**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**WICHITA FALLS DIVISION**

| | | |
|---|---|---|
| **STATE OF TEXAS et al.,** | § | |
| | § | |
| **Plaintiffs,** | § | |
| | § | |
| **v.** | § | **Civil Action No. 7:16-cv-00054-O** |
| | § | |
| **UNITED STATES OF AMERICA et al.,** | § | |
| | § | |
| | § | |
| **Defendants.** | § | |

**ORDER**

Before the Court are Defendants' Motion for Partial Stay of the Court's Preliminary Injunction Order (ECF No. 95), filed November 7, 2016; and Plaintiffs' Response (ECF No. 99), filed November 15, 2016. Defendants seek a partial stay, pending appeal, as to the preliminary injunction's application to states and entities not plaintiffs in this case and have requested expedited consideration of their motion. *Id.* at 7. After considering the briefing and applicable law, the Court finds that Defendants' motion for partial stay of the Court's preliminary injunction should be and is hereby **DENIED**.

## I. BACKGROUND

The Court issued the nationwide preliminary injunction at issue on August 21, 2016. ECF No. 58. Defendants filed a motion for clarification on September 12, 2016, requesting, among other things, that the Court narrow the scope of its injunction to plaintiff states. *See* Defs.' Mot. Clarify, ECF No. 65. The Court issued clarification on October 18, 2016, reemphasizing the injunction's nationwide scope and specifying its impact on Defendants. ECF No. 86. Two days

later, Defendants filed a Notice of Appeal to the Fifth Circuit Court of Appeals seeking interlocutory review of the Court's injunction and clarification order. ECF No. 88. In the present motion, Defendants ask the Court to reconsider the nationwide scope of its injunction by requesting a partial stay, pending appeal, of the injunction's application to non-plaintiff states and entities. Defs.' Mot. 7, ECF No. 95. Defendants reassert several arguments the Court previously addressed at length and the Court will not repeat its analysis on those issues.

## II. ANALYSIS

### A. Defendants are Unlikely to Succeed on Appeal and Suffer No Irreparable Injury

A party seeking stay of an injunction bears the burden of demonstrating (1) likelihood of success on the merits; (2) likelihood the applicant will be irreparably injured absent a stay; (3) that issuance of a stay will not substantially injure the other parties; and (4) that the stay is in the public interest. *See Texas v. United States*, 787 F.3d 733, 746–47 (5th Cir. 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). The first two factors "are the most critical." *Nken*, 556 U.S. at 434.

"A stay is not a matter of right, even if irreparable injury might otherwise result," and the propriety of issuing a stay depends on the circumstances of the particular case. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (quoting *Nken*, 556 U.S. at 427). The decision to grant or deny a stay is committed to the trial court's sound discretion. *Nken*, 556 U.S. at 433.

The Court remains convinced that Plaintiffs, not Defendants, have shown a great likelihood of success on the merits of their claims; and incorporates herein the analysis developed in its August 21, 2016 Order issuing the preliminary injunction. Aug. 21, 2016 Order 2, ECF No. 58 (finding "Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing

the Administrative Procedures Act's notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts.").

Additionally, Defendants fail to show they will suffer irreparable injury absent a stay. The first part of the enjoined Guidelines[1] was issued in 2010 and the most recent component on May 13, 2016, just days after the Department of Justice ("DOJ") seemingly began nationwide enforcement, suing North Carolina for upholding the right to sex-designated intimate facilities.[2] Aug. 21, 2016 Order 3, ECF No. 58. The federal statutes prohibiting discrimination on the basis of "sex"—the scope and meaning of which Defendants claim now includes gender identity—were promulgated more than forty years ago.[3] *See id.* The federal government did not articulate, much less enforce, the Guidelines' interpretation of sex as including gender identity for nearly fifty years after Title VII was passed in 1964 and the Court views this delay as strong evidence that Defendants will suffer no irreparable injury if a stay is denied and enforcement of the Guidelines delayed until their legality is established.

In requesting the Court remove non-plaintiff states from the injunction's reach, Defendants claim that "[non-plaintiff states] are in a better position than Plaintiffs or this Court to assess their own interests and injuries." Defs.' Mot. 16, ECF No. 95. But the injunction only restricts Defendants from enforcing or relying on the Guidelines; and leaves non-plaintiff states free to

[1] The Guidelines refer to the documents attached to Plaintiffs' Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) ("DOE Q&A Memo), ECF No. 6-2; (3) Ex. C ("Holder Memo 2014"), ECF No. 6-3, (4) Ex. D (OSHA Best Practice Guide), ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet), ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.

[2] *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C.) (filed May 9, 2016).

[3] Title IX of the Education Amendments of 1972 ("Title IX") and Title VII of the Civil Rights Act of 1964 ("Title VII").

exercise their judgment in crafting and enforcing legislation with respect to intimate facilities.[4] Defendants also claim the injunction burdens non-plaintiff states by "denying them the benefit of federal antidiscrimination enforcement." Defs.' Mot. 16, ECF No. 95. But non-plaintiff states continue to enjoy the benefit of all federal antidiscrimination enforcement that falls outside the injunction—combatting "discrimination based on race, national origin, or disability." Aug. 21, 2016 Order 5, ECF No. 86. Further, the injunction "does not affect a school's obligation to investigate and remedy student complaints of sexual harassment, sex stereotyping, and bullying." Oct. 18, 2016 Order 5, ECF No. 86. Defendants grossly misstate the injunction's scope in claiming it prohibits states from receiving "federal enforcement of the civil rights laws." Defs.' Mot. 16, ECF No. 95. The Court emphasized in its clarification order and reiterates here that the injunction does not prevent Defendants from continuing their core mission of enforcing the federal civil rights laws enacted by Congress.

**B. Breadth of Injunction**

As previously emphasized, this Court possesses the power to issue a nationwide injunction and finds such relief appropriate in the present case. "[T]he Constitution vests the District Court with 'the judicial power of the United States.' That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (quoting U.S. Const. art. III, §1). "The scope of injunctive relief is dictated by the

[4] "As the separate facilities provision in [34 C.F.R.] § 106.33 is permissive, states that authorize schools to define sex to include gender identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by [the preliminary injunction]." Aug. 21, 2016 Order 36–37, ECF No. 58.

extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamaski*, 442 U.S. 682, 702 (1979).

A nationwide injunction is appropriate in this case because Plaintiffs have presented a strong facial challenge to the Guidelines, arguing they violate the Administrative Procedures Act ("APA") by skirting the notice and comment process and contradicting existing law. Where a party brings a facial challenge alleging that agency action violated APA procedures, a nationwide injunction is appropriate. *See, e.g.*, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1407–08 (D.C. Cir. 1998) (invalidating an agency rule and affirming the nationwide injunction); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

Federal courts in the Fifth Circuit regularly enjoin enforcement of new federal regulations challenged as unlawful. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015) (enjoining executive order inconsistent with immigration statutes); *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-00066 (N.D. Tex. June 27, 2016), appeal pending (5th Cir.) (permanently enjoining Department of Labor persuader rule inconsistent with labor statutes); *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-cv-00425 (E.D. Tex. Oct. 24, 2016) (enjoining executive order and agency guidance inconsistent with labor statutes). This injunction, and the justification for its nationwide scope, centers on agency regulations that Plaintiffs allege are invalid on their face. But none of the authorities relied on by Defendants in their request for a partial stay center on agency regulations challenged as facially invalid. *See generally* Defs.' Mot., ECF No. 95. The Court finds the Guidelines' alleged facial defects warrant broad injunctive relief.

The Court also finds Defendants' appeal to the importance of circuit splits unpersuasive given the Supreme Court's recent grant of certiorari in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *recalling mandate & issuing stay*, 136 S. Ct. 2442 (2016), *cert. granted*, 2016 WL 4565643 (U.S. Oct. 28, 2016) (No. 16-273). The Supreme Court's upcoming review of *G.G.* diminishes the usual importance of a circuit split and may determine the legality of the Guidelines at issue here, abbreviating any alleged harm suffered by Defendants. *See* Defs.' Mot. 12–14, ECF No. 95; *see also* Pls.' Resp. 7–8, ECF No. 99.

## III. CONCLUSION

For the foregoing reasons, the Court finds that Defendants failed to demonstrate a likelihood of success or irreparable harm sufficient to justify a partial stay of the Court's preliminary injunction. Accordingly, the Court hereby **DENIES** Defendants' Motion for a Partial Stay of the Court's August 21, 2016 Preliminary Injunction Order (ECF No. 95).

**SO ORDERED** on this **20th day** of **November, 2016.**

**Reed O'Connor**
**UNITED STATES DISTRICT JUDGE**