

CLIENT NEWS BRIEF

Ninth Circuit Rejects Constitutional Challenge to School Safety Plan Allowing Transgender Student Use of Single Sex Facilities

The Ninth Circuit said it best: “Schools face the difficult task of navigating varying student (and parent) beliefs and interests in order to foster a safe and productive learning environment, free from discrimination that accommodates the needs of all students.”

In the recent case of *Parents for Privacy v. Barr* (9th Cir. 2020) 949 F.3d 1210, the Ninth Circuit artfully untangled these “varying beliefs and interests” when it upheld a “Student Safety Plan” that allowed transgender students to use school facilities that matched their gender identity, including restrooms, locker rooms and showers. In doing so, the court rejected several legal arguments that the “Student Safety Plan” violated Title IX and/or the First and Fourteenth Amendment privacy, parental, and/or religious rights of the students and parents who objected to the use of such facilities by transgender students. This case was brought by parents of current and former cisgender students who attended Dallas High School in Oregon. Plaintiffs believed the Safety Plan created a sexually harassing environment in violation of Title IX; violated the children’s right to “bodily privacy” and the parents’ right to direct their students’ education under the Fourteenth Amendment of the United States Constitution; and violated their right to freedom of religion under the First Amendment.

Ninth Circuit Holding

In a long and legally intricate opinion, the Ninth Circuit articulated why the Safety Plan at issue did not infringe upon others’ fundamental rights.

Title IX: Prohibition of Harassment/Discrimination on the Basis of Sex

Plaintiffs argued that the Safety Plan violated Title IX “by turning locker rooms, showers and multi-user restrooms into sexually harassing environments and by forcing students to forgo use of such facilities as the solution to the harassment.” The court struck down both arguments, holding: “A policy that treats all students equally does not discriminate based on sex in violation of Title IX” and “the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender.” The court noted that “just because the Safety Plan implicitly addresses the topics of sex and gender by seeking to accommodate a transgender student’s gender identity, or because it segregates facilities by gender identity, does not mean that the Plan harasses other students on the basis of their sex.” The court further noted “Plaintiffs do not allege that transgender students are making inappropriate comments, threatening them, deliberately flaunting nudity, or physically touching them.” In doing so, it declared that something more than a transgender person using a facility for its intended purpose is needed to violate Title IX.

May 2020
Number 40



Michelle L. Cannon
Partner
Sacramento Office
mcannon@lozanosmith.com



Carolyn L. Gemma
Senior Counsel
Sacramento Office
sgemma@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

Fourteenth Amendment: Right to Privacy

Plaintiffs alleged that under the Fourteenth Amendment individuals have a constitutional right to “bodily privacy” that includes a right to “privacy of one’s fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex.” The court disagreed saying, “The Fourteenth Amendment right to privacy does not extend to avoiding all risk of intimate exposure to or by a transgender individual.” The court explained that the Fourteenth Amendment Right to Privacy protects against unreasonable, arbitrary and unjustifiable intrusions into an individual’s privacy by government actors. Here, the inadvertent exposure that might occur as a result of the “gaps” in the privacy stalls is not protected. Although the alternatives and privacy protections afforded to the students who did not want to share the facilities with transgender students “admittedly appear inferior and less convenient” those “slight discomforts” were not enough to establish a privacy violation.

Fourteenth Amendment: Parental Rights

Plaintiffs argued that parents have a fundamental right to make decisions concerning the care, custody, and control of their children and that the Student Safety Plan infringed upon their right to do so. The court declined to extend parental rights to include the right to determine the bathroom policies of a public school. Rather the court found that a parent’s right to direct the education and raising of one’s child “does not extend beyond the threshold of the school door.” It noted, “[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or ... a dress code, these issues of public education are generally committed to the control of state and local authorities.”

First Amendment: Right to Free Exercise of Religion

Finally, plaintiffs alleged that the Safety Plan conflicts with and prevents objecting students and parents from fully practicing their religious beliefs (i.e. displaying modesty). The court disagreed, finding that the Safety Plan was neutral, generally applicable, and rationally related to a legitimate governmental purpose of protecting transgender students from harassment, discrimination, or other harm. The court noted that the plaintiffs’ acknowledged that the District created the plan in response to the students request for accommodation and to the threat of federal enforcement action; the plan did not reference religious practice, conduct, belief or motivation; and that the plain language of the plan stated it was created to “support a transgender male expressing the right to access” school facilities dedicated to male students. These facts weighed against a finding that the Safety Plan infringed upon an individual’s right to free exercise of religion.

Takeaways

While creating a safety plan is not legally required, doing so is a best practice to ensure compliance with federal and state anti-discrimination laws. This case serves as a reminder for school districts who choose to create and implement safety plans for transgender students that, if done appropriately, such safety plans will comply with federal and state anti-discrimination laws and not infringe upon others’ fundamental rights. Where safety plans are implemented, school districts should take steps to ensure that the safety plan clearly articulates the reason for the plan, the safety measures to be implemented, and treats all students, regardless of gender or gender identity, equally.

CLIENT NEWS BRIEF

May 2020
Number 40

If you have questions about the Ninth Circuit's decision in *Parents for Privacy v. Barr* or would like assistance in preparing, reviewing, or revising your existing or potential student safety plan, please contact the authors of the Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.