

Management Alert



Fourth Circuit Holds that Title IX Protects Transgender Student's Right to Use Men's Restroom Consistent With the Student's Gender Identity

By Kylie Byron, Abigail Cahak, Mary Kay Klimesh, and Sam Schwartz-Fenwick

Seyfarth Synopsis: The U.S. Court of Appeals for the Fourth Circuit holds that Title IX protects a transgender student's right to use the restroom that aligns with the student's gender identity.

The Fourth Circuit has become the first federal circuit to weigh in on bathroom access for transgender students. In *G.G. v. Gloucester County School Board*, Case No. 15-2056, the Fourth Circuit held that deference should be given to U.S. Department of Education ("DOE") guidance which directs that schools must treat transgender students consistent with their gender identity if schools designate separate bathroom facilities on the basis of "sex" as authorized by Title IX regulation at 34 C.F.R. § 106.33. Since Title IX applies to educational institutions generally, the impact of *G.G.* applies not only to public schools but also to colleges, universities, and private schools that are recipients of federal financial assistance.

This ruling thus places federal jurisprudence in direct opposition to the bathroom bills that have passed or been proposed in some states.

A link to the Fourth Circuit's decision can be found [here](#).

Case Background

G.G., a high school junior, is a transgender boy. His sex assigned at birth is female, but his gender identity is male. G.G. has been 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 legally changed his name to a traditionally male name. Consistent with predominating medical standards of care for transgender minors, G.G. has not undergone sex reassignment surgery.

During G.G.'s sophomore year, he informed the administration of Gloucester High School that he was transgender. He was subsequently permitted to use the men's restroom. He used the restroom without incident for almost two months. After interest and input from some community members, the Gloucester County School Board revised its policy to limit the use of restroom and locker room facilities to "the corresponding biological genders," and supplied a gender-neutral restroom for transgender students.

G.G. sued for gender discrimination under Title IX and the Equal Protection Clause and requested a preliminary injunction

allowing him to use the bathroom aligning with his gender identity. G.G. alleged that being required to use the women's restroom caused negative reactions from other students, severe psychological distress, disruption of treatment for gender dysphoria, stigmatization, and medical conditions arising from avoidance of use of restroom facilities at school. G.G. further alleged that he could not use the new unisex restrooms because they made him "feel even more stigmatized" and that being "required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different'."

The District Court for the Eastern District of Virginia dismissed G.G.'s Title IX claim, holding that Title IX prohibits discrimination on the basis of biological sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The court also denied his request for a preliminary injunction. G.G. appealed to the Fourth Circuit.

The Fourth Circuit's Ruling

The Fourth Circuit reversed the District Court, deferring to the DOE's guidance as to how the Title IX regulation should apply to transgender individuals' use of sex-segregated facilities. The Court noted that an "agency's interpretation of its own ambiguous regulation [will] be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute."

Here, the relevant guidance was contained in the DOE Office of Civil Rights January 7, 2015 Dear Colleague Letter which stated: "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 Court first found this guidance addressed an ambiguous regulation. Although the underlying regulation was unambiguous in that it differentiated between male and female students—it was ambiguous as to *how* maleness or femaleness was to be determined. For example, regulation of school restrooms under "biological gender" requirements, rather than "gender identity" requirements, could cause confusion in application to transgender individuals, intersex individuals, individuals with hormonal conditions, and others.

Second, the Court found the DOE's interpretation of its Title IX regulations was not plainly erroneous or inconsistent with the regulation or statute. Specifically, definitions of "sex" contained in the American College Dictionary (1970) and Webster's Third New International Dictionary (1971)—which were used close in time to Title IX's enactment—indicated that the "hard-and-fast binary division on the basis of reproductive organs" "was not universally descriptive." Thus, the regulations assumed a student population in which "various indicators of sex all point in the same direction" but provided little direction on what was required when they did not.

Finally, the Fourth Circuit concluded that the DOE's interpretation of Title IX was the result of its "fair and considered judgment." The court rejected arguments that government's position was "novel" or a "convenient litigating position," noting that novelty alone was insufficient to refuse deference and that the DOE had been consistently enforcing its position since 2014. It also noted that the DOE's position regarding access to restrooms for transgender individuals was consistent with the position of other federal agencies, including the Occupational Safety and Health Administration, Equal Employment Opportunity Commission, Department of Housing and Urban Development, and the Office of Personnel Management.

The court concluded by noting that permitting G.G. to use the men's restroom did not threaten constitutional abuses of intrusion into privacy and that the record was devoid of evidence indicating that there was any danger implied by his use of the men's restroom.

The Fourth Circuit's decision drew a vocal dissent which pointed out concerns about safety, a lack of established case law regarding the court's interpretation of Title IX, and the traditional role of physical anatomy in organizing restrooms to prevent intrusions into privacy.

What G.G. Means for Schools and Others

The holding in *G.G.* provides binding legal authority to schools, colleges and universities within the Fourth Circuit—and guidance to those schools outside of the Fourth Circuit—in defining obligations to transgender students under Title IX.

While *G.G.* did not address locker room or shower facilities directly, language in dicta could potentially be used to expand this ruling in future decisions. An immediate complication for schools seeking to comply with the law is that *G.G.* directly conflicts with the bathroom bill recently passed in North Carolina, a state in the Fourth Circuit.

Further complicating the landscape is that while *G.G.* is the first federal circuit court decision on whether or not Title IX should be interpreted to protect transgender students, other circuit courts may hear the same issue in the future and it is possible that a circuit split will emerge.

The complexities of complying with Title IX can be significant. These complexities are heightened by potential conflicts between the requirements of state and federal law, and the potential for inter-circuit conflict. We thus suggest school administrators and others confronting these issues reach out to legal counsel for assistance in understanding and navigating Title IX's requirements.

If you would like further information, please contact your Seyfarth attorney, [Kylie Byron](mailto:kbyron@seyfarth.com) at kbyron@seyfarth.com, [Abigail Cahak](mailto:acahak@seyfarth.com) at acahak@seyfarth.com, [Mary Kay Klimesh](mailto:mklimesh@seyfarth.com) at mklimesh@seyfarth.com, or [Sam Schwartz-Fenwick](mailto:sschwartz-fenwick@seyfarth.com) at sschwartz-fenwick@seyfarth.com.

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Seyfarth Shaw LLP Management Alert | April 25, 2016

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