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A Case Review of G. G. v Gloucester County School Board

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In education today, one theme is reoccurring, the question of where and how transgender students fit into our classrooms, our buildings, and on our athletic fields. In *G. G. v Gloucester County School Board* 20 U.S.C. 1681 § (a); G. G., a minor, transgender male, is attempting to use the boys' restroom at his high school. With the approval of his school administration, G. G. began to use the boys' restroom until the local school board passed a policy banning him from using said restroom. G. G. alleges the board discriminated against him and violated Title IX and the Equal Protection Clause of the Constitution. (*G.G. v Gloucester County*)

The United States District Court for the Eastern District of Virginia dismissed the Title IX claim and denied G. G.'s request for a preliminary injunction. The case was sent on appeal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals concluded the district court did not grant appropriate deference to the regulations of the Department of Education. As a result, the United States Court of Appeals for the Fourth Circuit reversed the District Court's dismissal of G. G.'s Title IX claim. The Court of Appeals also concluded the district court used the wrong evidentiary standard in reviewing G. G.'s motion for the preliminary injunction and vacated the denial of said injunction. The Court remanded the case for consideration under the correct standard. (*G.G. v Gloucester County*)

The question at the center of the case is whether Title IX requires schools to provide transgender students access to restrooms compatible with their gender identity. "Title IX provides: "[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. ' 20 U.S.C. 1681 § (a)(G.G. v Gloucester County)."

The Department of Education provides for separate toilets, locker rooms, and shower facilities on the basis of sex so long as the facilities are comparable for each of the sexes in the implementation of the Title IX regulations. The Office for Civil Rights of the Department of Education concluded, when interpreting Title IX for transgender students, the school must treat transgender students consistent with their gender identity (G.G. v Gloucester County). The struggle most districts find themselves in is trying to define transgender and gender-nonconforming students. The Minnesota Department of Education's Toolkit uses the following definitions:

- "Gender identity – an individual's innate sense of one's own gender; a deeply held sense of psychological knowledge of one's own gender, regardless of the gender assigned at birth.
- Gender expression – the external appearance, characteristics or behaviors typically associated with a specific gender.
- Gender nonconforming – people whose gender expression differs from stereotypical expectations, such as "feminine" boys, "masculine" girls, and those who are perceived as androgynous or gender nonbinary.
- Sexual orientation – refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay or lesbian), attraction to members of the other sex (heterosexual) and attraction to members of both sexes (bisexual).
- Transgender – an umbrella term for people whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth (Minnesota Department of Education, 2017)."

The State of Minnesota developed this Toolkit to ensure Minnesota students felt safe, supported, and welcomed; schools play a crucial role in ensuring students are engaged in learning, and nothing gets in the way of them doing their best in the classroom (Minnesota Department of Education, 2017).

According to the research used to develop the Toolkit published by the Minnesota Department of Education, transgender and gender nonconforming students are at risk because they are asked to do things that make them uncomfortable in order to make others more comfortable. The research shows that transgender and gender nonconforming students are at a higher risk for self-harm. “Seventy-seven percent of students who identify as transgender or gender nonconforming reported being harassed at some point between kindergarten and twelfth grade. Of those 77 percent, 54 percent were verbally harassed, 24 percent were physically attacked and 13 percent were sexually assaulted because they were transgender. The mistreatment faced by these students caused 17 percent to drop out of school. Fifty percent of gender-nonconforming students reported they did not participate in school activities because they feared being discriminated against, 42 percent were called derogatory names on a regular basis, and 40 percent reported they were excluded from school activities (Minnesota Department of Education, 2017).”

Research also shows Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning (LGBTQ) students face higher rates of bullying, discrimination, family rejection, and suicidality than their counterparts. The Trevor Project National Survey on the Mental Health of LGBTQ Youth found that 40 percent of LGBTQ students between the ages of 13 and 24 seriously considered suicide in the past year. Forty thousand young people were surveyed by the crisis intervention and

support group that found various reports of disorders; 68 percent reported symptoms of anxiety, 55 percent reported major depression, and 48 percent reported engaging in self-harm. In 2019, the Gay, Lesbian & Straight Education Network (GLSEN) conducted a National School Climate Survey. This survey found 86 percent of LGBTQ students experienced harassment during school. Almost 26 percent reported in the past year, the harassment fell in the physical realm, such as being pushed or shoved, due to their sexual orientation. Approximately 22 percent of those surveyed reported harassment due to gender expression and 22.2 percent reported harassment based solely on gender. The GLSEN survey also showed overall, schools nationwide are lacking in LGBTQ resources and supports and as a result not safe learning environments for LGBTQ students. The results differed according to school and geographic characteristics (Healy, 2021).

G. G. is a transgender boy whose biological sex is female, but his gender identity is male. He has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by a discrepancy between a person's gender identity and biological sex. For approximately two years, G. G. had undergone hormone therapy and had legally changed his name to G., a name traditionally given to male children. He lives all of the aspects of his life as a boy, however, he has not had sexual reassignment surgery. When G. G. and his mother notified the school of his gender identity, officials were supportive. G. G. was allowed to use the boys' restroom without incident for approximately seven weeks. His use of the restroom got the attention of community members, who contacted the Gloucester County School Board looking to bar him from continuing to use the boys' restroom. This issue resulted

in a board member adding an agenda item to the November 11, 2014 meeting. The transgender restroom policy that was added follows:

“Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and

Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals, and other trusted adults, and

Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore

It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility (G.G. v Gloucester County).”

Many citizens spoke at the November 11 meeting. Many of the speakers displayed hostility toward G. G. (G.G. v Gloucester County). This case resulted in two public meetings where members of the public discussed his restroom use and sexual identity in front of the media. G. G. suffers repercussions from these meetings because the Gloucester School Board decided to make the bathroom he uses a matter of public debate (Pochie). Following the comment period, the board adopted the policy, and G. G. could no longer use the boys’ restroom at the school. However, he looked to be a boy because of his hormone therapy, so he could not use the girls’ restrooms either. As part of the provisions of the new restroom policy, several updates were made to the restrooms in the schools that improved privacy for all students. Single stall, unisex restrooms were also made available to students. G. G. maintains, however, that he cannot use the unisex restrooms because they make him feel as if he is being set apart from his peers and serves as a reminder he is different (G.G. v Gloucester County). As a direct result of the newly implemented restroom policy, G. G. suffers from stress and anxiety

as well as physical ailments of multiple urinary tract infections because there is not a restroom in the building he is comfortable using (Pochie. 2018).

On June 11, 2015, G. G. and, because he is a minor, his mother sued the Gloucester County School Board to seek an injunction allowing him to use the boys' restroom with the claim the Board discriminated against him and violated Title IX of the Education Amendment Act of 1972 and the Equal Protection Clause of the Constitution. A hearing was held in District Court in which the court dismissed G. G.'s Title IX claim and denied the injunction but restrained from ruling on the dismissal of the equal protection claim. The district court followed this ruling with a written order on September 17, 2015 dismissing the Title IX claim and expanding on the reason refuting the injunction. The court articulated Title IX prohibits discrimination on the basis of sex and not on gender, gender identity, or sexual orientation, Title IX allows schools to provide separate restrooms based on the sex of the individual. Since G. G.'s sex was female, he would be required to use the female restroom, which was not a violation of Title IX. In the case of the injunction, G. G. did not meet the requirement showing the balance of equities was in his favor. The court also found the requirement of G. G. to use the unisex bathroom was not overly demanding and would result in less hardship than requiring the students who were uncomfortable with G. G. using the boys' restroom to use the unisex bathroom (G.G. v Gloucester County).

The appeal to the Circuit Court was before Justices Niemeyer and Floyd. Justices first looked at the district court's dismissal of the Title IX claim. To persevere through a motion to dismiss, a complaint must contain enough factual matter that claims on its merits are plausible. To allege a violation of Title IX, G. G. must maintain he was excluded from

participation in an education program because of his sex, the educational institution was receiving federal financial assistance at the time of his exclusion, and the discrimination caused G. G. harm. Unfortunately for G. G., one of the provisions of Title IX is not all discriminations on the basis of sex are impermissible. The United States Department of Education's regulations implementing Title IX permits there to be separate toilets, locker rooms, and shower facilities on the basis of sex so long as the facilities are comparable (G.G. v Gloucester County).

The district court declined to afford deference to the Department's interpretation of comparable facilities. It found the regulation to be unambiguous because it allows the school board to limit bathroom access on the basis of sex. The district court also found the interpretation advanced by the Department of Education was clearly erroneous and inconsistent with the regulation. It was reasoned that because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone (G.G. v Gloucester County).

The United States contends the regulation clarifies statutory ambiguity by making clear schools may provide separate restrooms for boys and girls without running unfavorably of Title IX. However, the Department also considers comparable facilities to be unclear to transgender students because the regulation is silent on what the phrases students of one sex and students of the other sex mean in the context of transgender students. The regulation is clear when it determines male and female but is silent as to how a school should determine whether a transgender student is male or female for the purpose of which restroom should be utilized. There is no guidance whether the determination of bathroom use be made by the

determination of biological sex and the present genitalia. Or should sex be determined by the gender identity of the individual (G.G. v Gloucester County)?

Title IX regulations were published by the Department of Health, Education and Welfare in 1975 and were adopted by the Department of Education in 1980 with no changes from the initial development. The two dictionaries in use at the time of adoption informed the definition of sex that was used in the wording of the regulations. The *American College Dictionary* from 1970 defined sex as “the character of being either male or female or the sum of those anatomical and physiological differences with reference to which the male and female are distinguished”. The Webster’s Third New International Dictionary from 1971 defined sex as “the sum of the morphological, physiological and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness”. The dictionary definitions the regulations were based on are clearly binary in concept and based on the presence of reproductive organs (G.G. v Gloucester County).

The Department of Education’s interpretation of how comparable facilities apply to transgender individuals is novel because it was not applied before January of 2015. Although novelty is not the only reason to refuse deference (G.G. v Gloucester County). In cases like G. v Gloucester County School Board, there is an idea that courts not get too far ahead of public opinion on matters of rights and liberties. The federal government sets a broad policy and provides the funding to implement that policy. States that choose to participate have a role in

implementing the policy. When federal law does not require or encourage state participation in the implementation of a policy or law, a court attempting to make clear provisions of said law might do so in a way that preserves flexibility for states. This flexibility may be necessary for three reasons: conditions vary in each community, state and local governments are given greater flexibility to interpret different conditions. When the conditions are consistent nationwide, local governments are given more leeway. Finally, the United States Constitution creates a system of dual sovereignty which allows the federal government to act on its powers while the states act on their lesser powers when the act does not conflict with either a federal law or the Constitution itself (Dorf, 2017).

In Senior Circuit Judge Davis' concurring opinion, he discusses the balance of hardships. G. G. has indicated he will suffer irreparable harm without an injunction. The board contends other students' constitutional right to privacy will be imperiled by G. G.'s presence in the boys' restroom. In the provisions provided by the district, the restroom has been altered to remedy a large part of this argument. Also, single stall restrooms have been made available to all students, no matter their biological or identifying gender. Judge Davis has concluded the balance of hardships tips heavily toward G. G. (G.G. v Gloucester County).

"In his dissent, Circuit Judge Niemeyer acknowledged the codification of beneficial sex segregation in Title IX and argued the ruling ran roughshod over custom, culture and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect (Pochie)". Judge Niemeyer also asserted the term sex in the case was not unclear, but referred to biological sex only. He reasoned common language, and the advantage of sex segregation strengthened his reading of Title IX. He also stated that if

transgender students and cisgender students shared spaces, such as restrooms and locker rooms, the concession of privacy and safety would be on the part of cisgender students, not transgender students (Pochie, 2018).

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