
Ninth Circuit Remands Case to Trial Court to Determine if District Policy Regarding Disclosure of Student's Gender Identity to Parents Implicates a "Fundamental Liberty Interest"

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The United States Court of Appeals for the Ninth Circuit has vacated the decision of the Eastern District of California dismissing a parent-plaintiff's constitutional facial and as-applied challenges to the Chico Unified School District's (District) Administrative Regulation (AR) 5145.3 - Nondiscrimination/Harassment (the Policy), specifically as it relates to student gender identity, privacy, and disclosure of information to parents. The Ninth Circuit remanded the case back to the trial court to consider whether the plaintiff adequately alleged the deprivation of a "fundamental liberty interest."

At the Eastern District, the parent-plaintiff (Regino) argued that the Policy amounted "to a '[s]ecrecy [p]olicy,' whereby school personnel '(1) socially transition any student who claims to have a transgender identity and asks to be socially transitioned in the school environment and (2) keep the social transitioning secret from the student's parents unless the student specifically authorizes parental notification.'" The Ninth Circuit's opinion in this case has been highly anticipated as local educational agencies grapple with how to comply with both State and federal law and guidance regarding student gender identity and related parental rights.

Background on the Policy

The District adopted the Policy "based on a sample regulation circulated by the California School Boards Association [CSBA] in accordance with directives issued by the California Department of Education [CDE]." The Policy prohibited the disclosure of a student's "transgender status" to anyone without the student's consent, including the student's parents. CSBA's model regulation and the CDE's related guidance was originally published in response to Assembly Bill (AB) 1266, passed in 2013. AB 1266 prohibits discrimination on the basis of gender, gender expression, and gender identity. AB 1266 also permits K-12 students to use the facilities and participate in the activities that are consistent with their gender identity.

Regino's Legal Challenges to the Policy

In early 2022, Regino's daughter and District student, "A.S.," confided in a school counselor that she "felt like a boy." Per A.S.'s wishes and in accordance

with the Policy, District staff began addressing A.S. by a different name and using male pronouns. Also consistent with A.S.'s wishes, due to concerns that Regino would "be mad at her," District staff did not disclose this change to Regino. Nonetheless, Regino ultimately found out and filed a lawsuit alleging that the Policy, both as written and as applied, unconstitutionally violated her parental rights to make decisions concerning the care, custody, and control of her children. The District filed a motion to dismiss the lawsuit, and the Eastern District granted the dismissal on the basis that Regino had "failed to allege the existence of a fundamental right that was clearly established in existing precedent."

Since the lawsuit was filed, A.S. has returned to using the name "A.S.," and female pronouns.

The Ninth Circuit Opinion

On appeal, the Ninth Circuit held that the Eastern District applied the wrong standard in reviewing Regino's complaint. Regarding Regino's *as-applied* substantive due process claims, the Ninth Circuit held that Regino did not need to demonstrate a "clearly established" right, as that standard is reserved for qualified immunity cases. Instead, according to the Ninth Circuit, the Eastern District should have directed Regino to provide a "careful description of the asserted fundamental liberty interest," within the meaning of U.S. Supreme Court precedent. Therefore, on remand, Regino will have the opportunity to provide a "precise" explanation of the scope of her alleged parental liberty interest, and the Eastern District can decide whether the liberty interest is "objectively, deeply rooted in the Nation's history." If so, then Regino could create new legal precedent that holds parents have a right to know their student's gender identity.

Regarding Regino's *as-applied* procedural due process claims, the Ninth Circuit likewise held that the Eastern District improperly dismissed Regino's claims based on her failure to allege a fundamental right. Instead, on remand, the Eastern District must "consider whether Regino adequately alleged the deprivation of a *liberty interest*, regardless of whether that interest is deemed *fundamental*." (Emphasis added.)

As to Regino's *facial* claims, the Ninth Circuit ruled that the Eastern District's analysis was flawed because it was premised on the improper standards identified above. Therefore, the Eastern District must re-review Regino's facial claims as well, in light of the Ninth Circuit opinion.

Takeaways

The propriety of school district policies which restrain informing California parents of their child's transgender or gender-nonconforming status in the school setting remains, at least in part, an unsettled question. This issue will be addressed in greater detail by the federal trial court in this matter, on remand. Specifically, if Regino successfully pleads a "fundamental liberty interest" within the meaning of U.S. Supreme Court precedent, then the district court will also have to determine whether the District's Policy, based off CSBA's model policy and former CDE guidance, violates that interest.

Client News Brief

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