

Case No. 16-3522

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiff-Appellee,

v.

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.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 16-CV-943
The Honorable Judge Pamela Pepper

**KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION AND
SUE SAVAGLIO-JARVIS' APPELLATE BRIEF**

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) because the claims involve questions under a federal statute—Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and its implementing regulations, specifically 34 C.F.R. § 106.33—and Constitutional provisions under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

This appeal is taken from an injunction order of the U.S. District Court for the Eastern District of Wisconsin entered on September 22, 2016 by the Honorable Pamela Pepper (Case No. 16-CV-943). A37-54.¹ This Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 1292(a)(1). This Court also has discretion to take pendent jurisdiction and review the District Court’s non-final order denying Defendants’ motion to dismiss, A55-56, as that order is “inextricably intertwined” with the appealable preliminary injunction. *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 Notice of Appeal was filed with the District Court on September 23, 2016 and included a request for the Court to take pendent jurisdiction over the denial of the motion to dismiss. (Dkt. No. 34). A formal motion to take pendent jurisdiction over the motion to dismiss order was filed on December 1, 2016. (App. Dkt. No. 20-1).

¹ Citations to Defendants’ short appendix or separate appendix, contemporaneously filed, will appear as “A_.”

STATEMENT OF THE ISSUES

1. Did the district court err in granting Plaintiff-Respondent, Ashton Whitaker, a minor, by his Mother and next friend, Melissa Whitaker's ("Plaintiff"), motion for preliminary injunction allowing Plaintiff, a biological female, to use the men's restroom? The District Court found that Plaintiff had a likelihood of success on the merits on this issue, that Plaintiff had no adequate remedy at law and would suffer irreparable harm, and that a balancing of the respective harms and considerations of public interest weighed in favor of granting the injunction.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case is about whether a public school is required by law to permit any student that self-identifies as "transgender" to use a bathroom designated for students of the opposite biological sex.

The majority of the background facts pertaining to this case are set forth in the unpublished opinion of *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016) (Dkt. No. 33); A1-18, which relied on the allegations in Plaintiff's Amended Complaint and, for the purposes of this Brief, and are not in dispute. Plaintiff is now a seventeen-year-old student in the Kenosha Unified School District No. 1 ("KUSD")². Pltf.'s Amd. Compl. (Dkt. No. 12) at ¶1; A64. Plaintiff was born as a biological female with

² 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 will be collectively referred to as "KUSD" herein.

a birth certificate that designates her sex as “female”. *Id.* Plaintiff “identifies” as being transgender and currently “identifies” as male. *Id.* Plaintiff has not undergone any sex change surgeries. *Id.* at ¶45; A77.

KUSD requires its students to use the bathroom that corresponds to their birth sex or to use one of several single-user, sex neutral bathrooms. *Id.* at ¶27; A71-72. KUSD’s policy was set in place in order to respect the privacy rights of all students to undress and perform personal bodily functions outside the presence of the opposite sex.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This lawsuit was filed on July 19, 2016. *See* Pltf.’s Compl. (Dkt. No. 1). On August 15, 2016, Plaintiff filed an Amended Complaint and Motion for Preliminary Injunction with supporting memorandum and exhibits. *See* Pltf.’s Amd. Compl. (Dkt. No. 12); A64-99; 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). *See* Def.’s Motion to Dismiss (Dkt. No. 14). On September 21, 2016 the District Court denied the motion to dismiss (Dkt. No. 29).³ On September 22, 2016 the District Court granted Plaintiff’s motion for temporary injunction. *See Whitaker*, 2016 WL 5239829 (Dkt. No. 33); A1-18. The District Court relied in part on the reasoning it employed in denying the motion to dismiss to support its finding that

³ On September 24, 2016, the District Court issued an Amended Order denying KUSD’s motion to dismiss removing language from the original ordering certifying the Order for interlocutory appeal. A19-20.

Plaintiff had a likelihood of success on the merits on the issue of whether Plaintiff could use the men's bathrooms. *See id.* at *3; A8-9; Transcript of Oral Decision on Motion to Dismiss; A21-63. 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).

The temporary injunction is limited to the use of restrooms and provides that KUSD is enjoined from:

- (1) denying Ash Whitaker access to the boys' restrooms;
- (2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;
- (3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and
- (4) monitoring or surveilling in any way Ash Whitaker's restroom use.

Whitaker, 2016 WL 5239829, at *8; A18.

SUMMARY OF ARGUMENT

The District Court erred in granting Plaintiff's motion for preliminary injunction because: the District Court failed to resolve whether the term "sex" in Title IX encompassed transgender status and as a matter of law the term "sex" only contemplates "male" and "female"; the "Dear Colleague" Letter is not entitled to deference; a student cannot unilaterally declare their gender then demand that they be treated like "all others" in that sex classification; providing for separate

bathrooms based on the anatomical differences between men and women is not sex-stereotyping; and transgender is not a suspect class entitled to heightened scrutiny and KUSD's policy is presumptively constitutional.

Additionally, the District Court erred in finding that Plaintiff showed irreparable injury and no adequate remedy at law, because: the District Court relied upon unquantified expert opinions; did not consider that emotional harm can be redressed by monetary damages; and did not take into account the alternative accommodations made available to Plaintiff. Moreover, the District Court did not consider Plaintiff's excessive delay in moving for an injunction or that the lawful implementation of Title IX cannot be the basis for irreparable harm.

Furthermore, the District Court erred in its balancing of the respective harms because the infringement on the constitutionally protected rights of KUSD and the students and parents it serves outweighs the individualized harms alleged by Plaintiff.

Finally, the District Court erred in finding that the injunction would not negatively impact the public interest because the injunction will have a negative impact on school districts throughout Wisconsin and the nation and create confusion and uncertainty.

ARGUMENT

I. STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy and is never awarded as of right. *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016). In reviewing the grant

or denial of a preliminary injunction, this Court reviews a district court's findings of fact for clear error. *Platinum Home Mortgage Corp. v. Platinum Fin. Grp., Inc.*, 149 F.3d 722, 726 (7th Cir. 1998) (citing *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111, 1114 (7th Cir. 1997)). The balancing of the facts is reviewed under an abuse of discretion standard. An "abuse occurs only when a court has acted contrary to the law or reached an unreasonable result." *In re Sokolik*, 635 F.3d 261, 269 (7th Cir. 2011). *See also Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 800 (7th Cir. 2013).

The District Court's legal conclusions are reviewed de novo, "which is to say with no deference given the district court." *Scaife v. Racine Cty.*, 238 F.3d 906, 907 (7th Cir. 2001). Significantly, it has long been held that "an error of law by the district court constitutes an abuse of discretion..." *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 n.2 (7th Cir. 1986).

When evaluating the merits of a motion for preliminary injunctive relief, a district court must determine whether the party seeking the preliminary injunction has demonstrated that: (1) it has a reasonable likelihood of success on the merits of its claim; (2) no adequate remedy at law exists; and (3) it will suffer irreparable harm if preliminary injunctive relief is denied. *Platinum Home Mortgage Corp. v. Platinum Fin. Grp., Inc.*, 149 F.3d 722, 726 (7th Cir. 1998). The threshold consideration in a motion for a preliminary injunction is the moving party's likelihood of success on the merits of the underlying claim. *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir. 1997).

When the threshold consideration of the moving party's likelihood of success on the merits largely involves questions of law, the Court of Appeals is in a good position to determine whether the district court's decision to grant a preliminary injunction can be justified by a low probability of their success on the merits.

Libertarian Party of Indiana v. Packard, 741 F.2d 981, 986 (7th Cir. 1984).

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFF HAD A LIKELIHOOD OF SUCCESS ON THE MERITS.

The threshold consideration in the motion for preliminary injunction was Plaintiff's likelihood of success on the merits of showing that not being allowed to use the men's restroom violates Title IX and Equal Protection. *See Rust Environment & Infrastructure*, 131 F.3d at 1213. If a plaintiff cannot state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the plaintiff cannot demonstrate a likelihood of success on the merits. *See Wisconsin Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1044 (E.D. Wis. 2001) (addressing defendant's motion to dismiss before plaintiff's motion for preliminary injunction, because "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" and if plaintiff "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").

The District Court erred in concluding that Plaintiff had a likelihood of success on the merits because Plaintiff's asserted right to use the men's bathroom

under Title IX and Equal Protection fails as a matter of law. The District Court's decision was incorrect as a matter of law because: (1) "sex" as used in Title IX does not encompass transgender status; (2) a student does not have the right to unilaterally declare his or her sex and then demand to be treated like "all other" students of that biological sex; (3) restricting bathroom use to the sex shown on a student's birth certificate merely reflects the anatomical differences between men and women and is not sex-stereotyping as a matter of law; and (4) transgender is not a suspect class subject to heightened scrutiny under a constitutional analysis.

A. The District Court Erred In Not Resolving Whether The Term "Sex" As Used In Title IX Encompasses Transgender Status.

Before diving into the issues it is important to take a moment to define the various terms which will be used in this brief. Often people tend to use the terms "sex" and "gender" interchangeably without appreciating the differences between the two. "Sex" relates to a person's actual "biological status." *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, American Psychologist, Jan. 2012, p. 11; A101.⁴ In other words, one's sex is defined by one's physical characteristics and biological information such as one's "chromosomes, gonads, internal reproductive organs, and external genitalia." *Id.* "Gender," on the other hand, "refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex." *Id.* "Gender identity" refers to "one's sense of oneself as male, female, or transgender. When one's gender identity and

⁴ The relevant excerpts are included in the appendix, A100-102.

biological sex are not congruent, the individual may identify as transsexual, or as another transgender category.” *Id.*

“Sex” is based on our physical characteristics and biological information, including our chromosomes. These cannot be changed over time. Simply put, there is no way to change sex because one cannot change the 23rd chromosome (XX or XY) located in the nucleus of each one of a person’s trillions of cells. *See generally id.* at pp. 10-12; A100-102.

Surprisingly, in ruling that Plaintiff had a reasonable likelihood of success on the Title IX claim, the District Court failed to make a ruling as to whether the term “sex” under Title IX encompasses “transgender” status. The District Court noted that it:

found that, because no case defines ‘sex’ for the purposes of Title IX, the plaintiff might succeed on his claim that that word includes transgender persons. The court found that, while the defendants raised a number of arguments in support of their claim that the word ‘sex’ does not encompass transgender persons, much of that case law came from cases interpreting Title VII, a different statute with a different legislative history and purpose.

Whitaker, 2016 WL 5239829, at *3; A8. Rather than determining whether the term “sex” as used in Title IX encompasses transgender status the District Court simply concluded that because the issue was unresolved, Plaintiff “might” ultimately prevail. The fact that a legal issue is not well-settled and could ultimately go either way does not demonstrate a reasonable likelihood of success on the merits.

B. As A Matter Of Law The Term “Sex” As Used In Title IX Does Not Encompass Transgender Status.

A plain language reading of Title IX supports the conclusion that transgender status is not encompassed within the term “sex” and therefore is not subject to protection under Title IX. This Circuit’s precedent supports such a conclusion. Thus, it was error to conclude that Plaintiff showed a likelihood of success on the merits that Title IX encompasses transgender status.

1. The Plain, Unambiguous Language Of Title IX Extends Only To Sex—Male or Female—Not To Transgender.

Title IX prohibits sex discrimination in educational programs that receive federal funding and states: “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 activity⁵ receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (emphasis added). The term “on the basis of sex” as used in the statute does not include being transgender. “Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute.” *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

Title IX and the regulations implementing Title IX clearly suggest that “sex” encompasses only two categories, male and female. The Title IX regulations

⁵ At least one court has reasoned that prohibiting a transgender student from using a restroom consistent with his or her sex does not constitute discrimination under Title IX, because “it would be a stretch to conclude that a ‘restroom,’ in and of itself, is educational in nature and thus an education program” as required to state a prima facie case under the statute. *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 682 (W.D. Pa. 2015) (internal citations omitted).

specifically permit educational institutions subject to Title IX to provide separate bathrooms on the basis of “sex”: “A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33. Quite clearly the regulation recognizes that there are two sexes: “one sex” and “the other sex.” There are only two sexes: male and female.

Finding that the term “sex” in 34 C.F.R. § 106.33 only refers to the biological and anatomical differences between men and women is supported by the common understanding of that term during the enactment of Title IX and the promulgation of the regulations:

It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by [Department of Education] following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth . . . [a]dditionally, it cannot reasonably be disputed that [Department of Education] complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students . . . this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33 . . . This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts, and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy.

Texas v. United States, No. 7:16-CV-00054-O, 2016 WL 4426495, at *14-15 (N.D.

Tex. Aug. 21, 2016)⁶.

⁶ Copies of all unpublished opinions are provided in the appendix, pages A103-315.

The clear language of Title IX shows that it applies to one's sex, i.e., being male or female, and, because the language of the statute specifically permits schools to provide students with sex-segregated bathrooms, i.e., one for men and another for women, there is no room for an interpretation that being transgendered is also protected under the law. *See Johnston*, 97 F. Supp. 3d at 678.

2. Seventh Circuit Precedent Supports The Conclusion That Title IX's Prohibition Of Discrimination "On The Basis Of Sex" Does Not Encompass Transgender Status.

While district courts are often said to be the "front line experimenters in the laboratories of difficult legal questions," they are bound to follow circuit precedent. *Carcano v. McCrory Berger*, No. 1:16CV236, 2016 WL 4508192, at *15 (M.D.N.C. Aug. 26, 2016) (citing *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 703 (7th Cir. 2016), *amended*, No. 15-1720, 2016 WL 5921763 (7th Cir. Aug. 3, 2016), *reh'g en banc granted, opinion vacated* (No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016))).⁷

The District Court did not believe that cases analyzing the term "sex" under Title VII of the Civil Rights Act of 1964 ("Title VII") could be relied upon in analyzing the term "sex" under Title IX. *Whitaker*, 2016 WL 5239829, at *3; A8. Nevertheless, numerous other courts have recognized that in applying Title IX courts may borrow from the law developed under Title VII. *See Johnston*, 97 F. Supp. 3d at 674 (providing that when there is a lack of controlling precedent on a

⁷ While the opinion in *Hively* was recently vacated and does not have precedential effect, the reasoning set forth in the opinion still has persuasive value. *See Christianson v. Colt Industries Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) (holding that a vacated opinion is persuasive but not binding).

question of Title IX, parties necessarily rely on cases in the Title VII context to construct the appropriate framework to answer the question); *see also Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012) (maintaining that “the legislative history of Title IX strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII”); *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 733 (E.D. Va. 2015) (“In applying Title IX, many courts borrow from the law developed under Title VII.”); *Doe By & Through Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1572 (N.D. Cal. 1993) (stating that the legislative history of Title IX indicates that it was patterned after Title VII and that the Supreme Court has relied on Title VII cases in analyzing claims under Title IX).

No court in this Circuit has yet to specifically address whether Title IX’s prohibition of discrimination on the basis of sex encompasses transgender status. Nevertheless, courts have considered this issue in the context of Title VII, and it is appropriate and instructive to rely on those cases in interpreting Title IX.

This Court has found that Title VII’s prohibition against employment discrimination based upon sex does not extend to transgender individuals. This Court reached this conclusion in *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) *cert denied*, 471 U.S. 1017 (1985). *Ulane* held that:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. **The words of Title VII do not outlaw discrimination against a person who has a sexual identity** disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a

female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

742 F.2d at 1085 (emphasis added).⁸

Other courts, including district courts within this circuit, have followed *Ulane's* proclamation that Title VII's prohibition against sex discrimination does not encompass transgender status. *See Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual."); *Creed v. Family Exp. Corp.*, 2009 WL 35237, at *6 (N.D. Ind. Jan. 5, 2009) ("Although discrimination because one's behavior doesn't conform to stereotypical ideas of one's gender may amount to actionable discrimination based on sex, harassment based on . . . transgender status does not."); *Sweet v. Mulberry Lutheran Home*, 2003 WL 21525058, at *2 (S.D. Ind. June 17, 2003) (stating that "discrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not . . . sexual identity, including an intention to change sex").

⁸ Some question whether *Ulane* is still good law following *Price Waterhouse*. Although *Price Waterhouse* created a cause of action for sex-stereotyping, nothing within *Ulane* suggests that the plaintiff was subjected to sex-stereotyping. The plaintiff was fired because the employer disapproved of "transsexuals." The employer did not welcome both male transsexuals and female transsexuals. Therefore, its action was not "because of gender." Likewise, Ms. Ulane had fully transitioned to being a female, including reconstructive surgery, hormone treatments, and a newly signed birth certificate that officially changed her gender to female. This Court found that there was no evidence to suggest that the employer acted against her because she was female. *Ulane*, 742 F.2d at 1087.

This Court has accepted that the definition of “sex” under Title VII is biological sex, not transgender status. *See Ulane*, 742 F.2d at 10. “The prohibition against discrimination based on an individual’s sex **is not synonymous with a prohibition against discrimination based on an individual’s sexual identity.**” *Id.* The Tenth Circuit has also explained that “discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII” because “the plain language of the statute . . . guides our interpretation of Title VII.” *Etsitty*, 502 F.3d at 1221. The plain meaning of “sex” does not encompass “anything more than male and female.” *Id.* at 1222.

Ulane’s holding that gender identity is not protected by Title VII has never been overturned. The precedent in this Circuit establishes that the term “sex” in Title IX does not encompass transgender status. This Court has stated that it will not depart from past precedent unless instructed to do so by the Supreme Court or by new legislation, *see Hively*, 830 F.3d at 718, and past precedent holds that discrimination based on an individual’s “sex” is not synonymous with a prohibition against discrimination based on an individual’s sexual identity. *Ulane*, 742 F.2d at 1085.

A conclusion that the term “sex” as used in Title IX encompasses transgender status would act to overrule the narrow definition of sex applied by this Circuit in analyzing claims under Title VII. There is no basis for doing so.

3. Extending Title IX To Cover Transgender Status Can Only Be Effectuated By Congress.

As explained above, 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). This Court has made this province clear:

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); *see also Johnston*, 97 F. Supp. 3d at 683 n.22 (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 Court in determining that it was without authority to expand the interpretation of “sex” in the Title VII context applies equally as forceful when deciding the issue under Title IX in this case. As stated by this Court 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).

Here too, for this Court to now 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 672.⁹ Moreover, as with Title VII, Congress has not acted to expand the scope of Title IX despite multiple

⁹ The District Court in *Hoffman v. Saginaw Pub. Sch.*, 2012 WL 2450805, at *5 (E.D. Mich. June 27, 2012), summarized the legislative history of Title IX stating that:

The purpose of Title IX, as originally conceived, was ‘banning discrimination against women in the field of education.’ *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). Summarizing the bill that would become Title IX, Senator Birch Bayh explained: ‘Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment.’ *Id.* at 524 (emphasis omitted) (quoting 118 Cong. Rec. 5803 (1972)). Responding to a fellow senator’s question regarding the scope of the proposed protections, Senator Bayh elaborated: ‘[W]e are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution.’

attempts by its members. Members of Congress have proposed the Student Non-Discrimination Act of 2015, S. 439 (114th Cong. 2015), that would prohibit discrimination based on sexual orientation or gender identity under Title IX. However, Congress had repeatedly refused to enact this proposed legislation rejecting it in various forms at least four times. This lack of congressional action in the face of public opinion exemplifies that Congress is aware of the issues facing transgender people, but has consciously chosen not to act.

Therefore, in the absence of 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 as explained above. 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 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).

KUSD recognize that this Court vacated *Hively* and that it is under consideration after *en banc* review was certified. One of the issues raised in *Hively* was whether it is appropriate for this Court to expand Title VII’s protection of “sex” to “sexual orientation.” While this Court will need to resolve that issue in *Hively*, Defendants submit that the analysis in *Hively* is very different than the analysis here.

At oral argument in *Hively*, members of the Court pondered why sexual orientation discrimination is not actionable as discrimination under the “but for sex” analysis or as sex stereotyping. These questions seemed to recognize that the Court, or at least some members of the Court, were willing to look at the well-recognized scope of Title VII and determine whether sexual orientation discrimination falls within it. Whether sexual orientation discrimination is within the scope of “sex” discrimination under the “but for sex” analysis or as sex stereotyping is an interpretation of existing rights, and is line with the EEOC’s position that:

‘ . . . sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.’ *Id.* at *5 (proffering the example of a woman who is suspended for placing a photo of her female spouse on her desk, and a man who faces no consequences for the same act). Second, it explained that ‘sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex,’ in which an employer discriminates against lesbian, gay, or bisexual employees based on who they date or marry. *Id.* at *6-7. Finally, the EEOC described sexual orientation discrimination as a form of discrimination based on gender stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances. *Id.*

Hively, 830 F.3d at 703 (citing *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015)).

The status of being transgender is very different than one’s sexual orientation and invokes a question different than the one raised in *Hively*. As noted above, “gender identity” refers to how one internally perceives their gender as male, female or transgender. “Sexual orientation,” on the other hand, “refers to the sex of

those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals)." *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, American Psychologist, Jan. 2012, p. 11; A101.

Additionally, the concerns outlined by the EEOC in regard to sexual orientation discrimination do not hold true in regard to transgender status and therefore the outcome of *Hively* will have no effect on this case. While having a rule that prohibits a woman, and not a man, from dating a woman may be treating an employee less favorably because of the employee's sex i.e., "but for sex", a rule requiring men and women to use the bathroom that corresponds to the sex on their birth certificate is not a "but for sex" requirement as it does not treat men and women differently. In this case, both men and women are required to use the bathroom that corresponds to the sex on their birth certificate. Second, while sexual orientation discrimination may be viewed as sex discrimination because it is associational discrimination on the basis of sex, a rule requiring men and women to use the bathroom that corresponds to the sex on their birth certificate carries with it no such associational discrimination. And, lastly, while sexual orientation discrimination may invoke sex stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances (i.e. who they choose to date), a rule requiring men and women to use the bathroom that corresponds to the sex on

their birth certificate does not invoke sex stereotyping. Regardless of how a man looks, behaves, or acts he must use the men's bathroom. Regardless of how a woman looks, behaves, or acts she must use the women's bathroom.

Thus, in *Hively* this Court will need to resolve whether "sexual orientation" falls within the recognized scope of "sex" as that term is used in Title VII. KUSD submit that the analysis in *Hively* is very different than the analysis here. Plaintiff here does not seek to draw "transgender" into the existing scope of "sex" under Title IX. Rather, Plaintiff seeks to have this Court expand Title IX. That is not permissible unless this Court is directed to do so by Congress.

C. The Department Of Education's Dear Colleague Letter Is Not Entitled To Deference And Therefore It Does Not Assist Plaintiff.

The District Court relied upon the Department of Education's ("DOE") Dear Colleague Letter in concluding that Plaintiff "might" prevail under Title IX. *Whitaker*, 2016 WL 5239829, at *3; A8-9. In relying upon the letter, the District Court concluded that it should accord *Auer* deference¹⁰ to the DOE's interpretations. The District Court's conclusion was erroneous: the DOE Dear Colleague Letter is not entitled to deference.

¹⁰ It is undisputed that the Dear Colleague Letter does not have the force of law as it is not a regulation entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

1. The Dear Colleague Letter Is Not Entitled To Deference Because Title IX Is Unambiguous On Its Face.

The Dear Colleague Letter is the DOE's interpretation of Title IX. An agency's opinion letter interpreting its own regulation may be given deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) ("*Auer* deference"). Under *Auer* deference, an agency's interpretation of its own regulation is entitled to deference only when the language of the regulation is ambiguous and the interpretation is not plainly erroneous or inconsistent with the regulation. *Christensen v. Harris Cty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621 (2000); *Auer*, 519 U.S. at 461. When a regulation is not ambiguous, to defer to the agency's position "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

The Supreme Court has been skeptical of federal agencies' interpretations of their own regulations, because by giving those interpretations *Auer* deference, the agency can make binding regulations without notice and comment. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212, 191 L. Ed. 2d 186 (2015) (Scalia, J., concurring); *see also United States v. Raupp*, 677 F.3d 756, 765 (7th Cir. 2012) ("Indeed, there are signs on the horizon that the Supreme Court may be about to revisit *Auer* and endorse a more skeptical review of agency interpretations of their own regulations.") "Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212. "To expand this domain, the agency need only write substantive rules more

broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.” *Id.* This skepticism is shared in this Circuit. *See Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 577 (7th Cir. 2012); *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003).

The first step in determining whether *Auer* deference is due is to determine whether the statutory language is ambiguous. To determine whether a statute is ambiguous, courts employ the first step in the cardinal canons of statutory interpretation—look at the text of the statute. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says.”); *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 543-44 (7th Cir. 2003) (providing that when addressing questions of statutory interpretation, courts begin with the text of the statute). When a statute is unambiguous, the inquiry “starts and stops” with the text. *United States v. All Funds on Deposit with R.J. O’Brien & Associates*, 783 F.3d 607, 622 (7th Cir. 2015) (“*All Funds*”). In the ordinary case, “absent any indication that doing so would frustrate Congress’s clear intention or yield patent absurdity,” a court’s obligation is to apply a federal statute “as Congress wrote it.” *United States v. Ranum*, 96 F.3d 1020, 1029 (7th Cir. 1996).

Any deviation from the generalized, common definition of “sex” would be contrary to the plain language of Title IX and counter to the definition of “sex” as

used in the Seventh Circuit. *See Hively*, 830 F.3d at 700 (stating that the Seventh Circuit acknowledges that Congress in passing legislation targeted at sex discrimination intends a very narrow reading of the term “sex”). Here, “on the basis of sex” by its plain reading refers to birth sex, not a person’s subsequent “gender identity.” This reading is in accord with Seventh Circuit precedent: “The prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity.” *Ulane*, 742 F.2d at 1085.

The regulations implementing Title IX state that: “A recipient may provide separate toilet ... facilities on the basis of sex.” 34 C.F.R. § 106.33. This is unambiguous language. *Texas*, 2016 WL 4426495, at *14.

It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by [Department of Education] following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth . . . [a]dditionally, it cannot reasonably be disputed that [Department of Education] complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students . . . this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33 . . . This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts, and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy.

Id. at *14-15 (internal citations omitted). Therefore, the Dear Colleague Letter’s interpretation of Title IX is clearly at odds with the plain, unambiguous meaning of “sex” as used in that statute and its regulations.

Even though the DOE may have good intentions in interpreting a greater breadth of protection into Title IX, an interpretation “no matter how noble or just, cannot defy the unambiguous and plain meaning of its text.” *All Funds*, 783 F.3d at 612. The Seventh Circuit’s conclusion that “to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation” should apply equally to this Court’s construction of Title IX. *See Ulane*, 742 F.2d at 1086. Therefore, the unambiguous and plain meaning of “sex” in Title IX can only be birth sex, not gender identity. And because of this, the Dear Colleague Letter is not entitled to deference.

2. Even If Title IX Is Ambiguous, The Dear Colleague Letter Is Plainly Erroneous And Inconsistent With Title IX And Its Implementing Regulations.

Agency interpretations are not due any deference when the interpretation is “plainly erroneous or inconsistent with the regulation.” *L.D.G. v. Holder*, 744 F.3d 1022, 1029 (7th Cir. 2014). “Interpretations that are flatly at odds with the language of a regulation cannot be followed.” *Id.* An agency’s interpretation of its own regulation is not entitled to deference when the interpretation is erroneous or inconsistent with the regulation. *Christensen*, 529 U.S. at 588; *Auer*, 519 U.S. at 461.

Here, the DOE’s interpretation as set forth in the Dear Colleague Letter is erroneous and inconsistent with the statute and regulations. Specifically, the Dear Colleague Letter states that the agencies should “treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.”

With regard to sex-segregated restrooms, the Dear Colleague Letter maintains that a “school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.”

These interpretations are completely at odds with the regulations implementing Title IX. Specifically, Title IX and its regulations, permit schools to provide separate restrooms “on the basis of sex,” so long as the facilities are comparable. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734-35 (4th Cir. 2016), *cert. granted in part*, No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016) (Niemeyer, Circuit Judge, concurring in part and dissenting in part) (citing 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33). By conflating the term “sex” with the concept of “gender identity”, the Dear Colleague Letter’s new interpretation blatantly ignores that Title IX expressly authorizes the provision of facilities and programs separated by “sex”, including bathrooms. *See* 34 C.F.R. §106.33. Only by changing the definition of the statutory term “sex,” can the Dear Colleague Letter advocate that public high schools may “not provide separate restrooms ... on the basis of biological sex.” *See G.G.*, 822 F.3d at 730. Such an expanded definition requires schools to “allow a biological male student who identifies as female to use the girls’ restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys’ restrooms and locker rooms.” *See id.* This interpretation “completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes.” *See id.*

The Dear Colleague Letter also seems to suggest that the term “sex” in Title IX refers only to gender identity, and the effect of this new definition of sex is illogical and unworkable. *See id.* at 737; *see also* Texas, 2016 WL 4426495, at *15 (“A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased.”). “This construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex.” *G.G.*, 822 F.3d at 738. “Biological males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align.” *Id.* “With such mixed use of separate facilities, no purpose would be gained by designating a *separate* use ‘on the basis of sex,’ and privacy concerns would be left unaddressed.” *Id.* Moreover, “enforcement of any separation would be virtually impossible” as “[b]asing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which . . . would render Title IX and its regulations nonsensical.” *Id.* Finally, it is impossible to determine how the Dear Colleague Letter’s interpretation would apply to the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities “on the basis of sex” if “sex” means gender identity. *Id.* at 738.

The Dear Colleague Letter's expansion of the definition of "sex" in Title IX to now mean "gender identity" creates an impractical and unworkable situation in which any student who self identifies as the opposite sex could use the corresponding bathroom without any restriction. This result renders the Dear Colleague Letter's interpretation of Title IX erroneous and inconsistent with the regulations that permit separate bathroom and living facilities on the basis of sex.

Finally, a simple exercise in logic shows the fallacy of the interpretation set forth in the Dear Colleague Letter. If the term "sex" in Title IX includes "transgender status" as the DOE and Plaintiff advocate, and given that the statute and regulations specifically allow a school to provide separate restrooms, locker rooms, and living facilities on the basis of "sex," then the statute and regulations specifically allow a school to provide separate restrooms, locker rooms, and living facilities on the basis of transgender status. The DOE and Plaintiff's interpretation of Title IX is actually self-destructive.

D. There Is No Support For Plaintiff's Claim That One Can Unilaterally Declare Their Sex And Then Insist On Being Treated Like "All Other" Students Of That Sex.

Plaintiff's position on Title IX has been somewhat inconsistent. In the Amended Complaint, Plaintiff takes the position that "being" transgender is a protected category under Title IX as falling within the meaning of "sex." *See* Pltf.'s Amd. Compl. at ¶111; A92. In the injunction pleadings, however, Plaintiff asserted a different position. Plaintiff now asserts that a transgender person can unilaterally designate his or her sex and then all recipients of federal funds must

respect that unilateral designation. *See* Pltf.'s Memo. In Supp. of Inj. (Dkt. No. 11) at pp. 16-17 ("Ash has a clear claim of discrimination 'on the basis of sex.' KUSD has treated him differently from other boys..."). From this, Plaintiff declares that once one declares their sex as changing from female to male, one must now be treated as "all other" male students. Plaintiff concludes that if a female who declares her sex to be male is not then treated like "all other" males, such treatment is discrimination on the basis of sex.

Plaintiff's assertion of a unilateral right to declare one's sex and to be treated like all others who are that sex is not supported in the plain language of Title IX or its regulations. Title IX says nothing about one's ability to change or declare one's sex. This cannot be the basis for a reasonable probability of success on the merits when the right is non-existent.

E. Separating Bathrooms Based Upon The Anatomical Differences Between Men And Women Is Not Sex-Stereotyping.

The District Court erred in finding that "the 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."

Whitaker, 2016 WL 5239829, at *4; A9. Sex stereotyping is actionable as a form of discrimination, but nothing about restricting Plaintiff to using the girl's restroom is sex stereotyping. This Court should follow the line of cases finding that policies concerning bathroom usage that merely reflect the anatomical differences between males and females are not sex-stereotyping as matter of law.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), the plaintiff was a woman who was denied partnership in an accounting firm at least in part because she was “macho,” “somewhat masculine,” and “overcompensated for being a woman.” 490 U.S. at 235. One partner advised her she could improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* In concluding the plaintiff had met her burden of establishing that sex played a motivating part in the employment decision, a plurality of the court explained that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250. The court stated that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251. This claim has come to be known as a “sex-stereotyping” claim.

Courts throughout the country have held that policies, especially concerning bathroom usage, that merely reflect the anatomical differences between men and women are not sex-stereotyping as a matter of law. For example, in *Etsitty*, 502 F.3d at 1222-23, the plaintiff argued that even if transsexuals are not entitled to protection under Title VII, “she is nevertheless entitled to protection as a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear.” The plaintiff argued that although courts have previously declined to extend Title VII protection to transsexuals based on the

interpretation of “sex,” this approach has been supplanted by the more recent rationale of *Price Waterhouse*. *Id.* at 1223. The Tenth Circuit, while not deciding whether discrimination based on an employee’s failure to conform to sex stereotypes always constitutes discrimination “because of sex”, held that the plaintiff failed to rebut the defendant’s legitimate nondiscriminatory reasons: “it[s] decision to discharge Etsitty was based solely on her intent to use women’s public restrooms while wearing a UTA uniform, despite the fact she still had male genitalia.” *Id.* at 1224.

The plaintiff in *Johnston*, 97 F. Supp. 3d at 680, made a similar attempt to cloak a Title IX claim in sex-stereotyping clothing, and this too was rejected. In rejecting this claim, the court noted that the plaintiff did not allege that “Defendants discriminated against him because of the way he looked, acted, or spoke. Instead, Plaintiff alleges only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex.” *Id.* The court determined that plaintiff failed to state a claim under *Price Waterhouse* because the pleadings established that the plaintiff had not alleged that the defendants discriminated against him because he did not “behave, walk, talk, or dress in a manner inconsistent with any preconceived notions of gender stereotypes.” *Id.* at 681.

In yet another case in which a transgender plaintiff’s sex-stereotyping claim was rejected, *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), the plaintiff argued that *Ulane’s*

holding that Title VII did not protect plaintiff's transgender status did not apply because plaintiff was not alleging discrimination based on transsexuality *per se*; rather, she asserted that the defendant engaged in "sexual stereotyping." The district court found 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." *Id.* at 999. The district court held that the defendant "did not require Plaintiff to conform her *appearance* to a particular gender stereotype, instead, the company only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms," and therefore, "insofar as Plaintiff's appearance was not challenged by her employer," the Court found that Plaintiff did not state a valid claim for sex-stereotyping as that practice has been interpreted by *Price Waterhouse* and its progeny. *Id.* at 1000.

There are cases that claim that any alleged discrimination against transgender individual constitutes sex-stereotyping, reasoning that a person is defined as transgender because of the perception that his or her behavior does not conform with sex stereotypes. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). These cases, however, run contrary to the decisions of other courts issued after *Price Waterhouse* that evidence of gendered statements or acts that target a plaintiff's conformance with traditional conceptions of masculinity or femininity are required to state a claim for sex-stereotyping. *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex.

2014); *see, e.g., E.E.O.C. v. Boh Bros.*, 731 F.3d 444, 454 (5th Cir. 2013) (finding that evidence that the plaintiff's coworkers taunted him with "sex-based epithets" "directed at [his] masculinity," as well as physical acts of simulated anal sex, simulated male-on-male oral sex, and genital exposure was sufficient to prevail on a gender-stereotyping theory); *Nichols v. Azteca Res. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (finding that evidence that the male plaintiff was "attacked for walking and carrying his tray 'like a woman'—i.e., for having feminine mannerisms," that coworkers called the plaintiff names "cast in female terms," and that coworkers and supervisors referred to him as "she" and "her" was sufficient to prevail on a sex stereotyping theory).

Plaintiff alleges that KUSD engaged in "sex-stereotyping" because it had a policy of requiring students to either use a bathroom consistent with their birth sex or a sex-neutral single-user bathroom and enforced that policy by monitoring students use of bathrooms. Pltf.'s Amd. Compl. at ¶2; A64-65.¹¹ This allegation, even if assumed true, only relates to Plaintiff's birth sex and the recognized anatomical differences between men and women. It does not reflect on whether the bathroom users "behave, walk, talk, or dress in a manner inconsistent with any preconceived notions of gender stereotypes." Even in light of *Price Waterhouse*, requiring a biological female to use the woman's bathroom, is not sex-stereotyping as a matter of law.

¹¹ Plaintiff also alleged in the Complaint the existence of an unsubstantiated future policy of requiring Plaintiff to use a green wristband. However, at oral argument, the District Court held there was a lack of evidence indicating that KUSD was enforcing a policy requiring Plaintiff to wear a green wristband. *See* Court Minutes, at 1 (Dkt. No. 31).

F. Transgender Is Not A Suspect Class Entitled To Heightened Scrutiny And KUSD's Policy Is Presumptively Constitutional Under Rational Basis Review.

The District Court also erred in finding that Plaintiff had a likelihood of establishing an equal protection violation.

First, the District Court erred in not deciding what level of scrutiny should be applied to a claim that transgender status is entitled to equal protection. *See Whitaker*, 2016 WL 5239829, at *4; A9 (stating that “the court did not, at the motion to dismiss stage, and does not now have to decide whether a rational basis or a heightened scrutiny standard of review applies to the plaintiff’s equal protection claim”). The determination of that issue is critical to addressing whether one states a claim for relief.

The level of scrutiny to be applied to a court’s review of governmental action is critical because governmental action is presumed to be valid if it is evaluated under the rational-basis standard of review. *See Smith v. City of Chicago*, 457 F.3d 643, 650 (7th Cir. 2006). Only if the action is based upon suspect classifications does the level of scrutiny increase and become subject to a heightened standard. *See id.*

The Supreme Court has admonished lower courts to not create new suspect classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 3255, 87 L. Ed. 2d 313 (1985). The Supreme Court and this Court have also never recognized transgender status as a suspect classification entitled to

heightened scrutiny under the Equal Protection clause. *See Johnston*, 97 F. Supp. 3d at 668 (as to the Supreme Court).

Numerous courts across the country have considered the allegations of transgender plaintiffs under rational basis review.¹² Under rational basis review, a non-suspect classification is “accorded a strong presumption of validity” and “cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Richenberg v. Perry*, 909 F. Supp. 1303, 1311 (D. Neb. 1995), *aff’d*, 97 F.3d 256 (8th Cir. 1996) (citing *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257 (1993)). The subject action, policy, or statute is presumed constitutional and the government has no obligation to produce evidence to sustain the rationality of the classification.” *Heller*, 509 U.S. at 320.

Requiring students to use facilities that correspond to their birth sex in order to provide privacy to all students has been recognized as a rational basis by multiple courts. *See Johnston*, 97 F. Supp. 3d at 669-70 (citing *Etsitty*, 502 F.3d at 1224; *Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975)). The right to privacy

¹² The following cases all reject the notion that transsexual or transgender is a suspect class: *Johnston*, 97 F. Supp. 3d at 668; *Etsitty*, 502 F.3d at 1227-28; *Brown v. Zavaras*, 63 F.3d 967, 970-71 (10th Cir. 1995); *Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981); *Braninburg v. Coalinga State Hosp.*, No. 1:08-CV-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue*, No. CIV S-11-2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012); *Kaeo-Tomaselli v. Butts*, No. CIV. 11-00670 LEK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013); *Lopez v. City of New York*, No. 05 CIV. 10321(NRB), 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009); *Starr v. Bova*, No. 1:15 CV 126, 2015 WL 4138761, at *2 (N.D. Ohio July 8, 2015); *Murillo v. Parkinson*, No. CV 11-10131-JGB VBK, 2015 WL 3791450, at *12 (C.D. Cal. June 17, 2015); *Druley v. Patton*, 601 F. App’x 632, 635 (10th Cir. 2015); *Stevens v. Williams*, No. 05-CV-1790-ST, 2008 WL 916991, at *13 (D. Or. Mar. 27, 2008); *Rush v. Johnson*, 565 F. Supp. 856, 868 (N.D. Ga. 1983).

is a longstanding fundamental right under the Constitution. *See Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 280 (7th Cir. 1982) (“The right to privacy is one of the most cherished rights an American citizen has; the right to privacy sets America apart from totalitarian states in which the interests of the state prevail over individual rights.”).

“Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females.” *G.G.*, 822 F.3d at 734. “An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex” and “courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind.” *Id.* at 734-35 (citing *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

Here, KUSD acknowledges its students’ constitutional right to perform personal bodily functions outside the presence of members of the opposite sex. Students at KUSD have the right to use the bathroom to perform personal bodily functions without the presence of members who do not share their birth sex. This

reason is presumptively constitutional and because this rational reason is “conceivable and plausible” considering Plaintiff’s allegations. *See St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 639 (7th Cir. 2007).

Even if a heightened standard of review were to apply in this case, Plaintiff’s Amended Complaint must still be dismissed as the policy of separating bathrooms, on the basis of birth sex is “substantially related to a sufficiently important government interest.” *Johnston*, 97 F. Supp. 3d at 669. The Court in *Johnston* aptly explained why separating on the basis of birth sex does not violate the Equal Protection Clause:

The Supreme Court has acknowledged that not all classifications based on sex are constitutionally impermissible: ‘The heightened review standard our precedent establishes does not make sex a proscribed classification . . . Physical difference between men and women, however, are enduring: ‘[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’...As such, **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.** Thus, ‘while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.’

Id. at 670 (emphasis added) (internal citations omitted).

Simply put, KUSD is applying a policy that respects and protects the privacy rights of all students. All students are treated equally under the policy. No student may use a bathroom that does not correspond to his or her birth sex. Even if an intermediate standard of review applied, KUSD’s policy, which does not permit students with a birth sex of female, like Plaintiff, to perform personal bodily

function in the male bathroom, serves the important purpose of respecting and protecting the privacy rights of all students.

III. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF HAD SHOWED IRREPARABLE INJURY AND NO ADEQUATE REMEDY AT LAW.

A. The District Court Relied Upon Unquantified Expert Opinions, Did Not Consider That Emotional Harm Is Generally Redressed By Money Damages, And Did Not Take Into Account Alternative Accommodations Made Available To Plaintiff.

The requirement that a preliminary injunction may not issue unless plaintiffs have no adequate remedy at law is closely related to the requirement of irreparable harm. Many courts fuse them into a single requirement. *Milwaukee Cty. Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016, 1033 (W.D. Wis.), *modified*, 710 F. Supp. 1532 (W.D. Wis. 1989).¹³ Irreparable harm is harm “which cannot be repaired, retrieved, put down again, atoned for. The injury must be of a particular nature, so that compensation in money cannot atone for it.” *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997) (internal citations omitted).

The District Court stated at the September 20, 2016 hearing, that Plaintiff was not required to prove that Plaintiff “will be forever irreversibly damaged in order to prove irreparable harm.” *Whitaker*, 2016 WL 5239829, at *5; A13.

The District Court reviewed “declarations from Dr. Stephanie Budge and Dr. R. Nicholas Gorton, M.D., which explain gender dysphoria and discuss, both in

¹³ The District Court chose not to fuse these factors into a single requirement and found that KUSD did not set forth arguments against Plaintiff’s adequate remedy at law contention. However, if Plaintiff cannot demonstrate irreparable harm, then there is necessarily an adequate remedy at law.

terms specific to the plaintiff (Dr. Budge) and terms general to persons suffering from gender dysphoria (Dr. Gorton) the effects on persons with gender dysphoria of not being allowed to live in accordance with their gender identity.” *Id.*; A11 (citing Dkt. Nos. 10-2, 10-3). However, neither expert quantified the harm Plaintiff suffered. Dr. Budge’s ultimate conclusion is that plaintiff will have “immediate and long-term significant consequences” to Plaintiff’s mental health. (Dkt. No. 10-2), at ¶55). Dr. Gorton, speaking generally, stated that his “patients who were allowed to transition at young ages show far more resilience, health, and well-being than those who were forced to live in accordance with their birth-assigned sex.” (Dkt. No. 10-3, at ¶28). These experts did not establish that Plaintiff would suffer irreparable harm. Moreover, any such harm was described as mental health related, and as stated below, emotional distress is not irreparable.

The District Court reviewed the expert declarations, but primarily based its decision on Plaintiff’s declarations and held that “plaintiff’s declaration establishes that he has suffered emotional distress as a result of not being allowed to use the boys’ restrooms.” *Id.*; A11-412. Suffering harm does not establish irreparable harm. Harm is irreparable when it is “difficult—if not impossible—to reverse.”

Michigan v. U.S. Army Corps of Engineers, 667 F.3d 765, 788 (7th Cir. 2011).

However, “emotional suffering is commonly compensated by monetary awards” in our legal system. *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).

In addition to the injunctive relief sought, Plaintiff specifically requests in this lawsuit an award of compensatory damages to compensate Plaintiff for emotional distress caused by KUSD's alleged conduct. Pltf.'s Amd. Compl. at Prayer for Relief (d); A98. The District Court did not take into account that emotional harm could be monetarily compensated and instead incorrectly framed the alleged harm as "fear" of being disciplined and "feeling" singled out in holding that this is not harm that can be rectified by a money judgment. *Whitaker*, 2016 WL 5239829, at *6; A13.

Further, harm is not irreparable if the moving parties fail to take advantage of readily available alternatives and thereby effectively inflict the harm on themselves. *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012); *see also Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013) ("[I]rreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary."). Plaintiff states in the Amended Complaint that a single-user restrooms were made available. *See, e.g.*, Pltf.'s Amd. Compl. at ¶61; A80-81. Plaintiff refused to use the single-user bathroom, in part, due to the alleged inconvenient location of the single-user bathrooms, *see id.*, and fear of being subjected to harassment or violence from other students. *See id.* at ¶81; A86.

The inconvenience of the location of the single user restrooms is not irreparable harm. *See Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *38 (N.D. Ill. Oct. 18, 2016). "[T]he mere inconvenience of

walking to a facility that is farther does not constitute irreparable harm.” *Id.* (citing *McLean v. Aurora Loan Servicing*, No. 11CV0455-LAB NLS, 2011 WL 4635027, at *1 (S.D. Cal. Oct. 5, 2011); *Corbett v. United States*, No. 10-24106-CIV, 2011 WL 1226074, at *5 (S.D. Fla. Mar. 2, 2011)) (both stating that mere inconveniences are not irreparable harms). Also, there is no indication in the record that Plaintiff was ever bullied or risked being bullied or threatened with violence if Plaintiff were to use the single-user bathroom. *See Student*, 2016 WL 6134121, at *38.

B. Plaintiff's Excessive Delay In Moving For An Injunction Belied Any Claim For Irreparable Harm.

The District Court erred in not considering Plaintiff's excessive delay in bringing this lawsuit and seeking an injunction. Excessive delay may counsel against a finding of irreparable harm if the plaintiff has failed to prosecute a claim for injunctive relief promptly, and if there is no reasonable explanation for the delay. *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 244 (D.D.C. 2014). “An unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.” *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005). Courts will deny a preliminary injunction because excessive delay in seeking that relief belies any legitimate claim of irreparable harm. *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275-76 (2d Cir.1985)). “[D]elay alone may justify the denial of a preliminary injunction when the delay is inexplainable in light of a plaintiff's knowledge of the conduct of the defendant.” *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 894 (8th Cir. 2013).

Here, Plaintiff was contemplating this lawsuit from at least April 2016. The allegations contained in the Amended Complaint and in the Motion for Preliminary Injunction were set forth in the April 19, 2016, letter from Plaintiff's counsel to KUSD. *See* Turner Letter (Dkt. No. 18-1). KUSD responded and set forth the same position that it is taking now on April 26, 2016. *See* M&Z Letter (Dkt. No. 18-2). The April 19, 2016, letter demanded that KUSD take the very action that Plaintiff now seeks in the form of an injunction. *See* Turner Letter (Dkt. No. 18-1).

Plaintiff has known since April 19, 2016 that the 2016-2017 school year would begin in early September and that KUSD would not voluntarily honor the request to allow Plaintiff to unilaterally determine which restroom to use. Plaintiff inexplicably waited almost three months (July 19, 2016) to file a law suit, and further waited another month, until the eve of the school year (August 15, 2016), to file a motion for an injunction. Nothing changed from April to August to render the perceived need for an injunction any more pressing.

Plaintiff appears to have waited until August to seek the requested relief in an attempt to artificially create an urgency to bolster claims of immediate irreparable harm. Plaintiff offered nothing to justify this excessive delay. Plaintiff had no reasonable excuse for waiting at least three months to move for an injunction, and such a delay belies any legitimate claim of irreparable harm. *See Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975) (affirming denial of temporary injunctive relief where movant, among other things, delayed three months in making its request); *Tough Traveler, Ltd. v. Outbound Products*, 60

F.3d 964, 968 (2d Cir. 1995) (vacating preliminary injunction where movant waited four months to seek a preliminary injunction after filing suit); *Citibank, N.A.*, 756 F.2d at 276 (ten week delay in seeking injunction undercut claim of irreparable harm).

C. The Lawful Implementation of Title IX Cannot Form The Predicate For Irreparable Harm.

Even if Plaintiff could prove the existence of irreparable harm, that harm alone is not a justification for an injunction where KUSD has not violated the law. If irreparable harm was not caused by a violation of the law, a preliminary injunction cannot issue. *See Am. Mach. & Metals v. DeBothezat Impeller Co.*, 180 F.2d 342, 349 (2d Cir. 1950).

The Code of Federal Regulations permits a school district to provide separate bathrooms on the basis of students' sex. *See* 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."). The policy that Plaintiff complains of—requiring students to use the bathroom that corresponds with his or her birth sex—is specifically permitted under the law. Absent the ability to point to specific violations of law, Plaintiff's motion for a preliminary injunction cannot issue regardless of whether Plaintiff can point to irreparable harm.

IV. THE DISTRICT COURT ERRED IN ITS BALANCING OF THE RESPECTIVE HARMS.

Courts consider whether the irreparable harm the applicant will suffer without injunctive relief is greater than the harm the opposing party will suffer if the preliminary injunction is granted. *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 474–75 (7th Cir. 2001).

A balancing of the respective harms weighs against granting an injunction because Plaintiff's alleged harms are unique and isolated to Plaintiff, while the harm to KUSD extends to all students¹⁴ within the school district and the community at large. Plaintiff's alleged harms—depression, anxiety, migraines, dizziness, fainting, decreased academic performance, and possible disciplinary action during senior year—are limited to Plaintiff. In contrast, if the preliminary injunction is granted, KUSD, including parents and children in the school district will all suffer irreparable harm.

The requested injunction will have the effect of forcing policy changes and stripping KUSD of its basic authority to enact policies that accommodate the need for privacy of all students. The injunction has placed KUSD in the untenable position of being required to make policy changes to implement an interpretation of Title IX that the Federal Government has no power to enforce against it. *See Texas*, 2016 WL 4426495, at *17. The injunction also sets the stage for a situation where any student who verbally identifies as being transgender would claim to be

¹⁴ KUSD's total student enrollment during the 2015-2016 school year was 22,160 students. *See* WI Dept. of Public Instruction, 2015-16 Public Enrollment (Dkt. No. 18-4).

entitled to use any bathroom, locker room, or overnight accommodation, regardless of their biological sex.

Compliance with the requested preliminary injunction will also put 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. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (stating that it is the fundamental right of parents to make decisions concerning the care, custody, and control of their children); *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 627, 67 L. Ed. 1042 (1923) (acknowledging the right for parents to control the education of their children).

Likewise, individual students will have their constitutionally protected right of privacy violated if forced to comply with the proposed injunction. *See G.G.*, 822 F.3d at 734-35 (“An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex” and “courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind.”); *Doe*, 660 F.3d at 176-77 (3rd Cir. 2011) (concluding that a person has a constitutionally protected privacy interest in “his or her partially clothed body” and “particularly while in the presence of members of the opposite sex”); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736,

751 (E.D. Va. 2015), *rev'd in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016)

(“Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public school education is a protective environment. Furthermore, the School Board is tasked with providing safe and appropriate facilities for these students.”).

Moreover, KUSD as a public school district and extension of the state, has the right to apply Title IX, and 34 C.F.R. § 106.33, in a manner consistent with the unambiguous language of those laws. An injunction that prevents a government actor from applying federal law constitutes irreparable harm:

the authorities hold, ‘any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.’ *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (stating, whenever an enactment of a state’s people is enjoined, the state suffers irreparable injury); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (‘When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.’)

Texas, 2016 WL 4426495, at *16.

The potential irreparable harm facing KUSD far outweighs the individualized harms that Plaintiff alleges, and a balance of the equities favors denying the requested injunction. The granting of the injunction would strip KUSD of its authority to enact a bathroom, locker room, and overnight accommodation policy which is necessary to protect the basic expectations of bodily privacy of its students. *See Quilici*, 695 F.2d at 280. It is KUSD’s responsibility to safeguard

these privacy expectations for all students and the DOE. is powerless to enforce its interpretation of Title IX against KUSD.

Therefore, the potential irreparable harm facing KUSD's students and parents at large outweighs the individualized, subjective harms alleged by Plaintiff.

V. THE DISTRICT COURT ERRED IN FINDING THAT THE INJUNCTION WOULD NOT NEGATIVELY IMPACT THE PUBLIC INTEREST.

The District Court summarily found that the public interest would not be harmed, because only KUSD is bound by the injunction. *Whitaker*, 2016 WL 5239829, at *6; A15. The Court abused its discretion in failing to “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376-77, 172 L. Ed. 2d 249 (2008) (internal citations omitted). In assessing whether a preliminary injunction is warranted, a court must consider whether the moving party has demonstrated that the preliminary injunction will not harm the public interest. *Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. 2d at 1044. The public interest meaning “the consequences of granting or denying the injunction to non-parties.” *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992).

In considering the effect of the requested injunction on the broader public interest, this Court should consider the harm that would extend to other school districts in Wisconsin and across the nation. The requested injunction would force school districts in Wisconsin and within the Seventh Circuit to contemplate whether they must change their policies and alter their facilities or risk being found out of compliance with Title IX by the DOE and risk losing their federal funding.

Moreover, the *Texas* decision has made matters even more difficult for these school districts as the policy changes demanded by the Executive Branch cannot be enforced until the stay is lifted in the *Texas* case. The public interest will be served by stopping KUSD from being forced to implement a policy that has been significantly questioned by the courts, including the Supreme Court of the United States. The current injunction has the effect of enforcing the Dear Colleague Letter. That policy statement has been found to violate federal law and not entitled to deference. *See Texas*, 2016 WL 4426495, at *13, 15. The district court in *Texas* issued a nationwide injunction enjoining the DOE from enforcing the guidelines set forth in the Dear Colleague Letter. *Id.* at *17-18. The federal government is currently enjoined from enforcing any of the policies set forth in the Dear Colleague Letter against any school district in Wisconsin. *See id.* at *1 n.2.

Furthermore, an identical injunction was stayed by the Supreme Court in *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016). The standards for granting a stay in the Supreme Court are substantially similar to those utilized in this circuit. *Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010) (per curiam) (noting that a stay is appropriate if there is “a fair prospect that a majority of the Court will vote to reverse the judgment below.”). The Supreme Court or a Circuit Justice rarely grant a stay application, but they will do so if they “predict” that a majority of “the Court would . . . set the [district court] order aside.” *San*

Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302-03 (2006) (Kennedy, J., in chambers).¹⁵

VI. BECAUSE THE INJUNCTION ANALYSIS DEMONSTRATES THAT PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW, PLAINTIFF'S CLAIMS SHOULD HAVE BEEN DISMISSED ON KUSD'S MOTION TO DISMISS.

In bringing this appeal, KUSD asserted that the denial of its motion to dismiss and the granting of the preliminary injunction were “inextricably intertwined” and thus, the motion to dismiss order should also be reviewed by this Court in this proceeding. (Dkt. No. 34). After this Court denied KUSD’s separate petition to appeal the motion to dismiss order (Case No. 16-8019, App. Dkt. No. 16), KUSD filed a formal motion in this appeal asking this Court to take pendent jurisdiction over the decision on the motion to dismiss. (App. Dkt. No. 20-1).

This Court should take pendent jurisdiction and rule on the motion to dismiss. The arguments set forth above as to why the District Court erred in finding a likelihood of success on the merits support a finding that Plaintiff failed to state a claim upon which relief can be granted. *See Wisconsin Coal. for Advocacy, Inc.*, 131 F. Supp. at 1044 (“Obviously, the question of whether the plaintiff has demonstrated a reasonable likelihood of success on the merits of its claims is, to a

¹⁵ The Supreme Court takes such actions only on the rarest of occasions. *See Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) (“On such an application, since the Court of Appeals refused the stay . . . this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari.”); *See also Russo v. Byrne*, 409 U.S. 1219, 1221 (1972).

large degree, bundled up with the issues raised by the defendants' motion to dismiss.").

Here, Plaintiff has failed to state a cognizable claim because: "sex" under Title IX does not encompass transgender status; a student does not have the right to unilaterally declare his or her sex and demand to be treated like the member of the opposite sex; a policy that acknowledges the anatomical differences between men and women is not sex-stereotyping; and transgender is not suspect class under equal protection. The arguments set forth above on each of these issues shows that not only did Plaintiff fail to demonstrate a likelihood of success on the merits, but that all of Plaintiff's claims fail as a matter of law and should have been dismissed by the District Court for failure to state a claim.

CONCLUSION

KUSD respectfully requests that this Court issue an Order reversing the District Court's decision granting Plaintiff's motion for a preliminary injunction and further reverse the District Court and grant KUSD's motion to dismiss for failure to state a claim.

Dated this 12th day of December, 2016.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Defendants-Appellants, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that his Brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced serif font. The length of the brief, from Statement of the Issues through Conclusion, is 13,998 words.

Dated this 12th day of December, 2016.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

I certify that the full contents of this Appellate Brief, from cover to conclusion, plus the Separate Appendix, has been electronically filed on December 12, 2016.

Dated this 12th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Defendant-Appellants hereby certifies that on December 12, 2016, an electronic copy of the Appellate Brief and Separate Appendix was served on counsel for Plaintiff-Appellee through the ECF system as all parties are registered users.

Dated this 12th day of December, 2016.

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Case No. 16-3522

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiff-Appellee,

v.

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.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 16-CV-943
The Honorable Judge Pamela Pepper

SHORT APPENDIX OF KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD
OF EDUCATION AND SUE SAVAGLIO-JARVIS

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I hereby certify that the short required appendix bound with the brief includes all materials required by Circuit Rule 30(a) while this separate appendix complies with Circuit Rule 30(b).

Dated this 12th day of December, 2016.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Plaintiff,

Case No. 16-CV-943-PP

v.

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.

**DECISION AND ORDER GRANTING IN PART MOTION
FOR PRELIMINARY INJUNCTION (DKT. NO. 10)**

I. INTRODUCTION

On July 19, 2016, the plaintiff, Ashton Whitaker, filed this action against the defendants, Kenosha Unified School District and Sue Savaglio-Jarvis, in her official capacity as the Superintendent of the Kenosha Unified School District. Dkt. No. 1. In his complaint (amended on August 15th), the plaintiff alleges that the treatment he received at Tremper High School after he started his female-to-male transition violated Title IX, 20 U.S.C. §1681, et seq., and the Equal Protection clause of the Fourteenth Amendment. Dkt. Nos. 1, 12. On August 15, 2016, the plaintiff also filed a motion for a preliminary injunction. Dkt. No. 10. The defendants filed a motion to dismiss the next day. Dkt. No.

14. Both motions were fully briefed by August 31, 2016. Dkt. Nos. 11, 15, 17, 19, 21, 22. Following oral arguments on the motions on September 6, 19 and 20, the court issued an oral ruling denying the defendants' motion to dismiss. Dkt. No. 28. See also, Dkt. No. 29 (order denying motion to dismiss). For the reasons stated at the September 20, 2016 hearing, and supplemented here, the court grants in part the plaintiff's motion for preliminary injunction. Dkt. No. 10.

II. BACKGROUND

The plaintiff, Ash Whitaker, is a student at Tremper High School, a public high school in the Kenosha Unified School District (KUSD). Dkt. No. 12 at ¶6. The plaintiff's mother, Melissa Whitaker, brought this action as his next friend. Id. at ¶7. She is also a high school teacher at Tremper. Id.

The plaintiff's birth certificate identifies him as female, and he lived as a female until middle school. Id. at ¶21. Around seventh grade, in late 2013, the plaintiff asked his mother about treatment for transgender individuals. Id. at ¶¶21-23; Dkt. 10-2 at 17. He later was diagnosed by his pediatrician with Gender Dysphoria. Dkt. No. 12 at ¶¶15, 25. "Gender Dysphoria is the medical and psychiatric term for gender incongruence." Dkt. No. 10-2 at 6. Individuals with gender dysphoria suffer extreme stress when not presenting themselves and living in accordance with their gender identity. Id. Treatment for gender dysphoria consists of transitioning to living and being accepted by others as the sex corresponding to the person's gender identity. Dkt. No. 12 at ¶17. To pursue medical interventions, a person with gender dysphoria must live in

accordance with their gender identity for at least one year. Id. at ¶18. If left untreated, gender dysphoria may result in “serious and debilitating” psychological distress including anxiety, depression, and even self-harm or suicidal ideation. Dkt. No. 10-2 at 6-7; Dkt. No. 12 at ¶15. The plaintiff currently is under the care of a clinical psychologist, and began receiving testosterone treatment in July 2016. Id. at ¶25.

During the 2013-2014 school year, the plaintiff began telling close friends that he was a boy, and transitioning more publicly to live in accordance with his male identity. Id. at ¶23. At the beginning of his sophomore year (Fall 2014), the plaintiff told all of his teachers and peers about his transition, and asked that they refer to him using male pronouns and by his male name. Id. at ¶24. In the spring of 2015, the plaintiff asked to be allowed to use the boys’ restrooms at school. Id. at ¶27. The school administrators denied the request, stating that the plaintiff was allowed to use only the girls’ restroom or the single-user, gender-neutral restroom in the school office. Id. The plaintiff did not want to use the office restroom because it was far from his classes and only used by office staff and visitors. Id. at ¶28. Consequently, the plaintiff avoided drinking liquids, and using the bathroom at school for fear of being stigmatized as different. Id. at ¶29. During his sophomore year, the plaintiff experienced vasovagal syncope¹, stress-related migraines, depression, anxiety and suicidal thoughts. Id. at ¶31.

¹ “Vasovagal syncope . . . occurs when you faint because your body overreacts to certain triggers, such as the sight of blood or extreme emotional distress. It may also be called neurocardiogenic syncope.”

Upon learning, over the summer of 2015, that the US Department of Justice had concluded that transgender students have the right to use restrooms in accordance with their gender identity, the plaintiff began using the male-designated bathrooms at school starting his junior year, September 2015. Id. at ¶35. He used the male bathroom without incident until late February 2016. Id. at ¶36-37. Despite the lack of any written policy on the issue, the school informed the plaintiff, in early March, that he could not use the boys' restroom. Id. at 38. Nevertheless, to avoid the psychological distress associated with using the girls' restroom or the single-user restroom in the office, the plaintiff continued to use the boys' restrooms when necessary. Id. at ¶42.

The plaintiff and his mother met with an assistant principal and his guidance counselor on or about March 10, 2016 to discuss the school's decision. Id. at 44. The assistant principal told him that he could use only the restrooms consistent with his gender as listed in the school's official records, and that he could only change his gender in the records only if the school received legal or medical documentation confirming his transition to male. Id. Although the plaintiff's mother argued that the plaintiff was too young for transition-related surgery, the assistant principal responded that the school needed medical documentation, but declined to indicate what type of medical documentation would be sufficient. Id. at 45. The plaintiff's pediatrician sent two letters to the school, recommending that the plaintiff be allowed access to

<http://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/home/ovc-20184773> (last visited September 21, 2016).

the boys' restroom. Id. at 46. Despite lacking a written policy on the issue, id. at ¶60, the school again denied the plaintiff's request, because he had not completed a medical transition, but failing to explain why a medical transition was necessary. Id. at 47.

The plaintiff generally tried to avoid using the restroom at school, but when necessary, he used the boys' restroom. Id. at 48. Consequently, the school directed security guards to notify administrators if they spotted students going into the "wrong" restroom. Id. at ¶56. The school re-purposed two single-user restrooms, which previously had been open to all students, as private bathrooms for the plaintiff. Id. at ¶61. The plaintiff refused to use these bathrooms, because they were far from his classes and because using them would draw questions from other students. Id. Despite several more confrontations with the school administration, id. at ¶¶49, 51, 54, the plaintiff continued to use the boys' restroom through the last day of the 2015-16 school year. Id. at ¶54.²

The plaintiff started his senior year of high school on September 1, 2016. As of the date of oral argument on this motion (September 20, 2016), the school still refused to allow him to use the boys' restroom, and the plaintiff

² The plaintiff alleges other instances of discrimination: that the defendants refused to allow him to room with male classmates during two summer orchestra camps, resulting in his having to room alone, id. at ¶¶33-34, 86; that the defendants directed guidance counselors to give transgender students a bright green bracelet to wear (the defendants dispute this, and as of this writing, the school has not implemented such a policy), id. at ¶¶80; and the school initially refusing to allow the plaintiff to run for prom king, id. at ¶¶71-72. For the reasons the court discussed on the record at the September 19, 2016 hearing, the decision decides only the request to enjoin the defendants from prohibiting the plaintiff from using the boys' restrooms.

continued to avoid the restrooms generally, using the boys' restroom when needed.

The plaintiff seeks the following relief: an order (1) enjoining the defendants from enforcing any policy that denies the plaintiff's access to the boys' restroom at school and school-sponsored events; (2) enjoining the defendants from taking any formal or informal disciplinary action against the plaintiff for using the boys' restroom; (3) enjoining the defendants from using, causing or permitting school employees to refer to the plaintiff by his female name and female pronouns; (4) enjoining the defendants from taking any other action that would reveal the plaintiff's transgender status to others at school, including the use of any visible markers or identifiers (e.g. wristbands, stickers) issued by the district personnel to the plaintiff and other transgender students. Dkt. No. 10 at 2.

As discussed in the oral arguments before the court, this decision only addresses the first two requests; the court orally denied the fourth request without prejudice at the September 19, 2016 hearing, and the court defers ruling on the third request to allow counsel for the defendants to discuss with his client recent developments, such as the plaintiff's legal name change and this court's denial of the defendants' motion to dismiss.

III. DISCUSSION

A. Preliminary Injunction Standard

"A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need." Turnell v. CentiMark Corp.,

796 F.3d 656, 661 (7th Cir. 2015) (citing Goodman v. Ill. Dep't of Fin. and Prof'l Regulation, 430 F.3d 432, 437 (7th Cir. 2005)). “[A] district court engages in a two-step analysis to decide whether such relief is warranted.” Id. (citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc., 549 F.3d 1079, 1085–86 (7th Cir.2008)). The first phase requires the “party seeking a preliminary injunction [to] make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits.” Id. at 661-62.

If the movant satisfies the first three criteria, the court then considers “(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the ‘public interest’).” Id. at 662. When balancing the potential harms, the court uses a ‘sliding scale’: “the more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor.” Id.

B. The Plaintiff Has Shown a Likelihood That His Claims Will Succeed on the Merits.

“The most significant difference between the preliminary injunction phase and the merits phase is that a plaintiff in the former position needs only to show ‘a likelihood of success on the merits rather than actual success.’”

Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 782 (7th Cir. 2011)

(quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)).

In the Seventh Circuit, the court “only needs to determine that the plaintiff has some likelihood of success on the merits.” Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 896 (7th Cir. 2001). As the plaintiffs argued, this is a relatively low standard.

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. Dkt. No. 28. The court found that, because no case defines “sex” for the purposes of Title IX, the plaintiff might succeed on his claim that that word includes transgender persons. The court found that, while the defendants raised a number of arguments in support of their claim that the word “sex” does not encompass transgender persons, much of that case law came from cases interpreting Title VII, a different statute with a different legislative history and purpose. The court also found that there was case law supporting the plaintiff’s position, as

well as the Department of Education's "Dear Colleague" letter, which, the court found, should be accorded Auer deference.

The court also noted that the 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 (the sex the school insists is his).

The court also found that the plaintiff had alleged sufficient facts to support his claims that the defendants had violated his equal protection rights. While the court did not, at the motion to dismiss stage, and does not now have to decide whether a rational basis or a heightened scrutiny standard of review applies to the plaintiff's equal protection claim, at this point, the defendants have articulated little in the way of a rational basis for the alleged discrimination. The defendants argue that students have a right to privacy; the court is not clear how allowing the plaintiff to use the boys' restroom violates other students' right to privacy. The defendants argue that they have a right to set school policy, as long as it does not violate the law. The court agrees, but notes that the heart of this case is the question of whether the current (unwritten) policy violates the law. The defendants argue that allowing the plaintiff to use the boys' restroom will gut the Department of Education regulation giving schools the discretion to segregate bathrooms by sex. The court noted at both the September 19 and September 20 hearings that it did not agree.

Because of the low threshold showing a plaintiff must make regarding likelihood of success on the merits, see Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir.1999), and because the plaintiff has articulated several bases upon which the court could rule in his favor, the court finds that the defendant has satisfied this element of the preliminary injunction test.

C. The Plaintiff Has Shown that He Has No Adequate Remedy at Law.

The court observed at the September 20 hearing that neither party focused much attention, either in the moving papers or at oral argument, on the question of whether the plaintiffs had an adequate remedy at law. The plaintiffs argued that plaintiff Ash Whitaker has only one senior year. They argued that even if, at the end of this lawsuit, the plaintiffs were to prevail, no recovery could give back to Ash the loss suffered if he spent his senior year focusing on avoiding using the restroom, rather than on his studies, his extra-curricular activities and his college application process. The defendants made no argument that the plaintiffs have an adequate remedy at law. The court finds, therefore, that the plaintiffs have shown that they have no adequate remedy at law.

D. The Plaintiff Has Shown That He Will Suffer Irreparable Injury If The Court Does Not Enjoin The School's Actions.

The parties focused most of their arguments on the element of irreparable harm. While alleged irreparable harm does not need to occur before a court may grant injunctive relief, there must be more than a mere possibility. United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed.

1303 (1953); Bath Indus., Inc. v. Blot, 427 F.2d 97, 111 (7th Cir. 1970). Put another way, the irreparable harm must be *likely* to occur if no injunction issues. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 21–23 (2008).

During the oral arguments, the plaintiff argued that the defendants' denial of access to the boys' restroom has caused and will continue to cause medical and psychological issues that his present and future health. In support of this argument, the plaintiff pointed to the declarations from Dr. Stephanie Budge and Dr. R. Nicholas Gorton, M.D., which explain gender dysphoria and discuss, both in terms specific to the plaintiff (Dr. Budge) and terms general to persons suffering from gender dysphoria (Dr. Gorton) the effects on persons with gender dysphoria of not being allowed to live in accordance with their gender identity. See Dkt. Nos. 10-2, 10-3. The defendants responded that the court should grant little weight or credibility to these affidavits, because Dr. Budge barely knew Ash Whitaker, Dr. Gorton did not know him at all, and neither affidavit quantified the harms they described.³

Relying primarily on the plaintiff's declaration (which the defendants did not challenge at the hearing), dkt. no. 10-1, the court has no question that the plaintiff's inability to use the boys' restroom has caused him to suffer harm. The plaintiff's declaration establishes that he has suffered emotional distress

³ While "[a]ffidavits are ordinarily inadmissible at trial . . . they are fully admissible in summary proceedings, including preliminary-injunction proceedings." Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997)(citing Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995)).

as a result of not being allowed to use the boys' restrooms. While the school allows him to use the girls' restrooms, his gender identity prevents him from doing so. He has refused to use the single-user bathrooms, due to distance from his classes and, more to the point, the embarrassment and stigma of being singled out and treated differently from all other students. Because the defendants do not allow him to use the boys' restrooms, he has begun a practice of limiting his fluid intake, in an attempt to avoid having to use the restroom during the school day. Lack of hydration, however, exacerbates his problems with migraines, fainting and dizziness. He describes sleeplessness, fear of being disciplined (and having that impact his school record ahead of his efforts to get into college), and bouts of tearfulness and panic.

The plaintiff also attested to the fact that the emotional impact of his inability to use the restrooms like everyone else, and his being pulled out of class for discipline in connection with his restroom used, impacted on his ability to fully focus on his studies. The Seventh Circuit has recognized that discrimination that impacts one's ability to focus and learn constitutes harm. See e.g., Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 853 (7th Cir. 1999).

To reiterate, the court finds that Ash has suffered harm. The defendants intimated in their arguments, however, that such harm was not irreparable, because the plaintiffs had not provided any evidence that the harm would be long-lasting, or permanent. It was in this context that the defendants challenged the professional declarations the plaintiffs had provided from

experts in the field of gender dysphoria and gender transition. As the court stated at the September 20, 2016 hearing, however, the plaintiffs are not required to prove that Ash will be forever irreversibly damaged in order to prove irreparable harm. The Seventh Circuit has noted that irreparable harm is harm that “would [not] be rectifiable following trial.” Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc., 549 F.3d 1079, 1088 (7th Cir. 2008). It has held that irreparable harm is “harm that cannot be prevented or fully rectified by the final judgment after trial.” Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386 (7th Cir. 1984).

The plaintiff’s spending his last school year trying to avoid using the restroom, living in fear of being disciplined, feeling singled out and stigmatized, being subject to fainting spells or migraines, is not harm that can be rectified by a monetary judgment, or even an award of injunctive relief, after a trial that could take place months or years from now. The court finds that the plaintiffs have satisfied the irreparable harm factor.

E. The Plaintiff’s Irreparable Harm Outweighs Any Harm The Defendants Might Experience and the Effects Granting the Injunction Will Have on Nonparties.

The balancing of the harms weighs in the plaintiffs’ favor. The court has found that Ash Whitaker has suffered irreparable harm, and will continue to do so if he is not allowed to use the boys’ restrooms. The court must balance against that harm the possible harm to the defendants.

In their moving papers, the defendants argued that requiring them to allow Ash to use the boys’ restrooms would subject them to financial burdens

and facility changes. They did not identify why allowing Ash to use the boys' restrooms would create a financial burden; the court cannot, on the evidence before it, see what cost would be incurred in allowing Ash to use restrooms that already exist. The defendants provided no evidence regarding any facilities that they would have to build or provide.

The defendants also argued that a requirement that they allow Ash to use the boys' restrooms would violate the privacy rights of other students. They provided no affidavits or other evidence in support of this argument. The evidence before the court indicates that Ash used the boys' restroom for some seven months without incident or notice; the defendants prohibited him from using them only after a teacher observed Ash in a boys' restroom, washing his hands. This evidence contradicts the defendants' assertions that allowing Ash to use the boys' restroom would violate other students' privacy rights.

The defendants argued that granting the injunctive relief would deny them the ability to exercise their discretion to segregate bathrooms by sex, as allowed by the regulations promulgated by the Department of Education. This argument is a red herring; the issuance of the injunction will not disturb the school's ability to have boys' restrooms and girls' restrooms. It will require only that Ash, who identifies as a boy, be allowed to use the existing boys' restrooms.

The defendants argued that the injunctive relief would require the defendants, in the first month of the new school year, to scramble to figure out policies and procedures to enable it to comply with the order of relief. This

relief, however, does not require the defendants to create policies, or review policies. It requires only that the defendants allow Ash to use the boys' restrooms, and not to subject him to discipline for doing so.

The court finds that the balance of harms weighs in favor of the plaintiff.

F. Issuance of the Injunction Will Not Negatively Impact the Public Interest.

Finally, the court finds that issuance of the injunction will not harm the public interest. The defendants argue that granting the injunction will force schools all over the state of Wisconsin, and perhaps farther afield, to allow students who self-identify with a gender other than the one reflected anatomically at birth to use whatever restroom they wish. The defendants accord this court's order breadth and power it does not possess. This order mandates only that the defendants allow one student—Ash Whitaker—to use the boys' restrooms for the pendency of this litigation. The Kenosha Unified School District is the only institutional defendant in this case; the court's order binds only that defendant. The defendants have provided no proof of any harm to third parties or to the public should the injunction issue.

G. The Defendants' Request for a Bond

At the conclusion of the September 20, 2016 hearing, the defendants asked that if the court were inclined to grant injunctive relief, it require the plaintiffs to post a bond in the amount of \$150,000. The defendants first cited Rule 65, and then cited the Wisconsin Supreme Court's decision in Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931). The defendants argued that, in the event that events revealed that this court had improvidently

granted the injunction, the Muscoda case provided that the court should impose a bond sufficient to reimburse the defendants' costs and attorneys' fees, and counsel estimated that those fees could reach \$150,000. The plaintiffs objected to the court requiring a bond, citing the plaintiffs' limited means.

Rule 65(c) states that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The rule leaves to the court's discretion the question of the proper amount of such a bond, and tethers that consideration to the amount of costs and damages sustained by the wrongfully enjoined party.

Counsel for the defendants argued that under Wisconsin law, "costs and damages" includes the legal fees the defendants would incur in, presumably, seeking to overturn the injunction, and argued that those fees could amount to as much as \$150,000. In support of this argument, he cited Muscoda Bridge Co. v. Worden-Allen Co., 207 Wis. 22 (Wis. 1931), which held that "[i]t is the established law of this state that damages, sustained by reason of an injunction improvidently issued, properly include attorney fees for services rendered in procuring the dissolution of the injunction, and also for services upon the reference to ascertain damages." Id. at 651. The problem with this argument is that Seventh Circuit law says otherwise.

[T]he Seventh Circuit has determined that, for purposes of Fed. R. Civ. P. 65(c), "costs and damages" damages do not include attorneys' fees. Rather, in the absence of a statute authorizing

such fees . . . an award of attorneys' fees is only proper where the losing party is guilty of bad faith."

Minnesota Power & Light Co. v. Hockett, 14 Fed. App'x 703, 706 (7th Cir. 2001), quoting Coyne-Delany Co. v. Capital Dev. Bd. Of State of Ill., 717 F.2d 385, 390 (7th Cir. 1983)). See also, Int'l Broth. Of Teamsters Airline Div. v. Frontier Airlines, Inc., No. 10-C-0203, 2010 WL 2679959, at *5 (E.D. Wis. July 1, 2010). When there is a "direct collision" between a federal rule and a state law, the Seventh Circuit has mandated that federal law applies. Id. at 707.

The defendants did not identify any statute authorizing an award of attorneys' fees should they succeed in overturning the injunction. Thus, in order to determine the amount of a security bond under Rule 65(c), the court must consider the costs and damages the defendants are likely to face as a result of being improvidently enjoined, but not the legal costs they might incur in seeking to overturn the injunction. It is unclear what damages or costs the defendants will incur if they are wrongfully enjoined. As discussed above, the defendants have not demonstrated that it will cost them money to allow Ash to use the boys' restrooms. Because it is within this court's discretion to determine the amount of a security bond, and because the defendants have not demonstrated that they will suffer any financial damage as a result of being required to allow Ash to use the boys' restrooms, the court will not require the plaintiffs to post security.

IV. CONCLUSION

For the reasons explained above, the court **GRANTS IN PART** the plaintiff's motion for a preliminary injunction. Dkt. No. 10. The court **ORDERS** that defendants Kenosha Unified School District and Sue Savaglio-Jarvis (in her capacity as superintendent of that district) are **ENJOINED** from

(1) denying Ash Whitaker access to the boys' restrooms;

(2) enforcing any policy, written or unwritten, against the plaintiff that would prevent him from using the boys restroom during any time he is on the school premises or attending school-sponsored events;

(3) disciplining the plaintiff for using the boys restroom during any time that he is on the school premises or attending school-sponsored events; and

(4) monitoring or surveilling in any way Ash Whitaker's restroom use.

The court **DENIES** the defendants' request that the court require the plaintiffs to post a bond under Rule 65(c).

Dated in Milwaukee, Wisconsin this 22nd day of September, 2016.

BY THE COURT:



HON. PAMELA PEPPER
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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

Case No. 16-cv-00943-pp

Plaintiff,

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.

****AMENDED** ORDER DENYING DEFENDANTS' RULE 12(b)(6) MOTION TO
DISMISS THE AMENDED COMPLAINT (DKT. NO. 14)**

On September 6, 2016, the court heard argument on the defendants' Rule 12(b)(6) motion to dismiss the amended complaint (Dkt. No. 14). See Dkt. No. 26 (court minutes from oral argument). On September 19, 2016, after having reviewed the pleadings and attachments and considered the parties' oral arguments, the court delivered its oral ruling, denying the defendants' motion to dismiss the amended complaint. Dkt. No. 28 (court minutes memorializing oral ruling).

For the reasons stated on the record during that oral ruling, the court

ORDERS that the defendants' Rule 12(b)(6) motion to dismiss the amended complaint is **DENIED**. Dkt. No. 14.

Dated in Milwaukee, Wisconsin this 24th day of September, 2016.

BY THE COURT:

A handwritten signature in black ink, appearing to be 'P. Pepper', written over a horizontal line.

HON. PAMELA PEPPER
United States District Judge

1 APPEARANCES CONT'D:

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TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

* * *

THE COURT: Have a seated everyone, please.

THE CLERK: Court calls a civil case, 2016-CV-943,
Ashton Whitaker vs. Kenosha Unified School District No. 1 Board
of Education, et al.

Please state your appearances starting with the
attorneys for the plaintiffs -- or for the plaintiff.

MR. WARDENSKI: Joseph Wardenski for plaintiff.

MR. ALLEN: This is Michael Allen with Relman Dane
Colfax, also for the plaintiff.

THE COURT: Okay, sorry. So we have Mr. Wardenski, we
have Mr. Allen and going on Mr. Pledl.

MR. PLEDL: Robert Theine Pledl also for the
plaintiffs.

THE COURT: Anybody else for the plaintiffs?

MS. TURNER: This is Ilona Turner with Transgender Law
Center for the plaintiff.

THE COURT: Thank you.

MS. PENNINGTON: And Allison Pennington with
Transgender Law Center for the plaintiff.

THE COURT: Okay. And for the defendant?

MR. STADLER: Good afternoon, Judge. Attorney Ron
Stadler on behalf of the defendants.

1 MR. SACKS: Jonathan Sacks on behalf of the
2 defendants.

3 THE COURT: Good afternoon to everyone.

4 As I think everyone's aware, we had scheduled today's
5 hearing after you all had presented -- or Mr. Wardenski and
6 Mr. Stadler presented oral argument on the defendant's motion to
7 dismiss. And I asked you all, especially given the lateness of
8 the hour when we finished up those oral arguments, to give me
9 some time to consider them prior to issuing a ruling. And I
10 told you that I was going to issue an oral ruling today because
11 of the fact that there's also a preliminary -- new motion for a
12 preliminary injunction and depending on how the motion to
13 dismiss were to go we'd need to decide whether or not to proceed
14 further on a motion for preliminary injunction. So the purpose
15 of today's hearing is for me to give you a ruling on the motion
16 to dismiss.

17 As you all are aware, the standard for the motion to
18 dismiss or for a ruling on a 12(b)(6) motion to dismiss is
19 pretty straightforward. A motion to dismiss under 12(b)(6)
20 challenges the sufficiency of the complaint, not the merits in
21 the complaint. So in order to consider a motion to dismiss I
22 have to accept as true all the well-pleaded facts in the
23 complaint and whatever inferences can be drawn those have to be
24 drawn in favor of the plaintiff.

25 So the complaint has to provide the defendant with

1 fair notice of the basis for the claim and also the allegations
2 in it have to be facially plausible. A claim is facially
3 plausible when the plaintiff pleads factual content that allows
4 the court to draw the reasonable inference that the defendant is
5 liable for the misconduct that's alleged.

6 And I'm quoting there from *Ashcroft vs. Iqbal*, 556
7 U.S. 662 at 678, 2007.

8 The standard for dismissal or considering a motion to
9 dismiss, of course, is also stated in *Bell Atlantic Corporation*
10 *vs. Twombly*, 550 U.S. 544, 555. Sorry, *Iqbal* is 2009. *Twombly*
11 is 2007.

12 So there is the standard that has to be considered.
13 And at the end of the oral argument a week or so ago, after the
14 parties had gone into extensive discussions I noted that we
15 needed to come back to that standard in evaluating the parties'
16 arguments.

17 Parties discussed a lot of facts and went into some
18 deep detail on a number of different cases, and I wanted to pull
19 us back to the issue of a motion to dismiss and whether or not
20 we were in a situation where the complaint had enough
21 well-pleaded facts to sustain in reasonable inferences in favor
22 of the plaintiff to sustain notice of the claim and facial
23 plausibility.

24 In the motion to dismiss I believe the defendants --
25 or I would characterize the defendants' arguments as being that

1 in many respects regardless of the factual claims that the
2 plaintiffs alleged that the plaintiffs could not prevail as a
3 matter of law on the two claims raised in the complaint. And
4 those two claims are: Number one, that the defendants violated
5 Title IX of the Education Amendments of 1972, and; number two,
6 that under 42 U.S.C. 1983, the defendants violated the
7 plaintiff's constitutional rights under the Equal Protection
8 Clause.

9 So those are the two claims pending in the complaint.
10 And the defendants argued that the plaintiffs could not prevail
11 as a matter of law on either one of those claims, and so most of
12 defendants' arguments were with regard to those legal issues.

13 The plaintiffs emphasized a number of the factual
14 allegations in the complaint in support of their arguments, but
15 I would think that for the most part the discussions the last
16 time we were together were in relation to the law. So I'm going
17 to start with a discussion of the law that the parties raised
18 and start with Title IX, which is the first cause of action in
19 the complaint.

20 Title IX, as the parties both agree, indicates that no
21 person in the United States shall, on the basis of sex, be
22 excluded from participation in, be denied the benefits of, or be
23 subjected to discrimination under any education program or
24 activity receiving financial assistance.

25 And the plaintiffs begin by alleging that, in Count 1,

1 that the defendants do receive federal funding which is one of
2 the basic starting premises for being covered by Title IX. I
3 don't understand there to be any objection or dispute as to that
4 issue. So the issue is really with regard to whether or not the
5 defendants discriminated against the plaintiff, are treating him
6 differently from other students -- and I'm now using the
7 language of the complaint -- "based on his gender identity, the
8 fact that he is transgender, and his nonconformity to male
9 stereotypes."

10 We spent a great deal of time at the oral arguments
11 when we were last together on the word "sex," S-E-X. Title IX
12 indicates, as I just stated, that it is prohibited for any
13 person to be discriminated against on the basis of sex.

14 The defendants argued -- first of all, I think they
15 acknowledged that there's no caselaw, there's no court in the
16 Seventh Circuit, lower court or appellate court that has looked
17 at the question of whether that word "sex" covers transgender
18 persons in the Title IX context. So we don't have any guidance
19 in Seventh Circuit caselaw on that issue.

20 But the defendants argued that it was clear that the
21 word "sex" was the gender that appeared on one's birth
22 certificate. And I think that Mr. Stadler and I discussed that
23 in some detail several times. And I inquired of both parties
24 whether or not either party could cite a case that defined "sex"
25 for the purposes of Title IX, the word "sex" for the purposes of

1 Title IX as the gender that appeared on one's birth certificate.

2 The defendants, Mr. Stadler, indicated that he
3 couldn't point to a case that said as much. Mr. Wardenski
4 indicated that he recalled, but didn't want to be held to it,
5 that *Doe vs. City of Belleville, Illinois*, a Seventh Circuit
6 decision, had indicated that "sex" was not confined -- the
7 definition of "sex" was not confined in the Title VII context to
8 the gender that appeared on one's birth certificate. He later
9 then submitted a letter indicating that while that decision
10 didn't specifically say that, it did indicate that the term
11 "sex" encompassed more than biology.

12 So in my mind the starting point for this discussion
13 about whether the complaint states a claim is whether or not
14 there is any set of circumstances or whether or not it is
15 plausible, to use the language of *Iqbal* and *Twombly*, for the
16 plaintiffs to argue that there's a question as to whether or not
17 the word "sex" for the purposes of Title IX encompasses the
18 plaintiff.

19 In considering that question I followed the lead of a
20 case that the parties discussed at some length, which is the
21 *G.G.* case out of the Fourth Circuit. And I understand that that
22 case right now, the Supreme Court has stayed the preliminary
23 injunction order, but that court began by looking at whether or
24 not at the time that the law was passed the dictionary
25 definition of "sex" confined "sex" to if -- to use the

1 defendant's words, the gender on one's birth certificate.

2 If one takes a look right now at dictionary
3 definitions of "sex," one finds some variety. Merriam-Webster
4 Dictionary defines "sex" as, quote, the state of being male or
5 female, unquote. And then it defines the term "male," the word
6 "male," as a man or boy, a male person.

7 Webster's New World College Dictionary, which if you
8 look at it online is entitled, "Your Dictionary," defines "sex"
9 as "either of the two divisions, male or female, into which
10 persons, animals, or plants are divided, with reference to their
11 reproductive functions."

12 And then there's a secondary definition: "the
13 character of being male or female; all the attributes by which
14 males and females are distinguished."

15 If you look at the term "male" under that dictionary,
16 the Webster's New World College Dictionary, it says "male" as
17 "someone of the sex that produces sperm, or something that
18 relates to this sex," and then the secondary definition seems to
19 be almost identical to the first one except that it adds, "as
20 opposed to a female who produces an egg."

21 Dictionary.com, online dictionary, is similar to the
22 Webster's New World College Dictionary, it defines "sex" as
23 "either the male or female division of a species, especially as
24 differentiated with reference to the reproductive functions."

25 It defines "male" as "a person bearing an X and Y

1 chromosome pair in the cell nuclei and normally having a penis,
2 scrotum, and testicles, and developing hair on the face at
3 adolescence; a boy or a man."

4 So those are current dictionary definitions from three
5 different dictionaries. In the *G.G. case, G.G. vs. Gloucester*
6 *County School Board*, 822 F.3d 709, Fourth Circuit, April 19th of
7 2016, at page 720 I believe it is, that quote started with
8 dictionary definitions from the drafting era of the statute.
9 And they had indicated that if you looked at the American
10 College Dictionary circa 1970, you would find the definition of
11 "sex" as "the character of being either male or female." That's
12 the same as that Merriam-Webster definition. Or "the sum of
13 those anatomical and physiological differences with reference to
14 which the male and female are distinguished."

15 Then it also looked to Webster's Third New
16 International Dictionary. There are 1800 different kinds of
17 Webster's dictionaries one discovers when one engages in one of
18 these exercises.

19 Webster's Third New International Dictionary defines
20 "sex" as "the sum of the morphological, physiological and
21 behaviorial peculiarities of living beings that subserves
22 biparental reproduction with its concomitant genetic
23 segregations and recombination which underlie most evolutionary
24 change, that in its typical dichotomous occurrence is usually
25 genetically controlled and associated with special sex

1 chromosomes, and that is typically manifested as maleness or
2 femaleness."

3 The conclusion that the *G.G.* court came to when it
4 reviewed those two definitions, the second of which was
5 virtually unpronounceable, is "that a hard-and-fast binary
6 division on the basis of reproductive organs -- although useful
7 in most cases -- was not universally descriptive. The
8 dictionaries, therefore," and by "dictionaries" it means those
9 two to which it referred -- "used qualifiers such as reference
10 to the 'sum of' various factors, or ' typical dichotomous
11 occurrence,' and 'typically manifested as maleness and
12 femaleness.'"

13 When the *G.G.* court concluded that none of that
14 terminology was particularly helpful in determining what it
15 means to have the character of being either male or female, if
16 any of those indicators or if -- or if more than one of those
17 indicators points in different directions.

18 In other words, if -- if a morphological indicator
19 points to "maleness" and a behavioral peculiarity points to
20 "femaleness," the *G.G.* court said that those definitions didn't
21 really help you if you had characteristics that pointed in
22 different directions.

23 And given the variety of dictionary definitions that I
24 have just recounted between the two that are listed in *G.G.* and
25 the three that I found myself, I agree with that court's

1 conclusion. None of these definitions assist in figuring out
2 whether or not the word "sex" -- how to interpret the word "sex"
3 if there's an individual who shows some of the characteristics
4 that we associate with biological sex and some of the
5 characteristics that we associate with other definitions of sex.

6 The Seventh Circuit has acknowledged in the Title VII
7 context, the employment statute context, in several cases, the
8 difficulties that arise in trying to -- to use that word "sex"
9 -- or in some cases "gender" which we sort of tend to use
10 interchangeably with "sex" -- to categorize individuals under
11 Title VII.

12 So in *Doe vs. City of Belleville*, 119 F.3d 563, the
13 1997 decision to which the plaintiffs referred, the panel
14 writing, Judges Ripple, Manion and Rovner -- Judge Rovner was
15 the author -- went through an extended discussion and I would
16 say a struggle to consider why it is that if a plaintiff claims
17 to have been harassed by someone making sexual advances toward
18 that plaintiff that have sexual overtones, the court struggled
19 with why it should matter whether the victim was harassed on the
20 basis of his or her sex.

21 The court talked about the fact that having someone
22 make sexual advances to you when you don't want them doesn't
23 seem so much related to what your gender is but the fact that
24 you're being put in the position where you're being subjected to
25 sexual advances that you don't want to be subjected to.

1 In the Seventh Circuit's decision in *Hively*, which we
2 discussed at the last hearing as well, 2016 Westlaw 4039703, the
3 *Hively* court talked about discrimination based on sexual
4 orientation and stated that it "does not condone," and I quote:
5 "a legal structure in which employees can be fired, harassed,
6 demeaned, singled out for undesirable tasks, paid lower wages,
7 demoted, passed over for promotions, and otherwise discriminated
8 against solely based on who they date, love, or marry."

9 Now, that was related to a sexual orientation claim
10 under Title VII. That's at page 14 of that decision, Seventh
11 Circuit, July 28th of 2016.

12 There are cases out there, not necessarily binding in
13 this court -- not binding on this court, but that discuss how
14 sometimes absurd results can obtain by trying to fit people into
15 biological gender boxes.

16 For example, *Schroer*, which we talked about at the
17 last hearing, *Schroer vs. Billington*, 577 F Supp.2d 293, 307,
18 that's the D.C. District Court 2008, it discussed this
19 hypothetical:

20 Imagine that an employee is fired because she
21 converts from Christianity to Judaism. Imagine
22 too that her employer testifies that he harbors
23 no bias toward either Christians or Jews but
24 only toward "converts." That would be a clear
25 case, said the court, of discrimination

1 "because of religion." No courts would take
2 seriously the notion that "converts" are not
3 covered by the statute. Discrimination
4 "because of religion" easily encompasses
5 discrimination because of a change of religion.
6 But in cases where the plaintiff has changed
7 her sex, and faces discrimination because of
8 the decision to stop presenting as a man and to
9 start appearing as a woman, courts have
10 traditionally carved such persons out of the
11 statute -- and again this is Title VII, not
12 Title IX -- carved such persons out of the
13 statute by concluding that "transsexuality" is
14 unprotected by Title VII. In other words,
15 courts have allowed their focus on the label
16 "transsexual" to blind them to the statutory
17 language itself.

18 Again, statutory language of Title VII. There are
19 other courts which reach a similar conclusion.

20 The defendants argued in the motion to dismiss that
21 pursuant to or under the Seventh Circuit's decision in *Ulane vs.*
22 *Eastern Airlines*, 742 F.2d 1081, which is a Seventh Circuit
23 decision from 1984, that there was simply no way or there is no
24 way that the plaintiffs could prevail on an argument that the
25 word "sex" in Title IX would apply to the plaintiff. And that

1 case does definitively say that under Title VII, Title VII does
2 not provide protection for "transsexual" I think is the word
3 that's used there, or "transsexual persons."

4 We had some discussion at the previous hearing about
5 the fact that that's a 1984 case. A lot of water has passed
6 under the bridge since that time. But the defendants also
7 argued that it hasn't been overruled by the Seventh Circuit or
8 by the United States Supreme Court and it remains on the books
9 as good law.

10 So the question is whether or not that decision from
11 the Seventh Circuit in 1984, in the context of Title VII,
12 mandates that the plaintiffs cannot prevail in a Title IX case
13 as presented here today. I don't believe that that is the case
14 sufficient to grant a motion to dismiss, for several reasons.

15 First, *Ulane* stated at page 1085:

16 It is a maxim of statutory construction that,
17 unless otherwise defined, words should be given
18 their ordinary, common meaning.

19 Quoting *Perrin vs. United States*, 444 U.S. 37, 42,
20 1979.

21 The phrase in Title VII prohibiting
22 discrimination based on sex, in its plain
23 meaning, implies that it is unlawful to
24 discriminate against women because they are
25 women and against men because they are men.

1 The words of Title VII do not outlaw
2 discrimination against a person who has a
3 sexual identity disorder, i.e., a person born
4 with a male body who believes himself to be
5 female, or a person born with a female body who
6 believes herself to be male; a prohibition
7 against discrimination based on an individual's
8 sex is not synonymous with a prohibition
9 against discrimination based on an individual's
10 sexual identity disorder or discontent with the
11 sex into which they were born.

12 That's a quote from the *Ulane* decision.

13 Interestingly, though, *Ulane* does not dig into the
14 definition of the word "sex" any more than some of its
15 contemporary decisions do. Instead it says that the "plain
16 meaning" of the word "sex" implies that it's unlawful to
17 discriminate against women because they're women and men because
18 they're men. It doesn't actually state a definition of the word
19 "sex."

20 Second of all, the court in *Ulane* conceded that -- and
21 again, *Ulane* is a Title VII case -- that there's almost no
22 legislative history regarding the prohibition of sex
23 discrimination in Title VII.

24 And the court goes into some discussion about how the
25 prohibition in Title VII was originally designed to prohibit

1 discrimination based on race and that at the last minute there
2 were some what I think the *Ulane* court might have characterized
3 as machinations to throw sex in for political reasons, but that
4 there really is no legislative history regarding what the
5 legislator meant by -- the legislature meant by "sex" when it
6 included it in Title VII.

7 That discussion, of course, is unique to Title VII.
8 This is a Title IX case. So the issue of legislative history or
9 lack thereof relating to Title VII, doesn't really apply in the
10 Title IX context. There may be reasons, there may not be
11 reasons for looking at the word "sex" differently under Title IX
12 and under Title VII. We haven't gotten that far yet because
13 again we're at the motion-to-dismiss stage.

14 In addition, there were some discussion during oral
15 argument between the parties or disagreement between the parties
16 about whether or not the fact that Congress has not put a
17 further gloss on the definition of the word "sex" in either
18 Title VII or Title IX indicates a legislative intent either to
19 exclude or to include, or something else, transgender persons.
20 And both sides had arguments with regard to what the failure of
21 the statute to change might mean.

22 In my mind that simply illustrates that there are two
23 different arguments to be made on that topic and we haven't
24 gotten to the point of flushing out those arguments as of yet.

25 Third, with regard to *Ulane*. As we did discuss at the

1 last hearing, *Ulane* predates the Supreme Court's decision in
2 *Price Waterhouse vs. Hopkins* by five years. The Seventh Circuit
3 has stated in the *Hively* decision that Congress intended, and I
4 quote, "to strike at the entire spectrum of disparate treatment
5 of men and women resulting from sex stereotypes." And it quotes
6 *Price Waterhouse* at page 251 in support of that statement.

7 So *Price Waterhouse* does exist, it does say what it
8 says, and it came along five years after the *Ulane* decision.

9 And I've already noted, finally, that the *Ulane*
10 decision deals with Title VII and not with Title IX.

11 *Ulane* also, I note -- the court in *Ulane* also
12 indicated -- the district court in *Ulane* had made a finding that
13 the plaintiff in that case was female. And the *Ulane* court,
14 toward the end of the decision, indicated that even if the court
15 accepted the district court's finding that the plaintiff is
16 female, the court had not made factual findings relating to
17 whether or not the defendant had actually discriminated against
18 her based on the fact that she was female.

19 The *Ulane* case, therefore, was in a different
20 procedural posture than this one, because at this point there
21 has not even been a legal determination made, although I think
22 the parties have urged me to do so, as to whether or not the
23 plaintiff is male pursuant to whatever the definition of sex is
24 under Title IX.

25 So, to sum up, there is no case in the Seventh Circuit

1 that defines "sex" under Title IX. No court has specifically
2 addressed whether or not the prohibition of discrimination on
3 sex that's described in Title IX encompasses transgender
4 students. The caselaw is scattered, I would say.

5 In the Title VII context, if that is, in fact, the
6 appropriate context to draw from in interpreting Title IX, there
7 is a dispute -- one can assume, although it may not be
8 specifically stated but there were arguments to this effect at
9 the last hearing -- with regard to whether or not the plaintiff
10 is male or female, an issue that would need to be resolved in
11 order to get to the question of discrimination. And as I
12 indicated, I don't believe that *Ulane* prohibits a cause of
13 action at the motion-to-dismiss stage.

14 I'd also like to briefly address the *G.G.* case. As
15 the defendants pointed out, the Supreme Court took the step to
16 stay the issuance of the preliminary injunction that the Fourth
17 Circuit had approved. And I am not relying on *G.G.* as being
18 binding precedent. It wouldn't be binding precedent on this
19 court even if the Supreme Court had not stayed the issuance of
20 the preliminary injunction, of course, because the Seventh
21 Circuit law binds this court not the Fourth Circuit.

22 But I note that one of the defendant's arguments was
23 that aside from the Supreme Court's action, perhaps casting
24 doubt on some of the holding in *G.G.*, and there are a number of
25 holdings in *G.G.*, that *Texas vs. United States*, 2016 Westlaw

1 4426495 in the Northern District of Texas, August 21st, 2016,
2 might also cast doubt on *G.G.*

3 The Texas case was the case in which the State of
4 Texas attempted to push back against a request for national
5 injunctive relief. That case may or may not cast doubt on the
6 reasoning in *G.G.* I think that is an issue that is beyond the
7 scope of the motion to dismiss because, again, *G.G.* is not the
8 binding precedent here.

9 Even if we reach a stage at some point where I were to
10 conclude or some other judge in this district were to conclude
11 that Title IX does not project -- protect transgender persons --
12 and I note that I haven't reached a decision one way or the
13 other. I think it's premature to reach that decision. But if a
14 court were to reach that decision in this instance, I believe
15 that the plaintiffs have alleged sufficient facts to sustain a
16 gender stereotype claim.

17 And again, I would refer back to *Price Waterhouse vs.*
18 *Hopkins*, 490 U.S. 228 at 251, 1989. Price Waterhouse discussed
19 clearly and in detail the legal relevance of sex stereotyping
20 and the fact that sex stereotyping is not allowed, at least
21 again in the Title VII context.

22 Also, the *Kastl, K-A-S-T-L, vs. Maricopa County* case,
23 325 F.Appx. 492 at 493, Ninth Circuit, a 2009 case, finding that
24 after *Price Waterhouse* and a Ninth Circuit decision, *Schwenk vs.*
25 *Hartford*, 205 F.3d 1187, at 1201-02, year 2000, Ninth Circuit

1 case, "it is unlawful to discriminate against a transgender or
2 any other person because he or she does not behave in accordance
3 with an employer's expectations for men or women."

4 Again, in Title VII context that's the reference to
5 employers.

6 And so regardless of what conclusion a court might
7 come to with regard to the word "sex" and whether it covers the
8 plaintiff in the Title IX discrimination context in terms of
9 discrimination, there are facts pleaded in the complaint, and I
10 think they're clear enough to place the defendants on notice
11 that the defendants -- or the plaintiff alleges that the
12 defendants treated him differently because they didn't conform
13 to gender stereotypes associated with being a biological female.

14 So for those reasons, I believe that there is
15 sufficient -- there are sufficient legal claims alleged here
16 that would be in dispute to survive a motion to dismiss.

17 As an aside, I also want to indicate -- I had asked
18 the defense some questions -- or the plaintiff, I'm sorry --
19 some questions about denial of educational opportunities.
20 Obviously one of the things that Title IX prohibits, the major
21 thing that Title IX prohibits is that an educational institution
22 deny someone educational opportunities based on one's sex. And
23 I did ask the plaintiffs with regard to the fact that this is an
24 allegation that the plaintiff cannot use bathrooms, the boys'
25 bathroom, whether or not the use of a restroom facility

1 constituted an educational opportunity.

2 There are cases out there which indicate that clearly
3 the ability to be able to conduct one's bodily functions impacts
4 on one's educational opportunities. The plaintiff cited some in
5 the supplemental letter that was filed after the hearing.

6 So, again, in order to survive a motion to dismiss the
7 question is whether there is any plausible or there are
8 plausible claims that the plaintiff could make in support of
9 that argument. I believe the caselaw that exists out there
10 shows that at least, yes, there is a plausible argument to be
11 made there.

12 In addition, there was some argument at the last
13 hearing with regard to whether the Department of Education's
14 "Dear Colleague" letter should be accorded any deference in
15 terms of the Court's consideration of Title IX and whether or
16 not the word "sex" encompasses the plaintiff.

17 I do agree with the defendants in their first two
18 arguments in that regard and then that that "Dear Colleague"
19 letter does not constitute a statute or a law. And, second of
20 all, that it's not entitled to *Chevron* deference because it
21 isn't a regulation either, it is a letter and the defendants are
22 correct about that.

23 However, I find that there is reason to consider that
24 the letter ought be granted *Auer* deference. And again, while
25 I'm not relying on *G.G.*, I think that its reasoning in that

1 regard is persuasive when it points out that again the relevant
2 regulation promulgated under Title IX allows schools -- and it
3 gives them the discretion actually, the language is "may" --
4 gives educational institutions the discretion to create
5 segregated bathrooms, male/female bathrooms, and it actually
6 uses the same word that the statute uses which is the word
7 "sex." It allows them to create separate bathrooms based on
8 sex.

9 For the same reasons that I just discussed with regard
10 to the word "sex" in Title IX, I think the use of the word "sex"
11 in the regulation could be considered ambiguous based on the
12 varying definitions of sex. The regulation, just like Title IX,
13 does not address how that word applies to transgender persons.

14 And if, in fact, that word is ambiguous because it
15 doesn't address transgender persons and it doesn't define "sex"
16 for the purposes that I iterated above, then I have to grant a
17 deference to the agency's consideration of that language. And
18 at this point I can't conclude -- at this stage in the
19 proceedings, at the motion-to-dismiss stage -- that the agency's
20 interpretation is plainly erroneous or inconsistent with the
21 regulation.

22 In particular the defendants argued that if -- if
23 "sex" were to cover transgender persons, if a transgender person
24 could use the restroom with which he or she identifies, that
25 this would gut a school's ability to create segregated -- to use

1 its discretion under the regulation and to create segregated
2 facilities.

3 I don't follow the argument that there's nothing there
4 that would prohibit a school from continuing to create
5 segregated facilities, a boys' bathroom and the girls' bathroom
6 or men's bathroom and a women's bathroom. And as I understand
7 the plaintiff's argument at this stage, the plaintiff's argument
8 is that it could continue to allow boys who identify as boys to
9 use the boys' restroom and girls who identify as girls to use a
10 girls' restroom, that the plaintiff's arguing -- the plaintiffs
11 are arguing that the plaintiff should be able to use the boys'
12 restroom because he identifies as a boy and, therefore, boys
13 should use the boys' restroom.

14 I don't see that argument, whether or not ultimately
15 it prevails, as being an argument that if accepted would gut a
16 school's ability to create segregated restrooms.

17 The defendants also argue that the only way to keep
18 that letter from being at odds with the regulation is to change
19 the statutory definition of "sex." That we circle back around
20 to my original point, the statute doesn't define "sex." The
21 regulation doesn't define "sex."

22 The defendants also argue that if sex were to include
23 transgender persons that it would be left up to the schools then
24 to try to assume gender identity based on appearances, social
25 expectations or explicit declarations of identity. The dissent

1 in G.G. raise that issue as well.

2 That may or may not be, and that's an issue I guess to
3 be -- a bridge to be crossed for another day. But the question
4 of whether or not that makes the interpretation that the
5 plaintiffs urge inconsistent with the regulation is a separate
6 question. You can still have segregated facilities.

7 So for all of those reasons with regard to the
8 defendants' argument that there is not a plausible basis for the
9 plaintiffs to succeed at law, I disagree.

10 That leaves then only the question of whether or not
11 the plaintiffs have alleged sufficient facts to indicate that
12 they could make a plausible claim for discrimination. I think
13 that is -- that question is less in dispute at the
14 motion-to-dismiss stage.

15 There are a number of allegations that the plaintiffs
16 make in the complaint that Ash is not allowed to use the boys'
17 restroom; that he -- that there are -- have been teachers or
18 other school personnel that have been assigned the task of
19 watching him to make sure that he doesn't use the boys'
20 restroom; that he's been given the key to a single-use restroom
21 which only he is directed to use and only he has the key to use;
22 that he was denied the ability to put his name in or run for
23 prom king initially, although I think that then changed.

24 There are a number of facts alleged in the complaint
25 that -- that would indicate discrimination if, in fact, there

1 were a conclusion that the statute did cover the plaintiff. So
2 I think it's clear that there are sufficient facts alleged in
3 the complaint to support a claim at the motion-to-dismiss stage.

4 The second allegation in the complaint, the second
5 count, alleges that the defendants violated a 1983 and the
6 Fourteenth Amendment Equal Protection Clause. Under 1983, in
7 order to prove a claim under 1983, the plaintiff has to allege:

8 Number one, that he was deprived of a right that was
9 secured by the Constitution or laws of the United States;

10 And, number two, that that deprivation was caused by a
11 person or persons acting under color of state law.

12 And I am obligated to review that claim pursuant to
13 the Fourteenth Amendment which is the constitutional provision
14 that the plaintiff claims.

15 In this case the complaint clearly states both the
16 1983 requirements:

17 Number one, the plaintiff does claim that he was
18 deprived of equal protection under the Fourteenth Amendment,
19 that is an acknowledged constitutional right, and;

20 Number two, that the declaration was caused by a
21 person or persons acting under color of state law, in this case
22 the school district -- employees at the school district.

23 So the 1983 elements are alleged in the complaint.
24 And that takes us to the question of whether or not the elements
25 of an equal protection claim have been alleged in the complaint.

1 In order to make out an equal protection claim a
2 plaintiff must present evidence that the defendants treated him
3 differently from others who were similarly situated.

4 He also has to present evidence that the defendants
5 intentionally treated him differently because of his membership
6 in a class to which he belonged.

7 And I'm citing *Personnel Administrator of*
8 *Massachusetts vs. Feeney*, 442 U.S. 256 at 279, 1979; also
9 *Nabozny, N-A-B-O-Z-N-Y, vs. Podlesny, P-O-D-L-E-S-N-Y*, 92 F.3d
10 446 at 453, Seventh Circuit 1996.

11 The complaint alleges that the school treated the
12 plaintiff differently from, and I quote, "other male students
13 based on his gender identity, the fact that he is transgender,
14 and his nonconformity to male stereotypes." That's from the
15 complaint at Docket No. 1 at pages 32 to 33.

16 So, if at a later stage in the proceedings the factual
17 conclusion is that the plaintiff is male, it is clear that he
18 has alleged sufficient facts to indicate discrimination relative
19 to other males. Other males are allowed to use the boys'
20 bathroom; other males don't have teachers monitoring them; other
21 males presumably are allowed to run for prom king if they wish
22 to do so or if they're nominated or however that process works,
23 et cetera.

24 There doesn't seem to be any dispute that the
25 plaintiff is transgender. And if the court were to conclude at

1 a later stage in the proceedings that that is a suspect class,
2 then he's also alleged sufficient facts to show discrimination
3 on that basis. Now, at this point, because again we're at the
4 motion-to-dismiss stage, I don't have to make a finding as to
5 whether or not transgender constitutes a suspect class.

6 And finally, as I indicated earlier, the plaintiff has
7 alleged sufficient facts at the motion-to-dismiss stage to show
8 discrimination based on gender stereotypes.

9 Now, I noted earlier, I don't have to decide whether
10 transgender is a suspect class at the motion-to-dismiss stage.
11 And for that I refer you to *Durso*, D-U-R-S-O, vs. *Rowe*, R-O-W-E,
12 579 F.2d 1365 at page 1372. It's a Seventh Circuit decision
13 from 1978. That was a case that involved an incarcerated
14 plaintiff alleging an equal protection claim. But the court
15 stated:

16 "A state prisoner need not allege the presence of a
17 suspect classification or the infringement of a fundamental
18 right in order to state a claim under the Equal Protection
19 Clause. The lack of a fundamental constitutional right or the
20 absence of a suspect class merely affects the court's standard
21 of review; it does not destroy the cause of action."

22 Now, the parties argued in their pleadings on the
23 motion to dismiss rather extensively the question of whether or
24 not in reviewing an equal protection claim the court ought to
25 use the rational basis standard of review or it ought to use a

1 strict scrutiny or a heightened scrutiny -- or not strict
2 scrutiny. Neither party ought think his argument with strict
3 scrutiny, but a heightened scrutiny standard of review.

4 And again, at the motion-to-dismiss stage I don't have
5 to make that determination. What I have to determine at this
6 stage is whether or not the plaintiff has stated a claim, stated
7 sufficient facts in support of a claim that would entitle him to
8 proceed on an equal protection cause of action. And as I've
9 indicated both under the elements of a 1983 claim and under the
10 elements of an equal protection claim, he has asserted those
11 facts taking or construing those facts in the light most
12 favorable to the plaintiff.

13 So for all of those reasons I am denying the motion to
14 dismiss. And as I had indicated at the last hearing, I wanted
15 to take up the motion to dismiss because if the case were not
16 going to proceed then there wouldn't be any reason for the
17 parties to then continue to discuss the preliminary injunction.
18 The denial of the motion to dismiss obviously means that the
19 case is going to proceed beyond this point and, therefore, it
20 looks like there is a need then to be able to discuss the issue
21 of the preliminary injunction.

22 Now, I want to -- I'm going to turn to the parties in
23 just a second to talk about how to proceed with that, but one
24 thing I did want to note is that the motion for the preliminary
25 injunction was filed back about the same time that the motion to

1 dismiss was filed, give or take. It was filed before the school
2 year started and there were some questions I think raised by the
3 defendants with regard to whether some of the activities that
4 the plaintiffs had predicted or some of the actions that the
5 plaintiffs had predicted the defendants might engage in would
6 actually be taking place in this school year. By the time we
7 held a hearing I believe that Mr. Whitaker had started school
8 and Mr. Wardenski argued that at least with regard to the use of
9 the restroom issue that that seemed to remain the same as it had
10 last year. But there were no discussions about whether any of
11 the other issues were going on and what was happening.

12 I bring all that up to indicate that in terms of what
13 actions the plaintiff may be seeking to enjoin, I understand
14 that that may have morphed or developed since the time the
15 original motion for the preliminary injunction was filed so I
16 just wanted to note that.

17 So, Mr. Wardenski, with regard to the motion for a
18 preliminary injunction, suggestions for moving forward?

19 MR. WARDENSKI: Yes, Your Honor. Given the hour we
20 could try to present argument briefly today, but we're also
21 happy to come back soon if that would be easier on both sides.

22 The scope of the relief we're seeking is still the
23 same.

24 THE COURT: Okay.

25 MR. WARDENSKI: The restroom policy and practice has

1 not changed. We would like to advise the court that Ash, as we
2 had noted in our briefs, had petitioned the Kenosha County Court
3 for a name change and that was granted on Thursday. So he has
4 requested that his student records be updated with regard to his
5 name. It's my understanding that that request has been approved
6 and they're in the process of figuring out what that means in
7 terms of his records.

8 But I think we would still seek the relief of the
9 staff not referring to him by his birth name or by the female
10 designation, by female pronouns which may still occur regardless
11 of what's on his official records.

12 As far as I know there's been no further talk of the
13 green wristbands issue, which is fine, but we certainly would
14 like to leave in that piece of the PI motion that would enjoin
15 the districts from identifying in any sort of physical manner or
16 visible manner a transgendered student through something along
17 those lines.

18 So the primary issue is restrooms, although names and
19 pronouns may still be an issue and otherwise identifying Ash as
20 anything other than Ash or [Indiscernible] while the
21 [Indiscernible] determination proceeds.

22 THE COURT: Thank you. Mr. Stadler?

23 MR. STADLER: Thank you, Judge. I would agree that
24 certainly the bathroom policy is still at issue. The issue of
25 the name I don't believe is going to be at issue at all because

1 we have a court order that has changed the name so that is
2 clear.

3 I do want to be clear, though, that a circuit court's
4 change of name order orders that a birth certificate be amended
5 to reflect a new name, it does not change the gender on the
6 birth certificate. So we will continue to have a birth
7 certificate that lists Ashton Whitaker as female. So if the
8 plaintiff is asking for us to be enjoined from ever referring to
9 Ashton as female, I think that's probably going to be an issue
10 in this matter as well because we're between a rock and a hard
11 place in regard to having a legal document that says the gender
12 of this student is female versus the student's desire to say
13 otherwise. So I think that still is at issue.

14 The issue in regard to somehow identifying transgender
15 students in any manner is not an issue, it's never happened,
16 it's never been done, it's never been proposed.

17 THE COURT: Oh, but what do you mean it's never
18 happened? Do you mean the wrist --

19 MR. STADLER: This wristband thing?

20 THE COURT: Okay.

21 MR. STADLER: Never happened. Never been a policy of
22 the district. Has never been the intent of the district to do
23 that.

24 THE COURT: Okay.

25 MR. STADLER: I don't believe they can make any

1 allegation that anyone has come forward to Ash or any other
2 transgender student and insisted that they wear a green
3 wristband or identify themselves in any other manner.

4 THE COURT: Well, it sounds like one way or the other
5 obviously it sounds like the plaintiffs still are requesting
6 that the district not refer to Ash by a female name or a female
7 pronoun regardless of what the birth certificate -- and I
8 understand your point, Mr. Stadler, that the birth certificate
9 is not necessarily going to change gender -- the reference on
10 the birth certificate is not going to necessarily change.

11 So it does sound like that is being requested and so
12 you're indicating that you're opposing that. So the question
13 is -- and as for the green wristband issue or any other form of
14 identifying the plaintiff as a transgender student, I think this
15 is where we get into a discussion of the evidence that needs to
16 be presented with regard to a preliminary injunction.

17 So the question is, you know, I realize the defense
18 may want to process a little bit of what the decision is today
19 and perhaps the plaintiffs may also want to take a little bit of
20 time to do that. I realize not a lot but a little bit. So the
21 question and let me just ask you guys practically because you
22 know how we've been working in terms of scheduling here, how
23 much time in terms of minutes/hours -- I'm assuming hours -- do
24 you think you would need to be able to present your evidence in
25 support of the preliminary injunction? And given that it's the

1 plaintiff's motion, Mr. Wardenski, I'll ask you first.

2 MR. WARDENSKI: We think the argument can be brief.
3 You know, frankly I think we presented our evidence in our
4 filings and so if the court, you know, wished to rule on the
5 papers we wouldn't be opposed to that.

6 But to the extent that a hearing would be helpful I'm
7 prepared to present argument in 10 or 15 minutes. We've already
8 gotten into, you know, some discussion of the merits on the
9 motion-to-dismiss arguments so there's no need to rehash those.
10 So I think it can be a shorter proceeding than the last one was.
11 And it's just a matter of me flying back out here. So -- and I
12 can be -- either tomorrow before I leave or sometime soon with
13 12 hours' notice.

14 THE COURT: Let me ask you this. Well, okay,
15 Mr. Stadler. Sorry, I asked Mr. Wardenski a question about time
16 so I'll ask you the same question.

17 MR. STADLER: I think 10 to 15 minutes is a little
18 light on the time. But I would agree that the issues for an
19 injunction hearing have certainly been narrowed because I think
20 one of the primary issues was reasonable probability of success.
21 I don't see us revisiting that in depth beyond of what we've
22 already argued with regard to the motion to dismiss. So I think
23 we've covered a lot of that ground already.

24 I think irreparable harm is going to be an issue that
25 gets a lot of attention. I would think we probably need an hour

1 to an hour and a half.

2 THE COURT: Okay. Then let me go back to what I was
3 going to ask Mr. Wardenski. Mr. Wardenski, you indicated that
4 you felt like you all had pretty much made most of your
5 arguments in your motion-to-dismiss papers and the pleadings on
6 the preliminary injunction. But of the three forms of
7 injunctive relief -- or the three actions you're asking to
8 enjoin, I think the one I'm still a little bit short on
9 information on is the green wristband argument, if that's the
10 form of identification that you all are seeking to have
11 enjoined.

12 I believe that your papers indicated that there was
13 some talk or some reference to the fact that the school might
14 consider doing that, that your client had heard that.
15 Mr. Stadler has responded that's never been required, it's never
16 been requested, it's not being requested now. So I guess that's
17 the one piece of information.

18 I understand what you're arguing on the restroom. I
19 understand what you're arguing on the use of his name and
20 pronouns. But the wristband I'm -- I mean is it taking place
21 right now? It doesn't sound like --

22 MR. WARDENSKI: No -- and I can -- as far as I know.
23 And I can try to, you know, respond to Mr. Stadler's argument.
24 We did present evidence in the form of the testimonial -- the
25 declarations from Ash and his mother Melissa Whitaker as well as

1 a photograph of the wristband that was distributed to guidance
2 counselors.

3 That said, we, you know, are taking the district at
4 its word that that was something that was never -- even if it
5 was proposed it was not implemented and it's not being
6 implemented this school year. So our focus and certainly the
7 timeliness of our motion for a preliminary injunction is on the
8 restroom access and on the name and pronoun usage.

9 So, you know, we could always -- if there were, you
10 know, some development later where there was some other
11 signifier separate and apart from the green wristband or if that
12 somehow materialized again we could come back to the court, but
13 I think the relief we're seeking is primarily the first two
14 issues. And there seems to be a little dispute on those as to
15 the facts.

16 And, you know, and I would just note that the district
17 did not present any affidavits or declarations or any other
18 evidence with its filings, so that's part of the reason why we
19 think that the time needed for that hearing does not need to be
20 extensive.

21 THE COURT: Okay. I would -- I would -- I think at
22 this point I would deny any request for injunctive relief as it
23 relates to the green wristband issue given the fact that I'm not
24 sure how one can argue irreparable harm if, in fact, it's not
25 being implemented right now. Now, if -- if there is some sort

1 of process that's put in place later in the school year, whether
2 it be a green wristband or anything else, then you obviously
3 have the ability to come back and seek injunctive relief. But
4 at this point we don't have it. And so I'm not sure what I
5 would be enjoining other than enjoining something that might or
6 might not happen in the future.

7 So given that, I think the two issues, as Mr. Stadler
8 said, the [Indiscernible] issues then are the question of the
9 restroom policy and practice and the use of the name. And if
10 that's the case then I guess the next question -- and,
11 Mr. Stadler, you indicated that you thought 10 or 15 minutes was
12 a little short shrift, are the defendants anticipating
13 presenting any kind of evidence or is this more argument with
14 regard to whether or not the practices alleged would give rise
15 to irreparable harm?

16 MR. STADLER: I anticipate mostly argument on that
17 issue.

18 THE COURT: Okay.

19 MR. STADLER: I want to give some thought to whether
20 we would present evidence on the issue.

21 THE COURT: Okay.

22 MR. STADLER: But I also want to be clear on one other
23 thing and that is the name issue. With a court order changing a
24 student's name, the district will be changing Ash Whitaker's
25 name on all of its documentation. It will get changed. So

1 there is no issue about name. My hang-up was pronoun. And I
2 say that only because I need to give some thought to that issue
3 as well. Regardless of whether your name has been changed, the
4 gender hasn't been changed and so the district has to give
5 thought as to what it does with a student who has a
6 male-sounding name but a female birth certificate. And I can't
7 speak for the district right now on that issue. It's gonna have
8 to do some thinking itself. That's more the issue. It's not
9 the name issue, it's just the pronoun, and then, you know, are
10 we going to have people thrown in jail because they slip on a
11 pronoun.

12 THE COURT: I don't think I have the ability to throw
13 anybody in jail in this civil case.

14 MR. STADLER: That is good.

15 THE COURT: Unless somebody knows about an indictment
16 that I don't know about.

17 MR. STADLER: You do have contempt power so --

18 THE COURT: I try not to use those if I can possibly
19 avoid it.

20 Then if that's the case, if it's going to mostly be --
21 I mean I want to give everybody the time that they need to
22 consult with clients and do what they need to do. I also, if I
23 don't have to make Mr. Wardenski get on another airplane -- if
24 any of us don't have to get on airplanes I think our lives are
25 highly improved given the state of flight in the United States

1 these days. But we could also schedule -- if it's mostly going
2 to be argument and not really presentation of evidence in terms
3 of what's going on here, we could do that by telephone because,
4 you know -- otherwise, I mean, I don't know what time you're
5 leaving in the morning, Mr. Wardenski, but I got a nine o'clock
6 hearing, I got a 10:30, I have a gap between noon and 2:00 and
7 then I got a couple more hearings.

8 MR. WARDENSKI: Well, I actually -- I have a hearing
9 in Chicago first thing in the morning, but I'm not flying home
10 until later in the day so if there was something in the
11 afternoon that would be possible.

12 THE COURT: Well, I guess then it depends,
13 Mr. Stadler, on how much time you're going to need to touch base
14 with your client and talk to your client.

15 MR. STADLER: The problem with my client is there's
16 seven of them.

17 THE COURT: Yeah, no. It's -- I understand.

18 MR. STADLER: So I need a little more than 24 hours to
19 be able to round up a school board and to be able to talk to
20 them on those issues.

21 THE COURT: Okay. So tell me when you think you may
22 be able to do that and perhaps what we can do is take the
23 argument by phone.

24 MR. STADLER: I'm sorry, I didn't hear the last part.

25 THE COURT: I ask you to tell me when you think you

1 may be able to get with your peeps and then we can do the
2 argument by phone.

3 MR. STADLER: Again, this is an assumption on my part
4 but I would suspect that I can confer with them sometime this
5 week. So if we were back next week sometime I think that would
6 be sufficient.

7 THE COURT: Okay. Hold on a second.

8 (Brief pause.)

9 MR. WARDENSKI: Your Honor, if I may, if the issue is
10 the pronouns that Mr. Stadler needs to consult with this whole
11 district about, I wonder if there's a way that we could address
12 the restroom arguments first and then to the extent that there
13 is still a dispute over the name and pronoun use, which may be
14 resolved in the next few days, the name change just happened,
15 you know, two days ago, that we could address that separately.

16 THE COURT: Do you need, Mr. Stadler, to consult with
17 your clients with regard to the restroom policy?

18 MR. STADLER: I do not.

19 THE COURT: Okay.

20 MR. STADLER: I mean, I have so I do not need further.

21 THE COURT: Would you all be able to make arguments on
22 the restroom policy now in terms of irreparable harm? Or -- or
23 at some point tomorrow?

24 MR. WARDENSKI: Either way.

25 MR. STADLER: I can do tomorrow. I've got -- your

1 morning I believe, Judge, was you said fairly packed?

2 THE COURT: Well, yeah. I mean, I've got a 9:00 a.m.
3 and a 10:30.

4 MR. WARDENSKI: Yeah, it would probably be afternoon
5 that I could get here.

6 THE COURT: I could do one o'clock.

7 MR. WARDENSKI: That would be great.

8 MR. STADLER: I've got a one o'clock phone conference
9 on a different case, but I will move that to a different time.

10 THE COURT: Are you sure?

11 MR. STADLER: Yup.

12 THE COURT: Okay. Shall we say one o'clock tomorrow?

13 And the arguments -- just so I'm clear so everybody is
14 on the same page, the arguments tomorrow will be on the restroom
15 use policy. We'll set aside the issue of this district's
16 position on pronouns until Mr. Stadler has had an opportunity to
17 talk with his clients. And maybe we can -- you know, if we need
18 further argument on that we can set up a phone hearing on that.

19 MR. WARDENSKI: Thank you, Your Honor.

20 MR. STADLER: Thank you.

21 THE COURT: Okay.

22 MR. STADLER: That's fine.

23 THE COURT: Anything else then that we need to get
24 taken care of this afternoon?

25 MR. WARDENSKI: No, Your Honor.

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MR. STADLER: No. Thank you.

THE COURT: All right. Thank you all.

THE CLERK: All rise.

(Audio file concluded at 4:38 p.m.)

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C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified September 27, 2016.

/s/John T. Schindhelm

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