

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor, by and through his  
guardians, JOHN DOE and JANE DOE;  
MARY SMITH; JACK JONES, a Minor,  
by and through his parents, JOHN JONES  
and JANE JONES; and MACY ROE,

Plaintiffs,<sup>1</sup>

v.

BOYERTOWN AREA SCHOOL  
DISTRICT; DAVID KREM, in his official  
capacity as superintendent of the Boyertown  
Area School District; DR. BRETT  
COOPER, in his official capacity as  
principal; and DR. E. WAYNE FOLEY, in  
his official capacity as assistant principal,

Defendants,

and

PENNSYLVANIA YOUTH CONGRESS  
FOUNDATION,

Intervenor-Defendant.

CIVIL ACTION NO. 17-1249

**ORDER**

**AND NOW**, this 5th day of September, 2019, after considering the motion to stay filed by the plaintiffs (Doc. No. 85), the response in opposition to the motion filed by the defendant, Boyertown Area School District (“BASD”) (Doc. No. 86), the response in opposition to the motion filed by the intervenor, Pennsylvania Youth Congress Foundation (“PYCF”) (Doc. No. 87), and the plaintiffs’ July 25, 2019 status letter (Doc. No. 88), it is hereby **ORDERED** that the motion (Doc. No. 85) is **DENIED**. The court will not stay this matter pending resolution of *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).<sup>2</sup>

**IT IS FURTHER ORDERED THAT** the court will hold a telephone conference on **Thursday, September 19, 2019, at 3:30 p.m.** to discuss the schedule for this matter moving forward. Counsel for the plaintiffs shall initiate the call by contacting the undersigned's civil deputy clerk at (610) 333-1833 once all counsel are present on the call.

BY THE COURT:

/s/ Edward G. Smith  
EDWARD G. SMITH, J.

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<sup>1</sup> The plaintiffs indicate that two additional plaintiffs were added to this lawsuit, but this court has not received notice of these additional plaintiffs. Until the court receives more information about this change, the court will not change the caption.

<sup>2</sup> Regarding motions to stay judicial proceedings,

the 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. True, the suppliant for 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 some one [sic] else. 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 each.

*Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) (internal citations omitted). In addition, “[t]he proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708 (1997). Further, “[w]hen 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.*, Civ. A. No. 08-4579, 2009 WL 545572, at \*2 (E.D. Pa. Mar. 4, 2009) (citation and internal quotation marks omitted).

The court will first reference the parties' positions before analyzing the request for a stay. The plaintiffs request that the court stay this action pending the United States Supreme Court's decisions in *Bostock v. Clayton County*, S. Ct. No. 17-1618, *Altitude Express, Inc. v. Zarda*, S. Ct. No. 17-1623, and *R.G. & G.R. Harris Funeral Homes v. EEOC*, S. Ct. No. 18-107 (collectively, the “Pending Cases”). Pls.' Mot. to Stay Proceedings Pending Resolution of Appeal in *Bostock v. Clayton Cty.*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes v. EEOC* at 2, Doc. No. 85. In support of their request, the plaintiffs argue that the Court's decision in the Pending Cases “will answer, or give clarity to, the central legal issues before this [c]ourt.” Pl.'s Br. in Supp. of Mot. to Stay Proceedings Pending Resolution of Appeal in *Bostock v. Clayton Cty.*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes v. EEOC* at 4, Doc. No. 85-1.

In this regard, they assert that

[t]he constitutional right to bodily privacy claim turns on the meaning of “sex” because the right to bodily privacy is most pronounced with respect to the opposite sex . . . [and w]ith the Title IX claim, the Third Circuit’s functional understanding of the meaning of sex colored its analysis on what is a “hostile environment.”

*Id.* (internal citation omitted). They also claim that “[s]hould the Supreme Court interpret ‘sex’ to mean biological sex, and nothing more, the premise upon which the Third Circuit’s opinion rests is substantially changed.” *Id.* at 7.

In addition to the above, the plaintiffs point out that *R.G. & G.R. Harris Funeral Home* will clarify whether sex stereotypes are protected under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and a Supreme Court holding that *Price Waterhouse* does not provide this protection will “substantially weaken” BASD’s case. *Id.* The plaintiffs also claim that PYCF’s “theory is similarly grounded in the sex-stereotyping theory that directly emerges from misreading *Price Waterhouse*.” *Id.* Thus, the plaintiffs assert that “whether *Price Waterhouse* created a new protected class for gender nonconformance/transgender status outside the text of Title VII is at the bedrock of this case.” *Id.* at 8.

Regarding their violation of bodily privacy claim, the plaintiffs believe that the Supreme Court will clarify the meaning of “sex” when the Court decides the Pending Cases. *Id.* at 9–10. In particular, the plaintiffs note that a decision that “sex” exclusively means biological sex will “call into question the Third Circuit’s analysis in this case.” *Id.* at 10. As for Title IX, the plaintiffs indicate that even though the Pending Cases are Title VII cases, Title VII cases are instructive in Title IX hostile environment harassment cases. *Id.* at 11. The plaintiffs argue that the Third Circuit reached its conclusion about their Title IX claim by “essentially replacing sex with gender identity,” and if the Supreme Court “determine[s] that sex does not mean gender identity, the premise upon which the [Third Circuit] based its opinion would necessarily change.” *Id.* at 12–13.

For their final points, the plaintiffs argue that judicial economy supports staying this matter because the parties will have to engage in another round of discovery, motions for summary judgment, and a trial while operating in “the same confused legal context which led the Supreme Court to take not one or two cases, but three that bear on the meaning of sex and will directly clarify *Price Waterhouse*’s stereotyping language.” *Id.* at 13. Further, the plaintiffs believe that neither BASD nor PYCF are prejudiced by this matter because the policy they are defending in this action would remain in place for the duration of the stay. *Id.* at 13–14.

In its opposition to the plaintiffs’ motion, BASD argues that a stay would not promote judicial economy because, *inter alia*, (1) the plaintiffs ignore that this court analyzed their invasion of privacy and Title IX claims using their definition of sex as referring to one’s gender assigned at birth, (2) the court determined that the plaintiffs failed to show that the defendants violated a constitutionally protected privacy interest in their partially clothed bodies and, as such, the definition of “sex” is immaterial, and (3) the court concluded that even if BASD’s policy violated the plaintiffs’ right to privacy, the policy is permissible because it was narrowly tailored to serve a compelling state interest. Defs.’ Resp. in Opp. to Pls.’ Mot. to Stay Proceedings at 3–5, Doc. No. 86. BASD also contends that the plaintiffs have failed to explain how the Third Circuit’s decision related to the definition of “sex” in Title IX when the Third Circuit “specifically noted that it would view harassment by transgender and cisgender students in the same manner,” *id.* at 6 (citation omitted), and explained that the plaintiffs failed to show discrimination when the policy was sex-neutral. *Id.* at 6–7 (citation omitted). BASD further points out that the definition of “sex” did not play a role in this court’s decision on the Title IX claim as this court also found the sex-neutral aspect of the policy to be “fatal” to any discrimination claim. *Id.* (citation omitted). BASD also notes that the plaintiffs never showed that they were excluded from or denied the benefits of any BASD education program on the basis of sex. *Id.* at 7.

Concerning the remaining factors for the court’s consideration when deciding whether to stay a matter, BASD acknowledges that a stay would not prejudice it or transgender students insofar as the current policy would remain in effect. *Id.* at 8. In addition, none of the plaintiffs would be prejudiced because they can still use the alternate restrooms and locker rooms offered by BASD. *Id.* Yet, to the extent that the court would not find the balance of harms to be neutral, BASD contends that there is some prejudice to it because it is seeking finality in this matter and a stay only further prolongs the ultimate decision in this case. *Id.*

BASD also argues that even if the Supreme Court’s decisions would affect the decision in this case, there is no reason to preclude the parties from conducting discovery until the Supreme Court decides the Pending Cases. *Id.* at 9. BASD explains that since the court will decide the Pending Cases in less than a 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.” *Id.*

As for PYCF, it contends that judicial economy will not be served by waiting for the decision in *R.G. & G.R. Harris Funeral Homes* because the decision will not affect the ultimate outcome in this case. Br. of Intervenor-Def. Pa. Youth Congress Found. in Opp. to Pl.’s Mot. to Stay Proceedings at 4, Doc. No. 87. PYCF first points out that the Third Circuit has already determined that this case presented a “very different issue” than whether Title IX prohibits discrimination against people because they are transgender. *Id.* at 5 (citation and internal question marks omitted). As such, the Third Circuit did not decide “whether Title IX’s prohibition against discrimination because of sex bars schools from discriminating against students because they are transgender.” *Id.* (citation omitted). In addition, PYCF indicates that the Supreme Court denied the plaintiffs’ petition for a writ of certiorari after granting the petition in *R.G. & G.R. Harris Funeral Homes*, and if the Court thought “that its decision in *Harris Funeral Homes* would alter the outcome here, it would have held Plaintiffs’ petition pending disposition of *Harris Funeral Homes*.” *Id.* at 5–6.

PYCF next argues that there is no guarantee that the Supreme Court will decide the meaning of “sex” or the lawfulness of sex-specific policies in *R.G. & G.R. Harris Funeral Homes*. *Id.* at 6. PYCF notes that the Court did not grant certiorari on the question sought by the petitioner, *i.e.* “whether the word ‘sex’ . . . meant ‘gender identity’ and ‘included’ transgender status” when Congress enacted Title VII in 1964.” *Id.* (first alteration omitted) (citation omitted). Instead, the Court framed the question as “[w]hether Title VII prohibits discrimination against transgender people based on . . . their status as transgender . . . .” *Id.* (citation omitted). PYCF believes that resolution of this latter question does not require the Court to decide what “sex” means in Title VII. *Id.* Additionally, PYCF argues that the Court “is unlikely to resolve the lawfulness of sex-specific policies, such as dress codes and restrooms, or how such rules apply to people who are transgender,” as the Court will only address whether Title VII prohibits discrimination against transgender people based on a sex-stereotyping theory under *Price Waterhouse*. *Id.* at 7.

For their final arguments that judicial economy does not favor a stay here, PYCF points out that this court’s resolution of the plaintiffs’ claims did not turn on the definition of “sex.” *Id.* at 7–8. In addition, PYCF notes that this court has already spent significant resources moving this matter towards its ultimate resolution. *Id.* at 8. As for the other factors in deciding whether to stay this case, PYCF argues that the length of the stay—possibly up to one year—weighs against a stay and other courts have declined to stay matters where the requests were of similar durations. *Id.* (citations omitted). Also, PYCF asserts that “[t]ransgenders at the high school should not have to wait an additional year before this litigation proceeds—a year in which a cloud of uncertainty hangs over their ability to live openly and fully at school.” *Id.*

After reviewing the parties’ arguments, the plaintiffs have not met their burden to show that a stay is warranted in this matter. While the court is appreciative of all parties’ desire to responsibly allocate resources, the court does not find that judicial economy favors a stay. It is unclear (and seemingly unlikely) that the Supreme Court’s decisions in the Pending Cases will have any impact on this case. The court cannot discern how the Pending Cases will impact the plaintiffs’ constitutional right to privacy claim. In addition, the Pending Cases do not appear to affect the Title IX claim, especially as, *inter alia*, this court and the Third Circuit determined that BASD policy could not give rise to a Title IX claim because it targeted both sexes equally. The court also disagrees with the plaintiffs’ assertion that a Supreme Court decision that “sex” means sex at one’s birth would substantially change the Third Circuit’s decision. For example, while the Third Circuit mentioned BASD’s contention that “barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination under a sex-stereotyping theory in violation of Title IX,” the Third Circuit did “not decide that very different issue” as part of the appeal. *Doe by and through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018) (footnotes omitted). Finally, decisions in the Pending Cases would appear to have no impact on the plaintiffs’ state-law tort claim.

Furthermore, the plaintiffs have not established that they will suffer any sort of hardship or inequity in having this matter move forward in discovery during the period that the Supreme Court will consider the three cases. Finally, while the plaintiffs’ counsel has kindly notified the court that the Supreme Court will hear oral argument on the Pending Cases on October 8, 2019, there appears to be a distinct likelihood (as seemingly recognized by all parties) that any stay could last until June and that simply is too long of a period considering the distinct possibility that the Court’s decisions will not impact any of the issues in this case. Accordingly, the motion for a stay is denied.