

## Students' Privacy Claims Fail to Upend School District's Transgender Restroom Policy

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In *Doe v. Boyertown Area School District*, 2017 WL 3675418 (E.D. Pa. 2017) (A Pennsylvania federal court denied a motion for a preliminary injunction in a case brought by four students (plaintiffs) in opposition to school policy permitting transgender students to use district restrooms and locker rooms aligning with their sexual identity instead of their biological sex).

### Summary Background

A recent graduate and several current students of the Boyertown Area School District brought suit in the United States District Court for the Eastern District of Pennsylvania contending that the school district's practice of allowing transgender students to use district restrooms and locker rooms aligning with their sexual identity instead of their biological sex violated their right to privacy and created a sexually hostile educational environment.

One male student complained that he saw a female, who was changing in the boys' locker room for gym class, while he was in his underwear. He brought this to the administration's attention and was told that the other student had permission to be there as a transgender male. The school offered him the opportunity to change in a private area rather than the boys' locker room. However, the male student did not change for gym at all and lost some points on his grade. He also used restroom facilities less frequently out of concern for seeing students of the opposite sex in these areas.

Another male plaintiff indicated that, while changing in the locker room, a fellow student called his attention to another student in the locker room who was wearing a short gray top and short shorts. He stated this student was a girl and that he was partially undressed at the time. Subsequently, when entering the boys' locker room, the student sought a sufficiently private area to avoid seeing or being seen by students of the opposite sex. Further, he limited his use of restrooms due to the practice.

A female student, upon seeing a student in the girls' bathroom that she believed was male, reported the incident to the administration, whereupon she learned of the school's policy allowing students of a different biological sex to use the bathrooms of the gender with which they identify. The student expressed privacy concerns when using the girls' restrooms where a boy might hear her relieving herself or opening menstruation-related products. Sometimes thereafter, she used the nurse's office and shower stalls with curtains in the locker room whenever she desired privacy.

The fourth plaintiff, also female, learned about the school's practice from one of the male plaintiffs. She claimed to have experienced fear and distress about the possibility of a boy entering the girls' room and noted girls often changed underwear in the locker room and had genitalia exposed.

The introduction to the court's opinion aptly summarized the legal and cultural context of the issues presented by the students' complaint:

"The current issue before the court — whether the court should issue a preliminary injunction prohibiting a school district from maintaining its practice . . . of allowing transgender students to use the bathrooms and locker rooms of the sex to which they identify — involves intricate and genuine issues relating to, inter alia, the personal privacy of high school students, a school district's discretion and judgment relating to the conduct of students in its schools, the meaning of the word "sex" in Title IX, and the rights of all students to complete access to educational opportunities, programs, and

activities available at school. The general issue of transgender persons' access to privacy facilities such as bathrooms has recently received nationwide attention, and the issue of transgender students' access to educational institutions' bathrooms and locker rooms aligning to their gender identity has spurred litigation with unsurprisingly inconsistent results. With regard to cases involving transgender students, they have generally centered on whether precluding transgender students from using facilities consistent with their gender identity violates those students' rights under the Equal Protection Clause of the Fourteenth Amendment or Title IX. And as to Title IX, which generally precludes public schools receiving federal financial assistance from discriminating "on the basis of sex," this has resulted in a debate as to whether "sex" refers to biological sex (which the plaintiffs in this case define as a person's classification as male or female at birth based on the presence of external and internal reproductive organs) or a broader and arguably more contemporary definition of sex that could include sex stereotyping or gender identity."

"Here, the court is presented with four students, . . . claiming that the defendant school district's practice of allowing transgender students (who the plaintiffs choose to identify as "members of the opposite sex" rather than as transgender students) to access bathrooms and locker rooms consistent with their gender identity violates (1) their constitutional right to privacy under the Fourteenth Amendment, (2) their right of access to educational opportunities, programs, benefits, and activities under Title IX because they are subject to a hostile environment, and (3) their Pennsylvania common law right of privacy preventing intrusion upon their seclusion while using bathrooms and locker rooms. The plaintiffs not only raise concerns with being in privacy facilities with transgender students regardless of whether the transgender students actually view them in a state of partial undress, but they raise concerns with the possibility of viewing a transgender person in a state of undress or having a transgender person present to hear them while they are attending to their personal needs while in the bathroom. At bottom, the plaintiffs are opposed to the mere presence of transgender students in locker rooms or bathrooms with them because they designate them as members of the opposite sex and note that, *inter alia*, society has historically separated bathrooms and locker rooms on the basis of biological sex to preserve the privacy of individuals from members of the opposite biological sex."

Following an evidentiary hearing upon the students' request for entry of a preliminary injunction, the federal court denied the motion concluding that the plaintiffs were unlikely to prevail on the merits of their claims.

## Discussion

The court rejected the students' argument that their right to privacy extends to protection from the transgender students hearing them use the restroom or observing them in a state of undress in locker rooms. It observed that no court had yet recognized a constitutional right as broad as that asserted by the students. Thus, the court explained that privacy claims under the Fourteenth Amendment require fact-intensive and context-specific analysis.

The court then examined the extent that the school's practice infringed upon the plaintiffs' privacy rights regarding the involuntary exposure of the intimate parts of the body (or even the possible disclosure of their partially clothed bodies) and whether the infringement is narrowly tailored to serve a compelling state interest. The school district demonstrated that no student was required to change in or use facilities which would make him or her uncomfortable and that it offered, or would be implementing, a range of privacy options, such as single-user restrooms and the installation of dividers in bathroom stalls and curtains in shower stalls. The court held that "[s]ince this matter does not involve any forced or involuntary exposure of a student's body to or by a transgender person and [Boyertown] has instituted numerous privacy protections and available alternatives for uncomfortable students or to protect against the involuntary exposure of a student's partially clothed or unclothed body, the plaintiffs have not shown that [Boyertown has] infringed upon their constitutional privacy rights." Further, noting that several court decisions have concluded that, because some school districts have been found liable for school policies restricting transgender students' use of restrooms, the court concluded that the school district had a compelling state interest not to discriminate against transgender students.

The court also concluded that the students' likely could not prove a claim of a Title IX violation. The court agreed with the school district's argument that all students were being treated equally under its practice and, therefore, the plaintiffs could not demonstrate that they were being discriminated against on the basis of sex. "The practice applies to both the boys' and girls' locker rooms and bathrooms, meaning that cisgender boys potentially may use the boys' locker room and bathrooms with transgender boys and cisgender girls potentially may use the girls' locker room and bathrooms with transgender girls."

### **Practical Advice**

This *Boyetown* case is the converse of suits brought to invalidate school policies precluding transgender students from using facilities consistent with their gender identity.

The court's decision aligns with other recent federal court decisions that have found restrictive facility policies to violate the constitutional rights of transgender students.

It can be expected that these issues will continue to be litigated with potentially varying results until such matters finally are addressed by the United States Supreme Court. In 2016, the Supreme Court agreed to review a Fourth Circuit court ruling in the matter of *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4<sup>th</sup> Cir. 2016). However, with the change in federal administrations in 2017, the Departments of Justice and Education issued guidance documents that contravened those provided by the prior presidential administration. The Supreme Court remanded the case for further consideration by the appellate court in light of the revised guidance. Consequently, school districts will need to continue to monitor the continuing legal developments on these issues.

Meanwhile, the practice of allowing transgender students to use restroom and locker room facilities consistent with their gender identity is the course most likely to avoid successful claims against school districts.

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