

Fourth Circuit Holds That Title IX Protection Extends to Transgender Restroom Access

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On April 19, 2016, the United States Court of Appeals for the Fourth Circuit, in a highly publicized decision, issued a ruling which addresses the rights of transgender students under Title IX of the Education Amendments Act of 1972 ("Title IX"). See *G.G., by his next friend and mother, Deirdre Grimm v. Gloucester County School Board*, No. 15-2056 (4th Cir., April 19, 2016).

The facts of *Grimm* are as follows: G.G. is a transgender boy in his junior year at Gloucester High School. G.G.'s birth-assigned sex is female, but his gender identity is male. G.G. was diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex. G.G. has undergone hormone therapy and has legally changed his name. Although he has not had sex reassignment surgery, G.G. lives all aspects of his life as a male.

Prior to the start of his sophomore year, G.G. and his mother informed school officials that G.G. was a transgender boy. The school administrators were supportive of G.G. They took steps to ensure that G.G. would be treated as a boy by teachers and staff, and they allowed G.G. to use the boys' restroom.

G.G. used the boys' restroom for nearly seven weeks without incident. However, upon learning of G.G.'s use of the boys' restroom, parents and community members began raising their concerns to the School Board. In response, and following two public meetings that included public comment on the issue, the Board adopted a policy that limited restroom use by students to their "biological genders," and that provided an "alternative appropriate private facility" for "students with gender identity issues."

G.G. filed suit against the District, seeking an injunction allowing him to use the boys' restroom and alleging that the Board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the United States Constitution. The lower court denied G.G.'s request for an injunction and dismissed G.G.'s Title IX claim. In dismissing the Title IX claim, the lower court reasoned that "Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation." G.G. filed an appeal of those decisions, which resulted in the Fourth Circuit's decision on April 19, 2016.¹

In describing the issue presented in this case, the Court of Appeals for the Fourth Circuit stated "at the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity."

In a 2-1 decision, the Court of Appeals for the Fourth Circuit overturned the lower court's dismissal of G.G.'s Title IX claims, meaning that G.G. would be permitted to continue his claim of discrimination under Title IX as a transgender

individual. In reaching this conclusion, a majority of the Court engaged in an application of administrative law to determine that the lower court did not give proper deference to the relevant guidance issued by the Department of Education ("DOE").

Specifically, the Court referred to the Office of Civil Rights' (OCR) Opinion Letter dated January 7, 2015, in which OCR opined that "[w]hen 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 Court also referred to OCR's December 2014 *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, wherein OCR stated that "[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX," and that recipients of federal financial assistance "must treat transgender students consistent with their gender identity."

The Court determined that an ambiguity existed in the current Title IX regulations, since it was not clear how the regulations would address the wide-variety of potential scenarios that could arise, including their application to transgender students.² The Court then determined that the DOE's interpretation of the application of this regulation and Title IX to transgender individuals reasonably resolved the inherent ambiguities by providing that the individual's sex as male or female is to be generally determined by reference to the student's gender identity. Since DOE's and OCR's interpretation was reasonable, the lower court was required to provide deference to it when deciding whether to dismiss G.G.'s Title IX claim.

What does this decision mean for Pennsylvania public school entities?

First and foremost, it is important to note that this decision is not binding on public school entities in Pennsylvania, since the Fourth Circuit is comprised of Maryland, Virginia, West Virginia, North Carolina and South Carolina. However, state and federal courts sitting in Pennsylvania are likely to give this decision significant weight if they are presented with the same circumstances.

Additionally, the effect of this judicial decision is to strengthen the regulatory guidance issued by OCR and DOE, which states that transgender students should be permitted to use the restroom associated with their gender identity.

Moving forward, Pennsylvania school entities should reexamine their policies and procedures for addressing requests from transgender students to utilize facilities associated with their gender identities. While the state-of-the-law on this topic in Pennsylvania is not fully settled, the Fourth Circuit's decision likely will be relied upon by students, parents and advocates to bolster requests to use the facilities associated with a student's gender identity, and likely will be cited by OCR as support for their continued, and increasing, enforcement efforts.

For additional guidance on this topic, see the National School Boards Association's *FAQs on Transgender Students in Schools*, available here: <https://www.nsba.org/nsba-faqs-transgender-students-schools>; and see the National Education Association's and ACLU's *Schools in Transition, A Guide for Supporting Transgender Students in K-12 Schools*, available here:

https://www.aclu.org/sites/default/files/field_document/schools.in_transition.2015.pdf.

If you have any questions or concerns regarding this development, or if we can provide any additional assistance as you review your existing policies and procedures, please do not hesitate to contact us.

1 *It is worth noting that the federal government filed an amicus brief supporting G.G.'s Title IX claim. In that brief, the federal government, not surprisingly, defended DOE's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.*

2 *The regulatory provision at issue was 34 C.F.R. 106.33, which permits schools to 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."*