

**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' REPLY TO PLAINTIFF-APPELLEE'S RESPONSE TO
DEFENDANTS-APPELLANT'S MOTION TO STAY PRELIMINARY INJUNCTION
PENDING APPEAL**

Defendants-Appellants, Kenosha Unified School District No. 1 Board of Education and Dr. Sue Savaglio-Jarvis (“KUSD”), hereby submits this reply pursuant to Fed. R. App. P. 27(a)(4) to Plaintiff’s response to KUSD’s motion to stay preliminary injunction pending appeal.

I. KUSD HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS THAT TITLE IX DOES NOT ENCOMPASS TRANSGENDER STATUS.

A. Because It Is For The Legislature, Not Courts, To Expand Title IX It Is Likely That KUSD Will Succeed In Its Appeal.

Plaintiff’s claim that KUSD is unlikely to succeed on the merits of its appeal is wishful thinking. First, this Court’s decision to grant *en banc* review of its decision in *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016), *amended*, No. 15-1720, 2016 WL 5921763 (7th Cir. Aug. 3, 2016), *reh’g en banc granted, opinion vacated* (Oct. 11, 2016) is not the death knell that Plaintiff would like it to be. The decision to grant *en banc* review is based upon the “exceptional importance” of the question presented, not a signal that the circuit is intent on reversing the panel’s decision. *See* Fed. R. App. P. 35.

Second, KUSD still has a reasonable likelihood of success on the merits of its appeal even if *Hively* does not remain as precedent in this circuit. Regardless of the holding in *Hively*, the term “sex” under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (“Title IX”) should still be narrowly construed in line with this Court’s reasoning in *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

Specifically, in holding that Title VII of the Civil Rights Act of 1964 (“Title VII”) does not encompass sexual orientation discrimination, this Court stated:

Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. Moreover, Congress has not acted to amend Title VII even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation in the workplace can no longer be tolerated . . . In short, Congress’ failure to act to amend Title VII to include sexual orientation is not from want of knowledge of the problem. And as a result, our understanding in *Ulane* that Congress intended a very narrow reading of the term ‘sex’ when it passed Title VII of the Civil Rights Act, so far, appears to be correct.

Hively, 830 F.3d at 701–02. Even without relying upon *Hively* as a reaffirmation of *Ulane*, the premise exemplified by the above reflects the long standing position of this Court that courts of appeals do not have the authority to infringe upon the legislative function of Congress:

We as judges of the U.S. Court of Appeals have only the power to interpret the law; it is the duty of the legislative branch to make the law. We must refuse to infringe on the legislative prerogative of enacting statutes to implement public policy. The problems of public policy are for the legislature and our job is one of interpreting statutes, not redrafting them.

Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1270-71 (7th Cir. 1993) (internal citations omitted).

The statutory language of Title IX and its implementing regulations says nothing about gender identity, gender expression, or any other concept related to transgender individuals. *See* 20 U.S.C. §§ 1681-1688; 34 C.F.R. §§ 106.33, 106.61. Courts are not vested with legislative power and it is their “duty to interpret and not change statutory law.” *Zonolite Co. v. United States*, 211 F.2d 508, 513 (7th Cir.

1954); *see also Am. Home Assur. Co. v. Stone*, 61 F.3d 1321, 1328 (7th Cir. 1995), *as modified* (Aug. 24, 1995) (“Our duty as a reviewing court . . . is not to legislate but only to interpret the laws as enacted by the . . . legislature.”); *In re Allard*, 196 B.R. 402, 408 n.3 (Bankr. N.D. Ill.), *aff’d sub nom. Great S. Co. v. Allard*, 202 B.R. 938 (N.D. Ill. 1996) (“It is not the function of this Court to legislate. It is the task of the Court to construe and apply the statute, not to reconstruct or correct it.”); *United States v. One Elec. Pointmaker*, 149 F. Supp. 427, 429 (N.D. Ind. 1957) (“Courts cannot and must not legislate.”).

Like the issues facing employees in the Title VII context, Congress is well-aware of the issues concerning transgender students under Title IX. Various Senators have continually attempted to pass legislation that would prohibit discrimination based on sexual orientation or gender identity in the form of the proposed legislation, the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015). *See* (Dkt. No. 23-1; Dkt. No. 23-2). Congress has repeatedly refused to enact this proposed legislation. Congress has explicitly rejected legislation that would extend federal legislation to cover sexual orientation and gender identity despite being keenly aware of the issue at hand.

The proper forum for changing the law is Congress and only after Congress has “had the opportunity for deliberation and reflection should a radical change” to the law be enacted. *Welsh*, 993 F.2d at 1271. “[F]ederal judges must not reach out and grasp at straws in an attempt to rewrite the laws duly enacted by the legislative branch of government, the Congress.” *Id.* This Court has said that it will refuse to

read into a statute what Congress has declined to include and must assume that Congress understood the meaning of the words it incorporated into a statute. *Id.* at 1270 (citing *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803, 807 (7th Cir. 1988)); *see also Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 683 n.22 (W.D. Pa. 2015) (citing *Oiler v. Winn–Dixie Louisiana, Inc.*, 2002 WL 31098541, at *6 (E.D.La. Sept. 16, 2002)) (“The Court recognizes the changing perceptions in society concerning transgender individuals. ‘However, the function of this Court is . . . to construe the law in accordance with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress.”).

The analysis undertaken by this Circuit in determining that it was without authority to expand the interpretation of “sex” is also reflected in *Ulane*:

Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress . . . Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. This we must not and will not do.

742 F.2d at 1086 (internal citations omitted) (emphasis added). For this Court to hold that Title IX protects transgender status would take it out of the realm of interpreting a statute and into the realm of legislating. The legislative history of the statute provides that “the intent of Congress in enacting Title IX was to open up educational opportunities for girls and women in education.” *Johnston*, 97 F. Supp. 3d at 672. Therefore, in the absence of any binding precedent or legislatively enacted changes,

this Court should not expand the statutory rights of Title IX beyond the plain language of the statute and the accepted definition of “on the basis of sex” in this Circuit. Regardless of any changing perceptions, evolving norms, or societal pressures, this Court should not expand the statutory rights under Title IX by changing the definition of “sex” to include transgender status, absent direction from the Supreme Court or Congress. *See Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir. 1972) (maintaining that it is for the legislature, not the courts, to expand the class of people protected by a statute).

B. Acknowledging The Anatomical Differences Between The Sexes Does Not Create A *Price Waterhouse v. Hopkins* Sex-Stereotyping Claim.

Plaintiff relies on *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) in claiming that access to the boy’s restroom is protected under Title IX. Plaintiff conflates the distinction between sex-discrimination and sex-stereotyping.

As to this injunction, Plaintiff alleges that KUSD engaged in “sex-stereotyping” because KUSD had a policy of requiring students to either use a bathroom consistent with their birth gender or a gender-neutral single-user bathroom and enforced that policy by monitoring students use of bathrooms. Pltf.’s Amended Comp. at ¶2 (Dkt. No. 12). Policies and practice that merely acknowledge the anatomical differences between the sexes does violate Title IX and do not amount to sex-stereotyping as a matter of law. *See, e.g., See Johnston*, 97 F. Supp. 3d at 680-81; *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003), *aff’d*, 98 F. App’x 461 (6th Cir. 2004)

(finding that plaintiff's allegation that the defendant fired her because her appearance and behavior did not meet the company's sex stereotypes of a woman was "a disingenuous re-characterization of a transsexuality discrimination claim"). Again, these allegations do not plausibly suggest that KUSD discriminated against Plaintiff because of the way Plaintiff dressed, spoke, or behaved, or that Plaintiff was treated adversely for not dressing, acting, or speaking like a woman. *See Johnston*, 97 F. Supp. 3d at 681.

The District Court ignored this distinction in holding that Plaintiff "had alleged sufficient facts to support a claim of gender stereotyping, alleging that the defendants had discriminated against him because he did not fit standard stereotypes of girls." *Ashton Whitaker, et al. v. Kenosha Unified School District No. 1 Board of Education, et al.*, No. 16-CV-943-PP, 2016 WL 5239829, at *4 (E.D. Wis. Sept. 22, 2016). This concept that KUSD engaged in sex-stereotyping by enacting policies related to the genitalia and acknowledged biological differences between men and women is misplaced and was misapplied by the District Court.

C. Plaintiff Ignores The Equal Protection Issue, Apparently Recognizing That KUSD Is Likely To Succeed On That Issue.

Plaintiff does not address KUSD's argument that transgender individuals do not constitute a suspect class for purposes of an Equal Protection challenge. Thus, Plaintiff concedes that KUSD has established that transgender status is not a protected category, and that Plaintiff's Equal Protection claim should have been reviewed under a rational basis standard. *United States v. Farris*, 532 F.3d 615, 619 (7th Cir. 2008); *Williams v. REP Corp.*, 302 F.3d 660, 667 (7th Cir. 2002).

Under rational basis review, courts presume the constitutionality of the classification and it “will not be set aside if any state of facts reasonably may be conceived to justify it.” *Patrick v. Raemisch*, 550 F. Supp. 2d 859, 864 (W.D. Wis. 2008) (citing *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992)). Respecting the privacy right of students to perform bodily functions outside the sight of members of the opposite biological sex is a conceivable and rational reason and “separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause.” *Johnston*, 97 F. Supp. 3d at 670.

II. CONSIDERATION OF THE IRREPARABLE HARM THAT WILL RESULT TO EACH SIDE WEIGHS IN FAVOR OF KUSD.

In addition to considering the success on the merits, in determining whether to grant a stay this court also considers “the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other.” *In re A&F Enters., Inc.*, 742 F.3d 763, 766 (7th Cir. 2014). The purpose of a stay pending appeal “is to minimize the costs of error.” *Id.*

KUSD has identified that if the injunction is not stayed, KUSD and the students and parents it serves, will suffer irreparable harm as continued compliance with the injunction will have the effect of forcing policy changes, imposing financial consequences, and stripping KUSD of its basic authority to enact policies that the accommodate the need for privacy of all students. Likewise, the injunction puts students’ parents’ constitutional rights in jeopardy. Depriving parents of any say

over whether their children should be exposed to members of the opposite biological sex, possibly in a state of full or complete undress, in intimate settings deprives parents of their right to direct the education and upbringing of their children.

Plaintiff focuses on KUSD's harm and gives shallow consideration to Plaintiff's alleged irreparable harm. A plaintiff could claim that constitutional violations constitutes irreparable harm, *see Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978)), but, as explained above, Plaintiff appears to concede that there is not a likelihood of success on the Equal Protection claim.

Although Plaintiff has consistently alleged harm, there has been no showing that Plaintiff will suffer irreparable harm. Irreparable harm is harm that is "unlikely to be made whole by an award of damages or other relief at the end of the trial." *Vogel v. American Society of Appraisers*, 744 F.2d 598, 599 (7th Cir. 1984).

In finding that Plaintiff had shown irreparable harm the District Court appeared to misunderstand the standard. The District Court found irreparable harm to been met if "the damage be done and it won't be able to go back and be undone." Transcript of Oral Argument on Motion for Preliminary Injunction, at p. 59.¹ Likewise, the District Court stated: "I don't believe under the case law that I need to make a finding that there's no possibility ever in any world where he could overcome whatever suffering he has in order to prevail on a request for preliminary relief." *Id.* Plaintiff has alleged harm. That is undisputed. But all of Plaintiff's harm—increased stress, migraines, sleeplessness, difficulty focusing—as identified by Dr. Budge are

¹ The relevant portions of the Transcript of Oral Argument on Motion for Preliminary Injunction are attached as Exhibit A.

but harm, not irreparable harm. There is nothing in the record to reflect that Plaintiff has been subjected to irreparable harm. All of the harms identified could be addressed with an award of damages or other relief at the end of the trial. *See Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, No. 10 C 8296, 2011 WL 221823, at *5 (N.D. Ill. Jan. 24, 2011) (stating that “emotional suffering is commonly compensated by monetary awards”).²

Dated this 20th day of October, 2016

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² A copy of *Bhd. of Locomotive Engineers & Trainmen v. Union Pac. R.R. Co.*, No. 10 C 8296, 2011 WL 221823 (N.D. Ill. Jan. 24, 2011), is attached as Exhibit B.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendants-Petitioners hereby certifies that an electronic copy of the above document was served via ECF on counsel for Plaintiff-Respondent.

Dated this 20th day of October, 2016.

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