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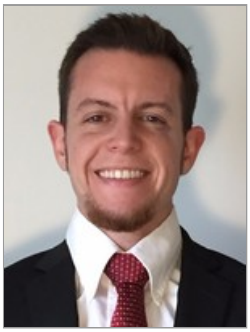
Flawed Commentary Can't Stop Trans Rights Momentum

By **Raymond Wendell and Ginger Grimes**



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Law360, New York (June 20, 2017, 1:15 PM EDT) -- A June 9, 2017, Law360 guest article by Jordan Lorence argues that the Seventh Circuit misapplied Title IX in its recent decision upholding a preliminary injunction prohibiting a school district from restricting a transgender boy's use of boys' restrooms. To reach his conclusion, Lorence mischaracterizes the facts and reasoning of Ashton Whitaker v. Kenosha Unified School District et al, as well as the law on which the case relies.

Ashton Whitaker, known in court documents by his nickname Ash, is a transgender boy who recently graduated from high school in Kenosha, Wisconsin. Whitaker's school district prohibited him from using boys' restrooms due to his transgender status; he was permitted to use only girls' restrooms or a gender-neutral restroom that was located far from his classes. Because Whitaker's peers accepted him as a boy, using girls' restrooms was not a reasonable option, and using the distant gender-neutral restroom was both impractical and stigmatizing. The resulting lack of restroom access aggravated a preexisting medical condition that makes Whitaker susceptible to fainting and seizures when dehydrated. Whitaker's school district also singled him out for disciplinary action, including surveillance by security guards. Reportedly, the school district even considered requiring transgender students to wear bright green wristbands in order to monitor their restroom usage.

Whitaker filed a lawsuit challenging the school district's discriminatory policies, and the district court granted a preliminary injunction in his favor. On May 30, the Seventh Circuit affirmed, ruling that Whitaker was likely to prevail on the merits of both his Title IX and his equal protection claims. The court recognized that sex discrimination includes discrimination due to an individual's failure to conform to sex stereotypes. It reasoned that this doctrine applies to discrimination based on transgender status.

Lorence's critique of Whitaker is logically and doctrinally unsound. First, Lorence takes issue with the Seventh Circuit's approach to statutory interpretation, contending that the plain words of a statute represent the full intent of Congress. He claims that had the Seventh Circuit consulted the language of Title IX and contemporaneous dictionaries, it would have concluded that the purpose of the statute is to protect women and girls from discrimination. According to Lorence, protecting transgender students undermines the statute's objectives. But the interpretive approach that Lorence advocates is at odds with his conclusion. Title IX provides that "[n]o person" may be subjected to discrimination on the basis of sex. Courts routinely recognize that this language includes men and boys; there is no indication that it excludes transgender students.

To be sure, Congress' clear mandate that all students be protected from sex discrimination is silent with respect to exactly what those protections entail for transgender students. Case law applying Title IX's protections to nontransgender students is not necessarily helpful, as these students tend to experience different forms of discrimination. Nor does the regulation that Lorence cites, which permits schools to maintain certain sex-segregated facilities, elucidate how schools

should accommodate transgender students in these facilities. Under former President Barack Obama, the U.S. Department of Education issued a guidance letter clarifying Title IX's protections of transgender students, but the letter has since been rescinded without replacement.

In light of this uncertainty, the Seventh Circuit in Whitaker took the sensible approach of turning to the more thoroughly developed case law interpreting Title VII's prohibition of sex discrimination in employment. That case law reflects the emerging consensus that discrimination on the basis of transgender status is unlawful under the doctrine of sex stereotyping.

For nearly three decades, the U.S. Supreme Court has recognized that employers who assume or insist that employees conform to the employers' sex stereotypes, including how an employee acts or dresses, discriminate on the basis of sex. Title VII's protections have applied equally to women who are seen as too masculine and men who are seen as too feminine. Courts interpreting Title IX, often looking to Title VII case law, have similarly concluded that students who are subjected to discrimination because they do not conform to their peers' or school officials' expectations about how boys and girls should look, act or dress are protected under Title IX.[1]

Lorence suggests that the school district's bathroom policy in Whitaker did not involve sex stereotyping because the school district's policy was based on Whitaker's sex as it was assigned at birth, not on how Whitaker acted or dressed.

Where Lorence's argument fails, and what the Seventh Circuit recognized, is that defining an individual's sex or gender only as it was assumed and assigned at birth is in itself sex stereotyping, a prohibited form of sex discrimination. Though many people have gender identities that match the sex they were assigned at birth, leading medical and psychological literature acknowledges that single measures, such as genitalia or chromosomes, are often insufficient to determine an individual's sex given the wide variation in human biology and experience. To impose such a harmful policy based on assumptions about an individual's gender — a policy inconsistent with leading medical and psychological guidelines on the treatment of gender dysphoria — is unlawful sex discrimination.

In line with Supreme Court precedent and three decades of sex stereotyping jurisprudence, the Seventh Circuit correctly concluded, "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[2]

Beyond Lorence's departure from established sex stereotyping doctrine, Lorence asserts that protecting transgender students from discrimination threatens the efficacy of protections for women from sex discrimination, for which he provides no support or explanation. Lorence implicitly suggests that if gender is "based solely on a person's self-perception," then everyone can claim Title IX's protections, which would render Title IX meaningless. First, as already explained, everyone is already protected from sex discrimination in education under Title IX. Second, Lorence's argument ignores both Whitaker's own diagnosis of gender dysphoria and the medical and psychological consensus on gender identity, which was thoroughly briefed for the Seventh Circuit.

Most importantly, the country's leading women's advocacy groups do not share Lorence's concern. As pointed out in an amicus brief submitted by a collection of these groups, Lorence's attempt to reframe his position as promoting the protection of women is a classic example of "romantic paternalism" used to "put women, not on a pedestal, but in a cage."[3] The brief describes the purported concern for women as a "protective pretext," similar to laws that barred women from entering certain professions in order to protect their health and welfare, employer policies excluding fertile women from certain jobs to protect the health of hypothetical fetuses, and anti-miscegenation laws designed to protect white women from black men.[4] Similarly, Lorence's concern appears to be paternalistic pretext rooted in a desire to perpetuate harmful stereotypes about transgender individuals.

Lorence's legal arguments are further undermined by some of the piece's more obvious flaws. For example, Lorence repeatedly claims that the court disregarded the privacy rights of Whitaker's classmates, but he does not elaborate on the nature of those rights or how they are threatened by Whitaker's presence in the boys' restroom. Instead, the article treats as self-evident that

nontransgender students have the right to not share a restroom with a person who was assigned a different sex at birth and renames this concept "privacy." The Seventh Circuit, by contrast, carefully considered the school district's privacy-based argument and found it to be speculative.

In addition, the article goes on at length about an unrelated Supreme Court case involving a sex crime. It is difficult to see this tangent as anything other than a pretext to reference sexual abuse and statutory rape in an article about a transgender person. Finally, the author's choice (unnecessary to his argument) to refer to Whitaker using female pronouns could be seen as driven by hostility toward the transgender community, rather than by concern for women's rights or the integrity of statutory interpretation.

Lorence's view of the Seventh Circuit's decision in Whitaker is consistent with his organization's position in a number of cases involving transgender individuals nationwide.[5] It is likely that Lorence and his organization will continue to mischaracterize the interests at stake in these cases with inconsistent arguments ignoring well-established precedent. What we can glean from this attack on a well-reasoned Seventh Circuit opinion is that those who oppose the safety and rights of transgender students, like Lorence and the Alliance for Defending Freedom, are in a futile fight. The recent resounding successes of transgender litigants under federal civil rights laws demonstrate the substantial momentum behind the transgender rights movement, which is unlikely to be slowed by opponents' poorly conceived arguments.

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[1] See, e.g., Theno v. Tanganoxie Unified Sch. Dist. No. 464, 394 F.Supp.2d 1299, 1302-08 (D. Kan. 2005) (holding that a plaintiff proffered sufficient evidence for a jury to find that the plaintiff succeeded on his Title IX claim based on a sex stereotyping theory where he was called words like "pussy," "flamer," and "faggot" because he had, among other things, quit the football team, wore earrings, and liked Tae Kwon Do).

[2] Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., --- F.3d. ---, No. 16-3522, 2017 WL 2331751, at *11 (7th Cir. May 30, 2017).

[3] See Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

[4] Brief of Amici Curiae National Women's Law Center, et al., in Support of Plaintiff-Appellee, Whitaker v. Kenosha, No. 16-3522, 20-25 (7th Cir. Jan. 30, 2017).

[5] See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, No. 16-2424 (6th Cir. appeal pending); Brief of Amicus Curiae Alliance for Defending Freedom in Support of Petitioner, G.G. v. Gloucester Cty. Sch. Bd., No. 15-2056 (4th Cir. Jan. 10, 2017); Doe v. Boyertown Area School Sch. District Dist., No. 17-1249-EGS (E.D. Pa complaint filed March 21, 2017); Privacy Matters v. U.S. Dept. of Educ., No. 16-cv-3015 (WMW/LIB) (D. Minn. complaint filed Sept. 7, 2016 and voluntarily dismissed April 13, 2017); Students and Parents for Privacy v. U.S. Dept. of Educ., No. 1:16-cv-04945 (N.D. Ill. complaint filed May 4, 2016); Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dept. of Educ., No. 16-4117 (6th Cir. appeal pending); State of Texas v. U.S., 201 F.Supp.3d 810 (N.D. Tex. Aug. 21, 2016) (granting nationwide preliminary injunction enjoining the U.S. Departments of Education, Justice and Labor, the U.S. Equal Employment Opportunity Commission, and various agency officials from investigating complaints under Title IX based on their interpretation that sex includes gender identity). The Southern Poverty Law Center lists Alliance Defending Freedom as an extremist anti-LGBT group. See Southern Poverty Law Center, Alliance Defending Freedom, https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom.