Case No. 16-3522

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ASHTON WHITAKER, a minor, by his mother and next friend,
MELISSA WHITAKER,

Plaintiff-Appellee,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and **SUE SAVAGLIO-JARVIS,** in her official capacity as Superintendent of the Kenosha Unified School District No. 1,

Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Wisconsin, Case No. 16-CV-943
The Honorable Judge Pamela Pepper

AMICUS CURIAE BRIEF OF ALLIANCE DEFENDING FREEDOM IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Jeremy D. Tedesco
Gary S. McCaleb*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020
480-444-0028 Fax
jtedesco@ADFlegal.org
gmccaleb@ADFlegal.org

Jordan W. Lorence
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
202-393-8690
202-347-3622 Fax
jlorence@ADFlegal.org

*Application for Admission
to this Circuit pending

Attorneys for Amicus Curiae Alliance Defending Freedom

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos.: 16-3522

Short Caption: Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Alliance Defending Freedom

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Alliance Defending Freedom

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

Attorney's Signature: s/Jeremy D. Tedesco Date: December 19, 2016
Attorney's Name: Jeremy D. Tedesco

Please indicate if you are *Counsel of Record* for the above-listed parties pursuant to Circuit Rule 3(d).

Yes [X] **No** [ ]

Address: 15100 N. 90th Street, Scottsdale, AZ 85260
Phone Number: 480-444-0020
Fax Number: 480-444-0028
Email: jtedesco@ADFlegal.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

Statutes:

***Rules and Regulations*:**

***Other Authorities*:**

INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom (ADF) is a not-for-profit legal organization providing strategic planning, training, funding, and direct litigation services to protect civil liberties. Since its founding in 1994, ADF has played a role, either directly or indirectly, in dozens of cases before the Supreme Court, numerous cases before the courts of appeals, and in hundreds of cases before federal and state courts across the country, as well as in tribunals around the world.

ADF has a particular interest in the outcome of the instant case, as how this Court resolves the question of providing access to sex-specific school locker rooms, showers, restrooms, and overnight accommodations on school trips under Title IX will bear directly on *Students and Parents for Privacy v. U.S. Dep't of Educ.*, No. 1:16-cv-04945 (N.D. Ill. October 18, 2016),[2] which ADF attorneys are litigating in this Circuit, and will be persuasive authority in two similar cases[3] that ADF is litigating in other circuits.

INTRODUCTION

In broad outline, the actors in this case and several similar cases currently in federal court fall into four categories: the federal Department of Education ("DOE"); a local school or school district; a student who professes to be transgender; and the rest of the students within a given school or district. While the precise role of each may vary from case to case, the core issues and arguments are largely the same.

---

[1] Counsel for amicus obtained consent from counsel of all parties prior to filing this brief. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amicus curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

[2] The case is pending decision by the Article III judge on the Magistrate Judge's Report and Recommendation on the plaintiff Students' motion for a preliminary injunction.

[3] *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., et al*., No. 2:16-cv-00524 (S.D. Ohio June 10, 2016); *Privacy Matters v. U.S. Dep't of Educ.*, No. 0:16-cv-03015 (D. Minn. Sept. 7, 2016).

It all started with the Department of Education, which in recent times issued "guidance"[4] to schools receiving federal education funds, informing them that under Title IX, the term "sex" includes "gender identity," and that such schools risk loss of their federal funding if they do not comply with that new definition.[5] Following up on those threats, the DOE enforced its new mandate against schools.[6]

As to the school districts involved, some of those targeted for enforcement yielded to the DOE's demands, and some, such as Kenosha Unified School District No. 1 Board of Education ("Kenosha") and our client, Board of Education of the Highland Local School District ("Highland Local School District"), resisted and stood by their locally decided policies.

In this case, Ashton Whitaker, the plaintiff, asserts a transgender identity, while in pending ADF cases, students professing a transgender identity intervened to assert their interests. In any event, all profess to be of a different sex than their birth sex, and each insists that the school must

---

[4] Guidance documents include: U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, May 13, 2016; U.S. Dep't of Educ., Office for Civil Rights, *Title IX Resource Guide*, Apr. 2015; U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, Dec. 1, 2014; and U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, Apr. 29, 2014. None of this guidance was promulgated via notice-and-comment rulemaking, but the DOE nonetheless enforces it as binding on all schools receiving federal education funding.

[5] The better reading of the federal position is that gender identity is the sole determinant of "sex" when regulating access to facilities under 34 C.F.R. §106.33, as logically proven by Judge Niemeyer in his dissent. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 737 (4th Cir. 2016) (Niemeyer, J., dissenting), *mandate recalled and stayed*, 136 S.Ct. 2442 (2016), *cert. granted*, 137 S.Ct. 369 (Oct. 28, 2016).

[6] Enforcement targets have included Highland Local School District (OH); Township High School District 211 (IL); Dorchester County School District (SC); Broadalbin-Perth Central School District (NY); Central Piedmont Community College (NC); Downey Unified School District (CA); Arcadia Unified School District (CA); *see* U.S. Dep't of Educ., Office for Civil Rights, *Resources for Transgender and Gender Nonconforming Students*, http://www2.ed.gov/about/offices/list/ocr/lgbt.html (last modified July 8, 2016). Other schools, well aware of the Federal campaign against local decisions on this issue, attempted to avoid enforcement by preemptively adopting the federal reinterpretation of Title IX as is the case in *Privacy Matters v. U.S. Dep't of Educ., et al.*, No. 0:16-cv-03015 (D. Minn. Sept. 7, 2016).

authorize them to use sex-specific facilities based not on their birth sex, but on their self-perceived sex. And they allege that if such access is not granted, then several of their legal rights are violated. In all cases of which ADF is aware, these students are too young[7] for so-called sex realignment surgery, so they remain anatomically true to their birth sex. In light of this, schools such as Kenosha which have resisted the federal mandate nonetheless have affirmatively accommodated professed transgender students' privacy needs by providing individualized facilities for changing clothes, showering, and personal hygiene.

Finally, there are all the other students in the affected schools. These students hold—as all humans do—a right to bodily privacy. That right is more specifically defined in these cases as: the right to use sex-specific intimate facilities free of government-mandated use by a member of the opposite sex. The students' legal interest in bodily privacy is raised either indirectly—by a school, such as Kenosha or our client Highland Local School District, that asserts the bodily privacy interests of its students as a basis for maintaining sex-specific facilities—or directly by students whose privacy is being violated by the federal mandate, as in our *Students and Parents for Privacy* and *Privacy Matters* cases.

As exemplified here, yielding to the federal mandate results in a school intentionally placing an anatomical male into girls' intimate facilities, or vice versa. Either way, the sexes are intermingled, and bodily privacy rights are violated. On the other hand, when schools have resisted the federal mandate, the privacy of all students has been protected: the professed transgender student(s) may access wholly private individual facilities.[8] And all students, whether they claim to be transgender or not, may access the facility designated for their sex—thus there is

[7] As is the case with Ashton Whitaker. *See* Ex. 1, Decl. of Ashton Whitaker at 3 ¶ 20.

[8] We recognize that in some instances logistical issues arose—distance to the facility, method of access, number of facilities and so on. But the Court's role is to interpret the law and establish the right principle of access, and should be able to leave managing site-specific concerns to local school officials.

no government-mandated intermingling of the sexes, and bodily privacy is protected for everyone.

ARGUMENT

Implicit in this sketch is the very point that ADF explicitly brings to this Court: those resisting the federal mandate are defending a bodily privacy right that impacts all students, and protecting bodily privacy is squarely within the purpose of Title IX and 34 C.F.R. §106.33. In contrast, the interest claimed by professed transgender students is solely a demand that the government affirm their subjectively perceived sex[9] which is not only divorced from the plain text of Title IX and its regulations, but as shown herein eliminates the ability of schools to protect bodily privacy under the authority of 34 C.F.R. §106.33.

This difference in interests is dispositive: Title IX was enacted to protect the fixed, binary, objectively defined categories of male and female, while 34 C.F.R. §106.33 issued to assuage self-evident concerns about bodily privacy if sex nondiscrimination was taken so literally as to *obligate* schools to have unisex restrooms. The statute and regulation complement one another, barring *invidious*[10] sex discrimination while permitting rational distinctions between the sexes that are rooted in anatomical differences between men and women. *See United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (noting that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.").

But there is no hint in the text, history, or logic of Title IX to suggest that Congress intended this sex nondiscrimination law to obligate the government to affirm an individual student's self-

[9] Some professed transgender students have claimed a "privacy" right to keep the transgender status they claim secret—at least from most people. Whatever the merits of this dubious claim, it is distinct from, and irrelevant to, the right of bodily privacy.

[10] We emphasize "invidious" because the government has a rightful role in eliminating irrational discrimination.

perception of his or her sex. Such an interpretation undercuts the clear purpose of Title IX of protecting and promoting equal educational opportunities for women by prohibiting invidious sex discrimination. But the interest of affirming a student's self-perception of their sex is wholly outside of Title IX, and if it is to be enforced through law, then Congress must first write and enact such a law.

I. Human reproductive nature establishes what sex is, and that nature gives rise to the human right of bodily privacy, the protection of which is consistent with Title IX objectives.

A person's sex is determined at conception[11] and may be ascertained at or before birth, being evidenced by objective indicators such as gonads, chromosomes, and genitalia. *See* Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM-5") (sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia."). As a sexually reproducing[12] species, we are equipped with gonads and genitalia—our "privates"—which facilitate the reproductive act, and the human sensitivities surrounding sex (whether used as a noun or a verb) and our privates give rise to personal privacy needs and correlated rights—specifically, the right to bodily privacy.

That right is evidenced through many areas of law. For example, females "using a women's restroom expect[] a certain degree of privacy from . . . members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. Ct. App. 2014). Similarly, teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v.*

[11]Gilbert SF, Developmental Biology, 6th Ed., (Sunderland (MA): Sinauer Associates 2000), https://www.ncbi.nlm.nih.gov/books/NBK9967/.

[12] Defined as "[a] form of reproduction that involves the fusion of two reproductive cells (gametes) in the process of fertilization. Normally, especially in animals, it requires two parents, one male and the other female." *Oxford Dictionary of Biology* (7th ed. 2015). It is essential to human survival, as "[s]exual reproduction, unlike asexual reproduction, therefore generates variability within a species." *Id.*

W. Va. Human Rights Comm'n, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy interests are why a girls' locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." *People v. Grunau*, No. H015871, 2009 WL 5149857, at *3 (Cal. Ct. App. Dec. 29, 2009).[13] As the Kentucky Supreme Court observed, "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993); *McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty.*, 384 N.E.2d 540, 542 (Ill. App. Ct. 1978) (refusing to place male teacher as overseer of school girls' locker room). And the right is reciprocal—what holds true for placing a male in girls' private facilities is no less true for placing a female in boys' private facilities.

II. The professed transgender students' claims are rooted in gender identity and enforcing their demand to have their self-perceived "sex" affirmed is inconsistent with the purpose of Title IX.

Once the federal mandate came down, implausibly insisting that sex now included gender identity, students who professed a sex different than their birth sex began asserting a right to enter sex-specific facilities based exclusively upon their gender identity. But unlike sex (which is binary, fixed, objectively discerned, and rooted in human reproduction), gender identity is a subjectively-determined fluid continuum ranging from male to female to something else:

> Other categories of transgender people include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people. Exact definitions of these terms vary from person to person and may change over time but often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive.

[13] *Grunau* is an unpublished decision which may nonetheless be cited per Fed. R. App. P. 32.1.

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 2 (3rd ed. 2014), http://www.apa.org/topics/lgbt/transgender.pdf; *see also* Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015) at 5 (describing gender identity as falling on a "gender spectrum") and 7 (defining "gender identity" as "a personal, deeply-felt sense of being male, female, both or neither"), http://bit.ly/2di0ltr (last visited Oct. 24, 2016).[14]

This subjective perception of gender identity—a self-perceived "sex," also divorces that claimed "sex" from humans' primary sex characteristics—the gonads, genitalia, and related physiological systems which fulfill either the male or female reproductive role. This was brought home in our *Highland Local School District* case, when the court sought to confirm that the intervening, professed male-to-female student had male genitalia—to which the student's counsel responded that it was "inappropriate to label any part of [the student's] body as male."[15] *See* Ex. 3, Highland Oral Arg. Transcript at 61. And that divorce of sex from humanity being a sexually reproducing species robs "male" and "female" of any real meaning: the *reductio ad absurdum* of the federal mandate is that every sex-related characteristic becomes merely a stereotype, with gender identity being the sole determinant of what "sex" a person is.

Because gender identity is divorced from the real physical differences between men and women, when the professed transgender students demand access to opposite sex facilities, there

[14] Notably, such fluidity has already arisen within the context of these Title IX cases, with one intervening student in *Students and Parents for Privacy* being born female, then identified as "gender queer" before transitioning again to present "in a masculine manner" for a number of months. [*See* Ex. 2, Decl. of Parent C at 2 ¶ 4].

[15] Which begs the question of how a sex stereotype might exist, if the primary sex characteristics of male and female are deemed to be neither?

is no basis for them to advance a bodily privacy claim. Instead, as consistently seen in their affidavits, their claim is that they must access communal facilities of the opposite sex so that their perceived "sex" is affirmed as real by school authorities and fellow students.[16] And that is an interest that is nowhere to be found in the text, legislative history, or plain meaning of Title IX and its implementing regulations.

III. Title IX may enforce only those legal interests consistent with its objectives.

An "agency's power to regulate . . . must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000). Here, Congress authorized agencies implementing Title IX to "issu[e] rules, regulations, or orders of general applicability which shall be *consistent with achievement of the objectives of the statute*." 20 U.S.C.A. § 1682 (emphasis added); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994) (noting that every congressional delegation of power implies that the agency is "bound . . . by the ultimate purposes" of the statute).

Title IX's purpose is to "prohibit[] sex discrimination by recipients of federal education funding." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). When Congress enacted Title IX in 1972, dictionaries defined "sex" as referring to the biological distinctions between men and women.[17] That Congress intended a binary understanding of the term "sex" is

---

[16] This "affirmation" interest is evidenced in the affidavits of the plaintiff in the instant case, *see* Ex. 4, Suppl. Decl. of Ashton Whitaker at 1 ¶ 4, 3 ¶ 11; Ex. 1, Decl. of Ashton Whitaker at 3 ¶ 11, at 4 ¶ 18; and by the intervening students in *Students and Parents for Privacy*, *see* Ex. 5, Decl. of Parent A at 4 ¶12, at 6 ¶ 19; Ex. 6, Decl. of Parent B at 3 ¶ 8, at 4 ¶ 12, at 5 ¶ 17, at 6 ¶ 21, *but see* at 4 ¶ 14 (Student B uses girls' locker room even while using boys' restrooms); Ex. 2, Decl. of Parent C at 2 ¶ 6, at 3 ¶ 10, at 4 ¶ 12; in *Privacy Matters*, *see* Ex. 7, Decl. of Jane Doe at 2 ¶ 5, at 3 ¶ 9, at 4 ¶ 18; and in *Highland Local School District*, *see* Ex. 8, Verified Complaint-in-Intervention at 10-11 ¶ 31.

[17] *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting) (noting dictionaries contemporaneous to Title IX's enactment relied on biological distinctions to define sex, and including the following, among other, examples: *The Random House College Dictionary* 1206 (rev. ed. 1980) ("either the male or female division of a

confirmed by Title IX's text, which repeatedly references "both sexes" and "students of one sex" as compared with "students of the other sex." *See, e.g.*, 20 U.S.C. § 1681(a)(2) (discussing "students of both sexes"); *id.* § 1681(a)(8) (discussing activities "provided for students of one sex" and "for students of the other sex").

Despite this, the federal gender identity mandate obligates schools providing sex-specific intimate facilities—locker rooms, showers, and restrooms—pursuant to 34 C.F.R. §106.33 to admit students professing to be transgender to those private facilities based on their gender identity, not their sex. If humans reproduced asexually, 34 C.F.R. §106.33 would never have been conceived. But we do not, and private parts engender privacy issues in these government-controlled intimate facilities where the right to bodily privacy should be protected by the school officials (who, standing *in loco parentis*, have a duty to protect that privacy). Instead, the federal gender identity mandate violates this vital privacy interest by intentionally placing an anatomical girl inside adolescent males' intimate facilities in this case, and vice versa in other cases, which utterly defeats the purpose of 34 C.F.R. §106.33.

CONCLUSION

Students' rights to bodily privacy are at the heart of 34 C.F.R. §106.33 and wholly within the scope of Title IX, so the Defendants-Appellees are squarely in the heart of Title IX when they reject the federal mandate. But Title IX does not create the new right asserted

---

species, esp. as differentiated with reference to the reproductive functions"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . . .")) Where the majority grievously erred was in simply ignoring the reproductive basis—which is the definitional basis—of human reproduction in respect to a statute which even the majority admits was unambiguously dealing with "male" and "female" people. *Id.* at 720.

by Plaintiff-Appellee, to have a subjective perception of sex be affirmed by the government at the cost of violating other students' bodily privacy.

The professed transgender students certainly must have their privacy protected, and schools do well to provide individualized facilities to this end. As well, Whitaker's challenging adolescence merits compassion, empathy, and support, and as with so many other issues which lay outside a federal court's purview, Whitaker may seek legal relief from Congress. But this Court must dispassionately apply the plain text and Congressional intent of Title IX and provide for male and female intimate facilities under 34 C.F.R. §106.33. We thus urge the Court to reverse the decision below.

Respectfully submitted this the 19th day of December, 2016.

By: s/Jeremy D. Tedesco

Jeremy D. Tedesco
Gary S. McCaleb*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020
480-444-0028 Fax
jtedesco@ADFlegal.org
gmccaleb@ADFlegal.org

Jordan W. Lorence
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
202-393-8690
202-347-3622 Fax
jlorence@ADFlegal.org

*Application for Admission
to this Circuit pending

Attorneys for Amicus Curiae Alliance Defending Freedom

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Amicus Curiae Alliance Defending Freedom, furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief, including footnotes and issues presented, but excluding certificates, contains 4790 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

Dated: December 19, 2016

ALLIANCE DEFENDING FREEDOM

s/Jeremy D. Tedesco

Jeremy D. Tedesco
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Jeremy D. Tedesco

Jeremy D. Tedesco
Attorney for Amicus Curiae