evidence was presented that the plaintiff had experienced a career of academic failure and that his grades improved when he started playing basketball. *Id.* Here, Plaintiff has claimed that it has been more difficult to focus on school work, but that nonetheless, Plaintiff has maintained exemplary grades and remains ranked at the top of the class. This is not a situation where actual educational harm is present. At best it is speculative harm that could occur in the future, but which never came to fruition. *Singer Co. v. P. R. Mallory & Co.*, 671 F.2d 232, 235 (7th Cir. 1982) (stating that a "speculative" injury does not constitute an irreparable injury justifying injunctive relief).

Finally, Plaintiff's disregard for the reasonable alternative of using the single-sex bathrooms is evidence that the alleged harm is not irreparable. In *Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), the District Court for the Northern District of Illinois addressed a group of students requesting an injunction to enjoin a school district from permitting transgender students from using bathrooms and locker room facilities with them. In holding that the students did not show irreparable harm, the Court

pointed to the availability of single-user restrooms. *Id.* at *38. The Court disregarded the argument that using single user bathrooms was inconvenient and stigmatizing, even though other students harassed them for using those bathrooms. *Id.* If the existence of single-user bathrooms can ameliorate the potential harm to non-transgender students, they can certainly be used in the same respect for transgender students. Just because Plaintiff does not want to use single-user restrooms for subjective and personal reasons, does not change the fact that a reasonable alternative was available and Plaintiff refused to take advantage of it.

B. The Potential Harm To The Constitutionally Protected Rights Of KUSD Students And Parents Outweighs The Individualized Harm Alleged By Plaintiff.

The District Court abused its discretion in finding that Plaintiff's subjective emotional harms outweighed the rights of all KUSD students and their parents.

Students have a clear right to bodily privacy and to be able to perform personal bodily functions outside of the presence of members of the opposite sex. *See Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1063 (7th Cir. 2000); *Johnston*, 97 F. Supp. 3d at 669. This right of privacy is invaded by Plaintiff's presence in the men's bathroom. Likewise, it is not necessary for there to be anecdotal evidence of this invasion of privacy. The presence of plaintiff in the men's room automatically infringes upon the constitutional rights of the other students. No additional evidence is needed. "The existence of a continuing constitutional violation constitutes proof of an irreparable harm." *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978).

Similarly, the injunction has the effect of infringing on the constitutional rights of KUSD's students' parents. Depriving parents of any say over whether their children should be exposed to members of the opposite biological sex while performing private bodily functions deprives parents of their right to direct and control the education and upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to . . . direct the education and upbringing of one's children."); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394–95, 71 L. Ed. 2d 599 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15 (1972) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

Finally, the injunction has the effect of infringing on KUSD's discretion in how to operate its schools for the best interest of all of its students. Public school districts enjoy broad authority and discretion in operating their schools. *See Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S. Ct. 2573, 2577, 96 L. Ed. 2d 510 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools."); *Bd. of Educ., Island Trees Union Free Sch.*

Dist. No. 26 v. Pico, 457 U.S. 853, 859, 102 S. Ct. 2799, 2804, 73 L. Ed. 2d 435 (1982) (noting that "statutes, history, and precedent had vested local school boards with a broad discretion to formulate educational policy"). Preventing KUSD from implementing the policy that it deems best for its students is a direct and tangible harm that hinders the operation of KUSD's schools moving forward.

In sum, Plaintiff presented evidence that medical professionals believe that it would be in the best interest of treating Plaintiff's mental health for KUSD to provide open and unlimited access to men's bathrooms. Plaintiff's experts did not take into consideration the effect of such suggestion on anyone other than Plaintiff. Furthermore, Plaintiff's position in this case undercuts the alleged harm. Plaintiff only feels the need to be treated like "other boys" in the bathroom setting. Plaintiff abandoned any request for an injunction to use locker rooms and shower facilities consistent with Plaintiff's gender identity. Plaintiffs needs are only those that are uniquely convenient for Plaintiff; respecting Plaintiff's privacy, but not the privacy of anyone else. Plaintiff wants to be present while other students are exposed while using the bathroom, but does not want others to view Plaintiff in a state of undress.

The District Court agreed with Plaintiff, determining that Plaintiff's needs come above the constitutionally protected rights of hundreds of students, the rights of those student's parents, and the ability of KUSD to set school policy. Infringing on their rights for the sole benefit of Plaintiff was not an appropriate measure for the District Court to take. A weighing of the harms did not support the issuance of the injunction.

C. The District Court Improperly Issued The Injunction By Disturbing The Status Quo When Further Guidance From The Supreme Court Is Forthcoming.

Preliminary injunctions have the limited purpose of merely preserving the relative positions of the parties until a trial on the merits can be held. *See University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). A preliminary injunction is "a provisional remedy designed to preserve the status quo until the case can be heard upon the merits." *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958). The status quo is "the last uncontested status which preceded the pending controversy." *Id.* Preliminary injunctions that disturb the status quo are viewed more skeptically by courts and generally such a request to disturb the status quo increases the burden on the moving party. *See Jordan v. Wolke*, 593 F.2d 772, 773-74 (7th Cir. 1978).

Here, the injunction granted by the District Court significantly disturbed the status quo as it prevented KUSD from implementing its bathroom policy with regard to Plaintiff. While an injunction need not be denied solely because it seeks to alter the status quo, this factor strongly mitigates against granting such relief and should not ordinarily be granted. *See id.*

In this regard, the recent dissent in *Dodds v. United States Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016), exemplifies why the injunction should have been denied. In stating that he would have granted the school district a stay of an injunction permitting transgender students to use the public bathrooms of their choice, Judge Sutton cited the Supreme Court's recent decision to grant a stay in

the *G.G. ex rel. Grimm v. Cloucester Cty. Sch. Bd.* matter. *See Dodds*, 845 F.3d at *3 (Sutton, J., dissenting) (citing *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442, 195 L. Ed. 2d 888 (2016)). Judge Sutton emphasized that the Supreme Court granted the petition for review and will presumably hear argument in the case this term. *See id.* (citing *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369, 196 L. Ed. 2d 283 (2016)). In light of the Supreme Court's decision, Judge Sutton stated that "[j]ust as the plaintiff in *Gloucester County* must wait for Supreme Court review before changing the status quo, so should the plaintiff in our case be required to wait for that decision before changing the status quo. Similar treatment of similar plaintiffs is the essence of equal justice under law." *Id.* Furthermore, the dissenting judge posited that "[w]hen the Supreme Court stayed the judgment in *Gloucester County*, it necessarily found that the school board was reasonably likely to succeed on the merits and that it would suffer irreparable harm without a stay." *Id.*

The District Court disturbed the status quo in issuing an injunction requiring KUSD to allow Plaintiff to use the men's restroom. The Supreme Court presumably believes that KUSD's general position as to the likelihood of success on the merits is correct, and in light of this likelihood, it was error for the District Court to grant the injunction when guidance from a superior court is on the horizon.

III. PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW AND MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM.

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

appeal. When the appeal of a non-final order is "inextricably intertwined" with an appealable preliminary injunction, this Court may exercise pendent jurisdiction to review the appeal of the non-final order. *See Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883, 886 (7th Cir. 2013), *as amended* (Apr. 29, 2013).

Here, the District Court's Order and decision granting Plaintiff's preliminary injunction is inextricably intertwined with the order denying KUSD's motion to dismiss. The "likelihood of success on the merits" element of a motion for preliminary injunction is a paramount consideration in whether to grant or deny such a motion because it is the threshold consideration. *See Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir. 1997). The overlap between these two issues is apparent as "[o]bviously, the question of whether the plaintiff has demonstrated a reasonable likelihood of success on the merits of its claims is, to a large degree, bundled up with the issues raised by the defendants' motion to dismiss." *Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. 2d at 1044. When two rulings, as is evident here, concern the "same single issue", the exercise of pendent appellate jurisdiction is proper. *See Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010).

Thus, if this Court determines that Plaintiff cannot succeed on the merits because the Complaint fails to state a claim upon which relief can be granted, this Court should exercise pendent jurisdiction and dismiss Plaintiff's Complaint.

IV. THE COURT SHOULD CAUTIOUSLY CONSIDER THE AMICUS BRIEFS FILED IN SUPPORT OF AFFIRMATION.

Multiple amici curiae have filed briefs in this matter. The amicus briefs filed in support of Plaintiff's position and affirmation of the District Court should be viewed cautiously by this Court.

The purpose of an amicus brief is to assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs. *See Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). Here, however, much like in other cases, "[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

The amicus briefs supporting Plaintiff's position merely regurgitate Plaintiff's arguments concerning the interpretation of Title IX and Equal Protection. Moreover, the arguments that concern tangentially related topics not relevant to this case should be similarly disregarded. Finally, amici who do little more than submit anecdotal testimony from individuals not related to the parties is of little value to the legal analyses required for a decision in this matter. Those anecdotes are unauthenticated, are not supported by affidavits, are irrelevant, and do not assist the court on the legal issues in hand. While KUSD does not object to the submission of these briefs, it respectfully requests that those briefs be given the limited weight to which they are due.

CONCLUSION

KUSD respectfully requests that this Court issue an Order reversing the District Court's decision granting Plaintiff's motion for a preliminary injunction and further reverse the District Court and grant KUSD's motion to dismiss for failure to state a claim.

Dated this 10th day of February, 2017.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Defendants-Appellants, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7) and Circuit Rule 32:

I hereby certify that his Brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) and Circuit Rule 32 for a reply brief produced with a proportionally spaced serif font. The length of the brief, from Introduction through Conclusion, is 6,998 words.

Dated this 10th day of February, 2017.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

I certify that the full contents of this Reply Brief, from cover to conclusion has been electronically filed on February 10, 2017.

Dated this 10th day of February, 2017.

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendant-Appellants hereby certifies that on February 10, 2017, an electronic copy of the Reply Brief was served on counsel for Plaintiff-Appellee through the ECF system as all parties are registered users.

Dated this 10th day of February, 2017.

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