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Federal Judge Orders Indianapolis School to Let Transgender Girl Play on Softball Team

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Michigan Supreme Court Rules That State Civil Rights Law Protects LGBTQ+ People

Title VII because of the similarity in statutory language of ELCRA and the federal statute.

Two members of the court wrote dissents, channeling the arguments that Justice Alito and Justice Brett Kavanaugh made in their dissents in the *Bostock* case.

Like Justice Kavanaugh, Justice Brian Zahra first observed that the court's opinion "is a victory for a good many Michiganders who worked diligently and unyieldingly for sexual-orientation equality under the law since the enactment of [ELCRA] more than 45 years ago. I take no issue with the merits of the policy adopted today by a majority of this court," he continued. "I also harbor no doubt that my colleagues in the majority are acting in good faith, with pure hearts and the best of intentions." But, he argued, what they were doing was what the state constitution authorizes the legislature, not the courts, to do – to make new law – and "this Court's duty is to say what the law is, not what it thinks the law ought to be."

Like Justices Alito and Kavanaugh, he argued that nobody at the time the law was enacted would have thought that the statute banned sexual orientation discrimination. In fact, by 1976 some local governments in the U.S. were already adopting ordinances banning sexual orientation discrimination, and the legislative history of ELCRA would support the argument that the legislature had consciously decided not to include sexual orientation under the statute. "We simply cannot pretend that the ELCRA says something that it does not say," he asserted.

Justice David Viviano's dissent advanced the argument that the statute requires a finding of discriminatory motivation. In the case of sex discrimination, that would be a motivation to discriminate against somebody because they are a man or they are a woman. He found the reasoning of the majority (and of the U.S. Supreme Court) inconsistent with this requirement for discriminatory motivation. In many ways, his dissent sounds like the dissenting opinion by 7th Circuit U.S. Court of Appeals Judge Diane Sykes from *Hively v. Ivy Tech Community College*, in which that court ruled before *Bostock* that Title VII allows sexual orientation discrimination claims.

Still to be decided, of course, would be whether the Michigan courts will recognize a religious free exercise defense in either of these cases on the part of the business owners, which cited their religious beliefs in denying services to the complainants in those cases.

Bills seeking to amend ELCRA to add sexual orientation and gender identity to the list of prohibited reasons for discrimination have repeatedly failed to advance. Under the *Rouch World* ruling, they are no longer necessary. But since this is a case of statutory, not constitutional, interpretation, the legislature could overrule the court by amending the statute. As a result, the task for the state's LGBTQ rights advocates is now to work against potential bad legislation rather than to advance the perennial gay rights bill. ■

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By Arthur S. Leonard

The federal trial court in Indianapolis has ordered the Indiana Public Schools to allow a transgender 10-year-old girl, identified in court papers as "A.M.," to play on the girls' softball team, finding she is likely to be able to prove that her federal rights under Title IX take priority over a recent Indiana law which would forbid her to do so. District Judge Jane Magnus-Stinson's order will be immediately appealed to the U.S. Court of Appeals for the 7th Circuit by Indiana Attorney General Todd Rokita, who intervened on behalf of the state to defend its new law. *A.M. v. Indianapolis Public Schools*, 2022 WL 2951430, 2022 U.S. Dist. LEXIS 132356 (S.D. Indiana, July 26, 2022).

Judge Magnus-Stinson's opinion explains that A.M., identified as male at birth, announced to her family when she was four years old that she is a girl, and she has lived as a girl ever since. She was diagnosed with gender dysphoria at age 6, dresses as a girl, and obtained a new birth certificate with her preferred female name and gender marker. Her parents have supported her in all this, and her mother sues on her behalf.

In light of her early female identification, she has always been known to her schoolmates as a girl. Her parents informed her teachers and school administrators that she is a transgender girl, but her identity as such has not been shared with her classmates. Last season while in the fourth grade, she played softball as a girl. Nobody complained and there was no indication that she enjoyed any special advantage because of being born male. If anything, she turned out to be one of the less talented members of her team. At age 10, she is

taking puberty blockers and, according to her Complaint, has not experienced any aspects of male puberty. She looks forward to getting feminizing hormones when her doctor determines that she is ready for them.

The new Indiana law took effect on July 1, 2022, after the end of the school softball season. A.M. looked forward to continuing to play softball as a fifth grader, but she was informed by the school that she may not, because the law provides: "A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology, may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport." The statute authorizes a "student or parent" to submit a grievance to the school for a violation of this provision. Nobody has submitted a grievance about A.M.'s participation, thus far, probably because the teachers and administration have maintained confidentiality and none of the parents or other students knew her as other than a girl.

A.M. went to federal court claiming a violation of her rights under Title IX and the Equal Protection Clause of the 14th Amendment, asking for a preliminary injunction so she can participate in girls' softball while the case is pending. The Indianapolis Public Schools and its Superintendent, the named defendants, have taken no position on whether the court should issue a preliminary injunction. Apparently, if not for the new statute, they would be happy to let A.M. continue to play softball with the other girls. But the state of Indiana has intervened as a defendant on being informed that the validity of its new law is being challenged, and it is the party opposing the injunction.

Both A.M. and the state offered expert testimony, but the judge ended up deciding that apart from some background information, what the experts had to say was not particularly relevant to the legal issues to be decided on the motion for a preliminary injunction. In light of the Supreme Court's 2020 decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, finding that discriminating on the basis of transgender status is a form of sex discrimination, taken together with a binding precedent, a 7th Circuit ruling from several years earlier, *Whitaker v. Kenosha Unified School District*, 858 F. 3d 1034 (2017), involving a transgender boy who was wrongly barred from using the boys' restrooms at his high school, the court found that this case was "not even close." Title IX forbids sex discrimination by schools that receive federal funds, which the Indianapolis schools do, and excluding A.M. from girls' softball because she is transgender is sex discrimination in violation of Title IX, so A.M. is strongly likely to win this case on the merits, which is the first thing she has to show to get a preliminary injunction.

After noting that the statute applies only to transgender girls, not transgender boys, the court found a clear case of sex discrimination. "The singling out of transgender females is unequivocally discrimination on the basis of sex," she wrote, "regardless of the policy argument as to why that choice was made."

Furthermore, A.M. made a strong showing that she would suffer irreparable harm if not granted preliminary relief. "A.M.'s mother has identified significant emotional harm that she believes A.M. will suffer if she cannot play on the girls' softball team, including that it will undermine her social transition and potentially cause her the trauma of being 'outed' as not 'really' a girl," wrote Magnus-Stinson. "The court finds that this emotional harm could not be addressed adequately through a remedy at law." ("Remedy at law" is legalese for money damages.)

The court also found that "there is no evidence of concrete harm to IPS or the State that would occur if an injunction issues," finding as "speculative" the argument that "biological girls will be forced to compete against transgender girls who have an advantage." Most importantly, in issuing this order the court is dealing only with A.M., a rising fifth grader. "Indeed," she wrote, "A.M. played on the girls' softball team last season, and the State has not set forth any evidence that this harmed anyone." Nobody complained, and the school was only acting because of the new state law. The court also found no evidence that the public would be harmed, either. All factors weighed in favor of issuing the preliminary injunction.

Because she granted the preliminary injunction solely on the basis of Title IX, the judge found it unnecessary to rule on A.M.'s constitutional claim.

A.M. is represented by Kenneth J. Falk, Gavin M. Rose, and Stevie J. Pactor of the ACLU of Indiana.

Judge Magnus-Stinson was appointed to the District Court by President Barack Obama. ■