IN THE UNITED STATES DISTRICT COURT
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

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO STAY PRELIMINARY INJUNCTION

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Plaintiff, G.G., by and through his mother, Deirdre Grimm, submits this memorandum of law in opposition to the Gloucester County School Board's (the "Board's") motion to stay the preliminary injunction entered by this Court on June 23, 2016 (ECF No. 69), pending disposition of the Board's appeal to the Fourth Circuit or disposition of the Board's forthcoming application for the Supreme Court to recall and stay the Fourth Circuit's mandate (ECF No. 71).

INTRODUCTION

"[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority." *Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000). In its decision granting G.'s motion for preliminary injunction, this Court faithfully applied the Fourth Circuit's decision in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016). Even though the Fourth Circuit has already denied the Board's request to stay the mandate, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 94 (4th Cir. June 9, 2016), the Board now asks this Court to stay the preliminary injunction based on the Board's prediction that the Supreme Court will overturn the Fourth Circuit's decision. The Supreme Court will have the opportunity to consider the Board's arguments in due course, but as long as the Fourth Circuit's decision remains binding precedent, the Board's motion to stay the preliminary injunction must be denied.

ARGUMENT

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review," and "[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). Accordingly,

a stay pending appeal "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Id.* at 437 (Kennedy, J., concurring). The four "stay equities" considered by courts when determining whether to grant a stay are:

> (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 the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (majority). "There is substantial overlap between these and the factors governing preliminary injunctions, not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* (citation omitted). For all the same reasons that this Court granted the preliminary injunction, Defendant's request to stay the injunction pending appeal must be denied.

I. The Fourth Circuit has already rejected the Board's request for a stay.

The Board has already asked the Fourth Circuit to stay its mandate based on substantially the same arguments that the Board now advances before this Court. *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 91 (4th Cir. June 7, 2016). The Fourth Circuit considered the Board's arguments and rejected them. *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 94 (4th Cir. June 9, 2016). The Board now effectively asks this Court to overrule the Fourth Circuit by granting a stay motion that the Fourth Circuit has already denied. Only the Supreme Court has the power to grant the Board's request.

II. The Board has not established a "strong showing" of likelihood of success.

In its order granting G.'s motion for preliminary injunction, this Court already determined that G. has established a likelihood of success on the merits in light of the Fourth Circuit's analysis of Title IX. *See G.G.*, 2016 WL 1567467, at *12 (Davis, J., concurring)

("G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim."). The Board now asks this Court to reverse course and conclude that the Board—not G.—is the party likely to succeed.

The Board candidly admits that "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." Def.'s Mem. 8. As the Board acknowledges, "Defendant's likelihood of success in this appeal is intertwined with its likelihood of obtaining Supreme Court review of, and reversal of, [the Fourth Circuit's decision in] *G.G.*" *Id.* at 3. In this Court, however, *G.G.* is binding precedent, and the Board's likelihood of success must be assessed in accordance with the Fourth Circuit's decision, not based on a prediction that the decision will be overturned. "[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority." *Yong*, 208 F.3d at 1119 n.2; *accord Lawrence v. Florida*, 421 F.3d 1221, 1224 n.1 (11th Cir. 2005) ("T]he district court abused its discretion in entering a stay order pending a certiorari ruling by the United States Supreme Court."); *cf. United States v. Lopez-Velasquez*, 526 F.3d 804, 808 (5th Cir. 2008) ("Absent an intervening Supreme Court case overruling prior precedent, we remain bound to follow our precedent even when the Supreme Court grants certiorari on an issue."). As long as *G.G.* is binding precedent, the Board cannot establish a "strong showing" of likelihood of success.

III. The Board will not be irreparably injured if the preliminary injunction is not stayed.

The narrow, limited preliminary injunction granted by this Court will not inflict any of the purported injuries the Board claims it will suffer. The preliminary injunction applies only to G.; it applies only to the boy's restrooms; and it applies only at Gloucester High School. The

preliminary injunction does not force the Board to "abandon its policy" for any other student or "develop new policies to safeguard the privacy and safety rights of its students, kindergarten through twelfth grade." Def.'s Mem. 9. *See Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 834 (10th Cir. 1993) ("Because this is not a class action, the broad sweep of the remedy exists only in defendant's imagination."). Any broader implications this case has for other students or other facilities, such as locker rooms, would follow from the precedential effect of the Fourth Circuit's decision—not from the preliminary injunction issued by this Court.

Moreover, the Fourth Circuit has already rejected the Board's argument that allowing G. to use the restroom would infringe on the constitutional rights of other students. As the majority explained, "G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in the cases regarding the constitutional right to bodily privacy. *G.G.*, 2016 WL 1567467, at *8 n.10; *accord id.* *13 (Davis, J., concurring) ("As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent."). Even the dissent acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. *Id.* at *21 (Niemeyer, J., dissenting). To be sure, in future cases, precedent from the Fourth Circuit's decision may have implications for transgender students' use of locker rooms and showers, but this Court's preliminary injunction (whether or not it is stayed) will have no legal effect on those facilities.

IV. Staying the preliminary injunction would irreparably injure G.

This Court granted a preliminary injunction in order to protect G. from irreparable injury. *See G.G.*, 2016 WL 1567467, at *13 (Davis, J., concurring) ("The uncontroverted facts before the district court . . . demonstrated that [G.] will suffer irreparable harm in the absence of an

injunction."). Staying the injunction pending appeal would nullify the injunction by forcing G. to experience the same irreparable enquires that justified granting the injunction in the first place.

G.'s senior year is his last chance to attend school in accordance with the legal protections of Title IX, and without being stigmatized and ostracized by the Board's discriminatory policy. G.'s sophomore and junior years have been irrevocably lost and cannot be restored through an award of money damages. Without a preliminary injunction, he will irrevocably lose his senior year as well. *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d. 771, 777 (S.D.W.V. 2012) (granting a preliminary injunction because plaintiffs "will experience their middle school years only once during their life"); *Chipman v. Grant Cty. Sch. Dist.*, 30 F. Supp. 2d 975, 980 (E.D. Ky. 1998) ("It is undisputed that this is the only time in these girls' lives that they will be seniors in high school with the opportunity to participate in [National Honors Society] activities. Therefore, if an injunction does not issue, these girls will lose this opportunity forever."); *cf. Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (affirming preliminary injunction allowing plaintiff to attend The Citidel because "[d]enying Faulkner's access . . . might likely become permanent for her, due to the extended time necessary to complete the litigation.") Time is of the essence, and "the appropriateness and necessity of . . . prompt action is plain." *G.G.*, 2016 WL 1567467, at *14 (Davis, J., concurring).

V. Staying the preliminary injunction would be contrary to the public interest.

"Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest." *G.G.*, 2016 WL 1567467, at *14 (Davis, J., concurring); *accord Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("[T]he overriding public interest l[ies] in the firm enforcement of Title IX."); *Doe*, 888 F. Supp. 2d at 778 (The "public interest is certainly served by promoting compliance with Title IX."). The

public interest is served by enjoining conduct that violates Title IX, not by allowing that conduct to continue.

CONCLUSION

For the foregoing reasons, the Board's motion to stay the preliminary injunction should be denied.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.

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Dated: July 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2016, I filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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