



Federal Appeals Court Rules In Favor Of Transgender Teen In Landmark Bathroom Case

Insights

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In a major win for transgender rights, the 4th Circuit Court of Appeals recently ruled in favor a transgender teenager who wanted to use the boys' bathroom at his former school, finding that the school district violated his constitutional rights when it prescribed which bathroom he should use and failed to amend his transcripts to reflect the gender with which he identifies. On August 28, the court sided with a growing number of courts when it concluded the Equal Protection Clause of the Constitution and Title IX dictated that schools must allow individuals to use the bathrooms that correspond with the gender with which they identify. Significantly, this case is the first to rule on bathroom access for transgender persons under Title IX after the U.S. Supreme Court's recent watershed decision that bars transgender discrimination under Title VII. What do schools need to know about this development?

Transgender Teen's Five-Year Legal Journey

Anyone who has followed the news about transgender rights is likely already very familiar with the name Gavin Grimm. He is a transgender male, meaning he was born anatomically female but identifies as male. Before the start of 10th grade, he asked to be allowed to use the boy's restroom and to be identified using male pronouns at his Virginia high school. The school board initially granted his request before reversing course and implementing a policy limiting restroom and locker room use to students with the "corresponding biological genders." The school posited that "students with sincere gender identity issues" should use an "alternative private facility."

In June 2015, Grimm filed suit challenging the school's policy. Grimm alleged that by denying him access to the boy's restroom, the school board discriminated against him on the basis of sex in violation of Title IX of the U.S. Education Amendments of 1972 (a federal law that prohibits sex discrimination by schools that receive federal financial assistance) and the Equal Protection Clause of 14th Amendment to the U.S. Constitution. While his lawsuit was under way, the Department of Education and the Department of Justice jointly published a "Dear Colleague Letter" which instructed public educational institutions to allow transgender students to use the bathrooms, locker rooms, and other facilities that correspond with their gender identity.

Grimm's case dragged on for over five years, and even included a brief stop at the U.S. Supreme Court. But once the Trump administration took office, it withdrew the "Dear Colleague" opinion letter, the Supreme Court had no choice but to kick the case back to the 4th Circuit for further consideration in light of the new Department of Education position. In May 2018, a Virginia federal

consideration in light of the new Department of Education position. In May 2018, a Virginia federal judge held that “claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory” under Title IX and ruled in Grimm’s favor. The school board appealed the decision, leading to this recent ruling.

Appeals Court Rules In Grimm’s Favor

On August 28, the 4th Circuit Court of Appeals ruled in Grimm’s favor. It held that his equal protection rights had been violated when the school board did not allow Grimm to use the bathroom that corresponded to the gender with which he identified, and when it refused to amend Grimm’s transcripts to reflect his gender as male. The court specifically rejected the school board’s argument that its bathroom policy as applied to Grimm was substantially related to the important objective of student privacy because the board did not “present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student.” The court also rejected the school board’s contention that its failure to amend Grimm’s school records to reflect his gender as male was based upon its important interest in maintaining accurate records. The court noted that the State of Virginia had already amended Grimm’s birth certificate so that his gender under the law is male.

The 4th Circuit also held that the school board violated Title IX because its bathroom policy and its failure to amend the records caused Grimm to be excluded from educational programs on the basis of sex, and that this exclusion harmed him. Critical to its reasoning was the U.S. Supreme Court’s recent landmark decision in *Bostock v. Clayton County*. There, the Supreme Court held that discrimination against a person for being transgender is discrimination “on the basis of sex” under Title VII.

Following this lead, the 4th Circuit had “little difficulty” holding that a bathroom policy precluding Grimm from using the boys’ restrooms discriminated against him “on the basis of sex.” The appeals court explained that the school board could not exclude Grimm from the boys’ bathrooms without referencing his “biological gender” under the policy, which it had defined as the sex marker on his amended birth certificate. The 4th Circuit reasoned that because Grimm’s sex was a “but for” cause for the board’s actions, the board’s policy excluded Grimm from the boys’ restrooms “on the basis of sex.”

Wrapping Things Up: What This Means For Your Organization

Notwithstanding the ongoing uncertainty regarding access to bathrooms and locker rooms for transgender individuals under Title IX, this decision provides a strong indication of the direction our federal courts are likely to take on this issue. With the 4th Circuit being the first post-*Bostock* court to decide the issue of what constitutes “sex” under Title IX, there is now an existing blueprint for other district and circuit courts to follow.

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, and now with a federal appeals court specifically relying on *Bostock* to extend such rights to transgender students, schools should expect renewed challenges to the bathroom and locker room rules – with

students, schools should expect renewed challenges to the bathroom and locker room rules — with aggrieved students and employees now relying upon *Bostock* and *Grimm* for an analytical framework and precedential support. In fact, in another “bathroom” case pending in the 11th Circuit Court of Appeals, the court recently requested that the parties file supplemental briefs to address the impact of *Bostock*, signaling that the Supreme Court decision may have implications for how Title IX is interpreted and applied in that case.

5-Step Best Practices Plan

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. Note that private schools that receive federal financial assistance, such as PPP loans, are covered by Title IX until the loan is forgiven or paid off. If your school is covered by Title IX or a state/local order prohibiting discrimination on the basis of sex, you should follow the following five-step plan to minimize exposure.

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. You should also consider converting open urinals to closed, private urinals for 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. You should evaluate your existing policies, or consider implementing policies if none exist, to address the method by which students and parents can seek accommodation based on gender identity. This includes restroom access, preferred names, and changes to school records to align with an individual’s gender identity. Ensure that the policies make clear to whom such requests should be directed so the individual receiving it is knowledgeable and trained in this sensitive area.
4. 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.
5. Finally, consider assembling a committee of relevant stakeholders to discuss ongoing efforts and to support your school in fostering an environment of inclusivity.

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 such developments may necessitate a reevaluation of your policies and procedures with regard to transgender students and employees.

Navigating these politically and culturally complex waters can be difficult. Your Fisher Phillips attorney stands ready to assist you in crafting an approach that best supports all the stakeholders of your organization, as do the members of the firm's Education Practice Group. We will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information.

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

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