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# Cisgender Students Rebuffed in Illinois Bathroom Case

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## 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 constitutional and statutory right not to have "biological boys" present in their restroom and locker room facilities where they could see girls undressing. The US Departments of Education and Justice and the school district were named as defendants.

The court granted the transgender girl who made the original complaint about facilities access and two other transgender students in the district and their parents intervenor status as defendants.

On October 18, 2016, Magistrate Judge Gilbert issued his report, concluding that plaintiffs were unlikely to prevail on their claims, and recommending their motion be denied. The plaintiffs filed objections with Judge Alonso.

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Cisgender students in suburban Chicago were rebuffed in their bid for an injunction against a school policy allowing trans students to use bathroom and locker rooms consistent with their gender identity, and their attorneys took a misplaced shot at the Seventh Circuit victory by Ash Whitaker, seen here at right with his mother Melissa, who prevailed in winning appropriate bathroom access at his Kenosha, Wisconsin high school.

In the meanwhile, significant developments at the federal level have affected the case. After President Donald Trump took office, his Justice and Education Departments withdrew the Obama guidance on Title IX protections for transgender students and announced that the underlying issue should be resolved at the local level.

Shortly after that, the Chicago-based Seventh Circuit Court of Appeals, ruling in a similar case, Whitaker v. Kenosha Unified School District No. 1 Board of Education, found that Title IX does extend to gender identity discrimination claims and upheld an injunction ordering a Wisconsin school district to allow a transgender boy to use the boys' facilities at a public high school.

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.

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.

Magistrate Judge Gilbert had rejected this argument in 2016 and the Seventh Circuit's Whitaker decision subsequently confirmed his understanding of this issue.

Alonso quoted from the Seventh Circuit ruling, which is binding on the Northern District of Illinois where he serves, writing "discrimination against transgender individuals is sex discrimination… because 'by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth'… a 'policy that requires an individual to use a restroom that does not conform with his or her gender identity punishes that individual for his or her gender nonconformance which in turn violates Title IX.'"

The plaintiffs tried to distinguish the Whitaker case from their own because it addressed only restrooms, not locker rooms, but 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

▶ CISGENDER SUIT, continued on p.15

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they would prevail on the merits, "they would still not be entitled to a preliminary injunction because they have not shown they are likely to suffer irreparable harm in the absence of an injunction, or that they lack an adequate remedy at law in the event that they ultimately succeed on their claims."

The only "specific harm to which they point," Alonso wrote, "is the risk of running late to class by using alternate restrooms to avoid sharing with a transgender student and the 'embarrassment, humiliation, anxiety, fear, apprehension, stress, degradation, and loss of dignity'" sharing the bathroom would allegedly entail. These harms, Alonso concluded, "were insufficient to establish irreparable injury."

During the time in which the district had its new policy, Alonso noted, "either Student Plaintiffs did not notice that transgender students were using restrooms consistent with their gender identity, or they knew and tolerated it for several years," since no examples of actual incidents were cited in their motion for an injunction. "The passage of time therefore further undermines Plaintiffs' claim of irreparable harm," he wrote.

In light of the Whitaker case and Alonso's strongly-worded opinion, one would expect the school district to promptly file a motion for summary judgment, if Alliance Defending Freedom does not decide to fold up its tent and steal away.

This issue could be clarified if the Supreme Court were to take up the Kenosha school district's appeal in the Whitaker case. News reports, however, indicate that the two sides there are close to a settlement and have asked the high court to extend the time for Whitaker's counsel to file a response to the school district's petition. As a result, it appears likely that no Supreme Court action to take up the Whitaker case will occur prior to the February 8 status hearing in the Illinois case.

The transgender student intervenors in this case are represented by the American Civil Liberties Union of Illinois and the national ACLU Foundation, with pro bono attorneys from Mayer Brown LLP.