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Gender Identity and Discrimination: The Rights of Transgender Students Under Title IX

Transgender students should be (and are) protected from discrimination under Title IX of the Education Amendments of 1972. Title IX protects students from discrimination “on the basis of sex or gender” in public schools, and courts have interpreted discrimination “on the basis of sex or gender” to include not just biological sex but discrimination against failure to conform to gender stereotypes. Accordingly, under Title IX, schools cannot discriminate against transgender students by prohibiting their access to restrooms consistent with their gender identity, as the U.S. Court of Appeals for the Fourth Circuit held recently in *G.G. v. Gloucester County School Board* (2016). Despite this decision, many states do not recognize the rights of transgender students under Title IX, necessitating a nationwide policy to protect transgender students from discrimination.

Courts have interpreted discrimination “on the basis of sex” to include discrimination against transgender individuals. As recognized in *G.G.*, in interpreting claims brought under Title IX, courts look to case law interpreting Title VII, and many of those courts have recognized the language “on the basis of sex” to apply to transgenders in employment settings. One such case is *Macy v. Department of Justice*, EEOC Appeal No. 0120120821, where the court held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.” The same analysis applies to Title IX, which the *G.G.* court held prohibits discrimination against transgender students.

Discrimination against transgender students includes the prohibition of their use of restrooms consistent with their gender identities. This was the conclusion reached by the U.S. Department of Education (DOE) in an opinion letter, which said that schools "elect[ing] to separate or treat students differently on the basis of sex....generally must treat transgender students consistent with their gender identity" (34 C.F.R. § 106.33). The DOE's interpretation was upheld by the G.G. court on the basis of Auer deference, which requires that a department or "agency's interpretation of its own ambiguous regulation be given controlling weight." Thus, while acknowledging that the implementation provisions of Title IX allow for "separate toilet, locker room, and shower facilities on the basis of sex," the G.G. court ruled that under the DOE's interpretation, the right of transgender students to use restrooms consistent with their gender identities is protected under Title IX.

Given the DOE's interpretation, the policy at issue in G.G. violated Title IX because it required students to use restrooms corresponding to their biological sex rather than gender identity. The policy was initially passed by the Gloucester County School Board after a (biologically female, male identifying) transgender student began to use the boys' bathrooms at the school. In response to the policy, the student sued the school for discriminating against him in violation of Title IX, and won the lawsuit. In consequence, the policy was overturned, and the student was allowed to attend restrooms consistent with his gender identity.

Recent lawsuits have challenged this interpretation of Title IX, with several filed specifically by the Alliance Defending Freedom (ADF) alleging that allowing transgender students to use restrooms of their gender identity violates the privacy of cisgender students. However, "the risks to privacy and safety are far reduced" in restrooms, as noted by the G.G. court, especially considering that partitions between urinals and stalls are found in most public

restrooms. In addition, in a joint letter last year, the DOE and Department of Justice (DOJ) stated that “even in circumstances in which other students, parents, or community members raise objections or concerns,” the “Title IX obligation to ensure nondiscrimination on the basis of sex” requires schools to “provide transgender students equal access to educational programs and activities.” Regardless of objections raised by the ADF and other groups or individuals, the aforementioned Departments affirmed that “the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”

Given the fact that groups such as the ADF as well as certain states do not recognize transgender rights under Title IX, a nationwide policy is needed to effectively protect transgenders from discrimination. This need was recognized and addressed by the Obama administration last year, when it threatened to withhold federal funding from schools not complying with the DOE and DOJ’s interpretation of Title IX. As discussed above, the DOE and DOJ’s interpretation was upheld by the G.G. court, which ruled that “discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court.” However, this interpretation has faced resistance from states such as North Carolina, where legislation regulating public restroom use by transgenders was recently passed. In the 2017 legislative session alone, legislation limiting transgender access to public restrooms and locker rooms has been introduced by twelve different state legislatures. These conflicting viewpoints and actions regarding the rights of transgender individuals necessitates the involvement of federal authorities.

Regardless of these conflicting viewpoints, the fact remains that Title IX protects transgender students to the same degree as other students. The protection includes the right of transgender students to use restrooms consistent with their gender identity, as explained in

statements by the DOJ and DOE and established by the U.S. Court of Appeals for the Fourth Circuit in G.G. As different opinions still occur throughout the nation regarding transgender rights, the federal government should continue its efforts to protect transgender students from discrimination.

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