

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CASE NO. 16-3522**

ASHTON WHITAKER,
a minor, by his mother and
next friend,
MELISSA WHITAKER,

Plaintiff-Respondent,

Appeal from the United States
District Court for the Eastern
District of Wisconsin

District Court Case
No. 16-CV-943

The Honorable Pamela Pepper

KENOSHA UNIFIED SCHOOL DISTRICT
NO. 1 BOARD OF EDUCATION and
SUE SAVAGLIO-JARVIS,
in her official capacity as
Superintendent of the Kenosha
Unified School District No. 1,

Defendants-Appellants.

**DEFENDANTS-APPELLANTS' MOTION FOR THE EXERCISE OF PENDENT
JURISDICTION**

INTRODUCTION

Defendants-Appellants, Kenosha Unified School District No. 1 Board of Education and Dr. Sue Savaglio-Jarvis, in her official capacity as Superintendent of the Kenosha Unified School District No. 1 (“KUSD”), hereby move this Court to exercise pendent jurisdiction over the appeal of the District Court’s Amended Order Denying Defendants’ Rule 12(b)(6) Motion to Dismiss the Amended Complaint (Dkt. No. 14), issued on September 25, 2016 (Dkt. No. 35), and consolidate the appeal with the current appeal of from the District Court’s Order granting Plaintiff, Plaintiff-Respondent, Ashton Whitaker, a minor, by his Mother and next friend, Melissa Whitaker (“Plaintiff”), a preliminary injunction (Dkt. No. 33).

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, filed this lawsuit in the Eastern District of Wisconsin on July 19, 2016 and amended the Complaint on August 15. (Dkt. No. 1); (Dkt. No. 12). On August 15, 2016, Plaintiff also filed a Motion for Preliminary Injunction with supporting memorandum and exhibits. *See* Pltf.’s Motion for Preliminary Injunction (Dkt. No. 10); Pltf.’s Memo. of Law (Dkt. No. 11). On August 16, 2016, KUSD filed a motion to dismiss plaintiff’s amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 14). The District Court issued an oral decision on September 19, 2016, denying KUSD’s motion to dismiss. *See* Transcript of Oral Decision on Motion to Dismiss¹; Court Minutes (Dkt. No. 28).

¹ A true and accurate copy of the September 19, 2016 Transcript of Oral Decision on Motion to Dismiss is attached as Exhibit A.

On September 20, 2016 KUSD orally moved for the District Court to consider certifying the Order Denying the Motion to Dismiss for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). KUSD also, on the same day, submitted a proposed order which contained the certification language required by 28 U.S.C. § 1292(b). (Dkt. No. 27). On September 21, 2016, the District Court entered an order including the certification language. (Dkt. No. 29).

On September 22, 2016 the District Court granted Plaintiff's motion for temporary injunction. *See Ashton Whitaker, et al. v. Kenosha Unified School District No. 1 Board of Education, et al.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016)². On September 22, 2016, Plaintiff filed a Civil L. R. 7(h) expedited non-dispositive motion to reconsider certification or order denying motion to dismiss for interlocutory appeal. (Dkt. No. 30). On September 23, 2016, KUSD filed a Petition for Permission to Appeal the order denying the motion to dismiss pursuant to 28 U.S.C. § 1292(b). (Case No. 16-8019, App. Dkt. No. 1).

On September 23, 2016, KUSD filed a notice of appeal as of right as to the motion for temporary injunction pursuant to Fed. R. App. P. 3 and 28 U.S.C. § 1292(a)(1). (Case No. 16-3522 App. Dkt. No. 1); (Dkt. No. 34).

On Saturday, September 24, 2016, the District Court granted Plaintiff's expedited motion for reconsideration and on Sunday, September 25, 2016 issued an

² A true and accurate copy of *Ashton Whitaker, et al. v. Kenosha Unified School District No. 1 Board of Education, et al.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), is attached as Exhibit B.

amended order denying KUSD's motion to dismiss and removing the language certifying the order for interlocutory appeal. (Dkt. No. 35); (Dkt. No. 36).

On September 27, 2016, KUSD filed a Civil L. R. 7(h) expedited non-dispositive motion for relief from the order granting Plaintiff's motion for reconsideration, arguing that the District Court should have afforded it an opportunity to file a responsive brief before rendering its decision. (Dkt. No. 42). On October 3, 2016, the District Court denied KUSD's motion for relief from order. (Dkt. No. 47).

On November 14, 2016, this Court denied KUSD's petition for permission to appeal due to lack of jurisdiction. (Case No. 16-8019, App. Dkt. No. 16). This Court stated that "this petition is not properly taken from an appealable order, so there is no proper jurisdictional basis from which we may extend pendent jurisdiction. The appropriate place for the defendants to request pendent appellate jurisdiction is in the appeal from the preliminary injunction order." *Id.*

In line with this Court order, KUSD now moves this Court to exercise pendent jurisdiction over the denial of the motion to dismiss as set forth in its petition for permission to appeal, and consolidate this appeal with the current appeal of the preliminary injunction order.

ARGUMENT

I. THIS COURT SHOULD EXERCISE PENDENT JURISDICTION OF THE APPEAL OF THE DENIAL OF KUSD'S MOTION TO DISMISS BECAUSE THIS ORDER IS INEXTRICABLY INTERTWINED WITH THE ORDER GRANTING PLAINTIFF A PRELIMINARY INJUNCTION.

This Court has the discretion to exercise pendent jurisdiction of the appeal of the order denying KUSD's Motion to Dismiss in conjunction with KUSD's current

appeal in *Ashton Whitaker v. Kenosha Unified School District, et al.*, Case No. 16-3522, which seeks review of the District Court's decision and Order granting Plaintiff's motion for a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

When the appeal of the District Court's non-final order is "inextricably intertwined" with an appealable preliminary injunction, this Court may exercise pendent jurisdiction to review the appeal of the non-final order. *See Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 707 F.3d 883, 886 (7th Cir. 2013), *as amended* (Apr. 29, 2013) ("The appeal of the district court's denial of remand also fits within the narrow doctrine of pendent appellate jurisdiction because the preliminary injunction appeal presents precisely the same question of subject matter jurisdiction as the motion to remand."); *see also Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 700 (7th Cir. 2003) (granting pendent jurisdiction because the non-appealable order was "necessarily intertwined" with the order that was appealable as a right); *Greenwell v. Aztar Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001) (stating that it is appropriate to exercise pendent jurisdiction where the issues are intertwined and interlocutory appeal prevents rather than produces piecemeal appeal).

In other words, when appellate "jurisdiction is properly founded upon the district court's ruling on a preliminary injunction under 28 U.S.C. § 1292(a)(1) . . . [appellate] review extends to all matters inextricably bound up with the preliminary injunction." *Amador v. Andrews*, 655 F.3d 89, 95 (2d Cir. 2011) (internal citations omitted). "To be inextricably intertwined requires, for example, that review of the

otherwise unappealable issue is necessary to ensure meaningful review of the appealable one.” *Id.*; *see also Wedgewood Ltd. P’ship I v. Twp. Of Liberty, Ohio*, 610 F.3d 340, 348 (6th Cir. 2010) (“Pendent appellate jurisdiction refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but, may be reviewed on interlocutory appeal if those issues are ‘inextricably intertwined’ with matters over which the appellate court properly and independently has jurisdiction.”); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1260 (11th Cir. 2006) (“If an otherwise nonappealable interlocutory order is ‘inextricably intertwined’ with or ‘necessary to ensure meaningful review’ of an injunctive order, we may review it under our pendent appellate jurisdiction.”); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002) (“Jurisdiction extends to *all* matters inextricably bound up with the order from which appeal is taken.”); *Ortiz v. Eichler*, 794 F.2d 889, 892 (3d Cir. 1986) (“Where the additional elements of the district court’s order are closely intertwined with those granting or denying injunctive relief, the exercise of jurisdiction over the additional elements is proper.”).

Here, the District Court’s Order and decision granting Plaintiff’s preliminary injunction is inextricably intertwined with the order denying KUSD’s motion to dismiss and review of the motion to dismiss is necessary to ensure meaningful review of the order granting the injunction. In holding that Plaintiff had shown a likelihood of success on the merits, the District Court indicated that it based its decision on the same grounds as its decision to deny the motion to dismiss. *See Whitaker*, 2016 WL 5239829, at *3. Specifically, the District Court explicitly acknowledged that the legal

issues and arguments surrounding Plaintiff's likelihood of success on the merits argument are the same as those raised in the motion to dismiss:

The arguments the parties made on September 20, 2016 regarding the motion for preliminary injunction mirror the arguments they made on September 19, 2016 regarding the motion to dismiss. Essentially, the defendants argue that gender identity is not encompassed by the word 'sex' in Title IX, and the plaintiff disagrees. The defendants also argue that under a rational basis standard of review, the plaintiffs cannot sustain an equal protection claim; the plaintiffs respond that they can, and further, that the court should apply a heightened scrutiny standard. The court denied the motion to dismiss because it found that there were several avenues by which the plaintiff might obtain relief.

Whitaker, 2016 WL 5239829, at *3.

In its notice of appeal, KUSD first set forth its position that the order denying the motion to dismiss is inextricably bound to the order granting the injunction:

The District Court's Order granting the injunction relied extensively upon the Court's legal conclusions reached in denying the motion to dismiss on September 21, 2016. In denying the motion to dismiss the Court concluded that Plaintiff's status as being transgender affords relief under Title IX and the Equal Protection Clause. It was this conclusion that allowed the Court to find that Plaintiff has a reasonable probability of success on the merits in analyzing the injunction. Thus, the Order denying the motion to dismiss is inextricably bound to the injunction, and this Court therefore has limited jurisdiction to review the Order denying the motion to dismiss, as well as the injunction, to the extent necessary.

(Dkt. No. 34).

The "inextricably intertwined" element is present here. The "likelihood of success on the merits" element of a motion for preliminary injunction is a paramount consideration in whether to grant or deny such motion because it is the threshold consideration. *See Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir. 1997). The overlap between these two issues is apparent as

“[o]bviously, the question of whether the plaintiff has demonstrated a reasonable likelihood of success on the merits of its claims is, to a large degree, bundled up with the issues raised by the defendants’ motion to dismiss.” *Wisconsin Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1044 (E.D. Wis. 2001). If “the plaintiff’s complaint, in any event, fails to state a claim upon which relief can be granted, then it follows that a preliminary injunction would be inappropriate precisely because the plaintiff would not have satisfied the first of the preliminary injunction standards.” *Id.* When two rulings, as is evident here, concern the “same single issue”, the exercise of pendent appellate jurisdiction is proper. *See Research Automation, Inc. v. Schrader-Bridgeport Int’l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010).

Moreover, pendent jurisdiction is especially warranted where a preliminary injunction order relied upon the same facts and reasoning as a dispositive motion. For example, in *Jones v. InfoCure Corp.*, 310 F.3d 529, 536 (7th Cir. 2002), this Court cited the Federal Circuit case, *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1345 (Fed. Cir. 2000), in which that court exercised “discretion to invoke pendent appellate jurisdiction over the interlocutory grant of summary judgment because it is closely interrelated factually to the preliminary injunction.” The Court of Appeals chose to exercise pendent jurisdiction because “the district court based its denial of the preliminary injunction request on its summary judgment ruling.” *Id.*; *see also Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 50, 115 S. Ct. 1203, 1212, 131 L. Ed. 2d 60 (1995) (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287, 61 S.Ct. 229, 232–233, 85 L.Ed. 189 (1940)) (stating that the court of appeals reviewing an order

granting a preliminary injunction also had jurisdiction to review an order denying motions to dismiss). As stated above, the District Court expressly acknowledged that it based its finding of a likelihood of success on the merits on its denial of the motion to dismiss. *See Whitaker*, 2016 WL 5239829, at *3.

The review of the success on the merits portion of the injunction will require this Court to consider: (1) whether a biological female student has the unilateral right to declare her gender as “male” and then has a right under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (“Title IX”) to use the men’s bathroom; (2) whether a policy that reflects the anatomical differences between biological men and women is actionable “sex-stereotyping” under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); (3) whether the May 12, 2016, guidance letter from the U.S. Department of Education (the “Dear Colleague Letter”) is entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (“*Auer* deference”); and (4) whether “transgender” is a suspect class under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. These same issues will need to be resolved in reviewing the District Court’s denial of the motion to dismiss. These two appeals are inextricably intertwined and a full and meaningful review of the preliminary injunction will require the Court to analyze the same issues raised in the motion to dismiss.

Finally, review of the motion to dismiss is necessary to ensure meaningful review of the order granting the injunction because the District Court failed to provide a full discussion as to its reasons for finding that Plaintiff had a likelihood of

success on the merits and instead chose to cross reference its decision to deny the motion to dismiss. *See Whitaker*, 2016 WL 5239829, at *3-4. In order for this Court to undertake a meaningful review it should take into account the District Court's full reasoning in entering the injunction by reviewing the oral decision denying the motion to dismiss. *See* Exhibit A. Review of the motion to dismiss would also prevent piecemeal litigation, because if Plaintiff fails to state a claim upon which relief can be granted, the injunction must be denied. *See Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. 2d at 1044. Finally, the exercise of pendent jurisdiction represents an opportunity for this Court to address and resolve unsettled questions of law in this circuit which are a matter of national importance.

CONCLUSION

Therefore, KUSD respectfully requests that this Court exercise pendent jurisdiction of the District Court's order denying KUSD's motion to dismiss and consolidate this appeal with the appeal of the order granting Plaintiff's preliminary injunction. The motion to dismiss and the motion for preliminary injunction are inextricably bound and this Court should exercise jurisdiction in order to conduct a meaningful review of the order granting the injunction.

Dated this 1st day of December, 2016.

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