UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A.C., a minor child by his next friend, mother and legal guardian, M.C.,	)	
Plaintiff,	)	
v.	)	No. 1:21-cv-02965-TWP-MPB
METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE, *et al.*,	)	
Defendants.	)	

Plaintiff's Memorandum in Opposition to Defendants' Motion for Stay of Preliminary Injunction Pending Appeal

I. Introduction

This Court has noted that a stay pending appeal "is generally considered 'extraordinary relief' and the moving party bears a 'heavy burden of proof.'" *Community Pharmacies of Indiana, Inc. v. Indiana Family and Social Services Admin*, 823 F. Supp. 2d 876, 878 (S.D. Ind. 2011) (quoting *Winston-Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers)). Although appellate stays are governed by Federal Rule of Civil Procedure 62(d), the specific standard to determine whether to grant the

> stay pending appeal is similar in nature to a decision granting or denying a preliminary injunction. Specifically, to make a stay determination, a court must consider: (1) "whether the stay applicant has made a strong showing that he is likely to succeed on the merits" on appeal; (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."

Id. (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985)). Defendants ("the School District") fall far short of meeting any of the requirements for an appellate stay, let alone all four. The motion must be denied.

II. The School District has not shown any likelihood of success on the merits in this case

As this Court found in granting the preliminary injunction, and as A.C. argued in his prior briefing, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Education*, 858 F.3d 1034 (7th Cir. 2017), *abrogation on other grounds recognized by Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020), is directly on point and dictates the result here. After all, *Whitaker* concluded that denying a transgender male student the ability to utilize male restrooms likely violated both Title IX, 20 U.S.C. § 1681(a), and the equal protection clause. *Id.* at 1050, 1054. In opposing the preliminary injunction request, the School District argued that *Whitaker* was wrongly decided and has been implicitly overruled. But the School District "admitted that this Court 'isn't in a position to overrule Whitaker' and made clear that the arguments were being presented 'for the purposes of our record . . . if this did go up on appeal.'" (Dkt. 50 at 11 n.3).

The School District does not deny that *Whitaker* compels the result that this Court reached in granting the preliminary injunction but stakes its claim that it has a likelihood of success on the hope that "the Seventh Circuit may distinguish this case from *Whitaker*

and/or entirely depart from the *Whitaker* decision." (Dkt. 54 at 2). This is hardly a convincing argument that this Court erred in relying on *Whitaker* and in following a host of similar cases (*see* Dkt. 30 at 22-23) in entering the preliminary injunction. Hypothesizing that the Seventh Circuit might *possibly* reverse *Whitaker* or find a way to distinguish a case that appears to be on all fours with binding precedent certainly does not establish a probability of success on the merits.

III. The School District has not demonstrated that it will be irreparably harmed absent a stay

As noted by this Court in its preliminary injunction determination, "the School District's alleged potential harm is unsupported" (Dkt. 50 at 14). There is no further support provided in the stay request. There simply is no evidence that the injunction will cause the School District any harm at all.

Nevertheless, the School District argues that to require it "to permit A.C. access to the boys' restrooms at this juncture, only to have it reversed on appeal, would be disruptive of the school's operations for the remainder of this school year." (Dkt. 54 at 4). There is absolutely no explanation as to why this is so and theorizing the possibility of unexplained harm certainly is not a "demonstrat[ion of] a likelihood of irreparable injury absent a stay." *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985).

Moreover, the school year ends in a matter of days on May 26 (https://www.msdofthe School District.org/calendars/ [last visited May 3, 2022]), which is less than the three weeks during which A.C. used the male restrooms without incident

earlier this year. (Dkt. 50 at 3). The source of the "disruption" hypothesized by the School District is not clear. It bears repeating that the School District allows some transgender students to utilize bathrooms associated with their gender identities and the School District has not claimed that this has caused any problems. (*Id.* at 14). Given this, an unsupported argument that allowing A.C. to similarly use the bathrooms associated with his gender identity would be in any way disruptive, is not credible. The School District has not demonstrated that the preliminary injunction will cause it any harm, let alone irreparable harm.

IV. Issuance of a stay will substantially injure A.C.

The School District argues that "the potential harm to A.C. by staying the Order is minute" and that A.C. has not suffered any "reportable harm." (Dkt. 54 at 3-4). The School District makes this argument in the face of the uncontested evidence, which this Court credited, that A.C. has suffered physical and emotional harm from being denied the ability to use male restrooms. (Dkt. 50 at 13). It is the School District's desire to allow this harm to continue while the stay is in effect. This harm is far from minute. It is, as found by this Court, "irreparable," even without considering the fact that "a presumption of irreparable harm exists for some constitutional violations." *Id.* "Like other courts recognizing the potential harm to transgender students, this Court finds no reason to question the credibility of A.C.'s account and that the negative emotional consequences with being refused access to the boys' restrooms constitute irreparable harm that would

be 'difficult—if not impossible—to reverse.'" (*Id.* [quoting *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1039 (S.D. Ind. 2018)] [further citation omitted]). Issuance of a stay will cause substantial injury to A.C.

V. The public interest does not support issuance of a stay

In finding that the preliminary injunction would not disserve the public interest, this Court noted that while "the public interest favors furthering individual privacy interests," allowing A.C. to use the stalls in the boys' restrooms would not threaten those privacy interests as "restrooms are an area where people are usually private." (Dkt. 50 at 15). In arguing that the public interest supports a stay, the School District ignores this Court's conclusion and states only that "[t]he status quo has been that schools have the authority to sex-segregate facilities under Title IX and are not subject to being forced to adhere to the demands of a particular interest group." (Dkt. 54 at 4). It is unclear what this means.[1] A.C. is not a member of an "interest group." He is a transgender boy who wants and needs to use the boys' restroom. In any event, the status quo in the School

[1] Curiously, in support of this statement the School District cites to *Parents for Privacy v. Barr*, 949 F.3d 1210, 1227 (9th Cir.), *cert. denied*, --U.S.--, 141 S. Ct. 894 (2020). It is unclear why the School District believes this case is helpful to it given that the court in that case rejected the argument of plaintiffs who claimed that a school's policy of allowing transgender students to use restrooms and other facilities consistent with their gender identities violated, among other things, Title IX. Indeed, at the page cited by the School District, the court stated, "just because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity." *Id*. at 1227.

District is to allow at least some transgender students to use the bathrooms associated with their gender identities.

The public interest is not served by harming a child. And the public has no interest in allowing a violation of federal law and the Constitution to continue (Dkt. 30 at 33), particularly when the Seventh Circuit has spoken so clearly on the issue. The public interest would most definitely not be served by the issuance of a stay pending the School District's appeal.

VI. Conclusion

For the foregoing reasons, the School District's request for a stay should be denied.

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