

## ALERTS

### School Law Alert - Appeals Court Sides With Transgender Student In Restroom Case, Upholds Preliminary Injunction

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In an opinion issued May 30, the U.S. Court of Appeals for the Seventh Circuit upheld a Wisconsin District Court's injunction that prevents a school from requiring that a transgender student use either the bathroom that matches the student's biological sex or a separate, gender-neutral bathroom. While the immediate impact is limited to the Wisconsin school in the case, its implications may reach all schools in the Seventh Circuit's jurisdiction.

In *Whitaker v. Kenosha Unified School District No. 1*, the Seventh Circuit panel found that the transgender student who brought the suit has a likelihood of succeeding under Title IX, reasoning that differential treatment of transgender students qualifies as sex discrimination. Additionally, the court found that policies directed toward transgender persons are subject to the same heightened scrutiny standards that courts apply to sex classifications under the Equal Protection Clause.

The plaintiff in this case requested a preliminary injunction against the school's bathroom policy, asserting that the Kenosha Unified School District violated Title IX's prohibition against differential treatment on the basis of a student's sex and the Fourteenth Amendment's guarantee of equal protection. The lower court granted the motion and the school district appealed, arguing that "transgender" is not a protected class under Title IX nor does it trigger heightened scrutiny under the Equal Protection Clause. The school also argued that its bathroom policy is rationally related to its need to protect student privacy in the bathrooms.

The three-judge panel of the Seventh Circuit disagreed, finding it reasonably likely differential treatment of a transgender student can be considered discrimination on the basis of sex under Title IX and the school district would not be able to articulate an exceedingly persuasive justification required for gender classification under the Equal Protection Clause.

The court further held that the school's accommodation – access to a gender-neutral bathroom – also likely violated Title IX and the Equal Protection Clause. The court noted that the separate accommodation caused harm to the plaintiff because it drew attention to the student's transitioning status, which increased the potential for stigmatization and exacerbated physical and psychological distress that the plaintiff reported feeling.

While the immediate impact of this case is on one school district's bathroom policy, the case provides key insights into how the Seventh Circuit is likely to rule on other transgender bathroom policies. It sends a

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clear signal that schools that do not permit transgender students to use the bathroom that matches their gender identity risk violating federal law. Further, the reasoning of this case could be extended to Title VII, affecting all employers and employees rather than just schools.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or Jason Clagg at 260-425-4646 or [jason.clagg@btlaw.com](mailto:jason.clagg@btlaw.com) or Mark Scudder at 260-425-4618 or [mark.scudder@btlaw.com](mailto:mark.scudder@btlaw.com).

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