

1 **TRANSCRIBED FROM DIGITAL RECORDING**

2 IN THE UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ILLINOIS
4 EASTERN DIVISION

4 STUDENTS AND PARENTS FOR PRIVACY,)
voluntary unincorporated association,))
5 et al.,)

6 Plaintiffs,)

7 vs.)

No. 16 C 4945

8 UNITED STATES DEPARTMENT OF)
9 EDUCATION, et al.,)

Chicago, Illinois

May 31, 2016

10 Defendants.)

10:12 A.M.

11 TRANSCRIPT OF PROCEEDINGS - Motions
BEFORE THE HONORABLE JEFFREY T. GILBERT, Magistrate Judge

12 APPEARANCES:

13 For the Plaintiffs:

ALLIANCE DEFENSE FUND
15100 North 90th Street
14 Scottsdale, Arizona 85260
BY: MR. JEREMY DAVID TEDESCO
15 MR. JOSEPH E. LA RUE
(Appearing telephonically)

THOMAS MORE SOCIETY
17 19 South LaSalle Street
Suite 603
18 Chicago, Illinois 60603
BY: MS. JOCELYN FLOYD

19 PAMELA S. WARREN, CSR, RPR
20 Official Court Reporter
21 219 South Dearborn Street
Room 2342
22 Chicago, Illinois 60604
(312) 408-5100

23 **NOTE: Please notify of correct speaker identification.**
24 **FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS**
25 **UNINTELLIGIBLE.**

1 **APPEARANCES: Continued**

2 For Defendants Department UNITED STATES DEPARTMENT OF JUSTICE
3 of Education, et al.: Civil Division, Federal
4 20 Massachusetts Avenue, N.W.
Washington, DC 20001
5 BY: MS. MEGAN ANNE CROWLEY

6 For Defendants District FRANCZEK RADELET PC
7 211: 300 South Wacker Drive
Suite 3400
8 Chicago, Illinois 60606
BY: MS. JENNIFER ANN SMITH
MR. MICHAEL A. WARNER, JR.

9 For the Intervenors: ROGER BALDWIN FOUNDATION
10 OF ACLU, INC.
180 North Michigan Avenue
11 Suite 2300
Chicago, Illinois 60601
12 BY: MR. JOHN A. KNIGHT

13 MAYER BROWN LLP
71 South Wacker Drive
14 Chicago, Illinois 60606
BY: MS. LAURA ROSE HAMMARGREN

15
16
17
18
19
20
21
22
23
24
25

1 (Proceedings held in open court:)

2 THE CLERK: 15 C 4945, Students and Parents for
3 Privacy, et al. versus United States Department of Education,
4 et al., for notice of motion.

5 THE COURT: Good morning, everybody. Somebody want to
6 come up to the lectern?

7 MS. CROWLEY: Good morning, your Honor. Megan Crowley
8 on behalf of the United States Government, federal defendants.

9 THE COURT: Good morning.

10 MS. SMITH: Jennifer Smith and Mike Warner on behalf
11 of School District 211.

12 THE COURT: Okay. Let me make myself a scorecard
13 here.

14 Jennifer Smith and Mike Warner. Okay.

15 MR. KNIGHT: And John Knight and Laura Hammargren for
16 the intervenor defendants.

17 THE COURT: Okay. And give me your last name. Mara?

18 MS. HAMMARGREN: Laura Hammargren,
19 H-a-m-m-a-r-g-r-e-n.

20 THE COURT: Got it. Sorry.

21 And then we have on the phone?

22 MR. TEDESCO: Yes, your Honor. Jeremy Tedesco for the
23 plaintiffs.

24 THE COURT: Anybody else?

25 MR. TEDESCO: And also -- yeah, also Joseph La Rue.

1 And in the courtroom I think we have Jocelyn Floyd.

2 THE COURT: Is Ms. Floyd here?

3 MS. FLOYD: I am here. Do you want me up at the
4 lectern (unintelligible)? They are going to be doing the
5 speaking.

6 THE COURT: They are going to do the speaking, and
7 you're going to just be here in person. You could go wherever
8 you -- you could come up or you could sit back there if you
9 want.

10 And if you want the lectern down a little bit, there
11 is a button that does that for you.

12 (Laughter.)

13 THE COURT: Okay. You can put the microphone up too.
14 Okay.

15 So Ms. Floyd is in the courtroom.

16 And did you say Mr. La Rue and Mr. Tedesco are on the
17 phone?

18 MR. TEDESCO: Correct, your Honor.

19 THE COURT: Great. Okay.

20 Okay. And so my agenda with you in your first
21 appearance before me today was pretty perfunctory. I wanted to
22 get a briefing schedule set on the motion for preliminary
23 injunction that was referred to me by Judge Alonso.

24 I wanted to briefly talk to you, but not have you tell
25 me which way you wanted to go on this because (unintelligible)

1 your decisions about whether or not you wanted to have --
2 exercise your right to have some type of a limited consent,
3 which our local rules provide. And in case you're unfamiliar
4 with it, I was going to talk to you about that because that
5 would eliminate a review level here.

6 And then -- but, first, before all that, I was going
7 to ask you what happened in front of Judge Alonso this morning.
8 Did -- what happened with -- I guess it was your motion to
9 intervene, correct?

10 MR. KNIGHT: Yes, Judge. He set a --

11 THE COURT: So and just for -- and just for purposes
12 of the transcript here, that's Mr. Knight talking, right?

13 MR. KNIGHT: Right, I'm sorry.

14 THE COURT: So before everyone --

15 MR. KNIGHT: I am speaking to the motion to intervene
16 before -- that was with Judge Alonso at 9:30 this morning. He
17 set an expedited schedule stating that responses would be due
18 June 7th, and our reply due on June 14.

19 Is that right? I think that's right.

20 And then he would decide then thereafter on the
21 motions without oral argument.

22 THE COURT: Okay. So I'll pause for a second. So
23 you're not -- you're not in the case yet, you're not in the
24 case yet, and so I'm not sure how that affects any briefing
25 on -- I mean, as of now you're not a party to the case, so --

1 MR. KNIGHT: Right. I mean just to state to your
2 Honor that, of course, the briefing, if is too expedited so
3 that the (unintelligible) part of it could severely prejudice
4 our clients (unintelligible) --

5 THE COURT: Uh-huh.

6 MR. KNIGHT: -- and we just wanted to make that point
7 (unintelligible) for the record.

8 THE COURT: Yes, yes. Okay. Well, what was the --
9 and I'll ask the defendants, Ms. Crowley and the folks with the
10 district, what you were going to propose with respect to a
11 briefing schedule on the plaintiffs's motion for a preliminary
12 injunction.

13 MS. CROWLEY: Yes, your Honor. We would like to do
14 some limited discovery. So we would ask for 45 days to do
15 that, envisioning some written discovery and the potential for
16 depositions. We were hoping to do it (unintelligible) but
17 we'll see.

18 And then from that point forward 28 days for briefing,
19 which is in part due to some requirements as far as
20 (unintelligible).

21 If you want to speak to that (unintelligible).

22 MS. SMITH: At this point the federal defendants do
23 not anticipate seeking discovery ourselves, but we do think it
24 is important to have the -- all the defendants's briefs filed
25 on the -- the same time.

1 And given the number of offices that we need to be
2 coordinated with and the levels of review that need to go on
3 for this opposition motion, we would request 28 days after the
4 close of discovery or -- 28 days after the close of discovery,
5 which I understand is 45 days.

6 THE COURT: And what kind of discovery do you
7 anticipate?

8 MR. WARNER: At this point, your Honor -- Michael
9 Warner for District 211. Largely (unintelligible)
10 interrogatories related to hostile environment (unintelligible)
11 the plaintiffs pled, makes some allegations that some of the
12 plaintiffs were exposed to a hostile environment. But we don't
13 know which plaintiffs, when this occurred, what the specifics
14 are of those events. The allegations -- the interrogatories
15 are largely directed at that, identify which plaintiffs, if
16 any, we want to depose on this. And we may not want to take
17 steps to (unintelligible).

18 THE COURT: Uh-huh.

19 MR. TEDESCO: Your Honor, this is Mr. Tedesco. Could
20 I have a chance to respond to a little bit of that?

21 THE COURT: Right. Yes, Mr. Tedesco, so -- and some
22 of the questions I had was, A, whether the plaintiffs object to
23 any discovery; B, whether if there was going to be discovery,
24 whether given what Mr. Warner has outlined whether it could be
25 -- whether we need a 30-day period of time given that I know

1 plaintiffs's feel time is of the essence here.

2 So one of the things I was thinking about was if it
3 was targeted discovery, could responses to that, if I was going
4 to allow it, could responses to that be served earlier than the
5 time period required by the Federal Rules?

6 And also I'm not intending to get into a very long
7 hearing today about whether or not plaintiffs would be entitled
8 to discovery. So if there is going to be a knock-down, drag-
9 out fight in front of me as to whether or not on the
10 preliminary injunction motion there is going to be -- I'm going
11 to allow discovery, what I would end up probably doing is
12 having the defendants who want to take discovery quickly file a
13 motion to take it and attach the discovery they want to serve
14 so that I could see it and the plaintiffs could see it, and we
15 could decide what that would look like.

16 So with that background, Mr. Tedesco, the floor is
17 yours.

18 MR. TEDESCO: Sure. We would object to discovery. We
19 don't think there is any need for it. There is quite a few
20 allegations in the complaint. It is a verified complaint so
21 there is a large factual record already in existence. Plus the
22 documents that were filed in support of summary judgment kind
23 of lay out the rest of the facts related to the locker room
24 agreement that was entered into and the school's policy.

25 Our concern with slowing down the case -- well, I

1 guess the other thing I would add is we think the issues in the
2 case are legal issues. There is really no need for discovery,
3 for the Court to decide the APA claim, the constitutional
4 privacy claim, and even the hostile environment claim.

5 Remember the Title IX claim is two-fold. One is that
6 the facilities are completely unequal. So the girls have
7 unequal facilities when compared to boys. We don't need any
8 discovery related to that question.

9 On the hostile environment claim, I just think it is a
10 very straightforward situation. When schools allow members of
11 the opposite sex into a restroom when people are changing
12 clothes, that's a hostile environment. You don't need
13 discovery. What you need to know is that the school has a
14 policy that permits that, and that's clearly the case here.

15 But the fact that the girls feel uncomfortable,
16 violated, demeaned, have their dignity violated by this
17 procedure, policy, is a natural outgrowth of having that kind
18 of a policy in place.

19 So we don't see any reason for any kind of discovery.
20 We'd like an expedited briefing schedule. And our bottom line
21 is school starts on August 15th, and so our plaintiffs are
22 needing relief from the Court, preliminary injunctive relief,
23 by August 15th.

24 So we would like to have a schedule set that would
25 allow the Court to have time to decide the motion by that date

1 so one way or another our plaintiffs know what their rights are
2 and whether the rights are going to be protected by the
3 (unintelligible) school.

4 MS. CROWLEY: Your Honor, may I briefly respond? This
5 is Megan Crowley for the government.

6 THE COURT: Yes.

7 MS. CROWLEY: The agreement that has been in place
8 Since December, since early December. This has been
9 plaintiffs's -- it is almost six months that the
10 (unintelligible) has been in place. Plaintiffs waited five
11 months to file their lawsuit.

12 And then we (unintelligible) an additional 14 days --
13 no, I'm sorry -- 17 days to serve the federal government. And
14 additional four days to file their preliminary injunction
15 motion. We think that that does undercut the idea that there
16 is extreme urgency in resolving these issues.

17 The status quo has been in place for six months. We'd
18 just like to note the government's position on that matter.

19 THE COURT: Okay.

20 MS. SMITH: Your Honor --

21 THE COURT: Go ahead.

22 MS. SMITH: -- could I just add a couple of things?

23 THE COURT: Identify yourself.

24 MS. SMITH: Jennifer Smith for the school district.

25 It was represented as a straightforward factual issue

1 as far as hostile environment. But I would represent that
2 there are significant factual issues. There has been a -- as I
3 said, the status (unintelligible) involves significant privacy
4 protection. And there certainly would be a question about
5 whether those were (unintelligible). It is not a matter of
6 simply as -- as represented what has been described as a boy in
7 the girls's bathroom. There are (unintelligible) and there are
8 privacy stalls. There is actions (unintelligible) alternative
9 locker rooms. There is -- the facility itself offers options.

10 So if you are talking about individual plaintiffs and
11 whether their privacy rights were violated, the situation of
12 each individual plaintiff would be important here.

13 THE COURT: Okay. Well, here, this is what I think I
14 would like to do.

15 Mr. Tedesco, I hear what you are saying. I hear you
16 would like to get this resolved as quickly as you can. I read
17 the brief that you all filed. I haven't studied it. I read it
18 quickly. I see that you do cite cases in there dealing with
19 hostile environment. And I guess as a rhetorical question, I
20 would say is it true -- are you telling me that in each and
21 every one of the cases that you cite where the Court has found
22 that the circumstances that you describe for hostile
23 environment, those were all decided on a motion to dismiss, and
24 there was no discovery in any of those cases? There was no
25 trial in any of those cases? There was no summary judgment in

1 any of those cases that tried -- that teased out or attempted
2 to focus on what exactly was hostile environment? I don't know
3 the answer to that question. But it seems to me that I bet at
4 least in some of the cases that you cite with respect to
5 hostile environment, there was at least a factual record that
6 was developed.

7 I understand -- I can see that you're making some
8 legal arguments, a large number of legal arguments. Some of
9 the arguments you're making might have a factual genesis or
10 something that the district or the Department of Education
11 might want a little bit of discovery on.

12 I am not going to do what I said earlier, which is to
13 tee up a motion as to whether the discovery can or can't be
14 served because that would delay you. So what I am going to
15 give it -- I'm going to tell the district that if they have
16 some discovery they would like to serve, I'm going to set a
17 quick timeline for them to serve it.

18 And then if you want to file a motion -- if you want
19 to respond to it in order to move the case forward, fine.
20 Otherwise, if you want to file a motion with sort of a
21 protective order, I'll get the issue teed up really quickly.
22 In other words, I'll see what the district wants. And you can
23 weigh in on whether or not it makes more sense to answer
24 interrogatories or to oppose them. And if you oppose them,
25 then, you know, my normal practice on a discovery motion is to

1 get the stuff teed up and dealt with pretty quickly.

2 So that way it would minimize the first step, which is
3 a motion for leave to file discovery, as opposed to kind of
4 (unintelligible) issue on what the discovery is. I think -- I
5 don't even think we have got any answers here. Right? So
6 we're at an early stage. But this is discovery on the
7 preliminary injunction motion, so it is kind of a special case.

8 I think the best way to deal with this is to see what
9 they want to ask and why. And then if on the plaintiffs's side
10 you feel like this is going to delay things too much or it is
11 improper, I'll deal with it.

12 So how much time -- can you get your discovery served
13 pretty promptly?

14 MR. WARNER: If we could have seven days to do that?

15 THE COURT: How about five days? Well, five days --
16 how about by Friday?

17 MR. WARNER: By Friday?

18 THE COURT: In terms of a -- yeah, I mean, I
19 don't -- I don't -- if written discovery is responded to,
20 hypothetically, I don't -- I don't know that I see the need for
21 depositions in this case in order to decide the preliminary
22 injunction issue.

23 Alternatively, if we needed an evidentiary hearing we
24 could have an evidentiary hearing. And there is nothing that
25 says everybody is entitled to know what everybody is going to

1 say at the evidentiary hearing before.

2 I thought -- I didn't think we were going to need an
3 evidentiary hearing when I looked at what had been teed up
4 here. I thought a lot of the issues probably could be dealt
5 with pre-thing slash argument, but I'm not -- I'm not deciding
6 that one way or another.

7 I would like to see what kind of interrogatories,
8 quote unquote, targeted you want to serve and whether the
9 plaintiffs make a decision to answer them or to oppose that,
10 and I'll decide that pretty quickly.

11 I'm cognizant of the fact that your motion for -- to
12 intervene is kind of sitting there. It is going to be decided,
13 sounds like, shortly after June 14th.

14 MR. KNIGHT: That's right.

15 THE COURT: And if you're in the case you would like
16 to brief it and not as a come along, but as probably along
17 with -- I mean, it would help me if everybody was briefing
18 things at the same time rather than over time.

19 MR. KNIGHT: Your Honor, if I could just point out
20 issue in terms of --

21 THE COURT: And that's Mr. Knight speaking.

22 MR. KNIGHT: Yes, John Knight for the intervenors.

23 THE COURT: Uh-huh.

24 MR. KNIGHT: There is one key mistake throughout this
25 complaint that the complaint misgenders my client. Student A

1 states incorrectly that she is a boy. That factually is
2 incorrect. And it is crucial that we are able to put on facts
3 to show otherwise.

4 THE COURT: And what do you mean by that, in terms of
5 an evidentiary hearing?

6 MR. KNIGHT: We certainly expect that a declaration
7 from the mother and father of the client, as well as the
8 client, possibly medical evidence.

9 MR. TEDESCO: Your Honor, this is Mr. Tedesco. That's
10 explained in the first footnote to the complaint and the first
11 footnote to the preliminary injunction memo and motion. I
12 (unintelligible) think it is a non-issue.

13 THE COURT: Well, I mean, as I understand what the
14 issue is, I think the plaintiffs have decided to nominate
15 Student A as male for purposes of their lawsuit because that's
16 the whole thrust of their lawsuit.

17 I understand your position, as I read it in the motion
18 to intervene, that Student A does not identify that way.
19 Right? Is that the crux of what you're raising?

20 MR. KNIGHT: Not only that she does not identify that
21 way, but she is a girl.

22 THE COURT: Okay. Yes, and she -- and, again, I saw
23 your motion to intervene, the facts that you put forward on
24 that. But are you saying you need to do more than put in a
25 declaration or an affidavit or Exhibit A, passport; Exhibit B,

1 whatever? Do you think there is a need for an evidentiary
2 hearing on that issue or is it a contention that you can
3 possibly put forward for a preliminary injunction purpose in
4 terms of the papers?

5 In other words, I'm not sure what your -- are you
6 raising this just to correct the record or to put a marker down
7 that we need an evidentiary hearing?

8 MR. KNIGHT: I mean, I think to the extent there is a
9 dispute, we would like -- we think an evidentiary hearing would
10 be important to resolve that dispute so that the evidence is
11 (unintelligible).

12 THE COURT: Yeah.

13 MR. KNIGHT: I think that we're concerned about making
14 sure that the facts are before you fully with respect to this.
15 But with respect to the misstatements in terms of allegations
16 with respect to disparate (unintelligible) so we do have views
17 about participation in discovery.

18 THE COURT: Okay. Well, hypothetically in terms of
19 trying to get to a schedule -- I'm just thinking out loud here.
20 I mean, if I had -- if we did have any written discovery and
21 written discovery was expedited and we got a decision on the
22 intervention motion along the schedule that Judge Alonso has
23 set, and I gave you, the defense, 28 days from today to file a
24 response brief --

25 (Brief interruption.)

1 THE COURT: I am just looking at the calendar. Math
2 was never my strong suit. So counting days and Mondays, briefs
3 would come in -- I mean, I'm just looking at the calendar.

4 For plaintiffs, Mr. Tedesco, you can't see what I am
5 doing here, so -- but I'm looking at the calendar.

6 I mean, I will say that if written discovery is
7 appropriate or interrogatories, I would shorten the amount of
8 time that it would take to respond to them provided that they
9 are targeted and can be responded to in a short period of time.

10 So on the defendants's side I would look to you to say
11 you maximize your chances of taking some discovery on your
12 preliminary injunction point by --

13 MR. KNIGHT: Less is more, your Honor.

14 THE COURT: I mean, less is more. And that -- and
15 also I would ask you to do something that is -- would make this
16 a little easier for me is that with your discovery serve a very
17 short, you know, five-page memorandum telling me and the
18 defendant why you want this discovery. It is relevant to what
19 claim and what -- why it is important for the Court to see the
20 responses to this discovery so that when Mr. Tedesco and his
21 clients get it, then -- and Ms. Floyd too -- sorry. I'm not
22 trying to minimize that -- that they know what you're shooting
23 for and why, and they can make a decision as to whether they
24 want to fight it or not.

25 So that would be by Friday.

1 MR. KNIGHT: And so we file the memo and the discovery
2 with the Court as well as serving it on the --

3 THE COURT: Well, serve -- give me a -- serve -- I'm
4 not requiring that you file stuff that doesn't have to be
5 filed. So file the memorandum. Send me a courtesy copy of the
6 discovery that you have served on the other side. That doesn't
7 have to be in the public record.

8 But the memorandum as to why you think it is necessary
9 would be. And then any protective order motion, obviously,
10 would be there too.

11 And assuming you guys know whether you're in the case,
12 you know, by the week of June 20th, then -- and on the
13 plaintiffs's side, how -- assuming that we -- when we get to a
14 date for the defendants to file or any intervenor to file a
15 response to your motion for preliminary injunction and your
16 memorandum in support, how much time are you going to ask for
17 to respond or to reply in support?

18 MR. TEDESCO: It is hard to answer that because I'm
19 not entirely sure how long the briefs are going to be and how
20 many (unintelligible) I'm going to be facing.

21 But I think, you know -- my biggest concern is to get
22 you enough time, your Honor, to rule by August 15th.

23 THE COURT: Well --

24 MR. TEDESCO: So my goal would be -- would be between
25 10 and 14 days, but I would take less if I had to.

1 THE COURT: Okay. Let's talk about August 14th for a
2 second. Okay? One, I mean, that -- you know, the perfect is
3 the enemy of the good, as they say. So, you know, I'll take
4 into account what Ms. Crowley said about timing.

5 But, A, before you leave here, we're going to talk
6 about the plusses and minuses of limited consents. But
7 whatever happens here if the -- if I am not deciding the
8 preliminary injunction motion on a consent basis so that an
9 appeal goes to the Seventh Circuit, there is no way in heck, I
10 think, that between Judge Alonso and I can we can get you a
11 decision by August 15th. All right? That's a full stop
12 because any appeal from what I would -- I would have to do a
13 report and recommendation. If there is no consent, the
14 procedure is that I would have to do a report and
15 recommendation to Judge Alonso as to what I felt the result
16 should be here, and he conducts a de novo review of that. So
17 whether he needs briefs or not, whether he wants a hearing or
18 not, all of that is, you know, going to effect your timing.

19 Two, I don't know how, given my schedule, let alone
20 Judge Alonso's, you're going to get this issue -- even if you
21 did it on a consent basis, I doubt you are going to get a
22 decision by the Court of Appeals in August. As a practical
23 matter, they don't sit for most of the summer.

24 So I -- you know, they have a motions judge and things
25 like that, but when it -- whether it is July or August that you

1 get a decision here, somebody may move to stay. It is going up
2 to the Court of Appeals. I don't -- you know, it would either
3 be a stay motion here or before Judge Alonso.

4 So, you know, I understand your desire in terms of
5 getting this adjudicated before the school year starts, but
6 given that we're talking about it on May 31st, as opposed to
7 maybe January 31st, I think that that is going to be a hard
8 schedule to meet in any event, you know, even if I did a 14-
9 and 14-day turnaround on briefs and didn't give you any
10 discovery.

11 And given what I have going on in July, I'm not sure
12 that even if I did that for you, you know, I would feel
13 terrible -- I always felt terrible as a lawyer if I pushed
14 people -- if the judge pushed me to file briefs and then they
15 sat with the judge for a long period of time.

16 I would rather have you think about what you are
17 writing rather than rush to have it done so that when it comes
18 to me I can decide it, hopefully, promptly.

19 So, you know, I -- that's not a -- that's
20 not -- that's just the facts, okay, I mean -- I just think
21 where we are.

22 Let me also talk about this limited consent. I mean,
23 under -- you know, as you know as a magistrate judge I am
24 somebody with limited jurisdiction to enter final orders. I
25 can enter final orders on the parties's consent. Under the

1 controlling statute, which is 28 USC 636, the parties can
2 consent for an entire case, meaning that the magistrate judge
3 then decides the case, and it goes to the Court of Appeals.

4 You can also do a limited consent. And our Local Rule
5 73.1 talks about limited consent, and 73.1D, it embodies the --
6 you know, the transfer of a portion of the case covered by the
7 consent to the magistrate judge for a decision on the merits.
8 And then an appeal from there would go to the Court of Appeals.
9 But the rest of the case remains on the docket of the district
10 judge.

11 I have done motions for preliminary injunction in that
12 way. We have a -- there is a -- there are several benefits to
13 that kind of procedure. As I said, one is, up or down on
14 whatever I decide, you end up going to the Court of Appeals and
15 not for de novo review before the district judge on a report
16 and recommendation that takes more time.

17 But that's totally up to you. And I don't get
18 involved in those kinds of decisions. The parties can talk
19 about it. There is a form on the website that can be filed
20 with respect to that. And if not all parties would agree to a
21 consent like that, then I would have no choice but to conduct
22 these proceedings, any hearing that's necessary, and prepare
23 and file the report and recommendation that I would give to
24 Judge Alonso.

25 So that's, you know -- that's a timing issue. That's

1 an expense issue. That's an -- also, you know, who is going to
2 decide the ultimate issue here, and that's totally up to you.

3 And for me, I just need to know at some point which
4 way you end up going with that because I need to know whether
5 I'm preparing a report and recommendation or a memorandum
6 opinion and order. But I have no -- I have no dog in that
7 hunt.

8 So let me just look at this for a second.

9 MR. TEDESCO: Your Honor, this is Mr. Tedesco. Can I
10 comment on a couple of those points you raise?

11 THE COURT: Yes.

12 MR. TEDESCO: One is we would certainly consent to --

13 THE COURT: You know, can I just interrupt for a
14 second, Mr. Tedesco? I intentionally don't want to have a
15 discussion on the record of who wants to -- because while I
16 hear you saying that, if some of the people standing in front
17 of me don't want to do that, I really don't want to know, and I
18 don't think they may want to know who says yes or no on the
19 consent side. So I'm sorry to interrupt you, but our -- our
20 local rules and all the stuff that's written about this says
21 that it is -- it really should not be a decision that the judge
22 is part of, and I think that that's right.

23 I think that you all ought to talk about it by phone
24 or in person. And I have -- as I said, I don't have a dog in
25 the hunt, so -- but I don't want somebody to feel, quote

1 unquote, feel bad, you know. You know, for legitimate reasons
2 they feel like -- or for whatever their client's reasons are,
3 they feel like they would like the ultimate decision to be made
4 by the district judge. I mean, I practiced for almost 29
5 years, and I have had lots of these conversations with clients
6 so I -- I get it.

7 So I don't -- I really want to kind of -- I want to
8 interrupt that train of thought so that nobody else feels they
9 need to go on record. Okay?

10 MR. TEDESCO: Sure.

11 One other thing I wanted to address was the comment
12 made about the amount of time between the locker room policy
13 going into effect and filing the lawsuit. To the extent that
14 there is any delay on seeking a preliminary injunction, the
15 only time that counts is between the complaint and the filing
16 of the preliminary injunction, which happened very quickly in
17 this case.

18 The only time delay matters is if you have waited six,
19 seven, eight months to file your preliminary injunction. But
20 the fact that the policy was in place but no lawsuit was lodged
21 doesn't have any relevancy to the standpoint -- from the
22 standpoint of, you know, whether the plaintiff had sat on his
23 rights or anything. There has been no sitting on our rights in
24 this context. We filed as soon as we possibly could. A
25 hundred thirty-plus plaintiffs, very difficult decision for the

1 plaintiffs, you know, and so there shouldn't be any concern
2 about slowing it down because we slowed down. We have them.
3 We filed -- or we moved for preliminary injunction very shortly
4 after we filed the complaint.

5 And I would just add, the Court -- you know, I know
6 you were talking about moving the response 28 days from today.
7 I really don't think there is any -- again, I would just
8 reiterate, I really don't think there is any need for
9 discovery. I would anticipate that we'll object to it. I
10 certainly don't think there is going to be a need for an
11 evidentiary hearing. I think this can be ruled on based on the
12 pleadings.

13 Most of the issues are very straightforward legal
14 issues. So, you know, our view is the quicker the briefing
15 schedule occurs, the sooner it can be lodged with the Court and
16 awaiting a decision.

17 THE COURT: Okay. Well, along those lines, here's the
18 proposal I would like to make here in terms of scheduling. And
19 I think it kind of accommodates a lot of people's concerns
20 here. I'd like your reaction to it. I know I'm the final
21 decider here on this, but I do -- would like your participation
22 in this.

23 I'd say that any discovery that the defendants want to
24 serve should be served by this Friday, the 3rd.

25 Any response, I would shorten the time for responding.

1 And I'm assuming you're talking about interrogatories, not
2 document production.

3 MR. KNIGHT: Correct, your Honor.

4 THE COURT: Okay. I would shorten the time to respond
5 to that discovery, if the plaintiffs were inclined to respond
6 to it, to 14 days or June 17th.

7 I would say that the defendants's opposition to the
8 motion for preliminary injunction would be filed on July 8th.
9 That is less than the 28 days you guys are asking for, but you
10 had the motion for about a week now. You probably are already
11 thinking about the legal issues.

12 It also would allow time for the intervenors to jump
13 in if they were allowed to intervene, so they are not
14 completely caught behind the eight ball.

15 I would have plaintiffs reply by July 22nd. You said
16 ten days or 14 days. I gave you the 14 days. If you wanted
17 more time, that would be fine.

18 And then I would be setting a hearing, assuming that
19 all of this is going terrifically and everybody is doing what
20 they have to do -- hold one for one second.

21 (Brief interruption.)

22 THE COURT: On Tuesday, August 9th.

23 How about Wednesday, August 3rd at 9:30 A.M.

24 Yeah. I'm just trying to work around lots of
25 different schedules that I have.

1 And my intention on that right now is not an
2 evidentiary hearing. That's argument on the motions and
3 questions that I might have. If we need it, we'll -- we have
4 plenty of time to get together between now and then.
5 Including, if somebody wants to request an evidentiary hearing,
6 I would look at that too.

7 And this would be a -- you know, this is my
8 anticipatory schedule here provided that the wheels don't fall
9 off the bus someplace.

10 How do these sound to the plaintiff? How do these
11 dates sound to the plaintiffs?

12 MR. TEDESCO: Yes, they are agreeable, your Honor.

13 THE COURT: What about defendants?

14 MR. WARNER: District -- Mike Warner for District 211.
15 I do have a question or concern about the deadline for
16 responding for discovery. Plaintiffs are going to answer this
17 discovery in, I think, 14 days is appropriate.

18 But as (unintelligible) suggest right now
19 (unintelligible) just going to object on principal or not
20 (unintelligible) could that time be shorter --

21 THE COURT: Yeah.

22 MR. WARNER: -- otherwise the objection process will
23 be (unintelligible).

24 THE COURT: Right. You're right. And that's a
25 good -- a couple points. I could shorten that time. I could

1 say that if the plaintiffs are going to file a motion for
2 protective order, they should do so by a date earlier than
3 that.

4 MR. WARNER: All right (unintelligible).

5 THE COURT: And I'll talk to Mr. Tedesco about that.

6 And, two, the reason -- if it is targeted discovery
7 and you're looking for certain stuff, the fact that it prevents
8 you from starting to write your brief -- do you know what I
9 mean?

10 MR. WARNER: Right.

11 THE COURT: You know, I suppose also that if I am
12 convinced, Mr. Tedesco, that the discovery would be -- is
13 relevant, probative, and helpful in the -- in the resolution of
14 the motion for preliminary injunction, and you all oppose it,
15 stands to reason that I could also adjust these briefing
16 schedule dates so that I am not prejudicing the defendants by
17 having them file before they have gotten the information that
18 they feel they need to respond.

19 So what I would like you -- what I -- can I say that
20 if you get the discovery on the -- I mean, you know, you have
21 already said you're going to oppose it. You haven't seen it
22 yet so -- but can I say like June 8th, which is the following
23 Wednesday, if you are going to file a motion for a protective
24 order, you would do it by then?

25 MR. TEDESCO: Yes. Yes, your Honor, that sounds fine.

1 THE COURT: Okay. Because that way we'll know, and
2 then I'll know after I see the discovery and the justification
3 for it, whether or not I want it and whether I have to adjust
4 the briefing schedules at all to allow for it. Okay?

5 MR. KNIGHT: Thank you.

6 THE COURT: And I would allow, Mr. Tedesco -- you
7 know, I would sign a confidentiality order, for example, if the
8 responses to interrogatories would fit within what we would
9 categorize as confidential or private information so that your
10 clients wouldn't be answering interrogatories.

11 I'm not presupposing the ruling on this. But I'm just
12 saying that there are ways, you know, to allow discovery as a
13 precatory matter in a case without having the matters be public
14 record or anything like that in order just to move to the
15 merits rather than getting hung up on the discovery phase.

16 And I -- but let me say this to, you know, Mr. Warner
17 and Ms. Smith, you know, I haven't prejudged what you are
18 doing, and I -- and I'll say that to Mr. Tedesco, since he
19 can't see the body language -- but there are a bunch of ways to
20 skin a cat on discovery at a preliminary phase like this, so --

21 MR. WARNER: And understand the need --

22 THE COURT: Without any disrespect to the cat.

23 MR. WARNER: -- and we're willing to work with all the
24 parties (unintelligible). These are all students
25 (unintelligible). And we understand the privacy

1 (unintelligible).

2 THE COURT: I mean, they are students, they are
3 minors. I don't know what questions you're going to be asking.
4 I don't know how intrusive they are into matters of privacy.
5 So, you know -- and, again, I don't know whether they are
6 necessary, which is why I want to see why you want to do it.
7 And I'll see what these guys do, if anything, on the 8th.

8 Let's keep this briefing -- so I didn't look at the
9 intervenors who aren't really parties yet. I mean, you guys
10 are obviously squeezed. But, on the other hand, you're not
11 squeezed as bad as you could have been. Right?

12 Okay. Well, let's see if this will work. All right?
13 I'm not going to set another date because if the plaintiffs
14 file a motion, you're going to be back in front of me.

15 If I need to see -- if you guys need to see me for
16 anything, you can get back in front of me.

17 So let's just -- and let's just make sure we know what
18 the playing field looks like. It (unintelligible) now
19 preliminary injunction matters in front of me.

20 Intervention matters and all other merits issues in
21 front of Judge Alonso. So if somebody wants more time to
22 answer the complaint, for example, that's in front of Judge
23 Alonso.

24 You know, I'm going to assume jurisdiction over
25 discovery relating to the preliminary injunction motion because

1 I think that's probably within the penumbra of the referral of
2 the preliminary injunction motion.

3 But things relating to merit, other than that, are in
4 front of Judge Alonso.

5 Now, obviously, if everybody consented, then I would
6 have the whole thing. But if -- for the entire case.

7 But, you know, any motion -- technically motions for
8 leave to appear pro hac vice, probably go to Judge Alonso on
9 that stuff too. I could -- you know, there is blurred lines,
10 right, if they are coming in for the preliminary injunction
11 motion. But I would think that at this point anything like
12 that goes in front of him.

13 Hold one for one second. I have got to consult.

14 (Brief interruption.)

15 THE COURT: Okay. Anything else anybody wants me to
16 address or that I would be helpful if I did address?

17 MS. CROWLEY: This is Meg Crowley for the federal
18 defendants. I just had a question on the page limitations for
19 our opposition brief.

20 THE COURT: Yeah. Let me talk about -- so I don't
21 know how this works, but -- so I'm looking at the -- the font
22 in the memorandum of law in support of the motion to intervene
23 and the font in the memorandum in support of plaintiffs's
24 motion for preliminary injunction here. Okay? I have never
25 been a big guy on fonts. And I know you get in a lot of

1 trouble with that in the Seventh Circuit. Okay? And I know
2 Judge Alonso did not allow the 33 pages that were requested by
3 the plaintiffs for their memorandum in support.

4 I have good eyes. I still consider myself a young guy
5 so I can read this stuff. And if I read it electronically, I
6 can even expand it.

7 But I'm looking at font in the memorandum, and I -- I
8 don't know whether that was a little smaller in order to get
9 you into 25 pages or not. And nobody has to respond to that.

10 Here's what I would say on pages. I gave -- I gave --
11 Judge Alonso gave 25 pages to them. You could have 25 pages.

12 Although frankly -- are you guys filing one -- no, you
13 guys are filing separate briefs, right?

14 MR. WARNER: We will coordinate the (unintelligible).

15 THE COURT: You know what, I don't want to invite long
16 briefs here. All right? I think what you ought to do is -- I
17 gave time to re -- to file. If you think that you are not able
18 to do it in our 15-page limit, given the allocation of who is
19 responding to what, give me a motion. You don't have to file
20 the motion with your brief attached, you know, because that
21 always puts a lot of pressure on somebody.

22 If -- I would be amenable to more pages. I find on
23 this side of the bench, and I also found this, frankly, when I
24 was -- although reluctantly on that side of the bench, if I --
25 whatever number of pages I give you, you can fill. Right? And

1 -- but what is -- I don't know whose -- is this Shakespeare,
2 brevity is the soul of wit, or something like that? So I don't
3 know if that is. If it is not Shakespeare, I'm sorry to
4 Shakespeare.

5 So I'll -- I mean, I would really like you to try
6 and -- given the fact that -- if the intervenors come in,
7 you've got three briefs, which are 45 pages. Now I know you
8 have different interests. I get that. But I would rather -- I
9 would rather not give you carte blanche right now. Because if
10 I give you 25 pages each, that's 75 pages to get done.

11 I -- 20 pages is a no-brainer for me. Okay? Twenty-
12 five pages, uh, I look at it a little harder.

13 Thirty pages, I say, can't you get it in 25? What
14 about in 22? Okay.

15 So govern yourselves accordingly on that. I'm not
16 going to be an ogre on it. But if you said you can get it in
17 the right type font with the right number of pages, that works.

18 Anything else?

19 Okay. I'll see you when I see you. And have a good
20 day.

21 (Which concluded the proceedings.)

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I certify that the foregoing is a correct transcript from the digital recording of proceedings in the above-entitled matter to the best of my ability, given the limitation of using a digital-recording system.

/s/ Pamela S. Warren
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

July 25, 2016
Date