No. 16-1733

In the United States Court of Appeals for the Fourth Circuit

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff – Appellee

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant – Appellant

On Appeal from the U.S. District Court,
Eastern District of Virginia
No. 4:15-cv-00054-RGD-TEM

EMERGENCY MOTION OF APPELLANT FOR STAY PENDING APPEAL

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LOCAL RULE 26.1 DISCLOSURE STATEMENT

No. 16-1733 *G.G., by his next friend and mother, Deirdre Grimm, Plaintiff-Appellee, v. Gloucester County School Board, Defendant-Appellant.*

Pursuant to FRAP 26.1 and Local Rule 26.1, Gloucester County School Board, Appellant in this case, makes the following disclosures:

1. Is party a publicly held corporation or other publicly held entity? ..... NO
2. Does party have any parent corporations? ..... NO
3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? ..... NO
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ..... NO
5. Is party a trade association? ..... NO
6. Does this case arise out of a bankruptcy proceeding? ..... NO

Signature: /s/ S. Kyle Duncan Date: July 6, 2016
Counsel for: Gloucester County School Board

CERTIFICATE OF SERVICE

I certify that on July 6, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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Signature: /s/ S. Kyle Duncan Date: July 6, 2016

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Introduction

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Appellant Gloucester County School Board ("School Board") moves for a stay of the district court's preliminary injunction pending appeal, or, in the alternative, pending disposition of the School Board's forthcoming application to the Chief Justice of the United States to recall and stay this Court's mandate in *G.G. v. Gloucester County School Board*, No. 15-2056, 2016 U.S. App. LEXIS 7026 (4th Cir. Apr. 19, 2016) ("*G.G. II*"). Because of the time-sensitive nature of this request, the School Board respectfully asks the Court to rule **within the next three business days, on or before Monday, July 11, 2016.**[1]

Background

This case concerns the validity under Title IX, 20 U.S.C. § 1681 *et seq.*, of the School Board's policy of "provid[ing] male and female restroom and locker room facilities in its schools," while providing students, including students with gender identity issues, alternative private facilities if they prefer to use those. *G.G. v. Gloucester Cnty.*

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[1] Pursuant to Federal Rule of Appellate Procedure 8(a)(2)(C), counsel for Appellant has given reasonable notice of this motion to Appellee by contacting Appellee's counsel by email on Monday, July 4, 2016.

Sch. Bd., 132 F.Supp.3d 736, 740 (E.D. Va. 2015) ("*G.G. I*"). On September 17, 2015, the district court dismissed Plaintiff's Title IX claim as precluded by a 1980 Title IX regulation expressly permitting schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." *G.G. I*, at 738, 744 (quoting 34 C.F.R. § 106.33). The court also declined to give deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to a 2015 letter from the Department of Education's Office of Civil Rights ("OCR") interpreting 34 C.F.R. § 106.33 to require schools to permit students to use restrooms and other facilities "consistent with their gender identity." *G.G. I*, at 745-47 (quoting Letter from James A. Ferg-Cadima, Dep't of Educ., Office of Civil Rights (Jan. 7, 2015) ("OCR letter") (ECF No. 28-2)).

On April 19, 2016, a split panel of this Court reversed and remanded, ruling that the OCR letter merits *Auer* deference. *G.G. II*, at *28. Judge Niemeyer dissented. *Id.* at *48-76. The panel denied *en banc* rehearing on May 31, 2016. *G.G. v. Gloucester Cnty. Sch. Bd.*, 2016 U.S. App. LEXIS 9909 (4th Cir. May 31, 2016). Judge Niemeyer again dissented, urging the School Board to seek certiorari because "the momentous nature of the issue deserves an open road to the Supreme

Court to seek the Court's controlling construction of Title IX for national application." *Id.* at 8 (Niemeyer, J., dissenting from denial of rehearing).

On June 9, 2016, the panel denied the School Board's motion to stay the mandate pending certiorari, again over Judge Niemeyer's dissent. ECF No. 94. The mandate issued on June 17. ECF No. 95. Then, on June 23, feeling compelled to do so by this Court's *G.G.* decision, the district court entered a preliminary injunction ordering the School Board to allow G.G. to use the boys' restroom. App. A. On June 27, the School Board appealed the preliminary injunction to this Court, App. B. On June 28, the School Board moved in the district court for a stay pending appeal, App. C, which was denied on July 6. App. E.

Following Judge Niemeyer's suggestion, the School Board intends to file a certiorari petition seeking review of this Court's *G.G.* decision on or before the due date of August 29, 2016. Sup. Ct. R. 13.1. The School Board also intends to file **by Tuesday, July 12, 2016** an application to recall and stay the *G.G.* mandate—and also to stay the preliminary injunction, if necessary—which will be addressed to the Chief Justice of the United States under Supreme Court Rules 22 and

23. Under those Rules, the School Board must seek a stay of the injunction pending appeal before seeking that relief from the Chief Justice. *See* Sup. Ct. R. 23.3 (requiring stay application to "set out with particularity why the relief sought is not available from any other court or judge"). For that reason, the School Board's motion is time-sensitive and it therefore requests a ruling **before Monday, July 11, 2016.**

Argument

Under settled standards, the Court may stay an injunction pending appeal if the movant shows: "(1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Belk v. Charlotte-Mecklenberg Bd. of Educ.*, 1999 U.S. App. LEXIS 34574, *4 (4th Cir. Dec. 30, 1999) (quoting *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970)); FED. R. APP. P. 8(a)(2). "Irreparable harm to the party seeking the stay and harm to the opponent of the stay are the most important factors in the balance" and thus "should be considered before examining the other factors." *Belk*, 1999 U.S. App.

LEXIS at *4 (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.3d 353, 359 (4th Cir. 1991)).

I. The School Board will suffer irreparable harm absent a stay.

Absent a stay, the School Board, including parents and children in the school district, will suffer irreparable harm for several reasons.

First, enjoining the School Board from enforcing its restroom policy for the upcoming school year strips it of its basic authority to enact policies safeguarding student privacy and safety. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (noting public schools' "'custodial and tutelary responsibility for children'") (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children"). This is a particularly devastating blow to the School Board's authority, given that it has made every effort to accommodate G.G.'s requests from the moment that G.G. approached school officials about the matter. Those efforts include providing a separate restroom in the nurse's office and subsequently installing three single-occupancy unisex restrooms for the use of any student, including G.G., who may

not feel comfortable using the multiple-occupancy restrooms for their biological sex. *G.G. I*, at 741.

Notwithstanding all this, the School Board now faces an order—based entirely on this Court's *G.G.* decision—prohibiting enforcement of its policy before the upcoming school year begins in September, giving the Board scant time to enact any further changes to school district facilities or to develop new policies to safeguard the privacy and safety rights of its students, kindergarten through twelfth grade. Putting the School Board in this untenable position alone constitutes irreparable harm justifying a stay of the preliminary injunction pending appeal or, at a minimum, pending disposition of the School Board's forthcoming application to recall and stay this Court's *G.G.* mandate.[2]

Second, compliance with the preliminary injunction will likely cause disruption as the upcoming school year approaches in September.

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[2] *Cf., e.g.*, *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (observing that "'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'") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (1977) (Rehnquist, J., in chambers) (granting stay pending certiorari in First Amendment access case because "preservation of th[e] status quo … is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time") (citing *Edelman v. Jordan*, 414 U.S. 1301, 1303 (1973) (Rehnquist, J., in chambers)).

When the school previously attempted to allow G.G. to use the boys' restroom, outcry from parents and students was immediate and forceful, leading to two rounds of public hearings. *See G.G. I*, at 740-41; App. E at ¶ 4 (stating that the day after G.G. was allowed to use boys' restroom, "the School Board began receiving numerous complaints from parents and students"). There is every reason to expect the same reaction if the School Board cannot enforce its policy, even as to G.G. alone. This too is irreparable harm. *See, e.g., N.J. v. T.L.O.*, 469 U.S. 325, 341 (1985) (noting "substantial need of teachers and administrators for freedom to maintain order in the schools").

Third, compliance with the preliminary injunction will also put in jeopardy the constitutional rights of students and parents, both at Gloucester High School and other schools administered by the School Board. Depriving parents of any say over whether their children should be exposed to members of the opposite sex in intimate settings deprives parents of their right to direct their children's education and upbringing.[3] Furthermore, it is only natural to assume that many

[3] *See generally Troxel v. Granville*, 530 U.S. 57, 66 (2000) (observing that, "[i]n light of … extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children") (and

parents could decide to remove their children from the school system after reaching the understandable conclusion that the School Board has been stripped by the *G.G.* decision of its authority to protect their children's constitutionally guaranteed rights of bodily privacy. *See*, *e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176, 177 (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") (and collecting authorities). The resulting dilemma—to the school district, students, and parents alike—constitutes irreparable harm.[4]

All of this threatened harm would be prevented in the interim if the preliminary injunction were stayed pending appeal or, at a minimum, pending disposition of the School Board's forthcoming application to the Chief Justice to recall and stay the *G.G.* mandate.

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collecting cases); *see also, e.g., Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing that the liberty interest protected by due process includes the right of parents "to control the education of their own").

[4] *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (noting the constitutionally protected "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Frederick v. Morse*, 551 U.S. 393, 409 (2007) ("School principals have a difficult job, and a vitally important one."); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) (observing that government has a "significant interest" in "strengthening parental responsibility" and that "[s]tate authority complements parental supervision").

II. Plaintiff will not be substantially harmed by a stay.

By contrast to the School Board, G.G. will not be substantially injured by staying the preliminary injunction.

When the new school year begins in September, G.G., like all students at Gloucester High School, will have access to three single-user restrooms, or, if G.G. prefers, to the restroom in the nurse's office. The latter option is significant because G.G. had previously agreed to use the separate restroom in the nurse's office after having explained his gender identity issues to school officials. *See G.G. I*, at 740 (noting that, "[b]eing unsure how students would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office"). Only later did G.G. decide that this arrangement was "stigmatizing" and refuse to use the facility. *Id.* It is not plausible that G.G. will suffer substantial harm—justifying maintenance of a preliminary injunction—based on a recent change in preference about using the nurse's restroom.

Moreover, now G.G. need not even suffer that discomfort, because the school has made generic single-user facilities available to all students. *Id.* at 741. Nor can G.G. credibly claim that having to use

those facilities rises to the level of substantial harm. After all, the U.S. Department of Education expressly "encourages" exactly that accommodation for gender dysphoric students. *See* OCR letter, at 2 (stating that "OCR encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities").

III. The public interest favors a stay.

These considerations also highlight the public interest in staying the preliminary injunction here. Indeed, as a general matter, "[t]he public interest is best served by preserving the *status quo ante litem* until the merits are considered." *O'Brien v. Appomattox Cnty.*, 2002 U.S. Dist. LEXIS 22554, at *4-5 (W.D. Va. Nov. 15, 2002) (citing *Maryland Undercoating Co. v. Payne,* 603 F.2d 477 (4th Cir. 1979)).

In this case, preserving the *status quo ante* means preserving the school district's authority to establish a restroom policy that balances the competing interests presented here, while protecting the legitimate and longstanding expectations of bodily privacy shared by the vast majority of students and their parents—especially at Gloucester High School. This is precisely what the School Board did, by crafting the

sensible and commonsense policy that G.G. subsequently challenged. And that previously established policy did not fail to account for students who might not wish to use multiple-occupancy restrooms designated for one's biological sex. To the contrary, the School Board's policy included installing single-user unisex restrooms for use by any student. *G.G. I*, at 740-41.

The public interest also favors preserving the School Board's ability to continue that policy as the upcoming school year approaches, in order to minimize disruption to the school environment and to the expectations that parents and students have already expressed at public meetings that took place well before this litigation ever began. *See id.* (discussing public meetings held in November and December 2014 to determine restroom and locker room policy); *see also, e.g., Belk*, 1999 U.S. App. LEXIS at *7-8 (finding public interest justified stay pending appeal where "injunction gives the public little time for input" and where "[t]he citizens of the … school district have an interest in the efficacious operation of their public schools"). At a minimum, the public interest favors preserving the School Board's authority while it applies to the Chief Justice to recall and stay this Court's *G.G.* mandate, an

application that will likely be fully resolved well before the school year begins next September.

IV. The School Board is likely to succeed on the merits.

Because the preliminary injunction depends on this Court's *G.G.* decision, the School Board's likelihood of success on appeal is intertwined with its likelihood of obtaining Supreme Court review and reversal of *G.G.* That is likely for several reasons.

First, over the past five years Supreme Court Justices have increasingly called for reconsideration of *Auer* deference (also known as "*Seminole Rock* deference"), which is squarely addressed by *G.G.* and provides the sole support for the decision.[5] This case presents an ideal vehicle for reconsidering *Auer* deference.

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[5] *See, e.g., Talk Am., Inc. v. Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (noting that he has become "increasingly doubtful of [*Auer*'s] validity"); *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring, joined by Alito, J.) (observing that it "may be appropriate to reconsider that principle [of *Auer* deference] in an appropriate case" where "the issue is properly raised and argued"); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (urging that *Auer* deference violates the Constitution because "[i]t represents a transfer of judicial authority to the Executive branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment) (stating that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect" and that consequently he "await[s] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016)

Second, the application of *Auer* deference to the specific issue in this case has taken on national importance, providing an additional, powerful justification for Supreme Court review. Less than a month after the *G.G.* decision, the United States Justice Department ("DOJ") sued North Carolina, its officials, and its university system, alleging that a North Carolina statute (known as "HB2")—which protects bodily privacy in restrooms, locker rooms and shower facilities—violates Title IX. *See United States v. McCrory, et al.*, No. 1:16-cv-00425-TDS-JEP (M.D.N.C. May 9, 2016). DOJ's case rests on exactly the same rationale contained in the OCR letter addressed by *G.G.* Four days after the DOJ lawsuit against North Carolina, the Department of Education and DOJ jointly issued a "Dear Colleague Letter" reaffirming and amplifying the OCR letter's interpretation and offering "significant guidance" on Title IX compliance to every federally funded educational program in the nation. *See* U.S. Department of Justice / U.S. Department of Education, "Dear Colleague Letter on Transgender Students" (May 13, 2016).[6]

(Thomas, J., dissenting from denial of certiorari) ("Any reader of this Court's opinions should think that the [*Auer*] doctrine is on its last gasp.").

[6] The letter (available at http://www2.ed.gov/about/offices/list/ocrletters/colleague-201605-title-ix-transgender.pdf) cites *G.G. II* as justification for its Title IX "guidance." *Id.* at 2 n.5. Thirteen States are now challenging the

This Court's *G.G.* opinion obviously impacts both of those recent developments, because it grants *Auer* deference to the same interpretation of Title IX as is involved in the DOJ enforcement action and in the Dear Colleague Letter.

Third, even if the Supreme Court proves unwilling at present to abandon *Auer* wholesale, a majority of the Court is likely to overturn this Court's application of *Auer* here for numerous reasons. For instance, the basic premise for applying *Auer* is lacking because the Title IX regulation at issue is not ambiguous. *See, e.g., Christensen v. Harris Cnty., Tex.*, 529 U.S. 576, 588 (2000) (explaining that "*Auer* deference is warranted only when the language of the regulation is ambiguous"). The plain text of 34 C.F.R. § 106.33 allows public restrooms to be separated by "sex," which the *G.G.* panel conceded was "understood at the time the regulation was adopted to connote male and female." *G.G. II*, at *25; *but cf. id.* (while conceding regulation "may refer unambiguously to males and females," nonetheless concluding regulation is "ambiguous as applied to transgender individuals").

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constitutionality of the Dear Colleague Letter in federal litigation. *See State of Texas, et al. v. United States, et al.*, No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016).

Furthermore, even assuming the regulation is ambiguous, the kind of non-binding opinion letter at issue—an opinion moreover developed in the context of *this* litigation—should not receive *Auer* deference. *See, e.g., Christensen*, 529 U.S. at 587-88 (declining to give *Chevron* deference to an agency interpretation "contained in an opinion letter" not subject to "formal adjudication or notice-and-comment rulemaking"); *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (Posner, J.) (observing that, in light of *Christensen*, "[p]robably there is little left of *Auer*"); *but cf. G.G. II*, at *26-27 (concluding unpublished opinion letter is not merely a "convenient litigating position" and therefore warrants *Auer* deference).

Moreover, *Auer* deference should not apply to what the *G.G.* panel conceded was a "novel" agency interpretation unsupported by the plain language or the original understanding of the regulation. *G.G. II*, at *27 (stating "the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015"); *id.* at *25 (stating that "the word 'sex' was understood at the time the regulation was adopted to connote male and female … determined primarily by reference to …

reproductive organs"). To accord controlling deference to that novel interpretation would be to allow the Department to "create *de facto* a new regulation" through a mere letter and guidance document. *Christensen*, 529 U.S. at 588; *see also, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (*Auer* deference warranted unless alternative reading is "compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"); *but cf. G.G. II*, at *26-27 (according *Auer* deference to Department's interpretation—although "novel" and "perhaps not intuitive"—because the issue in this case "did not arise until recently").

Finally, the agency interpretation reflected in the OCR letter is both plainly erroneous and inconsistent with the regulation itself, and so is not entitled to *Auer* deference for that reason alone. *See Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (*Auer* deference is "undoubtedly inappropriate" when agency's interpretation is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer*, 519 U.S. at 461). For example, by conflating the term "sex" with the fluid concept of "gender identity"

(which appears nowhere in Title IX or its regulations) the agency's new interpretation ignores the reality that Title IX, by regulation and by statute, expressly authorizes the provision of facilities and programs separated by "sex"—including, of course, restrooms, locker rooms, and shower facilities. 34 C.F.R. § 106.33.[7] *But cf. G.G. II*, at *25-26 (concluding agency's interpretation of regulation is "not plainly erroneous or inconsistent with the text of the regulation" because it is "permitted by the varying physical, psychological, and social aspects … included in the term 'sex'"). Furthermore, numerous instances in the U.S. Code and other federal provisions show that the concept of "gender identity" is plainly distinct from the concept of "sex" or "gender."[8] Consequently, it is quite clear Title IX's prohibition on "sex"

[7] *See also, e.g.,* 20 U.S.C. § 1686 (allowing educational institutions to "maintain[ ] separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing funding recipients to "provide separate housing on the basis of sex," provide those facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact").

[8] *See, e.g.,* 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination in programs funded through Violence Against Women Act "on the basis of actual or perceived race, color, religion, national origin, *sex*, *gender identity* …, sexual orientation, or disability"; 18 U.S.C. § 249(a)(2) (providing criminal penalties for "[o]ffenses involving actual or perceived religion, national origin, *gender*, sexual orientation, *gender identity*, or disability"); U.S.S.G § 3A1.1(a) (providing sentencing guideline increase if defendant selected person or property as object of offense "because of the actual or perceived race, color, religion, national origin, ethnicity, *gender*, *gender identity*, disability, or sexual orientation of any person") (emphases added).

discrimination does not cover "gender identity" discrimination, and that the OCR letter's interpretation of the Title IX regulation at issue is flatly wrong.

Conclusion

For the foregoing reasons, the School Board requests a stay pending appeal or, in the alternative, a stay pending disposition of its forthcoming application to the Chief Justice of the United States to recall and stay this Court's *G.G.* mandate. Additionally, because of the time-sensitive nature of this request, the School Board requests a ruling **within three business days, on or before Monday, July 11, 2016**.

Respectfully submitted,

/s/ S. Kyle Duncan

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Counsel for Appellant Gloucester County School Board

CERTIFICATE OF SERVICE

I certify that on July 6, 2016, I filed the foregoing with the Court's CM/ECF system, and additionally sent copies of the motion and all accompanying appendices to plaintiff's counsel via electronic mail.

/s/ S. Kyle Duncan
S. Kyle Duncan
Counsel for Appellant

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff

v. **CIVIL NO. 4:15cv54**

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

ORDER

This matter is before the Court on Plaintiff G.G.'s Motion for Preliminary Injunction. ECF No. 11. On September 4, 2015, this Court denied the Motion. ECF No. 53. On appeal, the Court of Appeals vacated this denial and remanded the case for reevaluation of the Motion under a different evidentiary standard. Op. of USCA, ECF No. 62 at 33. The Court of Appeals also reversed this Court's dismissal of G.G.'s claim under Title IX. Id. at 26. In a concurrence, Judge Davis explained why the Preliminary Injunction should issue in light of the Court of Appeals' analysis of Title IX. Id. at 37–44. It appears to the Court from the unrebutted declarations submitted by the parties that the plaintiff is entitled to use the boys' restroom. Therefore, for the reasons set forth in the aforesaid concurrence and based on the declarations submitted by the parties, the Court finds that the plaintiff is entitled to a preliminary injunction.

As noted in the Opinion of the Court of Appeals, this case is only about G.G.'s access to the boys' restrooms; G.G. has not requested access to the boys' locker rooms. Id. at 7 n. 2 ("G.G.

does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case."). Accordingly, this injunction is limited to restroom access and does not cover access to any other facilities.

Based on the evidence submitted through declarations previously proffered for the purpose of the hearing on the Preliminary Injunction, this Court, pursuant to Title IX, hereby **ORDERS** that Gloucester County School Board permit the plaintiff, G.G., to use the boys' restroom at Gloucester High School until further order of this Court.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Newport News, VA
June 23, 2016

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother,
DEIRDRE GRIMM

Plaintiff,

v. Case No. 4:15-cv-00054

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Defendant Gloucester County School Board hereby appeals to the United States Court of Appeals for the Fourth Circuit from an order imposing a preliminary injunction (ECF Document 69) entered in this action on June 23, 2016.

GLOUCESTER COUNTY SCHOOL BOARD

By Counsel

/s/

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CERTIFICATE

I hereby certify that on the 27th day of June, 2016, I filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send a Notice of Electronic Filing to all counsel of record.

/s/
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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

Civil No. 4:15-cv-00054-RGD-TEM

DEFENDANT'S MOTION FOR STAY PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(c), Local Rule 7(F), and Federal Rule of Appellate Procedure 8, and for the reasons stated in the accompanying Memorandum of Law, Defendant Gloucester County School Board respectfully moves for a stay pending its appeal [ECF No. 70] of this Court's order of June 23, 2016, entering a preliminary injunction against Defendant [ECF No. 69]. In the alternative, Defendant moves for a stay of the preliminary injunction pending disposition of Defendant's forthcoming application to recall and stay the Fourth Circuit's mandate in *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. June 17, 2016), which will be addressed to the Chief Justice of the United States under Supreme Court Rules 22 and 23.

Respectfully submitted,

/s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2016, I filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send a Notice of Electronic Filing to all counsel of record.

/s/
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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

Civil No. 4:15-cv-00054-RGD-TEM

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR STAY PENDING APPEAL

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR STAY PENDING APPEAL

Defendant Gloucester County School Board ("Defendant") submits this Memorandum of Law in support of its motion for a stay of the preliminary injunction entered against Defendant on June 23, 2016 [ECF No. 69], pending disposition of Defendant's appeal of that injunction [ECF No. 70] or, in the alternative, pending disposition of Defendant's forthcoming application to recall and stay the Fourth Circuit's mandate in *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. June 17, 2016), which will be addressed to the Chief Justice of the United States.

BACKGROUND

This case concerns the validity under Title IX, 20 U.S.C. § 1681 *et seq.*, of Defendant's policy requiring students either to use the multiple-occupancy restrooms and locker rooms designated for their biological sex, regardless of gender identity, or to use one of the three single-user restrooms available to all students. This Court correctly dismissed Plaintiff's Title IX claim under Federal Rule of Civil Procedure 12(b)(6) because the claim is precluded by a 1980 Title IX regulation, 34 C.F.R. § 106.33, which expressly permits schools to provide restrooms and locker rooms separated on the basis of sex. ECF No. 57, at 1, 12-13. This Court also correctly declined to give deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to a 2015 letter from the Department of Education's Office of Civil Rights ("OCR") that interprets 34 C.F.R. § 106.33 to require schools to permit students to use restrooms and other facilities in accordance with their gender identity. ECF No. 57, at 14-15.

However, on April 19, 2016, a split panel of the Fourth Circuit reversed and remanded, ruling that the 2015 OCR letter is entitled to deference under *Auer*. *G.G. v. Gloucester Cnty. Sch. Bd.*, 2016 U.S. App. LEXIS 7026 (4th Cir. Apr. 19, 2016). Judge Niemeyer dissented. *Id.*

at *48-76. The panel subsequently denied *en banc* rehearing on May 31, 2016. Judge Niemeyer again dissented, urging Defendant to seek review in the United States Supreme Court because "the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application." *G.G. v. Gloucester Cnty. Sch. Bd.*, ECF No. 90, at 4 (May 31, 2016) (Niemeyer, J., dissenting from denial of rehearing). That is exactly what Defendant intends to do.

On June 9, 2016, the Fourth Circuit panel denied Defendant's motion to stay issuance of the mandate pending Defendant's certiorari petition, again over Judge Niemeyer's dissent. The Fourth Circuit's mandate issued on June 17, 2016. Then, on June 23, 2016, this Court entered a preliminary injunction ordering Defendant to allow G.G. to use the boys' restroom, finding that the Fourth Circuit's decision essentially left it no choice. ECF No. 69. Defendant has subsequently appealed the preliminary injunction to the Fourth Circuit. ECF No. 70.

Defendant intends to file a certiorari petition seeking review of the Fourth Circuit's *G.G.* decision on or before the due date of August 29, 2016. Sup. Ct. R. 13.1. Defendant also intends to file within the next ten days an application to recall and stay the *G.G.* mandate, and to stay this Court's preliminary injunction, which will be addressed to the Chief Justice of the United States under Supreme Court Rules 22 and 23. Under those Rules, Defendant must seek a stay of the injunction pending appeal before seeking that relief from the Chief Justice. *See* Sup. Ct. R. 23.3 (requiring stay application to "set out with particularity why the relief sought is not available from any other court or judge").

ARGUMENT

Federal Rule of Civil Procedure 62(c) permits the Court to stay a preliminary injunction pending appeal upon considering the following factors: "(1) whether the stay applicant has made

a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies." *Microstrategy, Inc. v. Business Objects, S.A.*, 661 F.Supp.2d 548, 558 (E.D. Va. 2009); *see also, e.g., Davis v. Lukhard*, 106 F.R.D. 317, 318 (E.D. Va. 1984) (citing *Long v Robinson*, 432 F.3d 977, 979 (4th Cir. 1970)) (reciting same factors).[1] These factors strongly weigh in favor of granting Defendant a stay of the preliminary injunction pending appeal or, in the alternative, a stay pending disposition of Defendant's forthcoming application to the Chief Justice of the United States for a recall and stay of the *G.G.* mandate.

I. Defendant is likely to succeed on the merits.

Because the preliminary injunction depends entirely on the *G.G.* decision, Defendant's likelihood of success in this appeal is intertwined with its likelihood of obtaining Supreme Court review of, and reversal of, *G.G.* The Supreme Court is likely to review and reverse *G.G.* for several reasons.

First, over the past five years Supreme Court Justices have increasingly called for reconsideration of *Auer* deference (also known as "*Seminole Rock* deference"), which is the sole support for *G.G.* *See, e.g., Talk Am., Inc. v. Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (noting that he has become "increasingly doubtful of [*Auer*'s] validity"); *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring, joined by Alito, J.) (observing that it "may be appropriate to reconsider that principle [of *Auer* deference] in an appropriate case" where "the issue is properly raised and

[1] Additionally, the Federal Rules of Appellate Procedure require a party to "ordinarily move first in the district court … for a stay of the judgment or order of a district court pending appeal." Fed. R. App. P. 8(a)(1)(A).

argued"); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (urging that *Auer* deference violates the Constitution because "[i]t represents a transfer of judicial authority to the Executive branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment) (stating that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect" and that consequently he "await[s] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) ("Any reader of this Court's opinions should think that the [*Auer*] doctrine is on its last gasp."). As Defendant will explain in its certiorari petition and in its forthcoming stay application to the Chief Justice, this case presents an ideal vehicle for reconsidering *Auer* deference.

Second, the application of *Auer* deference to the specific issue in this case has taken on national importance, providing an additional justification for Supreme Court review. Less than a month after the *G.G.* decision, the United States Justice Department sued the State of North Carolina, its officials, and its university system, alleging that a North Carolina privacy statute (known as "HB2") violates Title IX for precisely the same reasons as expressed in the 2015 OCR letter which is the subject of *G.G.* *See United States v. McCrory, et al.*, No. 1:16-cv-00425-TDS-JEP (M.D.N.C. May 9, 2016). Four days later, the Department of Education and DOJ jointly issued a nationally applicable "Dear Colleague Letter" reaffirming and amplifying the Title IX interpretation contained in the 2015 OCR letter and purporting to give "significant guidance" regarding compliance with Title IX. *See* U.S. Department of Justice / U.S. Department of Education, "Dear Colleague Letter on Transgender Students" (May 13, 2016),

available at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.[2] The Fourth Circuit's *G.G.* opinion obviously impacts both of those recent developments, because it grants *Auer* deference to the same interpretation of Title IX as is involved in the DOJ enforcement action and in the Dear Colleague Letter. The Supreme Court is therefore likely to grant review in *G.G.* to address these issues of rapidly increasing national importance.

Third, the Fourth Circuit's application of *Auer* deference in *G.G.* implicates at least three separate circuit splits, further increasing the likelihood of Supreme Court review. For instance, the Fourth Circuit's decision conflicts with other circuits which have declined to give *Auer* deference to agency interpretations that appear in a format that lacks binding legal force, such as the opinion letter at issue in *G.G.* *See, e.g., Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129, 139-40 & n.13 (1st Cir. 2013) (declining to give *Auer* deference to an unpublished agency letter because "[t]he letter was not the result of public notice and comment" and holding that agency "interpretations contained in formats such as opinion letters" are entitled only to *Skidmore* deference). Additionally, the Fourth Circuit's decision conflicts with other circuits which have declined to give *Auer* deference to agency interpretations developed for the first time in the pending litigation at issue. *See, e.g., Mass. Mut. Life v. United States*, 782 F.3d 1354, 1369-70 (Fed. Cir. 2015) (declining to give *Auer* deference to IRS interpretation of Treasury Regulation that was "advanced for the first time in this litigation" and therefore did not "'reflect[ ] the agency's fair and considered judgment on the matter in question'") (quoting *Auer*, 519 U.S. at 462); *Vietnam Veterans v. CIA*,

[2] The Dear Colleague Letter cites *G.G.* as justification for its Title IX "guidance." *Id.* at 2 n.5. Twelve States are now challenging the constitutionality of the Dear Colleague Letter in federal litigation. *See State of Texas, et al. v. United States, et al.*, No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016).

811 F.3d 1068, 1078 (9th Cir. 2015) (declining to give *Auer* deference to agency interpretation where agency admittedly "developed [its] interpretation only in the context of this litigation"). Finally, the Fourth Circuit's decision conflicts with other circuits which have declined to give *Auer* deference to novel agency interpretations that conflict with the original understanding of the regulation when promulgated. *See, e.g., Morrison v. Madison Dearborn Capital Partners III L.P.*, 463 F.3d 312, 315 (3rd Cir. 2006) (placing "[p]articular weight" in the *Auer* analysis on "the agency's interpretations made at the time the regulations are promulgated" (citing *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)); *Gose v. U.S. Postal Service*, 451 F.3d 831, 838 (Fed. Cir. 2006) (explaining that a factor counting against *Auer* deference is "evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation").

Fourth, even if the Supreme Court proves unwilling at present to abandon *Auer* wholesale, a majority of the Court is likely to overturn the Fourth Circuit's application of *Auer* here for numerous reasons, including those highlighted by this Court in its earlier opinion. For instance, the basic premise for applying *Auer* is lacking because the Title IX regulation at issue is unambiguous. *See* ECF No. 57, at 14 ("To begin with, Section 106.33 is not ambiguous."); *see also, e.g., Christensen v. Harris Cnty., Tex.*, 529 U.S. 576, 588 (2000) (explaining that "*Auer* deference is warranted only when the language of the regulation is ambiguous"). The regulation plainly allows public restrooms to be separated by "sex," which even the Fourth Circuit admitted was "understood at the time the regulation was adopted to connote male and female." *G.G.*, 2016 U.S. App. LEXIS 7026, at *25; *but cf. id.* at *25 (while conceding regulation "may refer unambiguously to males and females," nonetheless concluding regulation is "ambiguous as applied to transgender individuals").

Furthermore, even assuming the regulation is ambiguous, the kind of non-binding opinion letter at issue—an opinion moreover developed in the context of *this* litigation—should not receive *Auer* deference. *See* ECF No. 57, at 14 (concluding agency interpretation "cannot supplant Section 106.33" because opinion letters "'do not warrant *Chevron*-style deference' with regard to statutes") (quoting *Christensen*, 529 U.S. at 587); ECF No. 57, at 15 (concluding agency "will not be permitted to disinterpret its own regulations for purposes of litigation"); *but cf. G.G.*, 2016 U.S. App. LEXIS at *26-27 (concluding unpublished opinion letter is not merely a "convenient litigating position" and therefore warrants *Auer* deference).

Moreover, *Auer* deference should not apply to what even the Fourth Circuit conceded was a "novel" agency interpretation unsupported by the original understanding of the regulation. *G.G.*, 2016 U.S. App. LEXIS at *27 (conceding "Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015"). As this Court reasoned in its previous opinion, "[t]o defer to the Department of Education's newfound interpretation would be nothing less than to allow the Department of Education to 'create *de facto* a new regulation' through the use of a mere letter and guidance document." ECF No. 57, at 15 (quoting *Christensen*, 529 U.S. at 588); *but cf. G.G.*, 2016 U.S. App. LEXIS at *26-27 (according *Auer* deference to Department's interpretation—although "novel" and "perhaps not intuitive"—because the issue in this case "did not arise until recently").

Finally, the agency interpretation reflected in the 2015 OCR letter is both plainly erroneous and inconsistent with the regulation itself, and so is not entitled to *Auer* deference for that reason alone. *See* ECF No. 57, at 14-15 (concluding that "the Department of Education's interpretation of Section 106.33 is plainly erroneous and inconsistent with the regulation"); *G.G.*, 2016 U.S. App. LEXIS at *58-74, *65 (Niemeyer, J., dissenting) (demonstrating that agency's

interpretation is inconsistent with text and context of regulation and would cause regulation to "function nonsensically"); *see also, e.g., Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (*Auer* deference is "undoubtedly inappropriate" when agency's interpretation is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer*, 519 U.S. at 461); *but cf. G.G.*, 2016 U.S. App. LEXIS at *25-26 (concluding agency's interpretation of regulation is "not plainly erroneous or inconsistent with the text of the regulation" because it is "permitted by the varying physical, psychological, and social aspects … included in the term 'sex'").

II. Defendant will suffer irreparable harm absent a stay.

Although the Fourth Circuit's *G.G.* opinion might make this Court reluctant to rule in Defendant's favor on the likelihood of success element of the stay inquiry, the other elements of that inquiry—irreparable injury and the other stay factors—are another matter. Absent a stay pending appeal, Defendant, including parents and children in the school district, will suffer irreparable harm for several reasons.

First, enjoining Defendant from enforcing its restroom policy for the upcoming school year essentially strips the school district of its most basic authority to enact policies that accommodate the need for privacy and safety of *all* students. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (noting public schools' "'custodial and tutelary responsibility for children'") (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children"). This is a particularly devastating blow to Defendant's authority, given that Defendant has made every effort to accommodate G.G.'s requests from the moment that G.G. approached school officials, including providing access to a separate restroom in the nurse's office and subsequently installing three

single-occupancy unisex restrooms for the use of *any* student, including G.G., who may not feel comfortable using multiple-occupancy restrooms corresponding to their biological sex. ECF No. 57, at 5-6.

Notwithstanding all this, Defendant now faces an order—based entirely on the *G.G.* decision—to abandon its policy before the upcoming school year begins in September, giving Defendant scant time to enact any further changes to school district facilities or develop new policies to safeguard the privacy and safety rights of its students, kindergarten through twelfth grade. Putting Defendant in this untenable position *alone* constitutes irreparable harm justifying a stay of the preliminary injunction pending appeal or, at a minimum, pending disposition of Defendant's forthcoming application to recall and stay the Fourth Circuit's *G.G.* mandate. *Cf., e.g.*, *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (observing that "'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'") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (1977) (Rehnquist, J., in chambers) (granting stay pending certiorari in First Amendment access case because "preservation of th[e] status quo … is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time") (citing *Edelman v. Jordan*, 414 U.S. 1301, 1303 (1973) (Rehnquist, J., in chambers)).

Second, compliance with the preliminary injunction will likely cause severe disruption to the school as the upcoming school year approaches in September. When the school previously attempted to allow G.G. to use the boys' restroom, outcry from parents and students was immediate and forceful, leading to two rounds of public hearings and ultimately to the issuance of the policy at issue. *See* ECF No. 57, at 4-5; *see also* Troy Anderson Decl. at ¶ 4 (stating that

immediately after G.G. was allowed to use boys' restroom, "the School Board began receiving numerous complaints from parents and students"). There is every reason to expect the same reaction if Defendant is now forced to abandon its policy. This also constitutes irreparable harm. *See, e.g., N.J. v. T.L.O.*, 469 U.S. 325, 341 (1985) (noting "the substantial need of teachers and administrators for freedom to maintain order in the schools").

Third, compliance with the 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 sex in intimate settings deprives parents of their right to direct the education and upbringing of their children. *See generally Troxel v. Granville*, 530 U.S. 57, 66 (2000) (observing that, "[i]n light of … extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children") (and collecting cases); *see also, e.g., Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing that the liberty interest protected by due process includes the right of parents "to control the education of their own"). Indeed, parents may decide to remove their children from the school system after reaching the understandable conclusion that the school has been stripped by the *G.G.* decision of its authority to protect their children's constitutionally guaranteed rights of bodily privacy. *See, e.g., Doe v. Luzerne Cnty.*, 660 F.3d 169, 176, 177 (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") (and collecting authorities). The resulting dilemma—to the school district and to parents alike—constitutes irreparable harm. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (noting the constitutionally protected "liberty of parents and guardians to direct the upbringing and education of children

under their control"); *Frederick v. Morse*, 551 U.S. 393, 409 (2007) ("School principals have a difficult job, and a vitally important one."); *see also, e.g.*, *Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) (observing that government has a "significant interest" in "strengthening parental responsibility" and that "[s]tate authority complements parental supervision"). All of this threatened harm would be prevented in the interim if the preliminary injunction were stayed pending appeal or, at a minimum, pending disposition of Defendant's forthcoming application to the Chief Justice to recall and stay the Fourth Circuit's *G.G.* mandate.

III. A stay will not substantially injure Plaintiff.

By contrast to Defendant, G.G. will not be substantially injured by staying the preliminary injunction. *See, e.g.*, *Microstrategy*, 661 F.Supp.2d at 558 (considering "whether issuance of a stay will substantially injure other parties interested in the proceeding").

When the new school year begins in September, G.G., like all students at Gloucester High School, will have access to three single-user restrooms, or, if G.G. prefers, to the restroom in the nurse's office. The latter option is significant because G.G. had previously *agreed* to use the separate restroom in the nurse's office after having explained his gender identity issues to school officials. *See* ECF No. 57, at 3-4 (noting that, "[b]eing unsure how students would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office"). Only later did G.G. decide that this arrangement was "stigmatizing" and refuse to use the facility. *Id.* at 4. It is not plausible that G.G. would suffer substantial harm—justifying maintenance of a preliminary injunction—based on a subjective change in preference about whether to use the nurse's restroom.

Moreover, now G.G. need not even suffer the subjective discomfort of the nurse's restroom, because the school has now made generic single-user facilities available to *all*

students. *Id.* at 5-6. Nor can G.G. credibly claim that having to use those facilities rises to the level of constitutional harm. After all, the Department of Education expressly *encourages* such accommodations for gender dysphoric students. *See G.G.*, 2016 U.S. App. LEXIS at *51-52 (Niemeyer, J., dissenting) (observing that 2015 OCR letter states that "to accommodate transgender students, schools are encouraged 'to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]"); ECF No. 57, at 5-6 (noting that Gloucester High School "has installed three unisex single-stall restrooms").

IV. The public interest favors a stay.

Finally, "[t]he public interest is best served by preserving the *status quo ante litem* until the merits are considered." *O'Brien v. Appomattox Cnty.*, 2002 U.S. Dist. LEXIS 22554, at *4-5 (W.D. Va. Nov. 15, 2002) (citing *Maryland Undercoating Co. v. Payne,* 603 F.2d 477 (4th Cir. 1979)); *see also, e.g., Whiteside v. UAW Local 3520,* 576 F.Supp. 2d 739, 743 (M.D.N.C. 2008) (explaining that "the court should consider wherein lies the public interest, sometimes described as preserving the [s]tatus quo ante litem until the merits of a serious controversy can be fully considered by a trial court") (citing *Maryland Undercoating*, *supra*).

In this case, preserving the *status quo ante* means preserving the school district's authority to establish a restroom policy that balances the competing interests presented here, while protecting the legitimate and longstanding expectations of bodily privacy shared by the vast majority of students and their parents. This is precisely what Defendant did, by crafting the sensible and commonsense policy that G.G. subsequently challenged. And that previously established policy did not fail to account for students who might not wish to use multiple-

occupancy restrooms designated for one's biological sex. To the contrary, Defendant's policy included installing single-user unisex restrooms for use by any student. ECF No. 57, at 5-6.

The public interest also favors preserving Defendant's ability to continue that policy as the upcoming school year approaches, in order to minimize disruption to the school environment and to the expectations that parents and students have already expressed at public meetings that took place well before this litigation ever began. *See* ECF No. 57, at 4-5 (discussing public meetings held in November and December 2014 to determine restroom and locker room policy). At a minimum, the public interest favors preserving Defendant's authority while it applies to the Chief Justice to recall and stay the Fourth Circuit's *G.G.* mandate, which will occur well before the school year begins next September.

CONCLUSION

For the foregoing reasons, Defendant respectfully asks the Court to stay the preliminary injunction entered against Defendant pending disposition of its appeal or, in the alternative, pending disposition of its forthcoming application to the Chief Justice to recall and stay the Fourth Circuit's *G.G.* mandate.

Respectfully submitted,

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Attorneys for Gloucester County School Board

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2016, I filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send a Notice of Electronic Filing to all counsel of record.

/s/
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G.,

Plaintiff,

v. Case No. 4:15-cv-00054-RGD-TEM

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

DECLARATION OF TROY M. ANDERSEN

On this 7th day of July 2015, I, Troy M. Andersen, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.

2. I am the Gloucester Point District Representative for the Gloucester County School Board ("the School Board" or "GCSB"), and I served in that capacity during the 2014-2015 school year. I am still a member of the School Board and currently serve as its chairman.

3. It has always been the practice of Gloucester County Schools to separate restrooms and locker rooms at school facilities on the basis of the students' biological sex, and this practice has been in place the entire time that Plaintiff has been a student within the Gloucester County school system. It is my understanding that Plaintiff enrolled as a freshman at Gloucester High School for the 2013-2014 school year as a female student.

4. While Plaintiff was granted permission at the school level to begin using the boys' restrooms at Gloucester High School on October 20, 2014, no decision was made by the School Board until December 9, 2014. Beginning on October 21, 2014, the School Board began

EXHIBIT
1

receiving numerous complaints from parents and students about Plaintiff's use of the boys' restrooms.

5. On December 9, 2014, the School Board adopted a restroom and locker room resolution that provided:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

6. The restroom and locker room resolution reflects what has always been the practice of the schools. The resolution was developed to treat all students and situations the same.

7. The School Board had three single-stall unisex bathrooms constructed at Gloucester High School. All three restrooms were open for use by December 16, 2014. Any student can use these unisex bathrooms, regardless of their biological sex, if they are uncomfortable using a communal bathroom, or for any other privacy reason. Students may also use a restroom located in the nurse's office.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on: 7/7/15 (date)

Troy M. Andersen
Troy M. Andersen

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiffs,

v. **CIVIL NO. 4:15cv54**

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

ORDER

This matter is before the Court on Defendant's Motion for Stay Pending Appeal. ECF No. 71. With this Motion the defendant, Gloucester County School Board ("Defendant"), asks this Court to stay the Preliminary Injunction issued by the Court on June 23, 2016 pending Defendant's appeal of that Order. Id.

On June 11, 2015, the plaintiff in this case, G.G. ("Plaintiff"), filed a Motion for Preliminary Injunction. ECF No. 11. On September 4, 2015, this Court denied the Motion. ECF No. 53. On appeal, the Court of Appeals vacated this denial and remanded the case for reevaluation of the Motion under a different evidentiary standard. Op. of USCA, ECF No. 62 at 33. The Court of Appeals also reversed this Court's dismissal of G.G.'s claim under Title IX. Id. at 26. In a concurrence, Judge Davis explained why the Preliminary Injunction should issue in light of the Court of Appeals' analysis of Title IX. Id. at 37–44.

The Court of Appeals denied Defendant's motion for a rehearing en banc, Order of

USCA, ECF No. 65, and its motion to stay the mandate pending the filing of a writ of certiorari, Order of USCA, ECF No. 67. On June 17, 2016, the Court of Appeals issued its mandate. ECF No. 68.

Based on the opinion of the Fourth Circuit and the evidence submitted by declaration, the Court granted the Preliminary Injunction on June 23, 2016. Order, ECF No. 69. Defendant filed a notice of appeal on June 27, 2016. ECF No. 70. On June 28, 2016, Defendant filed the instant Motion to Stay along with a Memorandum in Support. ECF Nos. 71–72. Plaintiff responded to the Motion on July 1, 2016. ECF No. 75.

This Court is bound by the Judgment of the Court of Appeals. The Court of Appeals' actions in denying a rehearing en banc and a stay of its mandate indicate that it desires that its Judgment take effect immediately. The Court of Appeals itself is bound by its own prior precedents. Although Defendant has filed an appeal of the Preliminary Injunction, the Court of Appeals' prior opinion in this case will control in that appeal. This Court believes that based on the law as laid out in that opinion and the evidence submitted by declarations in this case, the Preliminary Injunction was warranted. There are no grounds for a stay. Accordingly, the Court **DENIES** the Motion for Stay Pending Appeal. ECF No. 71.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Newport News, VA
July 6, 2016