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Fourth Circuit panel rules that transgender student stated valid Title IX sex discrimination claim based on gender identity after school board barred him from using boys' restroom facilities

G.G. v. Gloucester Cnty. Sch. Bd., No. 15-2056 (4th Cir. Apr. 19, 2016)

Abstract: A U.S. Court of Appeals for the Fourth Circuit three-judge panel has ruled, in a 2-1 split, that the U.S. Department of Education (ED) Title IX implementing regulation, 34 C.F.R. § 106.33, should be given *Auer* deference because the Title IX section allowing schools to provide segregated bathroom facilities based on sex 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" and the Department of Education's interpretation of the regulation, which it outlined in a letter dated January 7, 2015, indicates that Title IX should be applied to transgender students and that "when a school elects to separate or treat students differently on the basis of sex...the school must generally treat transgender students consistent with their gender identity."

As a result, the panel majority concluded that since "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 [ED's] interpretation—determining maleness or femaleness with reference to gender identity," it is ambiguous.

Having determined that the regulation is ambiguous as applied to transgender students, the majority stated "[ED's] interpretation is entitled to *Auer* deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute." After reviewing the difficulty in determining the character of what is male and what is female, the majority concluded that "[ED's] interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation."

The majority also found that the novelty of ED's interpretation was not a sufficient reason to deny it *Auer* deference. It stated that ED's interpretation was not "merely a convenient litigating position." It indicated that the interpretation could not be considered "a post hoc rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities."

In sum, the panel's majority stated:

We conclude that ED's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled

to *Auer* deference and is to be accorded controlling weight in this case. We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

With regard to the district court's denial of G.G.'s motion for a preliminary injunction, the panel found the lower court had "misstated the evidentiary standard governing preliminary injunction hearings." It said, "Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial."

Because the district court had incorrectly evaluated G.G.'s proffered evidence by using a stricter standard than warranted at the preliminary injunction stage, the majority concluded that "the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence." It, therefore, vacated the district court's denial of the motion and remanded the case to the lower court "for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein."

With regard to G.G.'s request that the case be reassigned to a new district court judge, the majority while conceding the judge "did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence." In addition, it declined to find that the district court's written order in the case raised a question about the judge's fundamental fairness in conducting the proceedings.

Facts/Issues: Gavin Grimm, a transgender boy, is a student at Gloucester High School (GHS). At the beginning of the 2014-15 school year, G.G. was allowed to use the boys' restroom for several weeks. However, after negative feedback from some members of the community, the Gloucester County School Board (GCSB) adopted a restroom policy that states in part:

[T]o provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

GHS's principal informed G.G. that he could no longer use the boys' restroom and would be disciplined if he did. G.G. filed suit against GCSB, challenging the school board's restroom policy under the Equal Protection Clause and Title IX. On July 27, 2015 the district court dismissed G.G.'s Title IX claim and on September 4, 2015 it denied G.G.'s motion for a preliminary injunction, which would have allowed him to resume using the boys' restroom while the court considered his equal protection claim.

The court dismissed the student's claim that the school board's policy

excluding him from using the boys' restroom based on his gender identity amounted to sex discrimination in violation of Title IX. It concluded that "the Title IX claim is precluded by Department of Education [(ED)] regulations." Specifically, it pointed out that ED regulation 34 C.F.R. § 106.33 expressly "allows schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable."

With regard to the preliminary injunction seeking an order from the court allowing the student to resume using the boys' restroom based on the Fourteenth Amendment's Equal Protection Clause, the court focused on balancing the hardships faced by the parties. It found that while the school board sought to protect students' interest in bodily privacy, which has been long recognized by the U.S. Court of Appeals for the Fourth Circuit, the student sought to "overturn a long tradition of segregating bathrooms based on biological differences between the sexes." The court concluded: "Because G.G. has failed to show that the balance of hardships weighs in his favor, an injunction is not warranted while the Court considers this claim."

Ruling/Rationale: The Fourth Circuit two-judge majority reversed the district court's denial of G.G.'s motion for a preliminary injunction and remanded the case to that court with instructions to give ED's interpretation of its Title IX implementing regulation *Auer* deference. *Auer v. Robbins*, 519 U.S. 452 (1997), requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. The majority also instructed the lower court to apply the correct evidentiary standard in determining whether to grant or deny the motion for a preliminary injunction. Finally, it rejected G.G.'s request that the appellate court reassign his case to a new district court judge.

Addressing the district court's refusal to give ED's interpretation of 34 C.F.R. § 106.33 *Auer* deference, the majority's inquiry began with an analysis of whether 34 C.F.R. § 106.33 contains an ambiguity. It looked to three factors to make that determination: "(1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole."

The majority determined that § 106.33 "plainly" allows schools to provide separate facilities, such as bathrooms, locker rooms, and shower facilities for its male and female students. It pointed out that the regulation by "implication ... permits schools to exclude males from the female facilities and vice-versa."

However, the majority stressed that while 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." It concluded 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 [ED's] interpretation—determining maleness or femaleness with reference to gender identity."

According to the majority, ED's interpretation resolved the ambiguity regarding a transgender student's use of sex-segregated facilities by concluding the question of whether a student's sex is male or female "is to be generally determined by reference to the student's gender identity."

Having concluded that the regulation is ambiguous as applied to transgender individuals, the majority said that ED's "interpretation [as outlined in its January 7, 2015 opinion letter] is entitled to *Auer* deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute." It "conclude[d] that [ED's] interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation."

The majority also concluded that ED's novel interpretation is "no reason to refuse deference and does not render the current interpretation inconsistent with prior agency practice." In addition, it took notice of ED's explanation indicating that the issue in this case has only recently been raised "because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities." It accepted ED's assertion that its interpretation occurred in response to policies, such as Gloucester County School Board's.

Finally, the majority found that ED's interpretation is not "merely a convenient litigating position," pointing out ED "has consistently enforced this position since 2014."

While not a part of its holding, the majority briefly addressed the dissent's acceptance of the school board's safety concerns as its rationale for refusing deference to ED's interpretation. It stated in footnote 11:

We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom.

Turning to the question of whether the district court applied the correct evidentiary standard in denying G.G.'s motion for a preliminary injunction, the majority found the district court had "misstated the evidentiary standard governing preliminary injunction hearings." It stated: "Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial."

The majority also found that the district court had improperly excluded evidence based on it being hearsay. It emphasized that: "The seven of our sister circuits to have considered the admissibility of hearsay in preliminary

injunction proceedings have decided that the nature of evidence as hearsay goes to weight, not preclusion and have permitted district courts to “rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction.”

Having concluded that the district court had applied “a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings,” the majority concluded that “the district court abused its discretion when it denied G.G.’s request for a preliminary injunction without considering G.G.’s proffered evidence.” It, therefore, “vacate[d] the district court’s denial of G.G.’s motion for a preliminary injunction and remand[ed] the case to the district court for consideration of G.G.’s evidence in light of the evidentiary standards set forth herein.”

Lastly, the majority took up G.G.’s request that the court reassign the case on remand to a new district court judge. The majority found that because G.G. did not explicitly claim that the district court judge was biased, the reassignment would only be appropriate in “unusual circumstances where both for the judge’s sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality.” To determine if such circumstances exists, courts look at three factors:

- (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,
- (2) whether reassignment is advisable to preserve the appearance of justice, and
- (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

While acknowledging that the district court judge expressed skepticism regarding G.G.’s argument being based on medical science, it pointed out that the judge’s memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

The majority said, “Although the district court did express opinions about medical facts and skepticism of G.G.’s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence.” It also pointed out that “the hearing record and the district court’s written order in the case do not raise in our minds a question about the fundamental fairness of the proceeding.”

Senior Circuit Judge Davis, who made up half of the two-judge majority, wrote a separate concurring opinion in which he stated his belief that the Fourth Circuit would have been on solid ground in granting G.G.’s motion for a preliminary injunction based on “the undisputed facts in the record.” He argued that given the weight of Fourth Circuit authority concluding that “discrimination

against transgender individuals constitutes discrimination 'on the basis of sex' in the context of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim."

Judge Davis likewise found that G.G. had presented sufficient factual allegations to support the other factors required for issuance of a preliminary injunction. However, he agreed that the appellate panel should defer to the district court and remand the case. Judge Davis did urge the lower court to take prompt action because "[b]y the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year."

Judge Paul Niemeyer, in dissent, stated his concurrence with the majority as to the issue of whether the case should be reassigned to another district court judge. On the question of whether G.G. had stated a valid Title IX claim, however, he stood firm with the district court's decision. He pointed out that the majority, in reversing the lower court, failed to cite any supporting case law.

The dissenting judge argued that the lynchpin of the majority's holding is ED's Office for Civil Rights' (OCR) 2015 letter to G.G., which stated: "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally must treat transgender students consistent with their gender identity." He said, "This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes."

According to Judge Niemeyer:

This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The dissenting judge contended that OCR's 2015 letter, which is not law, but is the only authority relied upon by the majority, "states more than the majority acknowledges." The judge asserted the letter allows, as the GCSB did, for schools to provide gender-neutral individual use unisex bathroom facilities as an alternative to boys and girls restrooms. He claimed Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes." He argued that "the need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term 'sex' were to encompass only a person's gender identity."

According to Judge Niemeyer, "Any new definition of sex that excludes

reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome. Thus, when the "School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations." He concluded, "If the position of G.G., the government, and the majority is that the term 'sex' means either biological sex or gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive."

The judge said that "[b]asing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical." He asserted: "In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities 'on the basis of sex' if 'sex' means gender identity."

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*[Editor's Note: On April 19, 2016, **Mike Kennedy of American School University** reported that the ACLU of Virginia, which filed the lawsuit on Gavin's behalf, says the court decision marks the first time a federal appeals court has determined that Title IX protects the rights of transgender students to use sex-segregated facilities that are consistent with their gender identities. "The court's ruling sends a strong message to schools and lawmakers that discriminatory restroom policies don't just harm transgender students, they put Title IX funding at risk," says Gail Deady, the Secular Society Women's Rights Fellow at the ACLU of Virginia.*

The Transgender Law Center, which had filed a friend-of-the-court brief in the case, also praised the ruling. "Today's ruling sets a legal precedent confirming what the federal government has made clear again and again: Schools cannot ban students from using the restroom that matches the gender they live as every day," says Transgender Law Center Executive Director Kris Hayashi.

*Also on April 19, 2016, **Louis Llovio of the Richmond Times-Dispatch** reported that the Family Foundation of Virginia criticized Tuesday's ruling, saying it hopes a court or judge steps in to "reaffirm that our children have the dignity of basic privacy rights in bathrooms and showers." "A society cannot function properly without basic, social norms like male and female," the group said in a statement. "The social chaos that would ensue from ignoring biological reality will inevitably bring tremendous harm to our children and limit freedom, not expand it."*

In January 2016, Legal Clips summarized an article in the Daily Press reporting that a Fourth Circuit three-judge panel heard oral argument in a case involving a school board's policy barring a transgender student, who is biologically female, but identifies as being male, from using the boys' restroom facilities. The student alleges that the school board's practice violates his Title IX and Fourteenth Amendment equal protection rights. The judges' questions focused primarily on definitions of sex and gender identity.

In September 2015, Legal Clips summarized the federal district court's decision in G.G. regarding dismissal of a student's Title IX claim, on July 27, 2015, and the denial of the student's motion for a preliminary injunction, which was filed for the purpose of allowing the student to use the bathroom that corresponds with his sexual identity pending the court's ruling on his Equal Protection claim.]

Tags: 4th Circuit Court of Appeals, Auer deference, G.G. v. Gloucester, restroom accommodations for transgender students, Title IX, transgender students, Virginia



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