

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)	3:34 p.m.
NO. 1 BOARD OF EDUCATION and SUE)	
SAVAGLIO-JARVIS, in her official)	
capacity as Superintendent of the)	
Kenosha Unified School District No. 1,)	
)	
Defendants.)	

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

APPEARANCES:

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TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

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THE COURT: Have a seated everyone, please.

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

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

MR. WARDENSKI: Joseph Wardenski for plaintiff.

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

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

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

THE COURT: Anybody else for the plaintiffs?

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

THE COURT: Thank you.

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

THE COURT: Okay. And for the defendant?

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

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

3 THE COURT: Good afternoon to everyone.

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

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

25 So the complaint has to provide the defendant with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 So those are current dictionary definitions from three
5 different dictionaries. In the *G.G.* case, *G.G. vs. Gloucester*
6 *County School Board*, 822 F.3d 709, Fourth Circuit, April 19th of
7 2016, at page 720 I believe it is, that quote started with
8 dictionary definitions from the drafting era of the statute.
9 And they had indicated that if you looked at the American
10 College Dictionary circa 1970, you would find the definition of
11 "sex" as "the character of being either male or female." That's
12 the same as that Merriam-Webster definition. Or "the sum of
13 those anatomical and physiological differences with reference to
14 which the male and female are distinguished."

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

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

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

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

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

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

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

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

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

12 So in *Doe vs. City of Belleville*, 119 F.3d 563, the
13 1997 decision to which the plaintiffs referred, the panel
14 writing, Judges Ripple, Manion and Rovner -- Judge Rovner was
15 the author -- went through an extended discussion and I would
16 say a struggle to consider why it is that if a plaintiff claims
17 to have been harassed by someone making sexual advances toward
18 that plaintiff that have sexual overtones, the court struggled
19 with why it should matter whether the victim was harassed on the
20 basis of his or her sex.

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

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

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

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

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

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

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

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

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

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

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

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

15 First, *Ulane* stated at page 1085:

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

19 Quoting *Perrin vs. United States*, 444 U.S. 37, 42,
20 1979.

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

1 The words of Title VII do not outlaw
2 discrimination against a person who has a
3 sexual identity disorder, i.e., a person born
4 with a male body who believes himself to be
5 female, or a person born with a female body who
6 believes herself to be male; a prohibition
7 against discrimination based on an individual's
8 sex is not synonymous with a prohibition
9 against discrimination based on an individual's
10 sexual identity disorder or discontent with the
11 sex into which they were born.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 4426495 in the Northern District of Texas, August 21st, 2016,
2 might also cast doubt on *G.G.*

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

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

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

22 Also, the *Kastl, K-A-S-T-L, vs. Maricopa County* case,
23 325 F.Appx. 492 at 493, Ninth Circuit, a 2009 case, finding that
24 after *Price Waterhouse* and a Ninth Circuit decision, *Schwenk vs.*
25 *Hartford*, 205 F.3d 1187, at 1201-02, year 2000, Ninth Circuit

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

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

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

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

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

1 constituted an educational opportunity.

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

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

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

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

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

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

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

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

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

1 its discretion under the regulation and to create segregated
2 facilities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 In this case the complaint clearly states both the
16 1983 requirements:

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

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

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

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

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

7 And I'm citing *Personnel Administrator of*
8 *Massachusetts vs. Feeney*, 442 U.S. 256 at 279, 1979; also
9 *Nabozny, N-A-B-O-Z-N-Y, vs. Podlesny, P-O-D-L-E-S-N-Y*, 92 F.3d
10 446 at 453, Seventh Circuit 1996.

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

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

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

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

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

9 Now, I noted earlier, I don't have to decide whether
10 transgender is a suspect class at the motion-to-dismiss stage.
11 And for that I refer you to *Durso, D-U-R-S-O, vs. Rowe, R-O-W-E*,
12 579 F.2d 1365 at page 1372. It's a Seventh Circuit decision
13 from 1978. That was a case that involved an incarcerated
14 plaintiff alleging an equal protection claim. But the court
15 stated:

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

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

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

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

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

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

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

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

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

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

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

24 THE COURT: Okay.

25 MR. WARDENSKI: The restroom policy and practice has

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

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

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

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

22 THE COURT: Thank you. Mr. Stadler?

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

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

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

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

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

19 MR. STADLER: This wristband thing?

20 THE COURT: Okay.

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

24 THE COURT: Okay.

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

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

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

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

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

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

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

6 But to the extent that a hearing would be helpful I'm
7 prepared to present argument in 10 or 15 minutes. We've already
8 gotten into, you know, some discussion of the merits on the
9 motion-to-dismiss arguments so there's no need to rehash those.
10 So I think it can be a shorter proceeding than the last one was.
11 And it's just a matter of me flying back out here. So -- and I
12 can be -- either tomorrow before I leave or sometime soon with
13 12 hours' notice.

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

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

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

1 to an hour and a half.

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

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

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

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

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

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

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

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

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

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

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

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

18 THE COURT: Okay.

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

21 THE COURT: Okay.

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

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

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

14 MR. STADLER: That is good.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: Okay. Hold on a second.

8 (Brief pause.)

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

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

18 MR. STADLER: I do not.

19 THE COURT: Okay.

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

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

24 MR. WARDENSKI: Either way.

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

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

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

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

6 THE COURT: I could do one o'clock.

7 MR. WARDENSKI: That would be great.

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

10 THE COURT: Are you sure?

11 MR. STADLER: Yup.

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

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

19 MR. WARDENSKI: Thank you, Your Honor.

20 MR. STADLER: Thank you.

21 THE COURT: Okay.

22 MR. STADLER: That's fine.

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

25 MR. WARDENSKI: No, Your Honor.

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MR. STADLER: No. Thank you.

THE COURT: All right. Thank you all.

THE CLERK: All rise.

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

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C E R T I F I C A T E

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

Signed and Certified September 27, 2016.

/s/John T. Schindhelm

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