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Third Circuit Rejects Challenge to School District's Bathroom Policy for Transgender Students

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The U.S. Court of Appeals for the Third Circuit has issued its much anticipated precedential opinion upholding denial of a preliminary injunction against a Pennsylvania school district's policy allowing transgender high school students to use the bathrooms and locker rooms aligned with the gender with which they identify.

The ruling comes less than a month after the court took the unusual step of announcing its holding from the bench during the oral arguments in May. Although it is not a final ruling on the merits, the decision is significant as one of the few appellate court rulings to address the rights of transgender students in a legal landscape that has shifted in the time between the Obama and Trump administrations.

The suit was brought by a group of high school students alleging that the Boyertown Area School District's policy of allowing transgender students to use single-sex designated bathrooms and locker rooms that do not conform to their physiological sex violated the plaintiffs' constitutional right to bodily privacy, Title IX, and Pennsylvania tort law.

The 2016 policy allows transgender students to use facilities that correspond to their gender identity. Permission is granted on a case-by-case basis after several layers of review, including consideration by trained counselors and school administrators. When approved, the student may use only the facilities designated for their identified gender. The locker rooms have private areas for changing and single-stall showers with privacy curtains. Additionally, the school has eight single-user bathrooms open to all students.

The U.S. District Court for the Eastern District of Pennsylvania refused to issue an injunction, finding the plaintiffs were unlikely to succeed on the merits and did not demonstrate that they would suffer irreparable harm. The Third Circuit agreed.

The court began its opinion noting that "sex is determined at birth based on the appearance of external genitalia," while "gender" is a broader societal construct" encompassing a person's subjective sense of self, i.e. their identity, and that a transgender individual is a person whose gender identity does not align with their assigned sex. The court then outlined the harm that transgender individuals face from policies that do not support their use of facilities in accord with their identity.

Noting that the attempted suicide rate of transgender individuals is nine times that of the general population, the court concluded that "[f]orcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes severe psychological distress often leading to attempted suicide."

Significantly, the Third Circuit ruled that the U.S. Constitution and Title IX both allow for single-sex accommodations, but neither require it. Ultimately, the court concluded that the school had a compelling interest in preventing discrimination against its transgender students and that the school narrowly tailored its policy to meet that interest. The court also noted that the policy "benefits all students by promoting acceptance."

The court further found that the plaintiffs alleged no harassing conduct on the part of the transgender students, but rather objected to "[t]he mere presence of a transgender student in a locker room," which is not objectively offensive to a reasonable person to support a Title IX claim or a claim for the Pennsylvania tort of intrusion upon

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seclusion.

The court stated that while it was not ignoring or minimizing the discomfort of the students, no irreparable harm could be shown where they have the option to use single-user facilities while pursuing their underlying claims.

An Uncertain Legal Landscape

In 2015 and 2016, the U.S. Departments of Education and Justice issued guidance providing that Title IX requires schools, when electing to make sex-based decisions, to treat transgender students in accordance with their gender identity. The guidance further provided that schools were obligated to respond to all student complaints of sex-based harassment—including that based on actual or perceived gender identity—to treat students in accordance with their gender identity even if it diverges from their identification documents, and to protect student's privacy in relation to their transgender status. This guidance was rescinded in 2017 following the election of President Donald J. Trump.

In 2015, the American Civil Liberties Union filed suit alleging Title IX and Equal Protection Clause violations on behalf of Gavin Grimm, a transgender student in Virginia, when the Gloucester County School Board refused to allow him to use his high school's male restrooms. Gavin used the boys' restrooms at the high school with his principal's permission without incident for about seven weeks before community members objected, prompting the school board to adopt a policy restricting use of bathrooms to those of the corresponding sex. The school district had three single-user bathrooms installed in the high school.

The district court denied the injunction, but the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the case, in April 2016, finding that the district court did not afford sufficient weight to the Department of Education guidance. The school district appealed to the Supreme Court, which granted certiorari and was scheduled to hear arguments on March 28, 2017.

After the Department of Education guidance was withdrawn, however, the Supreme Court vacated its grant of certiorari—over the objections of both parties—and remanded the case to the Fourth Circuit to consider in light of the revoked guidance.

Now back before the U.S. District Court for the Eastern District of Virginia, the school board argues that Title IX is not violated because it prohibits discrimination because of sex, not because of gender identity. The board also argues that the Equal Protection Clause is not violated because transgender individuals do not belong to a protected class.

On May 22, 2018, the court denied the school board's motion to dismiss, finding that the U.S. Courts of Appeal for the Sixth and Seventh Circuits and multiple district courts have concluded that excluding transgender students from using the restrooms aligned with their gender identity could be discrimination on the basis of sex in violation of Title IX and/or the Equal Protection Clause.

With the Trump administration now taking a position in opposition to that of the most recent federal court decisions, this issue could be headed back to the Supreme Court once final decisions are rendered.

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