

# Transgender Students Prevail

Case law is shifting in the direction of guaranteeing access to restrooms and locker rooms

By Perry A. Zirkel

In the country's current culture war, competing interests often inspire controversy, confusion, and gradual shifts in case law. A clear example that puts principals in a pivotal position is the issue of access by transgender students to school restrooms and locker rooms.

In 2015, this column summarized the restroom access case of a transgender elementary school student in Maine who prevailed under the state's Human Relations Act. However, the ruling was only generalizable to a few other states with similarly robust anti-discrimination laws. The following case, in contrast, illustrates the gradual settling of the applicable law at the federal level.

## The Plaintiff

In 1999, "C.G." was born a biological female. From a young age, however, C.G. did not feel like a female. For example, C.G. refused to wear girls' clothes by age 6. Starting at age 12, C.G. acknowledged his male gender identity to himself.

In 2013–2014, when C.G. was in ninth grade in Gloucester County, Virginia, he was so depressed about concealing his gender identity from his parents that he stopped attending school, instead taking classes through a homebound program. He informed his parents during the spring semester and started seeing a psychologist, who diagnosed him with gender dysphoria and recommended a lifestyle transition that included access to male restrooms and hormone treatments. As part of the transition, C.G. legally changed his name to a masculine first name.

At the start of the 2014–2015 school year (grade 10), C.G. and his mother met with the principal and the guidance counselor to arrange for his return to classes, changing his name in the school records and informing teachers of the change. Unsure of how other students would react, C.G. initially agreed to use a separate bathroom in the nurse's office but found it stigmatizing.

In October, the principal granted C.G.'s request to use the boys' restroom, which he did for seven weeks. However, in early December, based on complaints from some parents, the school board passed a resolution that limited access to male and female bathrooms and locker rooms according to biological gender and mandated the provision

of alternative private facilities for students with gender identity issues.

## The Case

As a result, C.G., via his mother, filed suit in federal court, alleging that the school board policy violated his rights under the 14th Amendment's equal protection clause and Title IX, which prohibits sex discrimination. They sought a preliminary injunction to allow him access to the boys' facilities pending a final decision after trial.

On Sept. 17, 2015, the federal district court denied C.G.'s motion for a preliminary injunction. Ducking the equal protection issue, the court interpreted Title IX regulations as allowing separate facilities based on biological gender, refusing to defer to the U.S. Department of Education's (USDE) 2015 guidance requiring schools to treat transgender students in a manner consistent with their gender identity if they provide sex-segregated bathrooms. C.G. immediately filed an appeal.

On April 19, 2016, the Fourth Circuit Court of Appeals issued a split decision that, on balance, disagreed with the lower court's ruling because it did not provide appropriate deference to the USDE's interpretation of Title IX regulations. On May 13, 2016, the USDE and U.S. Department of Justice issued a "Dear Colleague" letter that reiterated and reinforced the Obama administration's interpretation of Title IX in favor of transgender students' access to sex-segregated school facilities.

On June 23, 2016, in accordance with the Fourth Circuit's decision, the federal district court granted

## CASES IN POINT

Courts have rejected an expanded view of sex discrimination in favor of transgender rights in several recent decisions:

- *Students and Parents for Privacy* (N.D. Ill. 2016)
- *Lafferty* (Va. 2017)
- *Doe v. Boyertown* (3rd Cir. 2018)
- *Parents for Privacy* (D. Or. 2018)

Courts have also upheld the rights of a transgender plaintiff in several other cases:

- *Evancho* (W.D. Pa. 2017)
- *Whitaker* (7th Cir. 2017)
- *Dodds* (6th Cir. 2017)
- *A.H.* (M.D. Pa. 2017)
- *M.A.B.* (D. Md. 2018)
- *J.A.W.* (S.D. Ind. 2018)
- *Adams* (M.D. Fla. 2018)

C.G.'s motion for a preliminary injunction. However, the school board sought a stay of this ruling pending further proceedings. On July 12, 2016, the Fourth Circuit, again in a split vote, denied the school board's requested stay. On Aug. 3, 2016, the Supreme Court granted the stay and, on Oct. 28, agreed to review the case's underlying issue of the legal weight to be accorded to the Title IX guidance.

On Feb. 2, 2017, the Trump administration withdrew previous USDE and Department of Justice guidance with regard to Title IX and transgender students, and the Supreme Court sent the case back to the Fourth Circuit for reconsideration in light of the new administration's position. On April 18, the Fourth Circuit vacated the district court's preliminary injunction, ultimately sending the case back to the district court for further proceedings to determine whether the case was moot—i.e., no longer a "live" controversy for C.G.

On May 22, 2018, the federal district court concluded that the school board's original motion for dismissal was moot, but its amended motion due to intervening events was not. Since the original suit, the court observed, C.G. had undergone hormone therapy and chest reconstruction, legally obtained a name change and new birth certificate, and graduated from high school.

Second, based on the updated set of facts, the court denied the district's amended dismissal motion, ruling that C.G. had sufficiently set forth a cognizable claim under both Title IX and the equal protection clause. The fulcrum for both rulings was the court's conclusion, based on a growing body of case law, that discrimination on the basis of transgender status constitutes gender stereotyping. Balancing the school board's arguments for student privacy, the court cited examples of installing partitions and stalls in concluding that "there are many other ways to protect privacy interests in a

nondiscriminatory and more effective manner than barring [C.G.] from using the boys' restrooms."

### Additional Cases and Recommendations

Although federal guidance concerning Title IX has gone in the opposite direction in the three years since C.G. filed suit, courts have moved progressively to a position favoring transgender students under Title IX and the equal protection clause. In one line of successive decisions, the courts summarily rejected suits by students and their parents who opposed an expansive view of sex discrimination.

Only *Adams* (M.D. Fla. 2018) was a conclusive decision, because many cases were in response to motions for preliminary injunctions or dismissals. But case law

appears to be reasonably clear and settled in favor of providing access to transgender students.

Nevertheless, school leaders should consult with local legal counsel to develop procedures that prudently address the interests of both sides of this continuing controversy. For example, installing stalls and partitions and providing unisex single bathrooms when feasible are physical ways of accommodating competing interests. On a broader basis, proactively providing an inclusive program that can effectively respect the values of diversity and harmony in the long run will mitigate the potential for costly litigation and facilitate societal progress. ■

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