

***THE Source* for Recent Developments in School Law**

YOU ARE READING

Fourth Circuit denies Virginia district's petition for en banc rehearing of panel decision reversing federal district court's denial of transgender student's motion for a preliminary injunction allowing him access to boys' restroom at school

Education Week reports that the U.S. Court of Appeals for the Fourth Circuit denied Gloucester County School Board's petition requesting a rehearing en banc (all active judges on the circuit considering and deciding the case) of a three judge panel's decision that the federal district court erred in denying transgender student Gavin Grimm's motion for a preliminary injunction that would have allowed him access to the boys' restroom at school. The Fourth Circuit panel's ruling, which has been characterized as "groundbreaking," indicated that the U.S. Departments of Education (ED) and Justice's (DOJ) interpretation that, under Title IX, schools are obligated to provide transgender students with access to bathrooms, locker rooms, and sex-segregated classes that match their gender identity, even if that differs from their sex at birth, is a valid interpretation of the law.

After the panel's decision, ED/DOJ issued joint guidance restating the federal government's view that Title IX requires schools to provide students access to school facilities based on gender identity. Citing precedent, the panel said that a lower court had erred in not deferring to the federal interpretation when it considered the Grimm's case.

The appellate panel ordered the lower court to reconsider Grimm's case and to honor the federal interpretation of the sex-discrimination law, a move praised by advocates for transgender students. But the school district at the center of the case immediately appealed en banc, asking the whole court to consider the issue. That appeal snowballed in importance after the Obama administration issued its guidance to all schools, drawing resistance from state leaders around the country who are seeking to overturn the interpretation in court. The court denied the school district's appeal.

U.S. Circuit Judge Paul V. Niemeyer, the lone dissent on the appeals court's three-judge panel that first heard Grimm's case, also dissented from the decision not to rehear it. He wrote:

Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom. Have we not universally condemned as inhumane such forced exposure throughout history as it occurred in various contexts, such as in prisons? And do parents not universally find it offensive to think of

having their children's bodies exposed to persons of the opposite biological sex?...

ED and DOJ, in a circular maneuver, now rely on the majority's opinion to mandate application of their position across the country, while the majority's opinion had relied solely on the Department of Education's earlier unprecedented position.

Meanwhile, a federal district court in Illinois is hearing arguments from a group of parents who say a suburban Chicago school violated their children's right to privacy when, under threat of losing its federal funding, it complied with an order from ED to provide a transgender student unrestricted access to the girls' locker room. In addition, 11 states filed suit challenging the ED/DOJ joint guidance on transgender students.

School law experts have said the issue may be bound for the Supreme Court if two federal circuits issue differing rulings on the matter.

Source: Education Week, 5/31/16, By Evie Blad

*[Editor's Note: **The Fourth Circuit Court's order denying the petition for rehearing en banc** included Judge Niemeyer's dissent. In his opinion, the judge said he was forgoing asking for a poll on the petition for rehearing because "... the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application."*

*In April 2016, **Legal Clips** summarized the **Fourth Circuit panel's decision in G.G. v. Gloucester County School Board**, which held, in a 2-1 split, that the 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."*

Initially 11 states filed suit challenging the Obama administration's interpretation of Title IX, as it relates to transgender students. Within the last few days, Mississippi and Kentucky have indicated that they will join the suit.]