

Supreme Court. Again, by agreement of the parties, the matter at the trial level was stayed pending consideration of the Petition before the Supreme Court. That Petition was denied on May 28, 2019. Following the denial of their petition for certiorari, Plaintiffs have moved for a stay of proceedings pending the outcome of three other cases pending before the United States Supreme Court in its 2019-2020 session.² *See* Plfs.’ Mot. to Stay Proceedings [Docket 85] (the “Motion”). Defendant Boyertown Area School District (the “School District”), by and through its undersigned counsel, hereby files this response opposing the Motion.

I. ARGUMENT

A. Standard for Grant of a Stay of Proceedings

A stay is an “exercise of judicial discretion” based on “the circumstances of the particular case.” *Id.* at 433. In general, the power to temporarily stay proceedings lies within the informed, sound discretion of the district courts. *Nicholas v. Wyndham Int’l, Inc.*, 149 Fed. App’x. 79, 81 (3d Cir. 2005) (*quoting Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance”). A stay “is not a matter of right, even if irreparable injury might otherwise result” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (*quoting Virginian Ry. Co. v. United States*, 272 U.S. 658 (1926)).

² The cases are: *Bostock v. Clayton Co.*, *cert. granted*, 139 S. Ct. 1599 (2019); *Altitude Express, Inc. v. Zarda*, *cert. granted*, 139 S. Ct. 1599 (2019); and *R.G. & G.R. Harris Funeral Homes v. EEOC*, *cert. granted*, 139 S. Ct. 1599 (2019) (together, the “Pending Cases”).

The party seeking a stay “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.” *Landis*, 299 U.S. at 255. “The proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis*, 299 U.S. at 255); see also *CTF Hotel Holdings, Inc. v. Marriott Int’l, Inc.*, 381 F.3d 131, 139 (3d Cir. 2004) (“The opposing party must state a clear countervailing interest to abridge a party’s right to litigate”). In determining whether to stay proceedings, courts are to balance the competing interests at stake. *Landis* at 254-55; *Texaco, Inc. v. Borda*, 383 F.2d 607, 608 (3d Cir. 1967). “When deciding a motion to stay proceedings pending the resolution of another action in federal court, courts have considered three factors: ‘(1) the promotion of judicial economy; (2) the balance of harm to the parties; and (3) the duration of the requested stay.’” *Cirulli v. Bausch & Lomb, Inc.*, No. 08-4579, 2009 WL 545572 (E.D. Pa. Mar. 4, 2009).

Although federal courts are vested with authority to stay proceedings under *Landis*, a stay is an extraordinary measure that is only justified in “exceptional circumstances.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); see also *United States v. Breyer*, 41 F.3d 884, 893 (3d Cir. 1994). As the *Landis* court stated, “Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.” *Landis*, 299 U.S. at 255.

B. Plaintiffs’ Motion Does Not Promote Judicial Economy

Plaintiffs claim that a stay in this case would promote judicial economy by allowing the Supreme Court to define “sex” as used in Title VII and Title IX, because their claims in this case center on the definition of “sex.” Memorandum of Law in Support of Plf.’s Motion (“Mem.”),

pp. 3-13.³ However, Plaintiffs fail to acknowledge that in rejecting their motion for a preliminary injunction, this Court effectively analyzed the Plaintiffs' right to privacy and Title IX claims using their definition of sex as referring to one's gender assigned at birth.

Therefore, even if the U.S. Supreme Court were to issue a decision in any of the Pending Cases adopting the Plaintiffs' definition of sex, the outcome in this matter would be unchanged.

1. This Court analyzed the right to privacy claim using Plaintiffs' definition of 'sex' and 'opposite sex'

Plaintiffs allege that their right to privacy claim "turns on the meaning of 'sex' because the right to bodily privacy is most pronounced with respect to the opposite sex." Mem., p. 4. However, in deciding the preliminary injunction motion, this Court held that even when analyzing the issue by discussing transgender students as the "opposite sex" of the cisgender students sharing the same privacy facilities (*e.g.*, deeming transgender girls to be the "opposite sex" of cisgender girls) there had been no infringement of the Plaintiffs' constitutional rights, and the Third Circuit affirmed.

This Court found that "plaintiffs have yet to prove that the defendants violated their constitutionally protected privacy interest in their partially clothed bodies," noting that none of the Plaintiffs could even be certain that a transgender student saw them in even a partial state of undress. Opinion, p. 94a.⁴ The Court then held that any right to privacy could not extend to a

³ Plaintiffs do not argue that a decision in any of the Pending Cases would affect the tort claim in this case alleging intrusion upon seclusion.

⁴ The two original male Plaintiffs testified that they noticed a transgender male in the boys' locker room while they themselves were partially clothed. One of the original female Plaintiffs testified that she was fully clothed when she saw a transgender female in a restroom. And the other original female Plaintiff said that she never encountered a transgender student in a locker room or bathroom at BASH. Opinion, p. 94.

“prohibition of seeing a member of the opposite sex in a state of undress such as Joel Doe and Jack Jones experienced with Student A in October and November 2016.” *Id.*, p. 103. The Court then summed its analysis as follows:

Since this matter does not involve any forced or involuntary exposure of a student’s body to or by a transgender person, and the School District has instituted numerous privacy protections and available alternatives for uncomfortable students or to protect against the involuntary exposure of a student’s partially clothed or unclothed body, the plaintiffs have not shown that the defendants infringed upon their constitutional privacy rights.

Id., p. 104. Therefore, because the Plaintiffs failed to allege that any transgender student viewed any of them in a state of undress, or partial undress, definition of “sex” to be determined in the Pending Cases is immaterial here.

Furthermore, the Court held that even if the Plaintiffs’ right to privacy was violated by transgender students’ use of privacy facilities aligned with their gender identity, the District policy was permissible because it is narrowly tailored to serve a compelling state interest (*i.e.*, not discriminating against transgender students). *Id.*, p. 106. As such, the definitions of “sex” and/or “opposite sex” were inapposite to this Court’s analysis. Therefore, any decision in the Pending Cases will provide no guidance to the Court in this case, and there are no issues of judicial economy to be weighed. Accordingly, the Motion should be denied.

2. This Court’s analysis of the Title IX claim did not turn on the definition of ‘sex’

Plaintiffs next claim that the Third Circuit improperly framed their Title IX hostile environment claim because of its misunderstanding of sex and opposite sex.

By framing the problem as ‘transgender students in bathrooms and locker rooms constitut[ing] sexual harassment,’ the Third Circuit rejected the assertion that Plaintiffs are “effectively denied equal access to an institutions resources and opportunities.” However, Plaintiffs’ argument had nothing to do with how their fellow students identified (as they welcomed transgender

students into privacy facilities with them if they were the same sex), but had everything to do with the students' sex.

Mem., p. 11-12. However, the Plaintiffs do not explain how this supposedly turns on the definition of sex as used in Title IX. Instead, they claim in conclusory fashion that the Court “would have found that the presence of teen boys who identify as boys in the girls’ locker room as inappropriate, severe, pervasive, and/or objectively offensive.” Mem., p. 12. However, the Third Circuit specifically noted that it would view harassment by transgender and cisgender students in the same manner. *Doe*, 897 F.3d at 536, n.125 (“This is not to say that the transgender students could not engage in conduct that would rise to the level of harassment. It would be the same conduct required for cisgender students to harass someone.”).⁵ Furthermore, the definition of sex played no role in this Court’s determination of the Title IX claim on the motion for a preliminary injunction.

Title IX states, in pertinent part, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681(a). The heading of that subsection of the statute is “Prohibition against discrimination; exceptions.” *Id.* The Third Circuit noted that the Plaintiffs failed to make any claim of some form of discrimination. *Doe*, 897 F.3d at 534 (“The appellants have not provided any authority – either in the District Court or on appeal – to suggest that a sex-neutral policy can

⁵ The Third Circuit further noted that a determination of the legality of a policy such as the District’s is a “very different issue” than whether or not a policy preventing transgender students from using privacy facilities aligned with their gender identities would violate those students’ rights under Title IX. *Doe*, 897 F.3d at 536. However, the court noted that it need not decide that issue to affirm this Court’s ruling. *Id.*

give rise to a Title IX claim.”). Without some claim of discrimination, the definition of sex is moot.

Moreover, even assuming that Title IX requires no showing of discriminatory effect, Plaintiffs have never alleged how they were “excluded from participation in” or “denied the benefits of” any education program as a result of the District policy. Any decision not to use the District’s privacy facilities based on the District policy was of the Plaintiffs’ own making. The District did not preclude any student from using either the District’s locker rooms or restrooms, and the District certainly did not discriminate by treating males or females any differently under the policy. As this Court recognized, the facts are clear and undisputed that all students – male and female, cisgender and transgender – had the exact same rights to use single-user restrooms or multi-user restrooms, and to use the regular gym locker rooms or to take advantage of facilities that afford complete privacy protections.

[T]he School District treats all students at school similarly. Under the current practice, the plaintiffs (and the other students at BASH) are not targeted on the basis of their sex because the School District treats both male and female students similarly. The practice applies to both the boys’ and girls’ locker rooms and bathrooms, meaning that cisgender boys potentially may use the boys’ locker room and bathrooms with transgender boys and cisgender girls potentially may use the girls’ locker room and bathrooms with transgender girls. In addition, with regard to the transgender students, both transgender boys and transgender girls are treated similarly insofar as they, upon receiving permission from the School District, may use the locker rooms and bathrooms corresponding with their gender identity. Moreover, the School District is not discriminating against students regarding the use of alternative facilities if students are uncomfortable with the current practice insofar as those facilities are open to all students who may be uncomfortable using the locker rooms or multi-user facilities at BASH. The School District’s similar treatment of all students is fatal to the plaintiffs’ Title IX claim.

Opinion, pp. 113-14.

Therefore, because no Plaintiff is able to show that he or she suffered any discrimination or was excluded from participation in, or denied the benefits of, any District education program on the basis of sex – even as “sex” is defined by Plaintiffs – it is clear that the Supreme Court’s decisions in the Pending Cases will have no effect on this case, and the Motion should be denied.

C. The Balance of Harms Analysis Is Either Neutral or Disfavors a Stay

A review of the potential balance of harms in this case is at best neutral, but likely disfavors imposition of a stay.

If a stay were imposed, the District would be permitted to continue to allow transgender students to use the restrooms and locker rooms aligned with their gender identity during the stay. As such, the District recognizes that neither the District nor its transgender students would be obviously prejudiced. However, at the same time, Plaintiffs would also not be prejudiced by the imposition of a stay as they would be able to avoid any violation of privacy by using alternate restrooms and locker rooms offered by the District. As this Court has recognized, Boyertown Area Senior High School (“BASH”) offers eight single-user bathrooms for student use. Memorandum Opinion (“Opinion”), ¶ 75 (Aug. 25, 2017). Furthermore, BASH students who do not want to share locker room facilities with transgender students can change in the school’s single-user bathrooms, alternate locker rooms or “team rooms.” *Id.*, ¶ 77-78. “For BASH students who do not want to change in a locker room with a transgender student, the School District is committed to making facilities available for that student to change outside of the presence of the transgender student.” *Id.*, ¶ 86. Accordingly, none of the Plaintiffs face any prejudice or potential harm either. If any potential prejudice exists, it would be the prejudice the District faces in seeking finality in this matter.

D. Discovery Should Continue While Supreme Court Hears the Pending Cases

Even assuming the holdings in the Pending Cases would affect the decision in this case, discovery in this matter should be permitted to proceed while the parties await the U.S. Supreme Court's decisions.

Plaintiffs seek a stay of proceedings while acknowledging that they “anticipate another round of discovery, expert witnesses, [and] additional depositions.” Motion, p. 13. The discovery conducted for the preliminary hearing injunction lasted five months. Because the Supreme Court will issue decisions in the Pending Cases within one year, there is no reason that the parties in this case could not complete the necessary factual discovery to prepare for dispositive motions in the meantime. Then when the decisions are issued in the Pending Cases, the parties could model their arguments accordingly, or perhaps elect to forego further proceedings altogether.

II. CONCLUSION

As described above, the Plaintiffs have failed to show that a determination of any of the Pending Cases by the U.S. Supreme Court would affect the ultimate decision in this matter. Accordingly, any stay of proceedings would unnecessarily delay the final determination of this case. Wherefore, the District respectfully requests that the Motion be denied.

Respectfully submitted,

Date: June 28, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2019, I caused the foregoing Defendants' Response in Opposition to Plaintiffs' Motion to Stay Proceedings to be filed using the Court's Electronic Case Filing system, and a Notice of Electronic Case Filing was served upon all counsel in accordance with Fed. R. Civ. P. 5(b).

/s/ David W. Brown

David W. Brown