

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child,)
)
Plaintiff,)
v.) Cause No. 3:18-cv-37-WTL-MPB
)
EVANSVILLE VANDERBURGH SCHOOL)
CORPORATION,)
Defendant.)

MOTION TO STAY

The Defendant, Evansville Vanderburgh School Corporation (“EVSC”), moves the Court to stay the preliminary injunction granted in this cause pending appeal to the United States Court of Appeal for the Seventh Circuit, on the grounds that:

1. This Court has imposed upon the EVSC the remedy found in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), without a factual predicate even remotely similar to that which supported the preliminary injunction in *Whitaker*.

2. Irreparable Harm? Not even close:

Q You've seen your medical records, haven't you?

A Yes.

Q Do either one of them say you should be allowed to use a male restroom to assist your transition?

A No; but it's -- it wasn't related to that specifically.

Q So the answer is no medical provider has counseled the EVSC that you should be allowed to use male restrooms?

A Correct.

Q Now happily, unlike the plaintiff in *Ash* -- or *Whitaker*, you -- and I sincerely mean this -- have never expressed suicidal ideation related to these issues, have you?

A No.

Q While you've had anxiety and stress in your own home relating to the acceptance by, I think, your stepfather of your gender identity, the school problems have never -- or school issues have never required you to visit a counselor seeking help for anxiety related to the bathroom choices, have they?

A I mean, I didn't specifically go to counseling for that but that was related to it.

Q You've never expressed that to any counselor at school, have you?

A No.

(Transcript, p. 16, Lines 6-25, p. 17, Lines 1-3).

3. The record here is devoid of any medical testimony or evidence which supports J.A.W.'s professed need to use a restroom amongst his opposite biological sex peers. The Court's reach for the Affidavit of Dennis Fortenberry is ironic: This doctor has never examined or reviewed J.A.W.'s medical situation. Rather, he engages in stereotypical, conclusory generalizations in an area where science is anything but settled:

“Meanwhile, fundamental questions about gender dysphoria remain unanswered. Researchers still don't know what causes it -- gender identity is generally viewed as a complicated weave of biological, psychological, and sociocultural factors. In some cases, gender dysphoria may interact with mental-health conditions such as depression and anxiety, but there's little agreement about how or why.”

The Atlantic, July/August 2018 (in Appendix previously submitted).

4. The law relative to transgender rights and status as a protected class is anything but settled: *see Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget*

Mktg., Inc., 667 F.2d 748, 749-50 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977); *Etsitty v. Utah Transit Auth.*, 502 F.3d, 1215 (10th Cir. 2007).

Until the U.S. Supreme Court settles the issues presented, this Court should defer to Indiana law which empowers local school boards to exert all powers necessary to govern schools. I.C. 20-26-5, *et. seq.*

5. Respectfully, the EVSC must again point out that this case was not even properly before this Court for decision. An unemancipated minor's right to pursue strictly federal law based claims in a United States District Court is not controlled by state law. Rather, it is governed by the unequivocal requirements of Federal Rule of Civil Procedure 17(c) which mandates that a "next friend" or guardian pursue this cause. See *Whitaker, supra*, Footnote 3.

WHEREFORE, the EVSC prays that this Court stay its ruling imposing a preliminary injunction pending appeal of this cause to the Seventh Circuit Court of Appeals, and for such other relief as is just in the premises.

Respectfully submitted,

s/ Patrick A. Shoulders

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of August, 2018, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's electronic filing system upon:

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s/ Patrick A. Shoulders

Patrick A. Shoulders

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ORDER

This matter having come before the Court on Defendant's Motion to Stay the preliminary injunction granted in this cause pending appeal, and

The Court being duly and sufficiently advised now GRANTS said Motion, and it is

ORDERED that the ruling imposing a preliminary injunction is hereby stayed pending Defendants' appeal to the Seventh Circuit Court of Appeals.

DATED:

JUDGE, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

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