

Education

Appeals court sides with transgender student in Wis. school bathroom case

By **Emma Brown** May 30, 2017

A federal appeals court Tuesday issued a decision that could have far-reaching implications for transgender students, siding with a transgender boy whose Wisconsin school district had sought to bar him from the boys' bathroom to protect the privacy of other students.

High school senior Ash Whitaker sued Kenosha Unified School District No. 1 last summer, arguing that its bathroom policy violated his civil rights. In a unanimous decision, a three-judge panel of the U.S. Court of Appeals for the 7th Circuit upheld a preliminary injunction that temporarily stops the district from enforcing that policy while the case is tried.

The school district's privacy argument is "based upon sheer conjecture and abstraction," wrote Judge Ann Claire Williams, while the harm that Whitaker suffered when he was prohibited from using the bathroom that matched his gender identity is "well-documented and supported by the record."

Whitaker is set to graduate Saturday, so the concrete impact of this court victory on his school career will be limited. But advocates said the impact of the 7th Circuit's decision could ripple far beyond Wisconsin at a time when the Trump administration has argued that decisions about accommodations for transgender students should be left to states and local school districts.

Whitaker argued that the school district's bathroom policy violated his rights under the 14th Amendment of the U.S. Constitution and under Title IX, which prohibits sex discrimination in federally funded schools. The judges agreed, finding that Whitaker was likely to win his case based on that argument.

The decision makes the 7th Circuit the first appeals court to interpret both Title IX and the Constitution as protecting transgender students from discrimination — and requiring schools to allow transgender students to use the bathroom matching their gender identity.

The decision sets a precedent in the 7th Circuit, which includes Illinois, Indiana and Wisconsin. Advocates say other appeals courts will take note.

"Other courts, as they will be grappling with these same issues, will hopefully find the 7th Circuit's decision very persuasive as they look to answer these questions elsewhere," said Joseph Wardenski, a Washington lawyer who, along with the Transgender Law Center, represents Whitaker.

Ronald S. Stadler, a lawyer for the school district, said he was "disappointed" in the decision, which he said suggests that the court "believes there is no harm in allowing men and women to use the same restroom."

Stadler said the district is considering whether to appeal to the Supreme Court or ask a full panel of 7th Circuit judges to hear the case — or whether to proceed with the case in district court.

Importantly, the decision did not rely on or even mention the guidance to schools that President Barack Obama's administration issued in May 2016, explaining the accommodations that schools must provide for transgender students to comply with Title IX.

The U.S. Court of Appeals for the 4th Circuit had relied upon that guidance when it ruled in favor of transgender teen Gavin Grimm, who challenged his Virginia school district's policy banning him from the boys' bathroom.

But the Trump administration revoked the guidance this year, arguing that the Obama-era Education and Justice departments had overstepped their executive authority by dictating bathroom policies for local schools. The Supreme Court, which had been set to hear Grimm's case, instead sent it back to the lower courts for reconsideration in light of the administration's executive action.

Catherine Lhamon, who helmed the Education Department's Office for Civil Rights under Obama and was a key architect of the transgender guidance, said that the 7th Circuit's ruling was a vindication that she and her colleagues had not invented rules out of thin air, but accurately interpreted civil rights law on the books.

"The guidance didn't make new law, which was our point," she said.


The school district, citing the need to protect other students' privacy, had told Whitaker that he must use either the girls' restrooms or a gender-neutral bathroom in the school's main office — options that Whitaker said set him apart from his peers and stigmatized him because of his gender identity.

The judges agreed, citing an expert in gender dysphoria who had testified that the school district's efforts to keep Whitaker out of the boys' bathroom during his junior year led him to deeper depression and thoughts of suicide. He also suffers from a physical condition that was exacerbated when — in an effort to avoid using school bathrooms — he stopped drinking water during the day.

The judges were unsympathetic to the school district's argument that it had to keep Whitaker out of the boys' bathroom to protect the privacy of other students. Whitaker had used the boys' bathroom for six months without incident or complaint, the judges noted, before a teacher saw him washing his hands and alerted administrators.

The school district's policy "ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door," Williams wrote. "A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."

 **17 Comments**

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