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G.G. v. Gloucester County School Board – A Tipping Point on Transgender Student Access Issues?

Education Law Notes

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Have we reached a judicial tipping point on transgender student bathroom and locker room access issues? Perhaps we have.

On April 19, 2016, the Fourth Circuit Court of Appeals – the federal circuit court with jurisdiction over appeals originating from the federal district courts in Maryland, North Carolina, South Carolina, Virginia and West Virginia – issued what may well prove to be a landmark decision affirming the rights of transgender students to use bathroom facilities corresponding with their gender identity rather than their biological sex. The decision, in the case captioned G.G. v. Gloucester County School Board, --- F.3d ----, 4th Cir.(Va.), Apr. 19, 2016, (NO. 15-2056) (copy available **here**), is the first federal appellate court decision squarely addressing the rights of transgender students to access school facilities.

The facts, as alleged by the student in the G.G. case follow what has become somewhat of a familiar pattern in transgender student cases. G.G., a transgender boy who was born a biological female, is now a junior in high school. G.G. has been diagnosed as suffering from gender dysphoria – a psychological condition recognized under the **DSM-5** that is characterized by significant distress caused by the incongruence between one's gender identity and their biologically defined sex.

Before the start of his sophomore year G.G. and his mother approached school officials to discuss G.G.'s gender identity and steps that could be taken to ensure that G.G. was treated as a boy by students and staff. G.G. requested to use boys' communal bathrooms at school because he found use of single-stall, unisex bathrooms stigmatizing. School officials granted G.G.'s request and initially G.G.'s use of the boys' bathrooms at school went on without incident.

However, after about seven weeks G.G.'s use of the boys' bathroom sparked a heated community debate. Community members demanded that the school board take action prohibiting students from using bathroom or locker room facilities that did not correspond to their biological sex and ultimately the school board relented by enacting a "transgender restroom policy" that bars transgender students within the district from using bathroom and locker room facilities at odds with their biological sex. In response, G.G. sued.

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G.G.'s suit against the school district seeks a court injunction allowing him immediate access to boys' bathrooms at school. The lawsuit is premised on claims based on Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution.

Initially, Judge Doumar of the District Court for the Eastern District of Virginia denied G.G.'s motion for an injunction and dismissed his Title IX and Equal Protection claims. In essence, Judge Doumar found in an opinion captioned G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015), that Title IX's prohibition on sex-based discrimination only applied to claims of discrimination based on biological sex, and that any privacy concerns that G.G. has in using bathroom facilities corresponding with his gender identity had to be weighed against the privacy interests of other students. On this last point, Judge Doumar wrote:

It does not occur to G.G. that other students may experience feelings of exclusion when they can no longer use the restrooms they were accustomed to using because they feel that G.G.'s presence in the male restroom violates their privacy. He would have any number of students use the unisex restrooms rather than use them himself while this Court resolves his novel constitutional challenge.

The Fourth Circuit's opinion overturning Judge Doumar's lower-court ruling strikes a very different tone. Judge Henry Franklin Floyd, an Obama appointee to the Fourth Circuit Court of Appeals, but a George W. Bush appointee to the United States District Court for the District Court of South Carolina before that, authored the opinion for a divided court. The Court reversed the dismissal of G.G.'s Title IX discrimination claim because it found that the lower court failed to properly credit an interpretation by the Department of Education's Office of Civil Rights (OCR) of a Title IX regulation allowing for the provision of "separate toilet, locker room, and shower facilities on the basis of sex..." 34 CFR § 106.33. OCR's interpretation of the regulation was made pursuant to a January 7, 2015 **letter** in which it stated 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."

In his opinion on behalf of the Court, Judge Floyd found that OCR's interpretation of the regulation was owed deference and should not be disturbed by the courts unless it could be shown that the interpretation was clearly at odds with the Title IX regulation. In making this point Judge Floyd wrote:

Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading- determining maleness or femaleness with reference exclusively to genitalia —and the Department's interpretation—determining maleness or femaleness with reference to gender identity. . . It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual

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who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

In addition to reversing the District Court's dismissal of G.G.'s Title IX discrimination claim, the Court of Appeals also remanded the case back to the District Court so that Judge Doumar could reconsider G.G.'s motion for injunctive relief under a broader legal standard.

The Fourth Circuit's decision in G.G. v. Gloucester County School Board really is a big deal. With the possible exception of the Maine Supreme Court's decision Doe v. Reg'l Sch. Unit 26, 2014 ME 11, 86 A.3d 600 (2014), the Fourth Circuit's G.G. decision is the most-significant judicial decision to date on transgender student bathroom and locker room access issues, and, along with Doe, is only the second appellate court decision in the country to broach the topic.

Perhaps more significant than its timing though is the fact that the G.G. decision was reached by the Fourth Circuit Court of Appeals – a "conservative" appeals court that was once described by *The New York Times* (albeit thirteen years ago) as **"the shrewdest, most aggressively conservative federal appeals court in the nation."** In this respect, the G.G. decision could, at least to a degree, soften the judicial edges of the transgender student bathroom issue just as the issue is gaining momentum as a political powder-keg. To this end, it would seem, that opponents of transgender student rights now have a difficult hurdle to overcome since the Fourth Circuit has set a marker on the side of transgender student access.

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