

# Management Alert



## Seventh Circuit Affirms Likelihood of Success that School's Bathroom Policy Violates Title IX and Equal Protection Clause

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**Seyfarth Synopsis:** *The Seventh Circuit affirmed that a transgender student demonstrated a likelihood of success on claims that his school district's decision to prohibit him from using the boys' restroom violated both Title IX and the Constitution's Equal Protection Clause.*

In [Whitaker v. Kenosha Unified School District No. 1 Board of Education](#), a transgender high school student alleged that his school district informed him that, because he was listed as "female" in the school's records and had not undergone a surgical transition—a procedure prohibited for minors—he could use only the girls' restroom or a gender neutral bathroom. The Complaint asserted that this violated his civil rights under Title IX and the Equal Protection Clause of the Fourteenth Amendment. One month after initiating the case, the student filed a motion for preliminary injunction. The next day, the school district filed a motion to dismiss. The United States District Court for the Eastern District of Wisconsin denied the motion to dismiss and granted the preliminary injunction.

On May 30, 2017, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision. The Seventh Circuit declined to hear an appeal on the motion to dismiss, concluding it was not "inextricably intertwined" with the preliminary injunction ruling.

In affirming the lower court's ruling, the appellate court held that the student met his burden by making a threshold showing in support of the preliminary injunction. First, because two experts opined that use of the boys' restroom was integral to his "transition and emotional well-being," the student was likely to suffer irreparable harm without an injunction. Second, any harm the student would face without an injunction could not be remedied by an after-the-fact award of monetary damages because he provided evidence that he had contemplated suicide and this potential harm cannot be adequately remedied by legal relief. Third, the student's chances of success on his Title IX and Equal Protection Clause claims were "better than negligible."

Regarding Title IX, the court analogized to Title VII, finding that current case law did not foreclose the student from bringing his claim on a theory of sex stereotyping, as articulated by the Supreme Court in [Price Waterhouse v. Hopkins](#). With regard to the Equal Protection Clause, the court found the school district's policy was a classification based on sex and thus merited application of heightened scrutiny, noting that "[w]hen a sex-based classification is used, the burden rests with the state to demonstrate that its proffered justification is 'exceedingly persuasive.'"

The Seventh Circuit rejected the school district's argument that the student's presence in the boys' restroom infringed on the privacy of other students. In so doing, the court recognized the legitimate interest a school district has in ensuring bathroom privacy rights are protected, but noted that the "interest must be weighed against the facts of the case and not just examined in the abstract, to determine whether the justification is genuine." The Seventh Circuit reviewed the record and concluded that the "School District's privacy argument is based on sheer conjecture and abstraction," citing the fact that the student had used the restroom for months without issue and that the school district presented no evidence that his presence was any more intrusive than that of "an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."

The decision suggests that, although the present administration has backed away from interpreting Title IX to prohibit discrimination based on transgender status, private litigants may find support for this theory in court. Further, *Whitaker* may be indicative of a growing trend in the Seventh Circuit to take an expansive view of coverage of LGBT status under civil rights laws. For example, just over two months ago, the court concluded in its *en banc* [decision](#) in *Hively v. Ivy Tech Community College of Indiana*—a decision cited in *Whitaker*—that Title VII covers sexual orientation discrimination. Stay tuned for further developments in this rapidly evolving area of the law.

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