

G.G v. Gloucester County School Board 2016 WL 1567467 (U.S. Ct. App. 4th Cir)

April 19, 2016

Background

G.G., a transgender boy (his biological sex is female, but gender identity is male), sought to use the boys' restrooms at his high school. Beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. He was also 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. The school officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff and allowed G.G. to use the boys' restroom. G.G. used this restroom without incident for about seven weeks. Others in the local community, however, sought to bar G.G. from continuing to use the boys' restroom.

After several meetings, Board voted 6–1 to adopt a policy that “restroom and locker room facilities in its schools shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.” G.G. then brought suit alleging the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution.

At heart of the dispute between G.G. and the Board is the Department of Education's (DOE) implementing regulations regarding Title IX. Title IX simply provides that “[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” However, not all distinctions on the basis of sex are impermissible: Title IX also provides that “nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.” In its regulations implementing Title IX, the DOE allows schools to provide “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex.” (emphasis added) (the “Implementing Regulation”).

However, as SLRMA had previously reported, the DOE's Office For Civil Rights (“OCR”) issued a “Dear Colleague” letter on January 7, 2015, discussing the Implementing Regulation. In that letter, the OCR interpreted its regulation (“students of one sex ... students of

the other sex”) to mean 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.”

The Board argued that the OCR’s interpretation of its own regulation (the January 7, 2015 “Dear Colleague” letter) was plainly erroneous or inconsistent with the regulation and/or Title IX, because gender must rely exclusively on genitalia and not reference to gender identity. The plaintiff argued that the OCR’s interpretation controls the meaning and Title IX must be addressed based on gender identity.

Holding

This dispute required the appellate court to determine 1) whether the Implementing Regulation was ambiguous and, if so, 2) whether the OCR’s interpretation of the Implementing Regulation was consistent with the meaning of the term “sex” in Title IX. As a preliminary matter, the court quickly determined that the plain meaning of the Implementing Regulation was that Title IX permitted separate, binary-sex bathrooms, one for male students and one for female students. Further, the court found that applying this interpretation to a transgendered student rendered the Implementing Regulation ambiguous because it allows for two readings: the Board’s reading—determining male or female with reference exclusively to genitalia—and the DOE’s reading—determining maleness or femaleness with reference to gender identity. The court then found that it was unclear how the Implementing Regulation would apply to any number of hypothetical situations, even under the Board’s “biological gender” formulation. For example, which restroom would be appropriate for a post sex-reassignment person? Which would be appropriate for an intersex individual? What restroom for an individual born with X–X–Y sex chromosomes or individual who lost external genitalia in an accident?

Finding this ambiguity, the appellate court next addressed whether the OCR’s January 7, 2015 interpretation of the Implementing Regulation was consistent with the meaning of “sex” as used in Title IX. In reviewing this, the appellate court turned to review of the dictionary definitions of “sex” at the time Title IX was drafted. Although the appellate court found that the definitions suggest that the word “sex” was understood to connote maleness and femaleness as determined primarily by reference to “biological sex,” the definitions also suggest that such a hard-and-fast demarcations was not universally descriptive. The definitions of “sex” also included qualifiers, such that a person’s gender was the “sum of” various factors and was of a “typical dichotomous occurrence,” and “typically manifested as maleness and femaleness.” These definitions begin to fail, however, and “sheds little light on how exactly to determine the ‘character of being either male or female’ where those indicators diverge. With this reasoning, the appellate court ultimately determined that:

the Department’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 regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department’s interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, “the morphological, physiological, and behavioral peculiarities”—included in the term “sex.”

As a consequence, the appellate court found the plaintiff had established a claim under Title IX for the Board’s discriminatory conduct. The appellate court returned the case to the trial court to determine the Board’s liability, if any, to the plaintiff for the violation of Title IX.

Learning Point:

This case is very important because it is the first federal appellate case that finds Title IX prohibits determining a student’s sex based solely on the student’s biological gender. As a practical matter, this case provides strong support for the conclusion that unisex bathrooms or private bathrooms for transgender students are not sufficient and likely violate Title IX. As a consequence, schools have an obligation to treat a transgender student consistently with his or her gender identity.

To help your school district address these issues, we at SLRMA urge you to download and use SLRMA’s *District Transgender and Gender Non-conforming Student Self-Audit Checklist and Best Practices* published May 2014 and *Best Practices and Policies for Serving Transgender and Gender Non-conforming Students – Extracurricular Activities*.