



## Seventh Circuit Upholds Transgender Student's Right To Use Boys' Bathroom At School

In a ground-breaking decision, the Seventh Circuit held on May 30, 2017, that a transgender student who identifies as male must be allowed to use the boys' bathroom at his high school. This is the first federal appeals court to find conclusively that a transgender student has the right to be treated in accordance with the student's gender identity at school under both Title IX and the U.S. Constitution. This is particularly significant for Wisconsin school districts as the Seventh Circuit governs Wisconsin. While the Court's decision technically only applies to the student and school district involved and the injunction at issue in this case, it is a strong statement from the Seventh Circuit that federal law prohibiting gender discrimination in public schools protects transgender individuals.

### Background

Ash Whitaker is a seventeen year old who attends Kenosha Tremper High School. Ash's birth certificate designates him as "female" but he identifies as male. He began to openly identify as a boy during his freshman year in high school. In the spring of his sophomore year Ash and his mother requested that he be permitted to use the boys' bathroom while at school and at school sponsored events. That request was denied and the administration informed him he could only use the girls' restrooms or a gender neutral restroom that was in the school's main office, which was quite a distance from his classrooms. (The Court noted that the school district had no written policy and referred to the unwritten basis for the district's decisions as a "policy.") Instead of complying with this policy, Ash restricted his water intake and attempted to avoid using any restroom at school for the rest of the school year. This restricted water intake exacerbated a medical condition and caused him to be dizzy and to faint on occasion. He also suffered from migraines, depression, anxiety and suicidal thinking because of the impact of the district's policy on his transition.

In his junior year, Ash used the boys' restrooms at school without incident for six months until a teacher saw him washing his hands at a sink in the boys' restroom and reported it to the school's administration. Ash was again told he was not permitted to use the boys' restrooms. In the summer between his junior and senior years Ash filed a lawsuit alleging the school violated Title IX and the Equal Protection Clause of Fourteenth Amendment of the Constitution. He sought to enjoin enforcement of the school's policy pending the outcome of the litigation.

In September 2016, Judge Pamela Pepper, in the U.S. District Court for the Eastern District of Wisconsin, granted Ash permission to use the boys' bathroom at school and enjoined the district from enforcing any written or unwritten policy against Ash that would prevent him from using the boys' restroom while at school sponsored events, disciplining him for such action or monitoring or surveilling his restroom use in anyway. The Court also denied the school district's motion to dismiss the lawsuit.

### Seventh Circuit Appeal

The school district raised two issues on appeal. First, the district argued the Court should reverse the district court's decision on its motion to dismiss and second, that the district court erred in granting Ash's motion for a preliminary injunction. Holding that it did not yet have jurisdiction to decide an appeal of the denial of the motion to dismiss, the Court restricted its analysis to whether to the preliminary injunction was appropriate. This is significant, because it confines the decision in this case to the facts and circumstances of the specific injunction in this case. While an

argument may be made that this makes the decision narrow and limited, the Seventh Circuit's extensive analysis of both Title IX and the Equal Protection Clause seems a clear indication that the Court will interpret the federal law and the constitution to prohibit discrimination based on gender identity in future cases.

## **Injunction Standard**

A party seeking injunctive relief must meet a two-step burden. First, the party must establish that: (1) he or she will suffer irreparable harm absent preliminary injunctive relief during the pendency of the action; (2) inadequate remedies of law exist; and (3) he or she has a reasonable likelihood of success on the merits. If the party successfully makes that showing, the court then analyzes whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the moving party's interest.

The Court of Appeals agreed with the district court that Ash would suffer irreparable harm based on expert opinions that detailed the harm he would suffer absent injunctive relief. The Court was also satisfied that Ash demonstrated he had no adequate remedy at law if the preliminary injunction should not issue. The Court rejected the school district's argument that monetary damages could compensate Ash. The Court noted that suicide, which Ash had contemplated, was a potential harm which could not be compensated by monetary damages. The Court also noted that there is no adequate remedy for preventable life-long diminished well-being and life functioning.

## **Likelihood of Success on Merits**

The Court held that Ash had a likelihood of success under both Title IX and the Equal Protection Clause of the Constitution. A summary of the Court's analysis with respect to each is set forth below.

### **Title IX**

The Seventh Circuit held the statutory text of Title IX, as interpreted by the United States Supreme Court, protects transgender students from discrimination. According to the Court of Appeals, "A policy that requires an individual to use a bathroom that does not conform to his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." The Court's reasoning built on a long line of cases from the United States Supreme Court and other courts holding that "sex stereotyping," that is, treating someone differently because of his or her perceived failure to conform to dominant notions of what it means to be sufficiently male or female, is a form of impermissible sex discrimination. The Court relied heavily on cases interpreting Title VII to reach its conclusion including, *Hively v. Ivy Tech Community College*, a recent case in which the court held that a homosexual plaintiff could state a claim of sex discrimination based upon a theory of sex-stereotyping. (In *Hively*, the entire court, sitting en banc, reversed an earlier 2-1 panel decision on this issue.)

The Court of Appeals rejected the school district's argument that decisions from other courts, which have held transgender plaintiffs can maintain claims based on sex stereotyping, fly in the face of Title IX as Congress has not explicitly added transgender status as a protected characteristic to either Title VII or Title IX, despite having opportunities to do so. The Court noted that the United States Supreme Court has rejected this argument, stating that congressional inaction "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." Therefore, the Seventh Circuit held that congressional inaction is not determinative. In the end, the Court held that the district's policy subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, and therefore it violates Title IX.

## Equal Protection Claim

As to Equal Protection, the Court of Appeals stated that while it generally avoids rendering unnecessary constitutional decisions, it felt it was important to address the Equal Protection claim in this case because the district court determined Ash also demonstrated an adequate probability of success on the constitutional claim to justify the preliminary injunction. The significant part of this analysis was that the Court determined that in analyzing the school district's policy under the Equal Protection Clause, the student's transgender status should be entitled to heightened scrutiny because it creates a sex-based classification. In applying heightened scrutiny, the Court rejected the school district's argument that since all boys and girls are treated the same under district policy, the policy does not violate the Equal Protection Clause. Specifically, the Court found that the school district treats transgender students, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently - even disciplining them if they choose to use a bathroom that conforms to their gender identity. The Court held that the school district had to demonstrate that its justification for its bathroom policy is not only genuine, but also "exceedingly persuasive." The Court found that the school district failed to meet this burden.

In an attempt to justify its differential treatment of transgender students and to satisfy heightened scrutiny, the school district argued that the purpose of the policy was to protect the privacy rights of other students. The Court rejected this purported justification holding that "the School District's privacy argument is based upon sheer conjecture and abstraction." It noted that Ash had used the boys' restroom for several months without incident or complaint from another student. It was only when a teacher witnessed Ash washing his hands that the bathroom usage became an issue once again in the district's eyes.

Moreover, the Court noted that the policy of forbidding transgender students from using restrooms corresponding to their gender identity "does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door." The presence of transgender students does not pose an increased threat of privacy to any other students. The Court noted that refusing to permit Ash to use the restroom corresponding to his male gender identity further stigmatized him and marked him as "different."

## Balance of Harms

Having already determined the district court was correct in finding that Ash would suffer irreparable harm, the Court of Appeals needed to determine whether injunctive relief would harm the district and the public as a whole. This balance of harms is measured against the party's likelihood of success. The more likely a party is to succeed on the merits, the less the scale must tip in his or her favor. The converse is also true. The less likely he or she is to win, the more the balance of harms must weigh in his or her favor for an injunction to issue. The Court found that school district had not demonstrated that it would suffer any harm from having to comply with the district court's injunction order nor had it established the public as a whole would suffer harm. The harms identified by the school district were speculative. The Court of Appeals took notice of statements in briefs filed by amici ("friends of the court") from district administrators from twenty-one states and the District of Columbia who are collectively responsible for educating approximately 1.4 million students. The district administrators reported that the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in the combined experience of the district administrators, all students' needs are best served when students are treated equally.

## How Districts Should Proceed

As OCR has withdrawn its transgender student guidance and the Supreme Court has decided not to hear the earlier Fourth Circuit case, the Seventh Circuit decision is the leading guidance for school districts in Wisconsin. Many school districts have already adopted policies that prohibit discrimination on the basis of gender identity. Other school districts continue to deal with such students on a case-by-case basis as those situations arise.

In moving forward, school boards should first review existing policies. All districts are already required to have a policy which prohibits discrimination on the basis of sex. If a district has a policy prohibiting discrimination based upon sex, that does not specifically address "gender identity," the policy can stand and the district can enforce it consistent with the Seventh Circuit decision by including gender identity in the definition of "sex." The policy could also be revised to specifically include "gender identity" as a protected class if the school board desires. If a district has a policy that addresses discrimination based on gender identity, the district should continue to enforce it.

While this decision could be appealed to the United States Supreme Court, it seems unlikely that the Court would hear the case. Accordingly, this decision is likely to stand and more transgender students in Wisconsin may seek the protection of the courts to enforce their rights should these same issues arise.

For questions or more information about this topic, please contact one of the attorneys listed below.

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