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The Fourth Circuit Finds Merit in Transgender Boy's Title IX Claim: *G.G. v. Gloucester County School Board*

On April 19, 2016, the United States Fourth Circuit Court of Appeals in *G.G. v. Gloucester County School Board*, reversed a United States District Court order that dismissed a transgender high school boy's Title IX, 20 U.S.C. § 1681(a), claim that he has a right to use a male school restroom.¹ The appellate court also remanded the case to the District Court to reconsider its denial of the student's motion for a preliminary injunction seeking access to male restrooms.

Gloucester County School Board, though one of the first cases to analyze the Department of Education's Title IX regulations and its Office of Civil Rights (OCR) interpretive letters, and certainly not the last word concerning transgender rights under Title IX, represents a substantial judicial shift in favor of a broader interpretation of Title IX. It is likely that *Gloucester County School Board* will influence other District and Circuit Courts. This *GT Alert* identifies some potential impacts of this case upon colleges and universities.

Facts

G.G. is a public high school junior from Virginia and a transgender male who has legally changed his name to a typically male name, undergone hormone therapy and openly lives as a male. After advising the school administration of these circumstances, the district acted to accommodate his needs by informing teachers of his new name and directed that he should be treated in all aspects as a male. Further, the district made a restroom in the nurse's office available to him. G.G. was appreciative of the administration's accommodations, though he later complained that using the nurse's bathroom was stigmatizing and that he should be permitted to use a male restroom. After the school agreed, parents and students complained to the School Board that birth-assigned gender should determine bathroom use and not an individual's gender identification. Following emotional meetings, the School Board adopted a policy that restricted restroom and locker room use to birth-assigned gender.

¹ Transgender male generally refers to an individual who sincerely identifies as a male though his birth-assigned sex was female. A transgender female presents the converse circumstance.

G.G. then filed suit in the United States District Court for the Eastern District of Virginia alleging Title IX and Fourteenth Amendment Equal Protection claims and he sought a preliminary injunction requiring the school district to rescind its new policy so as to permit him to use male restroom facilities. (G.G. does not participate in school physical education and athletic programs, and does not wish to use the locker-rooms.) The District Court denied G.G.'s motion for a preliminary injunction and dismissed his Title IX claims. It held that the United States Department of Education (DOE) Regulation, 34 C.F.R. § 106.33, allows for separate gender based toilet, locker room, and housing, etc. facilities, and the school district complied with the regulation when it held that gender was birth-determined. The court also denied the preliminary injunction motion as it held that allowing G.G. to use the nurse's bathroom was not a hardship.

The Fourth Circuit Court of Appeals reversed and remanded the case to the District Court. It relied upon the DOE's regulations, and OCR's Jan. 7, 2015, opinion letter wherein OCR stated:

“When a school elects to separate or treat students differently on the basis of sex . . . a school must generally treat transgender students consistent with their gender identity.”

Because G.G.'s sincere gender identity is male, the appellate court held that his individual good faith gender identity is determinative, and that birth-assigned gender, though applicable in the vast majority of situations, does not outweigh gender identification consistent with a diagnosis of gender dysphoria. It then remanded the case to the District Court to reconsider the matter and apply a more expansive evidentiary standard for G.G.'s preliminary injunction motion. Therefore, while the District Court's ultimate disposition of the requested relief remains uncertain, the Circuit Court opinion limits the trial court's discretion as it rejected the District Court's holding that birth-assignment is determinative under Title IX.

What Does *Gloucester School Board* Mean For Colleges And Universities

Though *Gloucester* concerns a public high school student, it should have profound effects upon public colleges and universities and for private institutions that receive federal funds. In the Fourth Circuit, encompassing Virginia, North Carolina and South Carolina, colleges and universities must immediately re-think their housing and bathroom policies. For other institutions, they should examine their policies as well.

Housing

Colleges and universities may continue to offer same-sex dormitories, and other housing facilities. However, decisions as to who is a male or female may not be simply based upon birth-assigned gender. Rather, the sincerely held identity of students should be given great weight to determining gender housing assignments. Therefore, a student who has legally changed his/her name to that of a different gender, or legally amended his/her birth certificate, is undergoing some form of recognized gender re-assignment protocols, or outwardly identifies with one gender, may select the same-sex housing consistent with his/her gender identity, and the institution may not summarily reject the housing selection due to a contrary birth-assignment. What other actions the student need take to further gender identity has yet to be determined.

What if the student desires a same-sex housing facility contrary to his/her gender identity or birth-assigned gender? *Gloucester School Board* appears to signal that the school may be able to deny the request and comply with Title IX. (This issue is unsettled and will be the subject of further litigation.) The initial default would be to the birth-assigned gender for most students. If the student has a different gender identity than a birth-assigned identity, the college or university may be permitted to deny the student housing in an opposite gender same-sex facility, as the student's gender identity would not be consistent with the same-sex criterion.

May a college or university create gender neutral housing facilities? Again, this question remains unsettled, but *Gloucester School Board* appears broad enough to permit an institution to allow students to voluntarily opt to live in such a facility. However, *Gloucester School Board* holds that forcing a student to exclusively use gender neutral facilities may be stigmatizing and may, for some students, be a Title IX violation.

Bathroom and Athletic Facilities

Colleges and universities should also consider the student's gender-identification in making bathroom facilities open for use. That means that sincere transgender females may request to use bathroom facilities available to women-only, and transgender males must have similar rights without a reflexive denial. Institutions may create gender-neutral options, though they cannot force transgender students to exclusively use that facility.

As for athletic facilities such as locker rooms, *Gloucester School Board* does not address this issue. (G.G. opted not to participate in the school's physical education program.) It may be that there are other transgender students who may not feel comfortable in such a setting. Whether accommodations are legally required for those who opt to participate is an open issue.

Conclusion

Gloucester School Board validates the DOE's interpretation of Title IX by defining gender/sex, for transgender students, as a sincerely held individual decision based upon gender identity. For non-transgender students, birth-assigned gender is determinative. Under *Gloucester School Board*, decisions as to access to same-sex facilities should be considered in line with the transgender student's identity, and not strictly by birth. Colleges and universities should consult with their counsel to see if their current policies align with the new case law applying DOE regulations and OCR's interpretations.

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