

Wisconsin Federal Judge Orders School District to Allow a Transgender Student to Use Bathrooms Consistent with His Gender Identity and Allows Case to Move Forward

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Practice Area: School Law

On Monday, U.S. District Judge Pamela Pepper of the U.S. District Court for the Eastern District of Wisconsin rejected a motion by the Kenosha Unified School District to dismiss a case brought by Ashton Whitaker, a transgender student, thus allowing the case to progress through the federal courts. Whitaker filed the lawsuit in July, alleging that the District discriminated against him in violation of Title IX, the federal law that prohibits sex discrimination in schools, and in violation of his Fourteenth Amendment right to equal protection under the law.

The Court issued an oral opinion finding that the student had – at the very least – met the standard for allowing a Title IX claim to proceed through the courts. In issuing its oral opinion, the Court grappled with the various definitions of the word "sex." Ultimately, the Court agreed with the Fourth Circuit's reasoning in the case of *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. April 19, 2016), in which the Court suggested that the various definitions do not provide a universally descriptive "hard-and-fast binary division" but rather reference "the 'sum of' various factors." Contrary to the argument put forth by the District, the Court agreed with the Fourth Circuit that none of the definitions describe "sex" as the gender on a person's birth certificate.

The Court went on to note that no court in the Seventh Circuit has specifically addressed whether Title IX's prohibition on discrimination on the basis of sex encompasses transgender students, and that any attempt to draw parallels to case law interpreting the definition of "sex" in the Title VII context is difficult, due to the contradictory Title VII decisions. The Court further found that because the Seventh Circuit case, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), which found that Title VII did not provide protection to people who had "sex identity disorder," did not interpret "sex" under Title IX because it did not take into account subsequent Supreme Court of the United States case law, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (finding that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) (same-sex harassment claims are not excluded from the coverage of Title VII).

The Court went on to provide that regardless of whether Title IX provides protection for transgender persons, the student alleged sufficient facts to sustain a gender stereotyping claim. Drawing a parallel to the Supreme Court's decision in *Price Waterhouse*, the Court would allow the student's case to proceed on gender stereotyping discrimination claims. See *Price Waterhouse*, 490 U.S. at 251; *Kastl v. Maricopa County*, 325 F.Appx. 492, 493 (9th Cir. 2009) (finding that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."). The court stated the District clearly treated the student differently because he did not conform to the gender stereotypes associated with being a biological female. The District suggested that he use bathrooms that other students were not required to use, endure surveillance to police his bathroom use, and initially refused to allow him to stand for prom king (although it later changed that decision).

The Court's decision was based solely on the broad standard required at the motion to dismiss stage: the court need only determine whether the plaintiff's claims are plausible, not whether the plaintiff could actually succeed. Here, the Court found that the student's Title IX claim is plausible in that the student submitted sufficient factual evidence to survive a motion to dismiss, and his Title IX claim must be allowed to proceed.

The court did acknowledge *Texas v. USA*, 2016 WL 4426495 (N.D. Tex. August 21, 2016), in which a federal district judge in Texas blocked the DOJ and DOE's May 13, 2016, "Dear Colleague" Letter, which provides guidance to schools across the nation related to transgender students, from being implemented. However, the Court stated that the Texas case was unusual in its broad scope and questioned the imposition of national injunctive relief, and rather, opined that it would afford deference to the guidance provided by the DOE and DOJ's "Dear Colleague" Letter.

The Court then turned to the student's claim that the District violated his Fourteenth Amendment right to Equal Protection, and found that at the motion to dismiss stage, the student satisfied the elements of an equal protection claim and the claim would be allowed to proceed. The Court stated that, if one assumed for the purposes of the argument that the student is male, the student alleged sufficient facts to indicate that he was discriminated against relative to other males, because he had alleged that he was not allowed to use the facilities that the defendants allow other males to use. Alternatively, the Court stated that if one assumed the student is transgender, and if the Court concludes at a later stage in the proceedings that transgender persons constitute a suspect class, then the student has alleged sufficient facts to show discrimination on that basis. Again, as to the student's equal protection claim, the Court concluded that the student had alleged sufficient facts to show discrimination based on gender stereotypes.

In addition to the Court's ruling on Monday in which it allowed the student to proceed with the Title IX and Equal Protection lawsuit against the District, on Tuesday, the Court issued a temporary injunction barring the District from enforcing its policy prohibiting the student from using the boys' bathroom while the case is pending. The Court opined that barring the student from using the bathroom of the gender in which he identifies could cause the teen irreparable harm. The District has indicated that it would appeal the Court's decision on its motion to dismiss, as well as its decision to issue a temporary injunction.

School districts should be prepared to respond to a request from a student seeking direction as to school processes and procedures. Whether it be through the development of policies, guidelines, or internal processes, school districts should prepare to assist a student who may request guidance. Now is the time to prepare for the inevitable and ensure your district has laid the framework to quickly and fairly respond.

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