



What The Supreme Court's LGBTQ Decision May Mean For Bathroom And Locker Room Access In Title IX Schools: A 4-Step Best Practices Guide

Insights

7.15.20

When the Supreme Court recently concluded that Title VII protects LGBTQ employees from discrimination based on their “sex” in its *Bostock v. Clayton County* opinion, many schools immediately asked: “What does this mean for us?” – especially as it relates to bathroom and locker room access issues for LGBTQ students and employees. Since the definition of “sex” and court decisions interpreting Title VII and Title IX (and their regulations) are so interconnected, it stands to reason that schools would begin to question whether the legal standards have now changed. What do schools need to know about the current state of the law given this landmark decision? We’ll give you an analysis and provide a four-step best practices guide to assist schools in navigating this new terrain.

Setting The Table: Which Schools Need To Know?

Before proceeding, it is worth noting which schools are unaffected by the recent Supreme Court decision. First, any analysis regarding a school’s obligations under Title IX only applies to those schools that receive federal financial assistance, which includes the SBA’s Paycheck Protection Act loan. Schools that do not receive federal financial assistance may be under similar obligations under state or local laws, however.

Second, the decision did not provide any changes to the Title IX religious exemptions that are available to schools. Accordingly, schools that are not covered by Title IX and those seeking religious exemptions from Title IX may also be excluded from the potential application of the Supreme Court case to Title IX compliance requirements and Title IX cases pending in courts discussed in this article.

The *Bostock* Holding Did Not Address School Issues – Or Did It?

Last month, the U.S. Supreme Court ruled by a vote of 6-3 that Title VII of the Civil Rights Act of 1964 prohibits employers from terminating employees because of their sexual orientation or gender identity. Prior to this ruling in *Bostock v. Clayton County*, federal courts were split on the issue of whether Title VII, which prohibits employment discrimination that occurs “because of race, color, religion, sex, or national origin,” should prohibit discrimination on the basis of sexual orientation or gender identity.

Joined by Chief Justice Roberts, one of the Court's four conservative justices, Justice Gorsuch wrote for the majority: "The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Presumably, this pronouncement may foreshadow how the Court will rule on other federal discrimination laws that apply to persons of LGBTQ status, particularly in the context of ongoing litigation relating to bathroom and locker room access for transgender students.

However, despite this sweeping ruling, the majority was careful to claim that the decision did not extend beyond Title VII to other federal or state laws that prohibit sex discrimination. Justice Gorsuch clarified that "none of these other laws are before us." Even under Title VII, the Court made clear that the issues of sex-segregated bathrooms, locker rooms, and dress codes were not directly addressed by its decision. Justice Gorsuch further wrote, "under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind." Commentators and practitioners, alike, however, are unsure as to how the *Bostock* decision could *not* help but address bathrooms, locker rooms, or anything else of the kind where the definition of "sex" is at issue.

Indeed, in his dissenting opinion, Justice Alito cautioned that "What the court has done today — interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation or gender identity — is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex." Justice Alito specifically pointed to Title IX as an example and noted the pending lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds. Indeed, Title IX is modeled closely after Title VII, and courts have relied heavily on Title VII decisions to inform their rulings in Title IX cases. Because of the relationship between the two laws, schools should expect renewed challenges to the bathroom and locker room rules — with *Bostock* providing analytical framework and precedential support.

The Status Of Bathroom And Locker Room Cases Under Title VII And Title IX

While the growing trend in Title IX cases is that "sex" includes transgender sex identification for bathroom and locker room access purposes, continued challenges seeking to prohibit access based on an individual's gender identity as compared to their biological sex continue to be litigated. As recognized by Justice Alito in his dissent, the seminal Title IX cases that have held that barring a student from a bathroom consistent with gender-identity constitutes sex discrimination under Title IX include *G.G. ex rel. Grimm v. Gloucester County School Board* and *Adams v. School Bd. of St. Johns County*.

Grimm: Supreme Court Punts Opportunity To Answer Question

Initially, it appeared that the U.S. Supreme Court would answer the question regarding locker room and bathroom access issues in a case brought by a transgender student in 2017. The Virginia student brought a Title IX action alleging his high school denied him access to the bathroom that

corresponded to his gender identity. The school's policy restricted bathroom use based on students' "biological genders," and provided "alternative appropriate facilities" for students with "gender identity issues."

The case endured a long procedural history but, by 2017, it appeared the U.S. Supreme Court was poised to rule on what would have been its first landmark transgender case. *However, the Court instead remanded the G.G. ex rel. Grimm v. Gloucester County School Board case without deciding the main issue.* It cited to the Department of Education's rescission of Obama-era guidance, which clarified schools' responsibilities to ensure students had access to bathroom facilities and locker rooms matching their gender identities. It said that lower courts should deal with the issue in light of that development before it was ripe for Supreme Court review.

In August 2019, the district court ruled in favor of the student and rejected the school's argument that "sex" under Title IX is a binary term encompassing the physiological distinctions between men and women. It concluded that the school's bathroom policy discriminated against transgender students on the basis of their gender nonconformity. The school appealed and the 4th Circuit Court of Appeals heard arguments on May 26, 2020. The case remains pending, but the *Bostock* reasoning could certainly be persuasive to the 4th Circuit since the essential question in that case is the definition of "sex."

Adams: Federal Appeals Court Indicates That Bostock Could Influence Pending Restroom Case

Also, in *Adams v. School Bd. of St. Johns County*, a transgender student from Jacksonville, Florida, asked his high school to allow him to use a restroom that matches his male gender identity. The case was the first trial involving transgender students' equal access to restrooms. The lower court held that the meaning of "sex" in Title IX includes "gender identity" for purposes of its application to transgender students. This court's ruling is currently on appeal to the 11th Circuit Court of Appeals. Signaling the importance and impact of *Bostock* to the issue, the 11th Circuit has requested that the parties file supplemental briefs advising the court on the impact of the *Bostock* ruling.

These cases demonstrate that the *Bostock* decision may have far-reaching implications that extend to how Title IX is interpreted and applied, particularly given that courts analyzing Title IX look to Title VII precedent and largely turn on the definition of "sex." Courts may well consider *Bostock* persuasive for secular schools whose bathroom and locker room policies are challenged under other applicable federal or state discrimination laws.

Schools Also Face Employment Law Questions Regarding Bathroom Issues

Schools must also look to defining "sex" for their own employee's bathroom access. Generally, these claims are analyzed under Title VII rubric, but Title IX also covers employees of schools. Pre-*Bostock* courts analyzing bathroom bans for its employees typically used the Title VII jurisprudence as guidance. For example, in a 2016 Nevada federal court case, a transgender police officer sued the school district that employed him when, during his transition from female to male, he sought to be recognized as a man and requested to use the men's restroom. During Roberts' transition, the school district prohibited him from using the men's restrooms, instead mandating that he use the women's restrooms or the single-stall unisex restrooms.

women's restrooms or the single-stall unisex restrooms.

The court was persuaded by prior understanding of Title VII jurisprudence that transgender discrimination was a form of discrimination based on sex stereotyping, which was prohibited under Title VII. It therefore ruled in the employee's favor and concluded that Roberts should be allowed to use the men's restroom.

Bostock seemingly reinforces this reasoning. This places schools wishing to deny restroom access to transgender persons in a unique position — potentially having to provide bathroom access to transgender employees based on their gender identity while at the same time attempting to restrict restroom access for transgender students. However, the practical reasons behind restroom access is the same for each group — employees and students alike. Arguably, so, too, should the approach in granting or denying access. Thus, refusing to grant access in one instance and granting access in another instance seemingly would produce an inconsistent and illogical result. Yet, the *Bostock* opinion appears to leave open the question of restroom access under Title VII, given its explicit carveout in that regard.

The Department Of Education's Position

It bears noting that, just one month before the Supreme Court issued the *Bostock* decision, the Department of Education published final regulations governing campus sexual harassment under Title IX. The Department noted in its regulatory preamble that its "definition of sexual harassment applies for the protection of any person who experiences sexual harassment, regardless of sexual orientation or gender identity" – but specifically declined to address discrimination on the basis of gender identity or other issues relating to transgender students' access to facilities such as restrooms.

Notwithstanding the Department's more recent pronouncements on the issue, many schools have continued to follow the withdrawn Obama-era guidance which recognized that requiring transgender students to use bathrooms and locker rooms not aligned with their gender identity was prohibited, along with requiring transgender students to use single-user bathrooms. In any event, courts that may rely on *Bostock* to interpret "sex" to include gender identity may be at odds with the Department's current position on the issue.

4-Step Best Practices Plan

While the rights of transgender students and employees to access the bathroom and locker room aligned with their gender identity remain unsettled, schools should expect that the landmark decision in *Bostock* may result in courts extending such rights to transgender individuals. Thus, you should assess with counsel which laws apply to your school to determine whether it is required under Title IX and/or local or state law to accommodate student and employee transgender access to restrooms and locker rooms.

If your school is covered by Title IX or a state/local order prohibiting discrimination on the basis of gender identity, you should follow the following four-step plan to minimize exposure for potential Title IX and Title VII violations.

1. Include gender identity and expression in your Title IX, nondiscrimination, and conduct policies. Such policies should expressly prohibit transphobic conduct. You should also review all documents, forms, records and online information to ensure that gender-inclusive language and options are utilized and that the approach is consistent across school departments.
2. With regard to restroom and locker room access, consider a policy that would permit a transgender student or employee to use facilities aligned with their gender identity. At a minimum, you may wish to consider making a sufficient number of single-user options available to all students and employees who voluntarily seek additional privacy. Such restrooms should employ clear gender-neutral labeling and be clearly designated on campus maps. Do not require the single-user bathroom be used by transgender individuals, rather make them available for anyone to use.
3. It is critical to provide training for appropriate school officials on issues relating to gender identity. Similarly, regular outreach and awareness initiatives are important to enhance acceptance of gender diversity within the school community.
4. Finally, consider assembling a committee of relevant stakeholders to discuss ongoing efforts and to support your school in fostering an environment of inclusivity.

Conclusion

Notwithstanding the ongoing uncertainty regarding access to bathrooms and locker rooms for transgender individuals under Title IX and Title VII, you should take affirmative steps to assess your policies, procedures, and practices to ensure compliance according to the current status of federal law in your jurisdiction, as well as any applicable state or local laws. You should continue to pay close attention to updates from the U.S. Department of Education's Office for Civil Rights – as well as changes in federal, state, and local law – as such developments may necessitate a reevaluation of your policies and procedures with regard to transgender students and employees.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People





Sheila M. Abron

Partner

803.740.7676

Email

Service Focus

Employment Discrimination and Harassment

Industry Focus

Education