

1-2021

## **Federal Court Says Ohio Must Let Transgender People Correct Their Birth Certificates**

Arthur S. Leonard

to serve. Judge Peterson found that Campbell's transition began well before incarceration and that she has "lived, to the fullest extent possible, as a woman in male prisons for years."

Based on the evidence, Judge Peterson found that Campbell's gender dysphoria "would not remit without surgery." The defendants could not, as a matter of policy, apply the same kind of blanket rule prohibiting necessary treatment for gender dysphoria found unconstitutional when it was enacted as a statute. *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

As a last gasp, defendants asked Judge Peterson to order Campbell to spend a year in the women's prison prior to surgery. He declined to do so. Defendants "did not dispute that without surgery, Campbell was left in continuing anguish that surgery could alleviate." Campbell has waited "long enough." Judge Peterson also rejected as speculative proffers about possible difficulty Campbell might face in a women's prison, noting proof of her ability to adapt in a men's prison.

Judge Peterson concludes: "I find that defendants consciously disregarded Campbell's need for treatment for her severe anatomic gender dysphoria by denying her the one effective treatment. They did so as a matter of DOC policy without an individualized assessment of her suitability for sex reassignment surgery. I find further that no reasonable professional with expertise in the treatment of gender dysphoria would conclude that Campbell was not an appropriate candidate for sex reassignment surgery."

The parties are directed to try to agree on the terms of an injunction. In balancing the need for equitable relief (and in what could be taken as a bit of a dig at the Seventh Circuit), Judge Peterson finds that damages were not sufficient for the irreparable injury proven – and that in any event, they have been removed from the case by the Court of Appeals.

Campbell is represented by Husch Blackwell, LLP (Madison). Judge Peterson, who was appointed by President Barack Obama, notes his appreciation to counsel for their work. ■

## Federal Court Says Ohio Must Let Transgender People Correct Their Birth Certificates

By Arthur S. Leonard

U.S. District Judge Michael H. Watson ruled on December 16 that Ohio's refusal to issue corrected birth certificates for transgender people violates the United States Constitution. Lambda Legal and the American Civil Liberties Union sued state officials on behalf of four transgender plaintiffs whose attempts to get their birth certificates changed to correctly identify their gender had been thwarted. *Ray v. McCloud*, Case No. 2:18-cv-272 (S.D. Ohio).

At the time Lambda sued two years ago, there were only three states that categorically prohibited such changes: Kansas, Ohio and Tennessee. Since then, Kansas has settled a lawsuit by agreeing to change its policy. That leaves Tennessee as the last holdout.

However, Judge Watson's opinion did not address what requirements Ohio may impose to determine whether a particular transgender individual may obtain a new birth certificate correctly reflecting their gender identity. Some jurisdictions require proof of surgical alteration or at least some clinical treatment, some others are satisfied with a doctor's attestation as to gender identity, and some will accept a sworn declaration by the individual as to their correct gender identity. All that the judge held in this case was that the state cannot categorically refuse to make such changes under any circumstances.

This issue has had an inconsistent history in Ohio. State courts had turned down attempts by transgender individuals to get court orders to change their birth certificates for many years, but then the state did a turnabout and started allowing them until 2016, when it reverted to its former prohibition. Judge Watson noted that at least ten transgender people had actually obtained new birth certificates before the policy was changed. Since the statute

governing birth certificates in Ohio does not even mention the issue but generally provides that a birth certificate can be corrected if information "has not been properly or accurately recorded," the state claimed that it was now acting according to its interpretation of the statute as requiring a record that was correct at the time of birth.

Lambda's complaint on behalf of Stacie Ray, Basil Argento, Ashley Breda and "Jane Doe" asserted that the state's policy violated their Due Process privacy rights and their Equal Protection rights under the 14th Amendment, as well as their Free Speech rights under the 1st Amendment. Having ruled in favor of the plaintiffs on their 14th Amendment claims, Judge Watson commented in a footnote that he would decline to analyze their 1st Amendment claim.

At an earlier stage in the litigation, the court had refused to dismiss the case outright. The December 16 ruling granted summary judgment to the plaintiffs based on the evidentiary record. Each of the plaintiffs had explained how having a birth certificate that did not correctly reflect their gender identity caused practical problems for them, essentially misgendering them and "outing" them as transgender when they were required to provide their birth certificate. The court also noted the significant risk of harassment and physical violence that transgender people face as an important reason to allow them to obtain birth certificates that identify them correctly, citing a 2015 U.S. Transgender Survey showing that almost one-third of transgender individuals who had to use an identity document that misgendered them consequently suffered harassment, denial of benefits or services, discrimination, or physical assault.

The court found that because the fundamental right of privacy was

involved, the standard of review for their Due Process claim is “strict scrutiny,” under which the state’s policy would be presumed to be unconstitutional unless it met the burden of showing a compelling justification. On the equal protection claim, Judge Watson found that many federal courts now agree that heightened scrutiny applies, under which the state must show an exceedingly persuasive reason for its policy. Courts use heightened scrutiny for sex discrimination claims, arguably making relevant the Supreme Court’s *Bostock* decision earlier this year, which held that discrimination because of transgender status is sex discrimination within the meaning of the federal anti-discrimination law, Title VII.

Either way, however, the court concluded that the policy must fall, because the state’s arguments didn’t even support a “rational basis” for what it was doing. Having allowed transgender people to get new birth certificates in the past, the state should have articulated a reason why it had changed that policy, but it could not credibly do so. What the court left unstated was the likelihood that the change in policy was entirely political.

The state’s attempt to argue that its interest in having accurate birth records required this categorical policy was fatally undermined by the fact that changes to birth certificates are made in many other circumstances. A person who gets a legal name change can get a new birth certificate showing their new legal name. After an adoption, a new birth certificate can be issued listing the adoptive parents instead of the birth parents. The court found that no persuasive justification had been offered for freely changing the information on birth certificates in these other circumstances but not for transgender people, especially in light of the difficulty and harm they suffered.

As noted, however, the court’s ruling was limited to the categorical ban, leaving yet to be determined the criteria Ohio was adopt for determining whether the change can be made in a particular case. Furthermore, the state could attempt to appeal this ruling to

the 6th Circuit Court of Appeals, but that court has already gone on record regarding gender identity discrimination as a form of sex discrimination in the case of the late Michigan transgender funeral director Aimee Stephens, who employment discrimination case was part of the *Bostock* decision by the Supreme Court.

Lambda Legal attorneys who worked on this case include Kara Ingelhart and Peter Renn. Malita Picasso and John Knight of the ACLU’s LGBT Rights Project and Freda Levenson, Susan Becker, Elizabeth Bonham and David Carey of the ACLU of Ohio were co-counsel, as well as pro bono counsel Jennifer Roach from Thompson Hine LLP. Judge Watson was appointed to the district court by President George W. Bush. ■



## Federal Court Enjoins Pennsylvania Ethics Rule against Discrimination by Lawyers

By Ezra Cukor\*

Zachary Greenberg, a Pennsylvania attorney represented by the Hamilton Lincoln Law Institute, won a preliminary injunction enjoining the enforcement of an amended attorney ethical rule prohibiting discrimination and bias from U.S. District Judge Chad F. Kenney, who found that the rule violates the 1<sup>st</sup> Amendment. *Greenberg v. Haggerty*, 2020 WL 7227251 (E.D. Pa. Dec. 8, 2020).

Pennsylvania’s amended Rule 8.4(g) would have taken effect December 8, 2020. It defines as professional misconduct to “in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status.” The Rule explicitly neither limits “the ability of a lawyer to accept, decline or withdraw” representation in accordance with the rules for so doing, nor precludes “advice or advocacy.” Comments to the amended Rule 8.4(g) state that for purposes of the rule the practice law includes “participation in activities that are required for a lawyer to practice law,” such as continuing legal education (CLE), and clarify that “substantive law of antidiscrimination and anti-harassment statutes and case law guide” its application.

Pennsylvania’s amended Rule 8.4(g) is based on the American Bar