

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

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

Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Stay

I. Introduction

In its August 3, 2018, Entry on Motion for Preliminary Injunction (Dkt. 68), this Court properly concluded that this case is not distinguishable from *Whitaker by Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F.3d 1034 (7th Cir. 2017), *pet for cert. dismissed*, __U.S.__, 138 S. Ct. 1260 (2018). Given this, the Court correctly determined that J.A.W. was likely to prevail in his claim that the refusal of Evansville Vanderburgh School Corporation (“EVSC”) to allow him to use the male restrooms – the restrooms associated with his gender identity – violates both Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), and equal protection. The Court also held that J.A.W. was faced with irreparable harm and that, in contrast, EVSC failed to demonstrate that a preliminary injunction would impose any harm on it at all. Finally, the Court properly recognized that EVSC did not advance any arguments as to how an injunction, allowing J.A.W. to use male restrooms, would negatively affect the public interest. The

preliminary injunction was therefore entered, allowing J.A.W. to use male restrooms within EVSC.

EVSC has now filed a motion to stay the Court's preliminary injunction pending an appeal. (Dkt. 69). It has sought this stay with little argument and the request is clearly not meritorious and must be denied.

II. The standard for issuing a stay of a preliminary injunction pending appeal

Rule 62(c) of the Federal Rules of Civil Procedure allows a district court to issue a stay of, among other things, a preliminary injunction “[w]hile an appeal is pending.” However, such a stay is “extraordinary relief” for which EVSC bears a “heavy burden.” *Winston-Salem/Forsyth Co. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers) (denying a stay of desegregation order). The factors that must be considered in granting a stay are similar to those for the consideration of a preliminary injunction request, “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). A quick review of these factors demonstrates that EVSC's motion is without merit.

III. EVSC has not demonstrated a likelihood of success on the merits of its appeal

As another district court has noted,

The first factor, “likelihood of success,” presents the most conceptual difficulty. Obviously, we think an appeal will probably fail; we have reviewed our opinion and stand by it. Had we thought an appeal would be successful, we would not have ruled as we did in the first place. But a party seeking a stay need not show that it is more than 50% likely to succeed on

appeal; otherwise, no district court would ever grant a stay. It is enough that the City have a substantial case on the merits.

Thomas v. City of Evanston, 636 F. Supp. 587, 590 (N.D. Ill. 1986). EVSC's response to this Court's conclusion that J.A.W. is likely to prevail on the merits appears limited to a single statement: "The law relative to transgender rights and status as a protected class is anything but settled." (Dkt. 69 at 2). But, the issue in this case, the right of a transgender student to use the bathrooms consistent with the student's gender identity, is most assuredly settled in the Seventh Circuit by *Whitaker*, a point not addressed by EVSC. While it is certainly true that the Supreme Court has not addressed this issue, *Whitaker* did and in the Seventh Circuit *Whitaker* must be followed. See, e.g., *Bontrager v. Indiana Family and Social Services Admin.*, 829 F. Supp. 2d 688, 694 (N.D. Ind. 2011), *aff'd*, 697 F.3d 604 (7th Cir. 2012) ("Just as courts of appeals must follow Supreme Court precedent, so to must district courts follow decisions by courts of appeal unless and until they have been explicitly overturned.") (citation omitted). This Court properly followed *Whitaker*.

EVSC appears to argue that it will prevail on appeal because J.A.W. failed in his obligation to demonstrate irreparable harm as he has not tried to commit suicide and because he did not specifically go to counseling because of bathroom issues. (Dkt. 69 at 1-2). However, the evidence of irreparable harm, which this Court found to be credible, is that J.A.W.

experiences discomfort, distress, and anxiety when he is forced to use a girls' restroom because it is inconsistent with his male identity. In addition, using the girls' restrooms at school causes him distress because it draws attention to the fact that he is transgender, and he is aware that female students at school have expressed discomfort with him using the girls' restrooms because he appears male. In addition, using the nurse's restroom

is not a satisfactory option, both for practical reasons—i.e., its location—and because it forces him to have different restroom arrangements than his peers, undermining his social role transition. The Court finds that the likely negative emotional consequences of being denied access to the boys' restrooms at school would constitute irreparable harm to J.A.W. because it would be “difficult—if not impossible—to reverse.” *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) (citing *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam)).

(Dkt. 68 at 13). And, this harm is entirely consistent with the harm that the experts note is to be expected if a transgender student is denied access to the bathrooms that are consistent with the student's gender identity. (Dkt. 50-5 ¶¶24-26, 30; Dkt. 50-6 ¶¶ 30-31; Dkt. 50-7 ¶ 30).

EVSC's response is to claim that this Court's citation to one of the experts, Dr. Fortenberry, is “ironic” because his comments were “stereotypical, conclusory generalizations in an area where science is anything but settled.” (Dkt. 69 at 2). However, the evidence is clear, as recognized by all the experts here, and by the Seventh Circuit in *Whitaker*, that being denied the use of the correct bathroom causes irreparable harm to persons with gender dysphoria. And, *Whitaker* is not alone in acknowledging this unsurprising fact. See, e.g., *Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (transgender students' assertions that bathroom policy marginalized them causing “distress, anxiety, discomfort and humiliation” demonstrated irreparable harm).

There is nothing “stereotypical” about this. Instead, the fact that harm will occur is supported by the evidence -- a unanimity of opinion.¹ This Court most certainly did not err in concluding that J.A.W. would prevail on the merits and would suffer irreparable harm in the absence of a preliminary injunction.

IV. EVSC has not attempted to demonstrate that the other requirements for the grant of an appellate stay are met here

In its brief motion for stay EVSC makes no attempt to satisfy its burden of demonstrating that it will suffer irreparable harm in the absence of a stay or how the public interest would be served by the grant of a stay. *Hilton*, 481 U.S. at 776. Regardless of its other deficiencies, this is a fatal deficiency in its request.

As far as irreparable harm is concerned, it is incumbent on EVSC in seeking the stay to “substantiate the claim that irreparable injury is ‘likely’ to occur Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact occur*.” *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying appellate stay request because irreparable harm was not demonstrated) (emphasis in original). Here, EVSC does not argue that this Court erred in its preliminary injunction decision where it concluded that “EVSC has not demonstrated that it would suffer any harm if an injunction were to issue.” (Dkt. 68 at 16). It makes no argument at all that it will suffer irreparable harm if a stay is not issued during its appeal. In the

¹ EVSC seeks to challenge this unanimity by use of a quote from a magazine article whose admissibility has been challenged (Dkt. 54 at 9 n. 7). However, the quote that EVSC has inserted into its stay request (Dkt. 69 at 2) in no way addresses the uncontested evidence that denying a transgender student the ability to use the bathroom consistent with the student’s gender identity causes harm.

absence of any such harm an appellate stay cannot issue. *See, e.g., Lubow v. U.S. Dept. of State*, 934 F. Supp. 2d 311, 313 (D.D.C. 2013) (“[p]laintiffs’ failure to show some irreparable injury itself suffices to deny their motion [for an appellate stay]”).

Similarly, EVSC does not attempt to counter this Court’s conclusions that its arguments opposing the preliminary injunction “do not relate to any interest the public may have in preventing J.A.W. from using the boys’ restrooms” and that EVSC did not “articulate[] any harm that . . . the public would suffer specifically.” (Dkt. 68 at 17-18). It offers no argument concerning the public interest in the stay request. “Accordingly [EVSC] has failed to meet [its] burden to persuade the court that a stay is justified in this case.” *Payan v. United Parcel Service*, No. 2:14-cv-00400-JNP-DBP, 2017 WL 4844651, at * 2 (D. Utah September 1, 2017) (stay denied where movant did not “address likelihood of success on appeal, any threat of irreparable harm, or the public interest”). *See also, e.g., Madura v. BAC Home Loans Servicing, LP*, No. 8:11-cv-2511-T-33TBM, 2016 WL 4411305, at *3 (M.D. Fla. Aug. 19, 2016) (“Finally, the Court finds that the Maduras have not presented any convincing arguments regarding whether the requested stay would affect the public interest. Because the Maduras have failed to carry their burden, the Court denies the Motions [for stay].”); *Satterlee v. Wolfenbarger*, No. Civ. 03-71682-DT, 2005 WL 2704877, at *2 (E.D. Mich. Oct. 19, 2005) (“respondent is not entitled to the issuance of a stay, because she has failed to show, much less argue, that she would be irreparably injured in the absence of stay or that there would be any risk of harm to the public interest if a stay was not issued in this case”).

V. Conclusion

“[B]ecause the burden of meeting the standard [for an appellate stay] is a heavy one, more commonly stay requests will be found not to meet this standard and will be denied.” Wright and Miller, 11 FED. PRAC. & PROC. CIV. § 2904 (3d ed.) (footnotes omitted). Such is the case here. EVSC has satisfied none of the requirements to obtain a stay pending appeal and, in fact, has not even bothered to argue that all of the requirements are met. EVSC’s motion is not well taken and should be denied.

s/ Kenneth J. Falk

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Certificate of Service

I hereby certify that on this 9th 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 system on:

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