

CASE NOTES

Whitaker v. Kenosha: A Victory on the Newest Frontier for Civil Rights—the High School Bathroom

I. OVERVIEW	77
II. BACKGROUND	79
A. <i>Preliminary Injunction</i>	79
B. <i>Title IV Claim</i>	81
C. <i>Equal Protection Claim</i>	82
III. HOLDING.....	83
IV. ANALYSIS	85

I. OVERVIEW

For the first six months of the 2015-2016 academic year, high school junior Ashton “Ash” Whitaker, like the rest of his classmates, went to the bathroom at school.¹ However, one day in February, a teacher noticed him washing his hands in the boys’ bathroom and reported it to the school’s administration.² As a result, a school guidance counselor promptly informed Ash’s mother that he was not permitted to use the restroom he had often used without incident.³ Instead, Ash was only allowed the girls’ room, or the gender neutral restroom in the school’s main office.⁴ Because of his status as a transgender student, Ash’s mundane bathroom trips had come to an end.⁵ Although “Ash’s transition ha[d] been met without hostility and ha[d] been accepted by much of the Tremper community,” the School District had decided that his use of the boys’ restroom was now unacceptable.⁶

Over the course of several months, Ash’s mother made multiple inquires with the school as to why Ash continued to be barred from using the bathroom of his choice.⁷ First, the assistant principle told Ash’s mother that since Ash was listed as female in the school records, they needed an “unspecified” type of “legal or medical documentation,” before they

1. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1041 (7th Cir. 2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1040.

6. *Id.*

7. *Id.* at 1041.

would permit Ash to use the boys' room.⁸ As a response to the demand, Ash's pediatrician submitted two letters to the school that "identif[ied] him as . . . transgender . . . and recommend[ed] that he be allowed to use male-designated facilities at school," but the school deemed the letters insufficient and continued to bar him from the boys' room.⁹ The school then stated that "Ash would have to complete a surgical transition" in order to use the boys' room.¹⁰ The school never explained why a surgical transition was necessary and failed to address the fact that surgical transitions were prohibited for individuals under the age of eighteen.¹¹ Ultimately, the School District was never able to clearly state, nor present, "any written document[ation] that detail[ed] when the [bathroom] policy went into effect, what the policy [was], or how one can change his status under the policy."¹²

As a result of the school's decision to restrict Ash to either the girl's room or the gender-neutral restroom, Ash experienced anxiety and depression, and even contemplated suicide.¹³ Despite Ash's distress, the school instructed security guards "to monitor's [sic] Ash's restroom use to ensure that he used the proper facilities."¹⁴ Ash was also "removed from class on several occasions" when he continued to use the boys' room, prompting questions from "[h]is classmates and teachers . . . about these meetings and why administrators were removing him from class."¹⁵ In April 2016, the school made an attempt to accommodate Ash by giving him the "option of using two single-user, gender neutral restrooms," but they were located "on the opposite side of campus from where [Ash's] classes were held," which caused Ash to miss further class time.¹⁶ As a result, Ash tried to drink less water in order to avoid having to go to the bathroom at school, which exacerbated a health condition that Ash had called "vasovagal syncope" that made him prone to dizziness and fainting when dehydrated.¹⁷ All of this newfound attention at school regarding his "restroom use and transgender status" caused Ash to "beg[in] to fear for his safety."¹⁸

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1041-42.

17. *Id.*

18. *Id.* at 1042.

On August 15, 2016, Ash “filed an Amended Complaint alleging that the treatment he received at Tremper High School violated Title IX, 20 U.S.C. § 1681, *et. seq.*, and the Equal Protection Clause of the Fourteenth Amendment.”¹⁹ He also filed “a motion for preliminary injunction” to enjoin the School District’s enforcement of the unwritten bathroom “policy pending the outcome of the litigation.”²⁰ “[T]he School District filed a motion to dismiss and filed its opposition to the preliminary injunction shortly thereafter,” and the district court denied the motion to dismiss.²¹ After hearing oral arguments, the court granted Ash’s motion for preliminary injunction in part. The School District appealed the injunction.²² The Seventh Circuit Court of Appeals for the United States *held* that preliminary injunctive relief for Ash was proper because Ash met the threshold requirements and the balance of harms was in favor of Ash because the school district failed to demonstrate that either it or the public as a whole would suffer any harm if it was required to comply with the injunction. *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 1054 (7th Cir. 2017).

II. BACKGROUND

A. Preliminary Injunction

A plaintiff must first meet three threshold requirements in order to pursue a preliminary injunction: “(1) that the case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; (3) that the movant will suffer irreparable harm if the injunction is not granted.”²³ After the threshold requirements are met, the court engages in the second step of the inquiry—a balancing test in which the court must “weigh” the “irreparable harm” it finds “the plaintiff will suffer . . . if the preliminary injunction is denied” against the “harm that the defendant can show he will suffer if the injunction is granted.”²⁴

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984); *see* *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 313-14 (7th Cir. 1994).

24. *Roland Mach.*, 749 F.2d at 387.

For the plaintiff to meet the irreparable harm requirement, the harm must be likely—more than just a mere possibility.²⁵ However, the harm need not be certain to occur, or already occurring, for the preliminary injunction to be warranted.²⁶ It is a factual finding that is reviewed for clear error by a circuit court.²⁷

The plaintiff must also demonstrate that there is no adequate legal remedy available to him, as “[t]he absence of an adequate remedy at law is a precondition to any form of equitable relief.”²⁸ The plaintiff must show that during the interim period while the outcome of his case is pending, he will suffer irreparable harm that “cannot be prevented or fully rectified by the final judgment after trial.”²⁹ However, the plaintiff need not show that the remedy he would receive via the final judgment would be wholly ineffectual; rather, he must demonstrate that the award would be “seriously deficient as compared to the harm suffered.”³⁰

The last threshold condition—that the plaintiff must have a likelihood of succeeding on the merits of his case—is a low threshold.³¹ The plaintiff is only required to show that he has a “better than negligible” chance at succeeding on the merits of his case.³²

After the plaintiff has demonstrated that he meets the three threshold requirements, the court begins the second step of the inquiry and engages in a balancing test in which it “weigh[s] the costs of injunctive relief against the benefits.”³³ The Supreme Court has noted that “[a] preliminary injunction is an ‘extraordinary and drastic remedy. . . .’ [that] ‘should never be awarded as of right.’”³⁴ However, each case is unique; thus, “courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding

25. *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

26. *Id.* at 788; *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *United States v. Or. State Med. Soc’y*, 343 U.S. 326, 333 (1952); *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 111 (7th Cir. 1970).

27. *Michigan*, 667 F.3d at 769.

28. *Roland Mach.*, 749 F.2d at 386.

29. *Id.*

30. *Foodcomm Int’l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003); *Roland Mach.*, 749 F.2d at 386.

31. *Omega Satellite Prod. Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982); *Roland Mach.*, 749 F.2d at 387.

32. *Omega Satellite Prod. Co.*, 649 F.2d at 123.

33. *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986).

34. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citing *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

equitable relief.”³⁵ “Instead, courts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high.”³⁶ “[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”³⁷

B. Title IV Claim

According to Title IV, “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”³⁸ A covered school must not, among other things, “[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment” on the basis of sex.³⁹ However, “[n]either the statute nor the regulations define the term[s] ‘sex’ [nor] . . . ‘biological,’” and thus courts must turn to case law to determine their meaning.⁴⁰ The Seventh Circuit looks to Title VII when construing Title IX.⁴¹ The Supreme Court has articulated a theory of sex-stereotyping that may rise to a discrimination claim under Title VII.⁴² In *Price Waterhouse v. Hopkins*, the plaintiff was denied partnership because she failed to behave in a feminine manner, prompting negative reactions from her coworkers and superiors.⁴³ The plurality held that this was in violation of Title VII, reasoning that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”⁴⁴ The Sixth and Eleventh Circuits have both allowed transgender plaintiffs to bring successful claims under the theory of sex-stereotyping.⁴⁵

35. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting).

36. *Id.*

37. *Weinberger, Sec’y of Def. v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

38. 20 U.S.C. § 1681(a) (West 2018).

39. 34 C.F.R. § 106.31 (West 2000).

40. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017).

41. *See, e.g., Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) (“[I]t is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.”).

42. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

43. *Id.* at 235.

44. *Id.* at 251.

45. *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004) (amended opinion); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011).

C. Equal Protection Claim

The Supreme Court has noted that the Equal Protection Clause demands that “all persons similarly circumstanced shall be treated alike.”⁴⁶ “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination.”⁴⁷ The Court has considered state action to be lawful as long as the classification is rationally related to a legitimate state interest.⁴⁸ However, whenever there is a classification based on sex, the classification is subject to heightened scrutiny by a court, as sex “frequently bears no relation to the ability to perform or contribute to society.”⁴⁹ This requires the state to show that the “classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”⁵⁰ The justification cannot rely on overbroad generalizations about sex, and it must be genuine.⁵¹

Importantly, the Supreme Court has stated that “[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”⁵² The Eleventh Circuit has extended this reasoning in *Glenn v. Brumby*, holding that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.”⁵³ Similarly, in *Smith v. City of Salem*, the Sixth Circuit stated that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [a woman plaintiff], who, in sex-stereotypical terms, did not act like a woman.”⁵⁴

46. F.S. Royster Guano Co. v. Commonwealth of Va., 253 U.S. 412, 415 (1920).

47. Sunday Lake Iron Co. v. Wakefield Twp., 247 U.S. 350, 352 (1918).

48. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, (1985).

49. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

50. *United States v. Virginia*, 518 U.S. 515, 524 (1996).

51. *Id.* at 533.

52. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994).

53. *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011).

54. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (referring to the plaintiff in *Price Waterhouse*).

III. HOLDING

In the noted case, the Seventh Circuit reviewed the district court’s application of the “two-step inquiry” in order to determine if the injunction was indeed required.⁵⁵ The district court’s decision to grant Ash the preliminary injunction by implementing a theory of sex-stereotyping to justify Ash’s likelihood of succeeding on the merits of his case was ultimately affirmed.⁵⁶ The court affirmed that Ash met the required “threshold showing: (1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits.”⁵⁷ The court then applied the balancing test and determined that the balance of harm favored Ash, because the prospective harm to Ash sufficiently outweighed the harm to the School District or the public at large.⁵⁸

First, the court found the district court did not clearly err in finding irreparable harm.⁵⁹ The district court heard “expert opinions that supported Ash’s assertion . . . that use of the boys’ restrooms is integral to Ash’s transition and emotional well-being.”⁶⁰ A psychologist who specialized in adolescents with gender dysphoria “opined that the School District’s actions, including its bathroom policy, which identified Ash as transgender and therefore, ‘different,’ were ‘directly causing significant psychological distress and place [Ash] at risk for experiencing life-long diminished well-being and life-functioning.’”⁶¹ The harm Ash would suffer would not be self-inflicted simply “because he chose not to use the gender-neutral restrooms.”⁶² The court reasoned that this argument “fails to comprehend . . . [that] [t]he School District actually exacerbated the harm, when it dismissed him to a separate bathroom” because it “further stigmatized Ash, indicating that he was ‘different’ because he was a transgender boy.”⁶³

55. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1044 (7th Cir. 2017).

56. *Id.* at 1039.

57. *Id.* at 1044.

58. *Id.* at 1045-46, 1055.

59. *Id.* at 1045.

60. *Id.*

61. *Id.* (alteration in original).

62. *Id.*

63. *Id.* at 1045.

Second, the court rejected the School District's argument that Ash could be adequately compensated by monetary damages.⁶⁴ Ash sought a remedy for the prospective harm he would experience if he was barred from the boys' bathroom while his case was pending, rather than a simple past harm, as in a tort action, that could be easily remedied with monetary damages at the conclusion of his case.⁶⁵ Monetary damages would be a seriously deficient remedy for the long-term "diminished well-being and life functioning" that Ash would likely experience under the school's bathroom policy during the time that his case was pending.⁶⁶ The court noted the expert report of a psychologist who attested to the fact that the bathroom policy had caused Ash to contemplate suicide.⁶⁷

Finally, the court agreed with the district court that Ash was reasonably likely to win both his Title IX and Fourteenth Amendment claims on the merits, because the school's policy punished Ash for a failure to conform to his assigned gender at birth and treated Ash differently than other students for the same reason.⁶⁸

The court held in the noted case that Ash was likely to succeed on the merits of his Title IX claim under a theory of sex-stereotyping because "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity . . . violates Title IX" because it "punishes that individual for his or her gender non-conformance."⁶⁹ The bathroom policy subjected Ash "to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX," when it provided Ash with the gender-neutral bathroom alternative, because Ash was treated differently than other students when he was told to use only that bathroom.⁷⁰

The court also held that Ash was likely to succeed on the merits of his Equal Protection claim.⁷¹ The court reasoned that the school's bathroom policy could not "be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate."⁷² Thus, the court applied heightened review, which placed "the burden on the School District to

64. *Id.* at 1046.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1049-50, 1051.

69. *Id.* at 1049.

70. *Id.* at 1049-50.

71. *Id.* at 1054.

72. *Id.* at 1051.

demonstrate that its justification for its bathroom policy [was] not only genuine, but also ‘exceedingly persuasive.’”⁷³ The court held that the School District did not meet this burden. The District’s argument that the privacy interests of other students justified the unwritten “policy” failed to convince the court, which reasoned that the “policy [did] nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignore[d] the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door.”⁷⁴

Finally, the court considered the second step of the inquiry—the balancing test—and held that the balance of harms favored Ash.⁷⁵ The court first noted that “[s]ubstantial deference is given to the district court’s analysis of the balancing of harms.”⁷⁶ The court then reasoned that “the district court did not err” in concluding that the balance of harms favored Ash.⁷⁷ The School District failed to demonstrate that “it [would] suffer any harm from having to comply with the district court’s preliminary injunction order.”⁷⁸ The court reasoned that Ash used the bathroom for six months without incident, and no students had complained of his doing so.⁷⁹ Additionally, the “statements made by *amici*, who are school administrators from twenty-one states,” agreed that the hypothetical concerns about allowing transgender students to use the bathrooms of their choice “have simply not materialized” and, furthermore, treating students equally “best served” all students’ needs.⁸⁰ Since the School District presented no evidence-based arguments that it would suffer harm should the injunction be affirmed, the balance of harms favored Ash.⁸¹

IV. ANALYSIS

President Trump’s administration has seen expressions of increased intolerance and greater leeway for those in positions of power to discriminate against socially disadvantaged groups such as transgender individuals. Indeed, this country has an ongoing record of hostility toward plaintiffs, like Ash, who possess certain immutable characteristics

73. *Id.* at 1051-52.

74. *Id.* at 1052.

75. *Id.* at 1054-55.

76. *Id.* at 1054.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1054-55.

81. *Id.* at 1055.

perceived as intolerable by their contemporaries.⁸² The Trump Administration's recent rollback of Obama-era guidance on Title IX protections for transgender schoolchildren is a manifestation of such hostility, and it has justifiably alarmed the legal community as well as the relatives and friends of transgender youths. "The unclear instructions issued by the Department of Education sow a new level of confusion and doubt for students, families and schools."⁸³ Americans are understandably fearful that in this era, progress so far achieved with regard to sex discrimination will be reversed.

Fortunately, America has a long history in which brave plaintiffs have challenged intolerance and fought for basic civil rights and liberties for their contemporaries. The efforts and successes of tenacious plaintiffs like Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell, over many decades, will not be lost during the course of one presidency. Likewise, although the law is unsettled with regard to sex discrimination as it applies to transgender individuals, it is quite clear that "[f]ederal court rulings are increasingly on the side of transgender students, even if Secretary DeVos and [former] Attorney General Sessions are not."⁸⁴ "The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution."⁸⁵ If the Fourth and Seventh Circuits issue precedent-setting rulings in the direction they are currently leaning, then six out of thirteen will be in favor of greater protections for

82. *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017), *as amended* (Apr. 18, 2017) ("Our country has a long and ignominious history of discriminating against our most vulnerable and powerless. We have an equally long history, however, of brave individuals—Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell, to name just a few—who refused to accept quietly the injustices that were perpetuated against them. It is unsurprising, of course, that the burden of confronting and remedying injustice falls on the shoulders of the oppressed.").

83. Chris Johnson, *Trump Admin Issues New Title IX Guidance for Transgender Kids*, WASH. BLADE (June 16, 2017), <http://www.washingtonblade.com/2017/06/16/trump-administration-issues-bathroom-guidance-trans-kids/> ("Condemning the instructions as 'unclear' was Vanita Gupta, CEO of the Leadership Conference on Civil & Human Rights, who under the Obama administration was principal deputy assistant attorney general for the Justice Department's Civil Rights Division.").

84. *Id.* ("Mat Staver, chair of the Liberty Counsel, said the Title IX rules violate freedom of speech and called on the Trump administration to reverse the policy.").

85. *G.G. v. Gloucester Cty. Sch. Bd.*, 654 F. App'x 606, 607 (4th Cir. 2016); *see* Glenn v. Brumby, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000).

transgender individuals. Since *Kenosha v. Whitaker* has revealed the favorable alignment of the Seventh Circuit, it should encourage civil rights advocates and be considered the latest success in the fight for transgender rights. Although the Supreme Court is taking its time on this issue, which may be good for transgender rights in light of recent appointments,⁸⁶ cases like *Kenosha v. Whitaker* give reason to be optimistic that the progression will continue in the direction of tolerance while America awaits a final ruling.

Madeline Aruffo*

86. See *Druley v. Patton*, 601 Fed. Appx. 632, 636 (10th Cir. 2015). Judge Gorsuch joined an unpublished opinion that ruled against a transgender inmate's constitutional claims seeking hormone therapy and surgical reassignment from a male facility. See Eugene Scott, *In Kavanaugh's Non-Answer on Same-Sex Marriage, Many Heard a Troubling Response*, WASH. POST (Sept. 7, 2018), https://www.washingtonpost.com/politics/2018/09/07/kavanaughs-non-answer-same-sex-marriage-many-heard-troubling-answer/?utm_term=.a7d1110a5df5. Justice Kavanaugh did not give a clear answer when asked about same-sex marriage, which has been said to have "reaffirmed the fears of gay Americans and encouraged the conservative Christians who backed Trump with the hope that he would deliver the courts to them." *Id.*

* © 2019 Madeline Aruffo. J.D. candidate 2019, Tulane University Law School; B.A. 2015, Boston University.