

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his)	
mother and next friend, MELISSA)	
WHITAKER,)	
)	
Plaintiff,)	
)	Case No. CV 16-943
vs.)	Milwaukee, Wisconsin
)	
)	September 20, 2016
KENOSHA UNIFIED SCHOOL DISTRICT)	1:05 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 ARGUMENT ON
MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE PAMELA PEPPER
UNITED STATES DISTRICT JUDGE**

APPEARANCES:

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1 TRANSCRIPT OF PROCEEDINGS

2 Transcribed From Audio Recording

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4 THE COURT: Have a seat everyone, please.

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

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

10 MR. WARDENSKI: Joseph Wardenski for plaintiff.

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

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

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

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

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

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

23 MR. SACKS: Jonathan Sacks for the defendants.

24 THE COURT: Good afternoon to everyone.

25 As you know, yesterday when we were together we

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

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

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

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

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

20 THE COURT: Okay. Mr. Stadler?

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

24 THE COURT: Right, sorry.

25 MR. STADLER: It was just the pronoun issue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 He meets the criteria for a diagnosis of gender
9 dysphoria.

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

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

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

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

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

9 Dr. Budge further concluded that:

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

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

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

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

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

4 And I'll quote her again. She wrote:

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

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

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

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

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

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

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

1 identity.

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

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

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

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

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

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

25 We have a declaration from Judy Chiasson who is the

1 director of the Office of Human Relations Equity and Diversity
2 for the Los Angeles Unified School District, LAUSD. LAUSD is
3 the I believe second-largest school district in the country that
4 has 1200 schools, 732,000 students, and they adopted a
5 transgender-inclusive policy that Dr. Chiasson helped write in
6 2005. So for the past 11 years in this tremendously large
7 school district with hundreds of thousands of students, many
8 transgender students over the years, they have experienced in
9 her words "no issues at all." And they've actually revised
10 their policy several times to become -- to makes it more
11 inclusive and less case by case as the years have gone on.

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

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

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

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

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

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

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

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

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

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

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

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

9 Thank you.

10 THE COURT: Thank you, Mr. Wardenski.

11 Mr. Stadler.

12 MR. STADLER: Thank you, Judge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 link between the two.

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

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

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

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

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

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

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

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

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

12 THE COURT: You do?

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

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

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

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

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

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

12 In a case of this magnitude and this importance, I can
13 easily see attorney's fees in this case running into the 100 or
14 \$150,000 range. And on that basis we would ask the Court, if
15 it's going to consider granting the injunction, to require a
16 bond in the amount of \$150,000. I don't think the Court has to
17 get there because I think the conclusion in this case is that
18 plaintiff hasn't shown irreparable harm and the injunction
19 should be denied.

20 Thank you.

21 THE COURT: Thank you, Mr. Stadler.

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

24 MR. WARDENSKI: Yes, Your Honor.

25 Mr. Stadler has decided that he is both a medical

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Ash understood his federal right as a transgender

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 Thank you.

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

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

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

25 MR. WARDENSKI: So he was actually referring to the

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

4 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: And that was my question.

4 MR. STADLER: I know that --

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

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

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

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

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

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

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

3 THE COURT: 1922?

4 MR. STADLER: 1922.

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

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

10 THE COURT: That's fine.

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

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

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

23 Thank you.

24 THE COURT: Now, Mr. Wardenski.

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

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

6 THE COURT: Of 2016.

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

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

18 MR. STADLER: May 13.

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

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

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

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

14 It's worth emphasizing that all of this was happening
15 over summer break. So his harm between the last day of school
16 on or around June 10th and the first day of school on September
17 1st, was abated because he wasn't in school.

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

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

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

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

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

18 THE COURT: Thank you, Mr. Wardenski.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Now, that's the first element.

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

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

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

25 The defendants didn't really address adequate remedy

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

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

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

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

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

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

1 purposes of preliminary injunction proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 quo.

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

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

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

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

25 A further gloss on that argument, though, is

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

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

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

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

25 The school argues that there would be financial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that remains an issue we may come back to you for that issue.

2 But otherwise, no, not right now.

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

5 Mr. Stadler.

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

8 THE COURT: Sure.

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

15 THE COURT: Okay.

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

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

1 THE COURT: Okay.

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

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

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

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

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

24 THE COURT: [Indiscernible].

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

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

4 Mr. Stadler, anything else then?

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

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

14 MR. STADLER: Nothing further. Thank you.

15 THE COURT: Okay.

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

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

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

25 MR. WARDENSKI: Thank you, Your Honor.

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THE COURT: Okay. Thank you.

MR. STADLER: Thank you.

THE CLERK: All rise.

(Proceedings concluded at 3:04 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 October 7, 2016.

/s/John T. Schindhelm

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