

Latest Legal Developments on Transgender Student Issues

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Gloucester County School Board v. G.G., 136 S. Ct. 2442 (U.S. 2016): Supreme Court Stays Fourth Circuit Order allowing transgender student to use boys' restroom; *State of Texas, et al. v. United States of America, et al.*, Case 7:16-cv-00054-O (N.D. Texas August 23, 2016): District Court for the Northern District of Texas blocks federal government's transgender rules.

DISCUSSION

Gloucester County School Board v. G.G.

The case *G. G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. Va. Apr. 19, 2016) involved a high school student, G.G., who was born a biological female but identifies as a male. The school administration initially allowed G.G. to use the boys' bathroom, but the local school board adopted a policy that required students to use the bathrooms and locker rooms for their "corresponding biological genders." The board added that "students with gender identity issues" would be allowed to use private bathrooms.

As discussed in the Education Law Report released in June 2016 (Volume XXVII Number 2), on April 19, 2016, in the *G.G.* case, a three-judge panel of the Fourth Circuit reversed the lower court's dismissal of G.G.'s Title IX claim and held 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. The school 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, which automatically stayed the order.

Since the June 2016 Education Law Report, there have been significant developments in the *G.G.* case. On May 31, 2016, the Fourth Circuit denied the petition for a rehearing. As a result, the lower court, on June 23, 2016, entered a preliminary injunction order that required the school district to permit G.G. to use the boys' bathroom at the high school. The lower court and the Fourth Circuit both refused to stay the injunction until the issue could be resolved on appeal. However, on August 3, 2016, the Supreme Court of the United States stayed the June 23, 2016 preliminary injunction order pending the Court's decision to hear the case. Accordingly, G.G. is not permitted to use the boys' bathroom until the Court rules on the merits or decides to not hear the case.

State of Texas, et al. v. United States of America, et al.

As discussed in the June 2016 Education Law Report, in response to the Fourth Circuit's decision in the *G.G.* case, the Department of Justice and Department of Education issued a jointly authored Dear Colleague Letter on Transgender Students dated on May 13, 2016 (the "Letter") to all of the school districts in the country and told the districts that they must allow students to use the bathrooms, locker rooms and showers of the student's choosing and cannot force transgender students to use single-person facilities. The Letter also warned that failure to comply with this directive could result in the loss of Title IX-linked funding.

This Letter and related guidelines (collectively "Guidelines") issued by the Department of Justice, Department of Education and other federal agencies (collectively "government"), was then challenged by several states and agencies in the District Court for the Northern District of Texas in *State of Texas, et al. v. United States of America, et al.*, Case No. 7:16-cv-

00054-O.

On August 21, 2016, the court issued a preliminary injunction that enjoined the government from enforcing the Guidelines against plaintiffs and their respective schools, school boards, and other public, educationally-based institutions.

In reaching this decision, the court rejected the Fourth Circuit's holding in *G.G.* that the Title IX regulation, 34 C.F.R. §106.33, is ambiguous and that, therefore, the government's interpretation of the regulation should be given controlling weight. The regulation provides: "A recipient may provide 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 provided for students of the other sex." In the Texas case, the court found that regulation unambiguously protected against discrimination on the basis of biological sex, but not gender identity. Accordingly, because it found that the regulation was unambiguous, the court concluded that it should not defer to the governmental interpretations set forth in the Guidelines.

The court also found that the Guidelines were likely to be found to constitute "legislative rulemaking" and therefore had to go through the most formal regulatory process required by the federal Administrative Procedure Act ("APA"). The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them if they are legislative in nature. 5 U.S.C. §§ 553(b)(1)-(c).

The court found that the Guidelines were legislative because they created new standards and that violations would be punished. In other words, because the government had taken the position that schools not acting in conformity with the Guidelines are in violation of Title IX, the government was required to go through the notice and comment process.

The court concluded that plaintiffs met the requirements for a preliminary injunction and enjoined the government from enforcing the Guidelines. In addition, the court ordered that the injunction apply nationwide. However, the court acknowledged that since 34 C.F.R. §106.33 is permissive, the injunction only applies to any state that requires separate facilities based on biological sex. The court also acknowledged that the injunction would not impact any pending litigation in the federal courts.

PRACTICAL ADVICE

The law surrounding the rights of transgender students in schools is, to say the least, unsettled. The stay issued by the Supreme Court in the *G.G.* case does not necessarily mean that the Supreme Court will reverse the decision of the lower courts or even decide to hear the case. Moreover, the stay does not restrict how the federal government will interpret and apply its regulations.

The Texas case certainly appears to limit how the federal government can interpret and apply its regulations and Guidelines to school districts. However, Pennsylvania law does not require separate facilities based on biological sex, so it is uncertain whether the injunction in the Texas case even applies to Pennsylvania school districts. Moreover, even if it does apply, it is impossible to know whether the preliminary injunction will be appealed and, if so, whether the preliminary injunction blocking the Guidelines will be stayed or remain in force.

Accordingly, because the issues involving transgender students are complex, controversial, novel and unsettled, school districts should consult with their solicitor prior to implementing any policies concerning transgender students or acting on individual requests for accommodations from transgender students.

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