

Appeals Court Holds that Title IX Requires Schools to Provide Transgender Students Access to Restrooms Congruent with their Gender Identity

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G. G. v. Gloucester County School Board, 2016 U.S. App. LEXIS 7026 (4th Cir. Va. Apr. 19, 2016). A three-judge panel of the Court of Appeals for the Fourth Circuit reverses the lower court's dismissal of a transgender boy's Title IX claim and holds that, with respect to bathrooms, the Department of Education's Office for Civil Rights' interpretation of Title IX regulations that school districts must treat transgender students consistent with their gender identity must be given controlling weight.

SUMMARY AND FACTUAL BACKGROUND

G.G., a student with a birth-assigned sex of female, informed the school district during his sophomore year that he identifies himself as a male. The school officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. At G.G.'s request, school officials allowed him to use the boys' restrooms and he used the boys' restrooms without incident for about seven weeks. His use of the boys' restroom, however, aroused the interest of others in the community.

After two heated Gloucester County School Board ("Board") meetings, the Board passed a resolution limiting the use of locker rooms and bathrooms to corresponding biological genders (i.e., birth-assigned sex) and providing for "alternative appropriate private" facilities for "students with gender identity issues."

G.G. sued the Board, claiming that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 ("Title IX") and the Equal Protection Clause of the Constitution and sought an injunction allowing him to use the boys' restroom. The lower court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. G.G. appealed this decision to the Court of Appeals for the Fourth Circuit.

DISCUSSION

To receive federal funding, school districts must be in compliance with Title IX. Title IX provides: "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education's ("Department") regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights ("OCR") interpreted this regulation with respect to transgender students, stating: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."

The issue before a panel of the Court of Appeals for the Fourth Circuit was whether courts were bound to follow the OCR's interpretation of the regulation, as set forth in the January 7, 2015 letter. In Auer v. Robbins, the Supreme Court held that an agency's interpretation of its own ambiguous regulation must be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. 519 U.S. 452, 461 (1997).

Under the Auer test, a court must determine whether the regulation is ambiguous. The Fourth Circuit concluded that the regulation was ambiguous as to whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms.

Next, under Auer, a court must examine whether the interpretation is clearly erroneous or inconsistent with the regulation or statute. Because the term "sex" is not limited to a hard-and-fast binary division on the basis of reproductive organs, but instead acknowledges the varying physical, psychological, and social aspects included in the term, the court found that the interpretation was not plainly erroneous or inconsistent with the regulation or statute.

Accordingly, the court concluded that the Department's January 7, 2015 opinion letter, stating that school district "generally must treat transgender students consistent with their gender identity," was entitled to Auer deference, reversed the district court's dismissal of G.G.'s Title IX claim and remanded the case to the district court.

SUBSEQUENT DEVELOPMENTS

There have been two major developments since this decision. First, the Board filed a petition asking the U.S. Court of Appeals for the Fourth Circuit to order a rehearing by all 15 judges on the Fourth Circuit. The Fourth Circuit, in accordance with the Federal Rules of Appellate Procedure 41(d)(1), issued a mandate staying enforcement of the Fourth Circuit panel decision until further decision by the Fourth Circuit.

In addition, on May 13, 2016, the Department of Education and Department of Justice issued a Dear Colleague Letter on Transgender Students ("Guidance"). The Guidance does not change any laws, but informs districts how existing laws will be interpreted. The Guidance states, with respect to restrooms and locker rooms, that school district should provide transgender students with the right to use restrooms and locker rooms consistent with their gender identity. In addition, transgender students should not be forced to use single-person facilities, though single-person facilities can be provided to anyone who wants privacy.

PRACTICAL ADVICE

While not binding on Pennsylvania school districts, G. G. v. Gloucester County School Board is an important case because it is the first decision issued by a federal appeals court on this issue and could be a persuasive authority for Pennsylvania courts. However, many questions concerning the treatment of transgender students remain unanswered. For example, G.G. only challenged the Board's policy with respect to separate restrooms, but the court's ruling could necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities. The majority of the Fourth Circuit panel acknowledged that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed. Accordingly, the court may have permitted separate locker room and shower facilities. However, the Guidance instructs school districts to permit transgender students to use bathrooms and locker rooms consistent with their gender identity.

Accordingly, because the issues involving transgender students are complex, controversial and novel, school districts should consult with their solicitor prior to implementing any policies concerning transgender students.

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