

School Law for Administrators

Transgender Student Issues

Parents of transgender student sue for access to girls' restroom facilities

Citation: *Board of Education of the Highland Local School District v. United States Department of Education*, 2016 WL 5372349 (S.D. Ohio 2016)

A federal district court in Ohio has granted a transgender student's request for a preliminary injunction against her school district, requiring the school district to permit her to use the girls' restroom and otherwise treat her as a girl. The court denied the school district's request for a preliminary injunction to enjoin the U.S. Department of Education (DOE) and Department of Justice (DOJ) from enforcing the antidiscrimination provisions of Title IX against the school district.

Jane Doe was an 11-year-old transgender girl who was enrolled in the fifth grade at Highland Elementary School. Jane, who was assigned male at birth, had communicated to her family that she was female since she was four years old. After her parents sought out the advice of medical and mental health professionals, Jane was diagnosed with gender dysphoria, a medical diagnosis for a condition in which people experience extreme and unrelenting emotional pain resulting from the incongruity between their gender identity and the sex they were born with. Recommended treatment in most cases, and in Jane's, was to socially transition to the other gender, including through name change, clothing, pronouns, and treating her like a female. This, according to her parents immediately helped her feel more at ease and even experience happiness.

Before Jane started first grade, her parents notified the principal (Winkelfoos) of her transition and asked that she be treated as a female and permitted to use the girls' restroom. Winkelfoos

denied the request to permit Jane to use the girls' restroom and to change the records to reflect her female name, although the district has stated that it agreed to "address [Jane] as a female." The school arranged for Jane to use a restroom in the office used by school staff. This arrangement was not good for Jane, according to her parents, and the next year before second grade, her parents again requested Jane be allowed to use the girls' restroom, but this request was again denied and Jane was required to use a unisex restroom in the teachers' lounge. Jane began to experience extreme anxiety about this arrangement, feeling that the teachers glared at her. She was hospitalized in May 2014 (near the end of that year) after expressing suicidal thoughts. She was treated for severe depression.

In the meantime, in December 2013, her parents had filed a complaint with the Department of Education's Office of Civil Rights (OCR), complaining that the district discriminated against Jane on the basis of her sex by requiring her to use separate individual-user bathroom and denying her access to the bathrooms used by other female students. Later, the OCR amended the complaint to add that school staff harassed Jane by referring to her as a boy and failing to use female pronouns; the complaint also alleged the district failed to adequately respond when it was informed of this behavior by staff.

In September 2014, Jane's parents escalated their request for Jane to use the female restrooms to the superintendent, asking him to bring it before the school board. The superintendent

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Did You Know?

ED provides guidance on setting local policy around School Resource Officers

In a recent letter from John B. King Jr., posted on the U.S. Department of Education's (ED) website, King noted that educators around the country, like him, have become concerned about school-based law enforcement officer's involvement in and administration of school discipline. School resource officers (SROs) can help provide a positive and safe learning environment, King noted, but continued that he is concerned about "the potential for violations of students' civil rights and unnecessary citations or arrests of students in schools, all of which can lead to the unnecessary and harmful introduction of children and young adults into a school-to-prison pipeline."

To help school districts navigate this tricky conundrum, King

announced that ED and the Department of Justice have teamed up to provide a new resource aimed at helping states and school districts to improve their SRO policies and practices. The resource, called 'SECURE Rubrics' is meant to help districts set appropriate policies and team up in a positive way with SROs. For example, the guidance suggests that while SROs should help ensure safety and security in a school, they should not be permitted to administer discipline in schools.

To find out more, visit: <https://www2.ed.gov/policy/gen/guid/school-discipline/support.html#tools>.

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notified the parents that the board had voted not to grant the request. The situation was the same during the school year for Jane and the next summer, as the start of school approached in August 2105, Jane attempted suicide. Jane also developed an eating disorder, avoiding fluid and food intake in order to avoid needing to use the bathroom at school, which during her fourth grade year was a locked teachers restroom for which she was required to find an adult to unlock it and wait outside while she went to the bathroom.

In March 2016, the OCR notified the district that its treatment of Jane Doe violated Title IX and proposed a Resolution Agreement, which provided, in relevant part, that the district would grant Jane access to sex-specific facilities consistent with her gender identity, treat Jane consistent with her gender identity, and engage a third-party consultant with expertise in child and adolescent gender identity to assist it in implementing the terms of the Agreement. On June 10, 2016, the district filed this lawsuit, stating in its complaint that Highland had decided not to accept the Resolution Agreement. That same day, OCR sent a letter to the district's attorney informing him that OCR had learned of the lawsuit and that due to the lawsuit and several unsuccessful attempts to communicate with the district, OCR planned to end the 90-day period for negotiations over the Resolution Agreement and in 10 days issue a notice of violation of Title IX. This notice found the district failed to assess whether a hostile environment existed for Jane and denied Jane access to restrooms consistent with her gender identity. The letter noted that repercussions could include termination of federal funding and a lawsuit by the Department of Justice (DOJ). Federal funding amounted to a bit more than \$1 million of the district's \$15 million budget.

The board of education commenced a lawsuit in June 2016 alleging that the DOE, DOE, Secretary of Education, Attorney General, and others (defendants) violated: 1) the Administrative Procedure Act (APA); 2) the Spending Clause of Article I, Section 8 of the United States Constitution; 3) the federalism guarantees of the United States Constitution; 4) the separation-of-powers guarantees of the United States Constitution; and 5) the Regulatory Flexibility Act. The district sought a preliminary injunction that would have the court enjoin the federal defendants from enforcing the agency rule in a way that would recognize that "sex" in Title IX and its regulations includes "gender identity." The district also asked the court to enjoin defendants from enforcing Title IX in a manner that would require it to allow transgender students "to access overnight accommodations, locker rooms, and restrooms designated for the opposite sex;" and from taking any adverse action against the district including but not limited to steps to revoke its federal funding, because of its policy "requiring students to use sex-specific over-night accommodations, locker rooms, and restrooms consistent with their sex."

The following month, Jane Doe and her parents moved to intervene in the suit and, once approved, filed their own motion for preliminary injunction against the district and its employees, alleging violations of Jane's Fourteenth Amendment right to equal protection of the laws; her right to be free from sex discrimination

under Title IX; and her fundamental right to privacy under the United States Constitution. The family asked for a preliminary injunction requiring the district and its employees to "treat her as a girl and treat her the same as other girls, including using her female name and female pronouns and permitting Jane to use the same restroom as other girls at Highland Elementary School during the coming school year."

In considering whether a preliminary injunction would be appropriate, courts look to whether the party requesting the injunction has a substantial likelihood success on the merits; whether there is a threat of irreparable injury without the injunction; whether the injunction would cause substantial harm to others; and whether the public interest would be served by granting injunctive relief. While a party is not required to prove his case in full to secure a preliminary injunction, the proof required is more stringent than the proof required to survive a summary judgment motion.

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX also states that nothing in the statute "shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." Regulations and guidance from the DOE has clarified that a recipient of federal funds "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex."

With respect to Title IX and its implementing regulations' applicability to transgender students, the DOE has issued various guidance, explaining in 2010 that Title IX "protect[s] all students, including . . . transgender. . . students, from sex discrimination," and in 2014 that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." Also, in 2014, the DOE advised that "[u]nder Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." In 2015, the DOE issued further guidance on this point, noting that schools should "help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes." In 2016, the DOJ and DOE issued joint guidance that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity," and clarified that "[h]arassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly."

Turning first to the school district's motion, the court denied the injunction finding that it lacked subject matter jurisdiction over the district's constitutional claims. On the Title IX claims, the

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Retaliation

Bus driver files lawsuit claiming retaliation for his whistleblowing regarding bus safety

Citation: *Sprayberry v. Mississippi State Department of Education*, 2016 WL 1306273 (S.D. Miss. 2016)

A federal district court in Mississippi has granted in part and denied in part the request of two school district officials to dismiss First Amendment retaliation and other claims brought against them by a school bus driver who was terminated after he had complained about the safety of the district's buses and participated in a state-led investigation. The court found that ...

Todd Sprayberry was a bus driver in the Scott County School District who drove the handicapped school bus in 2012. He complained that the buses were unsafe, and did not have

required straps to secure children in wheelchairs.

The school district underwent an investigation in 2013, by the Mississippi Department of Education (MDE) and the state attorney general's office. The investigation resulted in the MDE finding that an extreme emergency situation existed in the school district. Sprayberry participated in the investigation, and reported that his supervisor, Greg Nicks, who was director of transportation, had told him to hide the handicapped bus during an inspection. He also told investigators that efforts were

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court noted that under the Title IX framework, the enforcement scheme for non-compliance imposes no immediate penalties and the district itself may initiate judicial review in the court of appeals after an adverse funding-termination decision from the agency. The court also found that Jane's intervention in the lawsuit did not deprive the district of meaningful judicial review, as the district argued, finding that while the district was forced to defend against Jane's third-party complaint, the district retained the ability to raise a defense that the recent guidance on Title IV actually violates Title IX.

Turning to Jane Doe's request for preliminary injunction, the court focused on her Title IX and equal protection claims (noting Jane made no argument regarding her right to privacy claim), and granted her motion for preliminary injunction, finding that Jane's claims met the requirements for a preliminary injunction.

On the Title IX issue, the court explained that the "crux" of the motion was whether Jane was excluded from the girls' restroom on the "basis of sex," with the definition of "sex" either encompassing "gender identity" or only applying to physical attributes. Title IX implementing regulations permit schools to provide separate toilet, locker, and shower facilities based on sex so long as the facilities are comparable. While the district argued that "sex" in Title IX referred to a person's biological sex (and the sex assigned on their birth certificate) and that to define it otherwise was counter to Title IX's objectives, Jane Doe and family countered that the federal defendant's interpretation of sex as encompassing gender identity was consistent with guidance on Title IX and its implementing regulations.

The court agreed with neither, finding that the term "sex" in Title IX and its implementing regulations is ambiguous. Therefore, the court found that deference needed to be given to the interpretation of the meaning by the DOE and the DOJ and that the federal defendant's argument that sex encompassed gender identity was not clearly erroneous. Further, under this interpretation, the court concluded that Jane had been denied access to the communal girls' restroom on the bases of her "sex." The court also found that this exclusion based on discrimination harmed Jane—the court

found credible Jane's parents' accounts that Jane felt stigmatized and bullied at school and was suicidal as a result. Further the court noted that just the fact that this exclusion caused Jane to avoid going to the bathroom all day would impair her ability to focus on learning. Based on these things, the court found Jane was likely to succeed on the merits of this claim.

Similarly with respect to the equal protection claim, the court found that Jane was likely to succeed on the merits. Applying a heightened scrutiny analysis, the court concluded that the district's discriminatory treatment of Jane was not substantially related to its interests in its students' dignity and privacy, finding that there was no real evidence that allowing Jane to use the girl's restroom would infringe on other student's privacy rights. The court next found that the district's justifications for its discriminatory actions were not substantially related to safety and lewdness concerns, finding that the district's concerns suffered many "flaws" including that the record was "devoid of any actual evidence" showing safety concerns.

Even if the court were to apply rational basis review to the equal protection claim, the court found that Jane would likely succeed on the merits, noting that the district could not show that its restroom policy was rationally related to its interests in the privacy and safety of its students. The district's concern was speculative and other school districts who submitted friend of the court briefs stated that they have been able to integrate transgender students fully into their academic and social communities without disruption, "and certainly without the doomsday scenarios Highland predicts, such as sexual predators entering an elementary-school restroom." Further, there was no evidence that Jane would present such a risk to other students.

Next the court found that Jane would be irreparably harmed without an injunction and that the balance of equities and public interest weighed in favor of granting Jane the requested injunction. Thus, the court did so.

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made during the investigation to have fewer wheelchair-bound students on the bus, having parents drop them off instead.

After the governor announced a state of emergency in the district, Mike Vinson was appointed Interim Conservator for the district on March 1, 2014. Sprayberry's boss, Nicks, terminated him from another job he had fueling the bus fleet. This job earned him \$1,200 a month. Some officials had reported loss of fuel, and there was an implication that fuel was being stolen. In March 2014, Nicks transferred Sprayberry from driving the handicapped bus to driving a regular bus. This entailed a cut in pay of about \$56 a day.

Soon thereafter, Sprayberry met with Vinson, who told him he would continue to drive the regular buses until the end of the year, and the following school year he would go back to driving the handicapped bus. Sprayberry also complained about the safety of the regular buses, which broke down or got flat tires on field trips and had nonfunctional gauges.

Sprayberry was due for recertification of his bus license in May 2014, but a new transportation director, David Tadlock, told him he would not need recertification since he would not be driving a bus in the next school year.

On June 30, 2014, Vinson resigned as interim conservator and was replaced by C.M. Boyles. On July 14, 2014, Sprayberry received a letter from Boyles informing him he would not be hired again in the coming school year.

Sprayberry filed a charge of discrimination with the EEOC and received a right to sue notice. He filed a lawsuit against the MDE, school officials at the state level, the special education director for the district, Vinson, and Boyles, claiming federal First Amendment retaliation, breaches of the IDEA, discrimination under Title VII of the Civil Rights Act, and retaliation under the state Whistle Blower Act. The claims against Vinson and Boyles are relevant to this summary. Vinson and Boyles asked the court to dismiss the claims, and it granted in part and denied in part their request.

FIRST AMENDMENT

Sprayberry argued his First Amendment rights were violated when he was retaliated against through adverse employment actions for voicing his concerns about the safety of the buses and for participating in the state's investigation of the district. To succeed in his claim, he had to show that: 1) he "suffered an adverse employment decision"; 2) his speech "involved a matter of public concern"; 3) his "interest in speaking was greater than the defendant's interest in promoting efficiency"; and 4) "the protected speech motivated the defendant's conduct" (*Juarez v. Aguilar*). Vinson and Boyle could only be liable if they: 1) affirmatively participated in the actions that resulted in a constitutional deprivation; or 2) they implemented policies that were unconstitutional and caused the deprivation (*Porter v. Epps*).

Sprayberry cited the three adverse employment actions he suffered: losing his fueling job; being transferred from driv-

ing the handicapped bus, which meant a loss in pay; and being terminated in July 2014. However, the court found Sprayberry did not supply enough factual allegations to show that Vinson was behind these actions, whether through creating a policy or by his own direct action. Therefore, the court dismissed the First Amendment claims against Vinson in both his official and individual capacities.

Additionally, Boyles did not become interim conservator until June 30, 2014. There were no factual allegations that Boyles was involved in any of the employment decisions before this date, and therefore the court dismissed these claims against Boyles in his official and individual capacities.

However, Boyles was interim conservator when he sent the termination letter to Sprayberry in July 2014. The court therefore denied Boyles' request to dismiss the First Amendment claim against him as regards to the termination decision.

IDEA

Regarding Sprayberry's claims under the IDEA, the court found that his claims against Vinson and Boyles in their official capacities lacked standing because he also made this claim against the MDE. Since Vinson and Boyles in their official capacities were employed by the MDE, the claims merged, and would apply only to the government entity (the MDE).

The claims against Vinson and Boyles in their individual capacities did not hold up because the court found the IDEA does not provide "a cause of action against a school official sued in his individual capacity" (*Tristan v. Socorro Indep. Sch. Dist.*). Therefore, the court dismissed the IDEA claims against Vinson and Boyles in their individual and officials capacities.

DISCRIMINATION

Sprayberry claimed he was discriminated against under Title VII of the Civil Rights Act on the bases of race and retaliation. Vinson and Boyles argued there is no individual liability under Title VII. The Fifth U.S. Circuit supported this claim in *Indest v. Freeman Decorating, Inc.* Therefore, the court dismissed these claims against Vinson and Boyles in their individual capacities.

STATE LAW CLAIMS

Regarding Sprayberry's state law claim under the Mississippi Whistle Blower Statute, Sprayberry did not establish that the court could exercise jurisdiction over the claim. According to the statute there were certain administrative remedies to follow under such a claim before bringing it to court, and "the employee shall be required to exhaust such remedies prior to instituting an action authorized under Sections 25-9-175 and this section." The court found that, although Sprayberry submitted a whistle-blower complaint to Vinson, he did not exhaust all the administrative remedies. Therefore, the court dismissed the claim until Sprayberry could show that the remedies were exhausted or otherwise did not apply.

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2016 Sports Law Year-In-Review

(Below please find the first part of a three-part installment by Lee Green, J.D. on January 04, 2017 discussing 2016 Sports Law Year-In-Review. A special thanks to Mr. Green for allowing us to provide this information to all school administrators in Maine.)

Legal Issues in Athletics Administration

Over the course of the year, lawsuits were filed, court cases were decided, legislation was enacted, administrative agency rulings were released, state athletic association decisions were issued and other legal pronouncements were handed down impacting school sports programs. In each instance, the principles established illustrate the importance for school administrators and athletics personnel of understanding contemporary issues in sports law and proactively applying that knowledge to policy development and day-to-day management of their athletics programs.

Liability for Sports Injuries

In January 2016, in *Dixon v. Pop Warner Football*, the youth football organization and four football coaches agreed to a settlement in excess of \$1 million in a lawsuit filed by the mother of Donovan Hill, who during a Los Angeles-area game in 2011 when he was 13 years old sustained neck and spinal cord injuries resulting in permanent quadriplegia when attempting to make a tackle by leading with his head, a practice the suit alleged had been taught and encouraged by his coaches.

In December 2015, the California judge overseeing the case ruled that the pre-participation waiver of liability Hill's mother had signed did not bar suing for gross negligence and scheduled a trial for May of 2016 on the issues as to whether Pop Warner would be held vicariously liable for a lack of reasonable care in its selection and training of coaches and the failure of those coaches to provide proper technique instruction and adequate supervision of players. The settlement also resolved a separate misrepresentation lawsuit filed by Hill's family alleging that Pop Warner continued to state on its website for years after the injury that, because of the organization's stringent safety protocols, no player had ever been catastrophically injured. On May 11, Donovan died after complications from surgery related to his injuries. In response to the Dixon case and numerous other similar incidents in youth football, Pop Warner changed its rules regarding head-on tackling, kickoffs, practice drills, contact safety protocols, and mandatory football-specific safety training for coaches.

In June 2016, a \$10.5 million settlement was reached in *Carter v. Kern High School District*, a case in which a Bakersfield (California) High School student, Mitch Carter, was wearing a chicken costume at a football pep rally in the school's gymnasium when, at the encouragement of athletic department personnel in what was supposed to be a mock attack on an upcoming opponent's mascot, Carter was dogpiled by approximately 30 members of the Bakersfield football team.

With an estimated 6,000 pounds of schoolmates on top of him, he was kicked, punched, and had his head repeatedly pounded against the hard, wooden floor. Because of the laughter and applause from the students attending the pep rally, school officials failed to intervene in a timely fashion and, after realizing that Carter was being injured, were slow to pull the pile of 200-to-300-pounders off him. Carter sustained numerous injuries, including broken bones, a damaged pituitary gland and a Grade 3 (severe) concussion. He spent six months in a brain injury treatment center and has since suffered from multiple indicia of Chronic Traumatic Encephalopathy (CTE).

Applying the doctrine of comparative negligence, in the first phase of its deliberations, the jury found the school district and its personnel 100 percent responsible for failing to exercise reasonable care to fulfill its duties to provide a safe environment and adequate supervision of athletic department-related activities. During the subsequent phase of the trial, as the jury was deliberating to determine the financial damages it would award, the parties agreed to the \$10.5 million settlement (the district's insurers were concerned that the jury would return with a far greater financial award).

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2016 Sports Law Year-In-Review. . . (Continued from page 5)

Concussions

In March 2016, a \$2 million settlement was finalized in *McNamee v. Hillsborough County School Board (FL)*, a resolution originally agreed to in October 2015 in a case involving a 16-year-old, high school football player who sustained a head injury during practice while not wearing a helmet, who allegedly received only a cursory evaluation by a coach and athletic trainer, and who was reputedly left alone in a training room for a half-hour before being allowed to drive himself home, at which time his parents immediately transported him to a hospital emergency room where he was diagnosed with a fractured skull and a severe concussion. The lawsuit alleged negligent supervision, lack of an emergency medical response plan, inadequate immediate medical response, and failure to comply with a Florida High School Athletic Association bylaw mandating liability insurance coverage for student-athletes.

During 2016, numerous concussion-related lawsuits were filed against school districts and high school coaches across the country. In February 2016, a lawsuit was refiled in federal court in Texas, *Ripple v. Marble Falls ISD*, that had been dismissed in April 2015 because of a failure to complete a prerequisite administrative process. The case involved a high school football player whose school and coaches had allegedly ignored indicia of multiple concussions and purportedly pressured the young man to continue practicing and competing in violation of the state concussion protocol statute and state association policies.

In March 2016, a suit was filed in Montana, *Back v. Belt Valley School District*, seeking \$20 million from the district, its athletic director, its football coaches, and an athletic trainer for allegedly disregarding their state concussion law by prematurely returning a concussed player to action who then suffered a second head injury that rendered him a quadriplegic.

In May 2016, a lawsuit was filed in Florida, *Holley v. Florida High School Athletic Association and Orange County Public Schools*, in which a lacrosse player sustained a concussion in a violent collision with an opponent during a game and allegedly was not removed from the contest or evaluated for a head injury despite exhibiting multiple indicia of a head injury, all in violation of the state's concussion management law.

In August 2016, in *Goodman v. Trousdale*, a Kentucky appellate court upheld a lower court's refusal to dismiss a traumatic brain injury case involving a Hart County High School cheerleader who fell and struck her head while practicing a stunt run, and asserting that the cheer sponsor violated both the Kentucky state concussion statute and Kentucky High School Athletic Association policies governing head injuries.

In November 2016, a suit was filed in state court in Connecticut, *O'Reilly v. Glastonbury Public Schools*, alleging failure by school athletic personnel to follow state-mandated concussion protocols in a case in which a high school cheerleader fell from a pyramid and hit her head on a hardwood gymnasium floor.