

New Federal Court Interpretation for Transgender Protections

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In a decision that could have significant implications in the ongoing tug-of-war in the scope of protection afforded transgender individuals under federal law, a holding this week from a federal appeals court applied a novel analysis to the gender identity restroom issue.

In a case [Barley Snyder](#) attorneys have continued to track, the decision from the Seventh Circuit Court of Appeals in *Whitaker v. Kenosha Unified Sch. Dist.* marks the first time a federal court has ruled that an anti-discrimination law applies to transgender students, relying heavily on Title VII case law.

The case involves Ashton Whitaker, a high-achieving high school senior in Wisconsin. Born biologically female, Ashton has identified as a male since 2013, and has requested that his classmates and school personnel acknowledge the gender with which he identifies. After a number of meetings with school counselors and administrators to address his requests to use facilities that correspond with his identified gender, Ashton was notified by the school district in February 2016 that he could not use the boys' restroom and was required to use either the girls' restroom or a single-occupancy restroom that would be made available only to him.

Ashton's family brought claims against the school district alleging that the school district's unwritten policy prohibiting Ashton from using the male facilities directly resulted in physical and emotional harm. The district court granted a preliminary injunction requiring the school district to permit Ashton to use the boys' restroom while the case unfolded.

On appeal, a three-judge panel for the Seventh Circuit Court of Appeals agreed with the district court. In reviewing whether the district court erred in granting the preliminary injunction, the court reviewed whether:

Ashton would suffer irreparable harm absent preliminary injunctive relief during the pendency of the action

Inadequate remedies at law exist

There is a reasonable likelihood of success on the merits

The court decided in each instance the injunction should be allowed. You can [read the court's legal analysis here](#).

The court's determination that Congress intended "sex" to include bias based on gender identity is a new approach to the analysis of this issue. It is noteworthy that the court makes no mention of any of the recently contested Title IX guidance documents in its decision. The court is essentially saying that where a school district bases a decision on a sex-stereotype, that may amount to unconstitutional discrimination.

We will continue to monitor developments on this issue and provide additional updates as appropriate. This update is provided in follow-up to 2016 Barley Snyder alerts issued [April 22](#), [May 13](#), and [August 5](#).

If you have any questions or concerns regarding this new guidance, or if we can provide any additional assistance as you review your existing policies and procedures, please do not hesitate to contact any of the attorneys in [Barley](#)

Snyder's Education Law group.