

Supreme Court to Rule on Use of Bathrooms in School for Transgender Student

In late October 2016, the United States Supreme Court agreed to hear a case concerning whether a school board's refusal to allow a transgender student to use the bathroom associated with his gender identity constitutes as discrimination "on the basis of sex" under Title IX of the 1972 Education Amendments. See *Gloucester County School Board v. G.G.* The pertinent question accepted by the Court is whether the phrase "on the basis of sex" in Title IX includes gender identity. To aid with the interpretation of the Title IX, the Department of Education issued a letter in 2015 stating that schools must treat transgender students consistent with their gender identity. Later that same year, the Department of Education further stated that schools refusing to accommodate the needs of transgender students could lose federal funding.

The factual and procedure history of the case is as follows. Gavin Grimm was born physiologically as female but identifies as male. Grimm is 17 years old and attends Gloucester High School in southeastern Virginia. Grimm and his family notified the school of his gender identity and the school administration allowed Grimm to first use the bathroom in the nurse's office and then the boys' bathroom. Due to complaints, the local school board later adopted a policy that allowed students to use the bathroom consistent with his/her biological gender. At a later time, the school board allowed students with non-gender conforming identities to use private bathrooms. According to Grimm, the private accommodations humiliated him and disrupted his day because he actively tried to prevent needing to use the bathroom, which resulted in a painful urinary tract infection.

In April 2016, the Fourth Circuit Court of Appeals heard the *Gloucester* case, which resulted in a split decision. While the court of appeals did not decide the ultimate question of whether or not the term "sex" as defined in Title IX included gender identity, the court did accept the Office of Civil Rights' (OCR) broad interpretation of "sex" which included gender

identity and the case was remanded to the lower court. Further, the court of appeals cited to other examples in which restroom access was granted to individuals born with XXY sex chromosomes, intersex individuals, and individuals who have undergone sex-reassignment surgery. Moreover, the court also noted that the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management have applied the same guidelines and granted bathroom access to transgender individuals. Overall, the court of appeals stated that the "because of sex" language in Title IX was ambiguous, but it gave deference to a December 2014 opinion letter from the Department of Education's office of civil rights stating that Title IX affords protections for transgender students.

What can a ruling in favor of the broader interpretation mean to businesses?

First, if the Supreme Court does uphold the lower court's ruling, the definition of "sex" as it pertains to gender identity will only be applied to Title IX. However, this ruling would undoubtedly support arguments to expand the definition of "gender" to include sexual orientation under Title VII. Therefore, this ruling would define an additional protected class. Second, the overall ruling may expand LGBT rights overall, but it could still impose limitations regarding shared facilities. Specifically, the justices could find that especially in terms of schools and children, that the right to privacy outweighs the right of an individual to use his/her bathroom of choice. Third, the Supreme Court could decide to adopt a narrower definition of "sex" while also seeking assistance from Congress as to the intent and interpretation of "sex" as defined in Title IX. Lastly, it is possible and even likely that if President Obama is unable to fill the open seat on the Supreme Court, that the case will result in a 4-4 split. In the event of an even split, the decision of the lower court is upheld and no precedent is established. If this

occurs, the court of appeals holding will stand; however, instruction as to the interpretation of “sex” and scope of Title IX will remain unanswered.

What can businesses do in preparation for an expansion of rights?

Currently, oral arguments for *Gloucester County School Board v. G.G* are scheduled to be heard by the Supreme Court at some point during January or February 2017. According to the court website, there is no particular date set. However, in anticipation of the Supreme Court’s ruling, some large companies have decided to add private bathrooms to its stores to accommodate non-gender conforming customers.

For example, in August 2016, Target Corporation announced a transgender-friendly bathroom policy and stated that it would spend \$20 million to add private bathrooms to its stores.

While employers may decide to take a wait-and-see approach, it is our recommendation that where economically practicable, employers provide or convert handicap single-use bathrooms to non-gender specific single-use bathrooms for employees. Further, companies that do not have policies in place protecting transgender employees from sex discrimination may want to start working with their legal departments or counsel to do so.

Swanson, Martin & Bell, LLP recognizes Meredith Fox for her efforts in drafting this newsletter.

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