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Cisgender Students Rebuffed in Illinois Bathroom Case

Federal judge denies preliminary injunction to halt school district’s trans-inclusive policy

BY ARTHUR S. LEONARD

Federal District Judge Jorge L. Alonso ruled on December 29 that a group of parents and cisgender students are not entitled to a preliminary injunction blocking Township High School District 211 in suburban Chicago from allowing transgender students to use restrooms and locker rooms consistent with their gender identity. Alonso’s ruling accepted the recommendation of US Magistrate Judge Jeffrey T. Gilbert.

The dispute grew out of prior legal action by a transgender girl at William Fremd High School in Palatine seeking to use the girls’ facilities. During the Obama administration, the Education Department responded to the student’s complaint by negotiating a settlement agreement with the school district allowing her access to the appropriate facilities. The school district’s willingness to settle turned on a formal guidance that the Obama Education and Justice Departments had issued, interpreting Title IX of the Education Amendments of 1972 to protect gender identity under its sex nondiscrimination requirement.

Reacting to that settlement, an ad hoc group of parents of students at Fremd, together with some girls who attend the high school, brought this suit in May 2016, represented by Alliance Defending Freedom, a legal group that fights LGBTQ rights advances nationwide. The suit asserted that the girls had a privacy concern. Alonso quoted from the Seventh Circuit ruling, which is binding on it.

The plaintiffs also maintained that the Obama guidance mooting that part of the lawsuit involving the federal government departments, but the school district remained a defendant, as did the transgender student intervenors.

The plaintiffs’ case was predicated on a Title IX regulation that authorizes schools to maintain sex-separate restroom and locker room facilities, provided that the facilities are comparable in scope and quality. They argued that in authorizing sex-segregated facilities, the law was recognizing the privacy concerns of the students and that requiring students to have to share such facilities with transgender students of a different “biological” sex contradicts those privacy concerns.

The Trump administration’s actions withdrawing the Obama guidance mooted that part of the lawsuit involving the federal government departments, but the school district remained a defendant, as did the transgender student intervenors. Alonso concluded that nothing in Whitaker “suggests that restrooms and locker rooms should be treated differently under Title IX or that the presence of a transgendered student in either, especially given additional privacy protections like single stalls or privacy screens, implicates the constitutional privacy rights of others with whom such facilities are shared.”

The plaintiffs also maintained that the Seventh Circuit ruling in Whitaker was so “astonishingly wrong” that its reasoning undercuts its “worth even as persuasive authority.” That, of course, is not a winning argument in a district court about a circuit precedent which is binding on it.

Alonso also found that even if plaintiffs had shown a likelihood...
that this expression did not present the type of free speech issues to which the court would have to apply strict scrutiny. The Supreme Court’s public accommodations jurisprudence, Garrett noted, has treated such laws as neutral laws — not specifically targeted on particular political or religious views but instead intended to achieve a legitimate purpose of extending equal rights to participate in the community.

The Kleins largely relied on the Supreme Court’s rulings on a gay group’s right to march in the Boston St. Patrick’s Day and a gay scoutmaster’s right to stay in the Boy Scouts. In those cases, the high court found that public accommodations law would have to yield to the free expression rights of an organization or association that has a particularly expressive purpose. They also focused on the famous flag salute issue from World War II where the Supreme Court ruled that the government cannot compel private individuals to express a specific message.

Even granting that the Kleins’ “products entail artistic expression,” the court was not persuaded that the expression was entitled to “the same level of constitutional protection as pure speech or traditional forms of artistic expression... it is not enough that the Kleins believe them to be pieces of art... they have made no showing that other people will necessarily experience any wedding cake that the Kleins create predominantly as ‘expression’ rather than as food.”

The court concluded that “any burden imposed on the Kleins’ expression is no greater than essential to further the state’s interest.” pointing out that “BOLI’s order does not compel the Kleins to express an articulable message with which they disagree,” such as “God Bless This Marriage.”

Given the state’s interest in preventing “unequal treatment” in public accommodations, Garrett wrote, “there is no doubt that interest would be undermined if businesses that market their goods and services to the ‘public’ are given a special privilege to exclude certain groups from the meaning of that word.”

Looking to another Supreme Court ruling, the panel also concluded that the “incidental effect” on the Kleins’ free exercise of religion does not violate the First Amendment.

The appeals panel also rejected the Kleins’ arguments that recognizing a narrow exception for businesses whose owners had religious objections to same-sex marriage would have only a “minimal” effect on “the state’s antidiscrimination objectives,” pointing out that “those with sincere religious objections to marriage between people of different races, ethnicities, or faiths could just as readily demand the same exemption.”

The panel also concluded that the award of $135,000 had an adequate basis in the trial record and was not out of line with awards in other cases.

The one area on which the court agreed with the Kleins was in finding that their public comments about their determination to defend their case and to adhere to their religious beliefs did not specifcally violate the state’s ban on businesses announcing an intent to discriminate. The Kleins were careful in wording the sign they put up at their bakery and in their comments on Facebook and in the press to avoid stating that they would discriminate because of a customer’s sexual orientation. The court was not willing to interpret the nondiscrimination statute as exposing businesses to additional liability for stating publicly their belief that their past action had not violated the law.

The Kleins were represented in this appeal by attorneys from several law firms, some specializing in championing socially conservative causes, so it would not be surprising to see them file an appeal with the Oregon Supreme Court. The Oregon attorney general’s office represented BOLI. Lambda Legal, the American Civil Liberties Union, and Americans United for Separation of Church and State filed amicus briefs, joined by a long list of liberal religious associations, on behalf of Rachel and Laurel Bowman-Cryer. A Supreme Court ruling in the Masterpiece Cakeshop case is expected by June.

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