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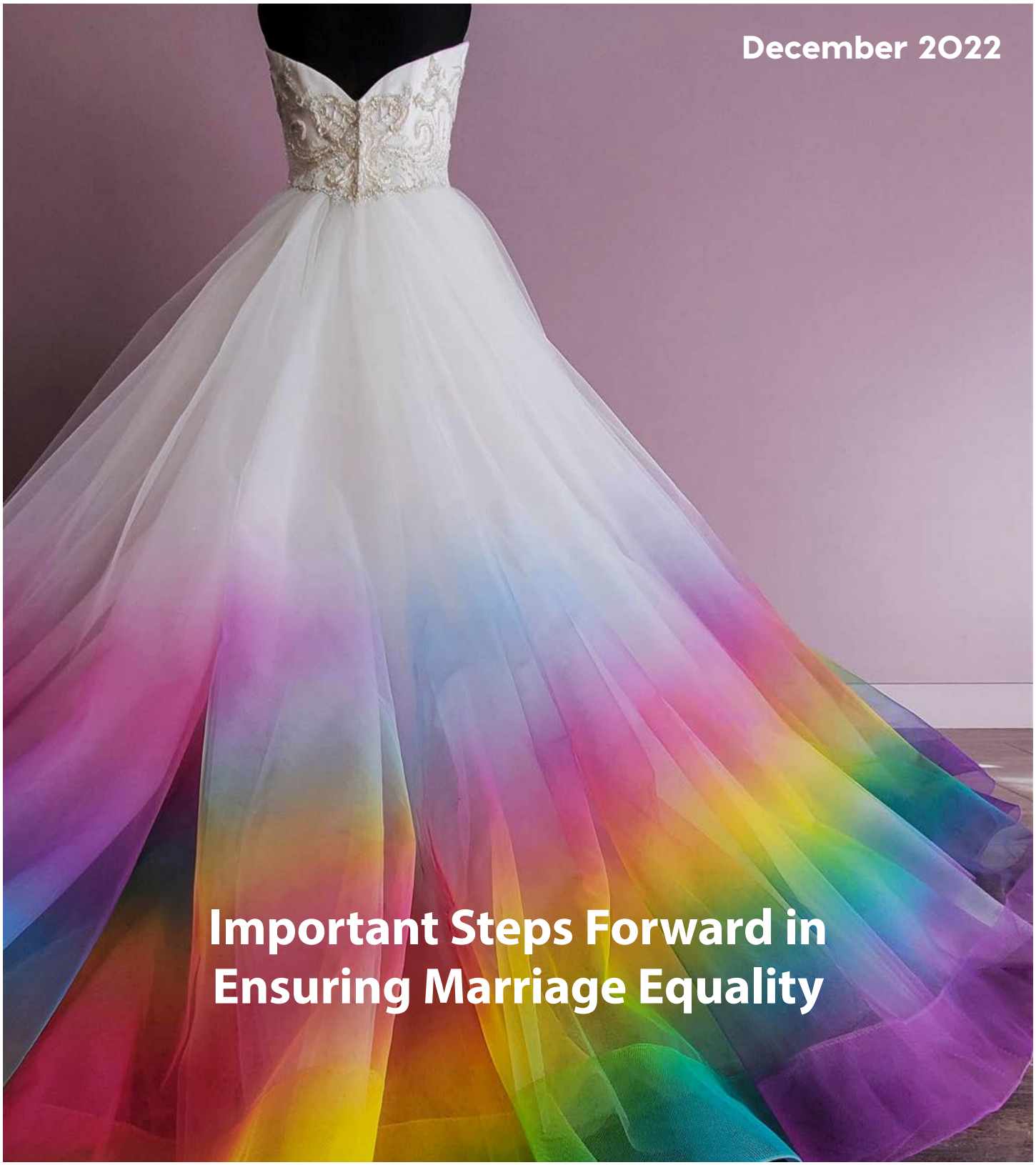
LAW NOTES

December 2022



Important Steps Forward in Ensuring Marriage Equality

John J. McKetta III, David R. Schleicher, and Douglas S. Lang represented the Commission and the officials. The First Liberty Institute and Jonathan Mitchell represented Hensley. Justice Thomas J. Baker wrote the opinion. Justice Melissa Goodwin wrote the concurring opinion. Although last updated in October before the ruling, the First Liberty Institute claimed to still be fighting for Hensley. ■

Corey L. Gibbs is a member of the New York Bar.

U.S. District Judge in Tennessee Rules Against Transgender Girl Seeking to Use Restroom Consistent with Her Gender Identity

By Matthew Goodwin

On November 2, U.S. District Judge William L. Campbell, Jr., a Trump appointee in the U.S. District Court for the Middle District of Tennessee, ruled against an eight-year-old transgender girl in her lawsuit seeking access to use the multi-occupancy girls' restroom in her Nashville elementary school. *D.H. v. Williamson Cnty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 199490, 2022 WL 16639994.

Through her parents as "next friends," the girl, identified in the opinion only by her initials D.H., sued to enjoin the Williamson County Board of Education and Public Schools, as well as the Tennessee Department of Education (Defendants), from enforcing the "Tennessee Accommodations for All Children Act." The Act has sometimes been referred to in the press and elsewhere as the School Facilities Law.

The 2021 Act is just one of many such anti-transgender laws passed in recent years in jurisdictions throughout the United States. The Act ". . . provides students, their parents or legal guardians, teachers, and employees a private right of action to sue [Tennessee] public school systems for 'psychological, emotional, and physical harm,' including monetary damages and 'reasonable attorney fees and costs,' if they 'encounter[] a member of the opposite sex [defined as sex at birth] in a multi-occupancy restroom or changing facility located in a public school building . . . [and] the public school intentionally allowed a member of the opposite sex [defined as sex at birth] to enter the multi-occupancy restroom or changing facility while other persons were present."

The practical effect is to bar Tennessee schools from allowing transgender students like D.H. from accessing and using restroom facilities consistent with their gender identity.

D.H. alleges that the Act law violates Title IX of the Education Amendments of 1972, which prohibits discrimination "on the basis of sex" in education programs that receive federal funding. D.H. further alleges that the Act violates her rights under the Equal Protection and Due Process Clauses of the U.S. Constitution.

The case was before Judge Campbell on a motion for a preliminary injunction brought by D.H.

D.H., presently a third grader, began her social transition at age 6, during which time she began using she/her pronouns; this coincided with 2020 and the COVID pandemic. After beginning her social transition, D.H. was frequently misgendered by teachers and bullied and harassed by students both at school and the bus stop.

When D.H. returned to in-person classes for the second half of second grade, she was not allowed to use the multi-occupancy girls' restroom but, instead was only provided access to the school's four single-occupancy restrooms. According to D.H., one of these single-use bathrooms was far from her classroom and the others were dirty, often unavailable, or located in school areas closed-off to students requiring that she "out" herself to staff in order to use the bathroom.

The result was that D.H. began either limiting the amount she ate or drank at school or would not use the restroom at all. Once, D.H.'s mom had to pick her up from school so that D.H. could use the bathroom elsewhere during the day. D.H. felt singled out and began ". . . having screaming fits, throwing objects, engaging in negative self-talk, and hitting herself. She also became apathetic and lethargic at times, and experienced migraines, and recurring nightmares."

The U.S. District Court for the Middle District of Tennessee is part of the Sixth Circuit, where there is no controlling appellate precedent to follow on this issue, unlike in the neighboring Fourth and Seventh Circuits. D.H. argued, however, that the Sixth Circuit's decision in *Dodds v. United States Dept. of Educ.*, 845 F.3d 217 (2016) bound Judge Williams to find that D.H. was likely to prevail on the merits.

In *Dodds* an eleven-year-old transgender girl, who sought to use a restroom consistent with her gender identity, was granted a preliminary injunction by the district court hearing her Title IX and Equal Protection claims. The Sixth Circuit denied the school district's subsequent appeal of the injunction. Wrote Judge Williams, "[t]he *Dodds* Court's finding that the school district did not make its required showing of a likelihood of success on appeal, does not equate to a holding that the failure to allow individuals to use the restroom corresponding with their gender identity is a violation of equal protection or Title IX."

Judge Williams also took pains to insulate D.H.'s case from the implications of the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731.

As readers may recall, *Bostock* held "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." At the same time, Justice Gorsuch writing for the majority in *Bostock*, ". . . expressly declined to address 'bathrooms, locker rooms, or anything of the kind.'"

The U.S. Department of Justice and the U.S. Department of Education have each released guidance that would apply *Bostock*'s reasoning to Title IX cases, but the Education Department was enjoined from implementing this guidance by a different Tennessee district court judge in August of 2022.

Judge Williams' analysis of Plaintiff's likelihood of success on her Equal Protection claim, reads, initially, as though he disagrees with Defendants and will find for D.H—which of course is not where he lands.

Plaintiff and the Tennessee Department of Education defendants agreed, albeit for different reasons, that intermediate is the appropriate level of scrutiny for the court to apply in the Equal Protection context. The Williamson County Board of Education and Public School defendants contend that rational basis review is appropriate. Here, the Court found "Plaintiff has the better argument."

The Defendants went on to argue that the substantially important government objective furthered by the Act, and which justifies the differential treatment of D.H., was the safety of children who might be using the restroom at the same time as a transgender student.

Wrote Judge Williams, ". . . Defendant's suggestion that transgender students seek access to restrooms corresponding to their gender identity for any reason other than that which everyone else seeks to use the restroom is entirely speculative and is indicative of precisely the kind of prejudice of which Plaintiff accuses them. Defendants do not cite to any evidence that allowing transgender individuals – in this case an eight-year-old – to use the restroom corresponding with their gender identity poses any threat to the safety of others in the restroom."

The court, nevertheless, went on to state D.H. was unlikely to prevail on the merits of her Equal Protection claim on the basis that ". . . separate bathrooms for the biological sexes have been accepted as a valid differentiation that serves the interest of individual privacy . . . Even if the actual risk of exposure of private areas of the body is minimal during typical restroom use, the interest in privacy extends beyond avoiding unwanted genital exposure, to a privacy interest in 'perform[ing] bodily functions away from those of the opposite sex."

Arguably, after apparently chiding Defendants for prejudicial attitudes toward transgender children, the court itself seems to fall back onto the same prejudiced notions.

Turning to the Title IX claim, D.H. alleged that excluding her from using a multi-occupancy restroom for girls was exclusion from an education program for Title IX purposes and was discrimination "on the basis of sex."

Judge Williams wrote, "[t]he Court does not disagree that discriminating against a person for being transgender constitutes discrimination on the basis of sex."

Again, however, the court finds D.H. unlikely to prevail on the merits of her Title IX claim by adopting reasoning at odds with *Bostock* and the enjoined guidance from the Department of Education.

"Acceptance of Plaintiff's argument requires either that Title IX allows for the provision of separate bathrooms, but does not mandate who may use them, or that 'sex' encompasses 'gender identity.' The Court is not persuaded by either of these readings of the statute . . . Absent indication that 'sex,' as it is used in the statute, means something more expansive than 'biological sex,' the Court presumes 'sex' has its ordinary meaning. The conclusion that 'sex' refers to biological sex does not mean that discrimination for being transgender is not discrimination based on sex. In this context, it merely means that provision of separate restrooms for the different biological sexes is not a violation of the statute."

The court also disagreed that D.H. would suffer irreparable harm absent the injunction she sought, although Judge Williams allowed that there would be "some harm" if D.H. was not immediately able to use the girls' restroom. Here, the court seemed to point to a letter from D.H.'s mother sent to the school at the end of her second-grade year stating D.H. had improved, her nightmares had subsided, and she was using the bathroom more frequently as evidence that any harm was not irreparable. Of course, at the end of her second-grade year, D.H. was not using the multi-use girl's restroom so the leap the court seems to make is that her improvement while being denied access to the girl's bathroom must mean any harm she is suffering is not irreparable. None of the parties offered expert testimony or affidavits on this question.

Finally, the Court found the balance of the equities and public interest to be "neutral." Most persuasive to the Court

in reaching this conclusion appears to have been the fact the Court deemed D.H. unlikely to succeed on the merits of her claim, which, Judge Williams wrote, "minimizes the public interest in granting the injunction."

D.H. was represented by Adam S. Lurie, Sean Mooney, Linklaters LLP, New York, NY; Ami Rakesh Patel, Jason Starr, Human Rights Campaign Fund, Washington, DC; Tricia Herzfeld, Branstetter, Stranch & Jennings, PLLC, Nashville, TN. ■

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Federal Court Declares Biden Administration Application of *Bostock* to the Affordable Care Act Unlawful

By Ashton Hessee

On November 11, U.S. District Judge Matthew J. Kacsmaryk (N.D. Tex., Amarillo Division), issued his latest ruling *Neese v. Becerra*, 2022 WL 16902425, 2022 U.S. Dist. LEXIS 205608 brought by several medical practitioners who ethically oppose gender-affirming healthcare to varying extents against Xavier Becerra in his official capacity as Secretary of the U.S. Department of Health and Human Services (HHS). Recent opinions by Judge Kacsmaryk in this action include denying a motion to dismiss in April and granting a motion to certify a class action suit in October – which was covered in the previous issue of Law Notes. *Neese v. Becerra*, 2022 US Dist LEXIS 188379 (ND Tex. Oct. 14, 2022).

This time around, Judge Kacsmaryk considers motions for summary judgment brought by both the plaintiff medical practitioners (who are represented by former Trump administration attorneys) and the defendant Secretary of HHS. He grants both motions in part by awarding the Plaintiffs relief under the Administrative Procedure Act (APA) and the Declaratory Judgment Act (DJA). However, he denies the Plaintiffs' request for injunctive relief and issues a declaratory judgment which clarifies that for the purposes of this action Becerra's May 10, 2021, Notification is unlawful, and §1557 of the Affordable Care Act (ACA) and Title IX do not implicitly prohibit discrimination based on sexual orientation or gender identity (SOGI).

The controversy at the center of this suit is whether health care providers who receive federal funding subject to §1557 of the ACA are prohibited from discriminating against patients on the basis of their sexual orientation and gender identity, in addition to "sex". 42 U.S.C. §18116(a). This dispute takes place in the shadow of the Supreme Court's decision of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), in which the definition of "sex" was interpreted to encompass SOGI for the purposes of Title VII. Defendant Becerra in his Notification shared with healthcare providers subject to the ACA that the government will apply this logic for the purposes of preventing SOGI discrimination by healthcare providers. The Plaintiffs in filing this suit assert that the imminent enforcement of the Notification if and when they refuse to provide gender-affirming care to Transgender patients causes them an injury, an assertion that Judge Kacsmaryk confirmed for standing purposes. Now, the court weighs in on whether the reasoning in *Bostock* that prevents SOGI discrimination can be applied in respect to the ACA and Title IX, as the Biden Administration contends.

First, Judge Kacsmaryk considers both parties' motions for summary judgment. For summary judgment to be appropriate, the moving party must be entitled to judgment as a matter of law and there must be no outstanding issues of material fact in the dispute. Judge Kacsmaryk highlights three elements that are at issue in the parties' respective motions: (1) whether the Plaintiffs have proper standing, (2) whether the Defendant's Notification is in accordance with the law, and (3) whether §1557 prohibits SOGI discrimination.

Citing his previous findings that the eventual enforcement of the Notification yields an injury to the Plaintiffs that is actual and imminent, concrete and particularized, traceable to the Defendant, and redressable by the courts; Judge Kacsmaryk now reaffirms that the medical practitioners possess the required standing.

Next, the court turns to whether the Notification is itself in accordance with the law. While the Defense argues that a similar analysis to *Bostock* should be