POTTY POLITICS: G.G. EX REL. GRIMM V. GLOUCESTER COUNTY SCHOOL BOARD, TITLE IX, AND THE CHALLENGES FACED BY TRANSGENDER STUDENTS UNDER THE TRUMP ADMINISTRATION AND BEYOND

*Nathan Heffernan**

TABLE OF CONTENTS

It seems reasonable to say that no individual should be discriminated against because of their gender, gender identity, or sexual identity. However, for those who are familiar with the struggles of the LGBTQ community, it should come as no surprise that many members of the transgender community are subjected to nearly daily discrimination and harassment for those very reasons. Although acceptance and understanding of the transgender community has expanded in recent years, discrimination on a large-scale basis has also expanded nearly proportionately. At the forefront in the battle for equal rights is the debate surrounding "bathroom bills"—laws which seek to prevent the access of transgender individuals to the restroom and locker room facilities of their choice—which have become increasingly popular and controversial in recent years, even amidst a heated debate regarding their constitutionality.[2]

In April of 2016, a divided three-judge panel from the United States Court of Appeals for the Fourth Circuit decided *G.G. ex rel. Grimm v. Gloucester County School Board*, striking a preliminary blow to bathroom bills by holding

* University of Wisconsin Law School, J.D. Candidate 2018.

2. NATIONAL CONFERENCE OF STATE LEGISLATURES, *"Bathroom Bill" Legislative Tracking* (July 27, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/DX2C-J2WH].

that they are contrary to Title IX of the United States Education Amendments of 1972.[3] In that case, the Court of Appeals reviewed an order from the Eastern District of Virginia denying Gavin Grimm (G.G.), a transgender student at Gloucester High School in Gloucester, Virginia, the right to use the school bathroom of his choice, after he challenged the school district's new policy that would prevent him from using the bathroom of his choice.[4] In holding that G.G.'s claim under Title IX should not have been dismissed by the trial court, the Fourth Circuit reversed and remanded in large part on procedural grounds, publishing an opinion that would ultimately lead to the granting of a preliminary injunction in G.G.'s favor while sidestepping a full-blown analysis of the substantive issues underlying the original case.[5] In August of 2016, the Supreme Court granted a stay of the injunction, which was eventually granted by the district court following the Fourth Circuit's judgment.[6] Furthermore, the school board's petition for certiorari was granted in late October of 2016, giving a strong indication that at least some of the members of the Court may have disagreed with the Fourth Circuit's reasoning—this would have been the Court's first opportunity to weigh in on bathroom bills.[7] However, before the Court could hear the case, new officials at the Department of Education under the Trump administration revoked prior Obama-era guidance, which the Court of Appeals had held to be controlling in G.G.'s favor.[8] In response to this sudden shift, the granting of certiorari was vacated, as was G.G.'s preliminary injunction.[9] As a result, as of mid-2017, G.G.'s saga was effectively placed back at step one.[10]

The purpose of this note is to clarify the law surrounding the issues of *G.G.*, such as Title IX, the Equal Protection Clause, the rights of transgender students, and other students' right to privacy. Analysis of the arguments, counter-arguments, and alternative arguments of this case are exceptionally important within the larger issue of transgender rights, as the sudden reversal of policy under the Trump administration shows that this is not an issue which will be disappearing any time soon.

Part I includes the facts in *G.G.* and a short summary of the district court's decision. Section II explains the procedural and substantive standards behind the Fourth Circuit's holding. Sections III sets forth the analysis of *G.G.*'s Title IX claim in both the district court and the court of appeals. Section IV explains the

3. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016).

4. *Id*. at 715-17; *See* G.G. *ex rel*. Grimm v. Gloucester Cty. Sch. Bd., 132 F.Supp.3d 736, 739-41 (E.D.Va. 2015).

5. *See G.G. ex rel.* Grimm, 822 F.3d at 714-15.

6. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016).

7. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2016).

8. Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html [https://perma.cc/4N5B-CXYC].

9. Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017); G.G. v. Gloucester Cty. Sch. Bd., 853 F.3d 729, 729-30 (4th Cir. 2017).

10. *See* Amended Complaint, Gavin Grimm v. Gloucester Cty. Sch. Bd., No. 4:15-cv-54 (E.D. Va. 2017), https://www.aclu.org/legal-document/amended-complaint [https://perma.cc/8A8B-DSS3].

significance of the Trump administration's reversal of policy, and what it means for G.G. and the transgender community as a whole. Section V provides an analysis on the issues of Title IX as it relates to *G.G.*, including both procedural and substantive analysis of the parties' motions and policy reasons supporting protection of transgender students' rights. The central thesis presented in Section V is that while there are very good reasons to protect the interests of transgender students like G.G., Title IX may not be the correct avenue to protect those interests, absent some additional official action by either Congress or the Department of Education. Part V also presents legal alternatives to challenge bathroom bills under Title IX, including using the Equal Protection Clause and formal amendment to Department of Education regulations. Section VI finishes by offering a brief perspective on this issue as it moves forward under the Trump administration. The final conclusion is that while the Trump administration is unlikely to offer any constructive support to transgender students like G.G., the Equal Protection Clause of the Constitution may be the ultimate protector of their rights.

I. FACTS OF THE CASE- G.G. EX. REL. GRIMM V. GLOUCESTER COUNTY SCHOOL BOARD

G.G. is a transgender student now in his senior year at Gloucester High School in Gloucester, Virginia.[11] While G.G.'s "birth" or "biological" sex is female, G.G. has been diagnosed with gender dysphoria, a condition defined by the fifth volume of the Diagnostic and Statistical Manual of Mental Disorders (DSM) as "a marked incongruence between one's experience/expressed gender and assigned gender."[12] Gender dysphoria is manifested by a desire to be rid of one's primary and/or secondary sex characteristics because of that incongruence, a strong desire for the primary and/or secondary sex characteristics of the other gender, a strong desire to be of the other gender, and a strong desire to be treated as a member of the other gender.[13] As a result of his gender dysphoria, G.G. identifies as male.[14] Before beginning his sophomore year at Gloucester High, G.G. and his mother informed the school that G.G. was a transgender boy.[15]

While the school initially accepted G.G.'s preferences, even allowing G.G. to use the boys' restroom without incident for seven weeks, backlash from parents and the county school board quickly mounted.[16] On December 9th, 2014, the Gloucester County School Board met to discuss the use of restrooms and locker rooms by transgender students.[17] By the end of the meeting, the Board adopted a new policy, making it the official practice of the Gloucester County

11. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016).

12. *G.G.*, 822 F.3d at 715; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS §302.85 (American Psychiatric Association (APA) Publishing, 5th ed. 2013).

13. AM. PSYCHIATRIC ASS'N, *supra* note 11.

14. *G.G. ex rel.* Grimm, 822 F.3d at 715.

15. *Id*.

16. *Id*. at 715-16.

17. *Id*. at 716.

Public Schools to provide male and female restroom and locker room facilities in its schools.[18] Although "students with gender identity issues" were provided alternative private facilities under the new policy, it explicitly stated that an individual's use of public facilities is limited solely to that person's biological gender—regardless of their preferred gender.[19]

As a result of the newly enacted policy, G.G. sued the Board on June 11, 2015.[20] G.G.'s objective was to obtain an injunction that would allow him to once again use the bathroom of his choice.[21] G.G. argued that in prohibiting him from doing so, the Board had violated Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution.[22] G.G. also claimed that being required to use the girl's bathroom would cause G.G. severe psychological distress and would substantially hinder his treatment for gender dysphoria.[23] While the Board continued to allow G.G. to use separate, single-person bathrooms, G.G. posited that such separate facilities "set him apart from his peers, and serve[d] as a daily reminder that the school viewe[d] him as different."[24]

II. PRIOR/CONTROLLING LAW

Bathroom bills, laws and regulations that seek to restrict access to restrooms, locker rooms, and other sex-segregated facilities solely on the basis of sex as defined by "biological sex," or sex assigned at birth, have become increasingly common in recent years, despite drawing harsh criticism from their opponents.[25] Bathroom bills have been proposed in nineteen separate states to date, although many of these bills have been rejected by state legislatures.[26] It was most likely bills such as these that served as the model for the Board's restrictive bathroom policy.

Currently, North Carolina is the only state to have successfully enacted such legislation. North Carolina House Bill 2, officially named "An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations," passed in March 2016.[27] In the act, the North Carolina Legislature explicitly states that "in no event shall . . . [a] public agency [allow] a person to use a multiple occupancy bathroom or changing facility designated . . . for a sex other than the person's biological sex."[28] Biological sex is defined as "the physical condition of being male or

18. *Id*.
19. *G.G. ex rel.* Grimm, 822 F.3d at 716.
20. *Id*. at 717.
21. *Id*.
22. *Id*.
23. *Id*. at 716.
24. *Id*. at 716-17 (internal quotations omitted).
25. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 1.
26. *Id*.
27. *Id*.
28. H.B. 2, 2016 Gen. Assemb., 2nd Extra Sess. (N.C. 2016).

female, which is stated on the person's birth certificate."[29] Although the portion of House Bill 2 relating to bathroom segregation was repealed in early 2017, it stands as a prime example of the type of legislation that many individuals in state and local government would seek to emulate.[30]

Members of the civil rights community deride bathroom bills like House Bill 2 as examples of public ignorance, discrimination, and anti-LGBTQ fearmongering.[31] Despite some groups' insistence that these laws are nothing more than "common-sense" legislation, detractors of such legislation have used the same language—"common sense"—in decrying it.[32] Restrictions like those enacted by the Gloucester County School Board are, in the eyes of its opponents, not only morally wrong and unjustifiable, but also unquestionably illegal.[33]

As stated above, G.G. claims that the Board's policies violate his rights under two sources of law: Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution.[34]

A. Title IX

Title IX, modeled after Title VI of the Civil Rights Act of 1964, is a comprehensive federal law that seeks to remove barriers that prevent people from participating in educational activities on the basis of sex.[35] Codified at 20 U.S.C. §§ 1681-1688, Title IX states that that "no person in the United States 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."[36] The two principal objectives of Title IX are (1) to

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29. *Id*.

30. Richard Fausset, *Bathroom Law Repeal Leaves Few Pleased in North Carolina*, N.Y. TIMES (March 30, 2017), https://www.nytimes.com/2017/03/30/us/north-carolina-senate-acts-to-repeal-restrictive-bathroom-law.html?_r=0 [https://perma.cc/Q8KA-VAW5].

31. James Esseks, *Anti-Trans Bathroom Bills Have Nothing to Do With Privacy and Everything To Do With Fear and Hatred*, ACLU (Apr. 19, 2016, 3:00 PM), https://www.aclu.org/blog/speak-freely/anti-trans-bathroom-bills-have-nothing-do-privacy-and-everything-do-fear-and [https://perma.cc/PK4Y-XQSG].

32. Douglas Williams, *The Truth About North Carolina's Bathroom Bill*, FEDERALIST (May 9, 2016), http://thefederalist.com/2016/05/09/the-truth-about-north-carolinas-bathroom-bill/ [https://perma.cc/4WSZ-GEQ5]; Ryan Thoreson, *Anti-Transgender Bathroom Bills: Common Sense and Nonsense*, HUFFINGTON POST (May 24, 2016, 10:00 AM), http://www.huffingtonpost.com/ryan-thoreson/anti-transgender-bathroom_b_9431478.html [https://perma.cc/2EFC-9P36].

33. *See, e.g.*, *G.G. v. Gloucester County School Board*, ACLU (Mar. 6, 2017), https://www.aclu.org/cases/gg-v-gloucester-county-school-board [https://perma.cc/6DU3-9C5W] ("[T]he bathroom policy is unconstitutional under the Fourteenth Amendment and violates Title IX of the U.S. Education Amendments of 1972, a federal law prohibiting sex discrimination by schools.").

34. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 717 (4th Cir. 2016).

35. U.S. DEP'T OF JUSTICE, *Title IX Legal Manual, I. Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, https://www.justice.gov/crt/title-ix#I [https://perma.cc/9JCZ-ZWNT] (last updated Aug. 6, 2015).

36. 20 U.S.C. § 1681 (2012).

avoid using of federal resources to support discriminatory practices in education programs, and (2) to provide individual citizens effective protection against those practices.[37]

While Title IX is meant to prevent discriminatory acts in educational settings, not all sex-based actions are prohibited. Department of Education regulations, empowered under federal legislation, explicitly state that schools "may provide separate toilet, locker room, and shower facilities on the basis of sex . . ." so long as "facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex."[38]

While this language may initially appear to give schools wide authority to segregate their bathrooms in any way they choose so long as that segregation is based on "sex," and so long as the facilities are "relatively comparable" for each gender, the Department has previously sought to clarify this regulation, in large part because of the recent surge in the popularity of "bathroom bills."[39] From 2014 to 2016, the Department published a series of documents and letters designed to guide governmental action by addressing the issue of discrimination against transgender students and seeking to clarify the meaning of Title IX.[40] Across these documents, the message the Department attempted to convey is this: while schools may provide sex-segregated restrooms, when doing so they must treat transgender students in a way that is consistent with their gender identity.[41]

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37. U.S. DEP'T OF JUSTICE, *Title IX Legal Manual, II. Synopsis of Purpose of Title IX, Legislative History, and Regulations*, https://www.justice.gov/crt/title-ix#I [https://perma.cc/VT88-8UG3] (last updated Aug. 6, 2015).

38. 20 U.S.C. § 1682 (2012) ("Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."); 34 C.F.R. § 106.33 (2017).

39. *See* Joe Sterling, Eliott C. McLaughlin & Joshua Berlinger, *North Carolina, U.S., Square Off Over Transgender Rights*, CNN (May 10, 2016), http://www.cnn.com/2016/05/09/politics/north-carolina-hb2-justice-department-deadline/ [https://perma.cc/GES3-EME7].

40. U.S. DEP'T OF EDUC. OFF. FOR C.R., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 25 (Dec. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf [https://perma.cc/EX7F-8GJ6]; Letter from James A. Ferg-Cadima, Deputy Assistant Secretary for Policy, U.S. Dep't of Educ. Office for Civil Rights, to Emily T. Prince (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [https://perma.cc/Q5CL-AC63]; U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *Dear Colleague Letter on Transgender Students* (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/BJN8-ZDLU].

41. *See, e.g.*, Letter from James A. Ferg-Cadima to Emily T. Prince, *supra* note 39 ("The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.").

If this interpretation of Title IX is controlling, the Gloucester County School Board was in clear violation of Title IX in its treatment of G.G. Although born female, G.G. identifies as male. As such, the Department's interpretation would require the Board to let G.G. use the boy's restroom, despite his original or biological sex. Because they did not do this, instead forcing G.G. to choose between either the girl's bathroom or a separate private restroom, the Board would necessarily lose under such an analysis.

However, in February of 2017, officials in the Trump Administration's Education Department unequivocally rejected the Obama-era guidance documents and clarifications.[42] In place of this guidance, the Education Department and Justice Department released a joint letter, stating that any prior guidance was improperly made "without due regard for the primary role of the states and local school districts in establishing educational policy."[43] As such, the language of Title IX currently stands alone, and the full extent of public schools to segregate restroom and locker facilities remains unclear.

B. Equal Protection

The Equal Protection Clause, part of the Fourteenth Amendment to the United States Constitution, has been repeatedly used to contest gender-based government action. The clause, enacted in 1868 following the passage of the Civil Rights Act of 1866, states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[44] While many legal theorists have argued that the Equal Protection Clause does not apply in the context of sex discrimination, that opinion is contrary to the overwhelming weight of Supreme Court precedent.[45] The Court first applied the Equal Protection Clause in the context of sex discrimination in *Reed v. Reed*, explicitly holding that state legislatures could not accord different treatment to individuals "on the basis of criteria wholly unrelated to the objective of that statute" (in that case, on the basis of gender).[46]

The modern standard for gender discrimination under the Equal Protection Clause was set forth in *United States v. Virginia*.[47] In *Virginia*, the Supreme Court examined the male-only admission policy enforced by the Virginia Military Institute (VMI).[48] Although the district court and Court of Appeals had accepted Virginia's proposal to open a parallel and separate program for women at the "Virginia Women's Institute for Leadership," the court held that this could not save VMI from claims under the Equal Protection Clause.[49]

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42. Peters et al., *supra* note 7.

43. *Id*.

44. U.S. CONST. amend. XIV, § 1.

45. *See, e.g.*, *The Originalist: Justice Antonin Scalia*, CALIFORNIA LAWYER (Jan. 2011), http://ww2.callawyer.com/clstory.cfm?pubdt=201101&eid=913358&evid=1 [https://perma.cc/X7Z4-MTQ6].

46. Reed v. Reed, 404 U.S. 71, 75-76 (1971).

47. U.S. v. Virginia, 518 U.S. 515 (1996).

48. *Id*. at 519.

49. *Id*. at 526-28, 554.

The court began by establishing that under the Equal Protection Clause, "parties who see to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action."[50] To qualify as "exceedingly persuasive," the defender of the discriminatory action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[51] While the Court did not question that there are certain "inherent differences between men and women," they did not accept the proposition that VMI's stated objective—producing so-called "citizen soldiers"—was incompatible with integration of women into their classes.[52]

The Court additionally analyzed the standard required for remedy of Equal Protection violations. In order for a remedial plan to comply with Equal Protection requirements, the plan "must closely fit the [Equal Protection] violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination."[53] While the Court did not dismiss outright that providing an alternative institution for women could place disadvantaged potential students "in the position they would have occupied absen[t] discrimination," the Court found that Virginia's alternative plan was ultimately insufficient, as the alternative plan did not provide the same curriculum and did not feature the same rigorous adversarial process from which the male students at VMI had benefitted.[54]

Similarly, Equal Protection concerns may be implicated by the Board's policy restricting bathroom access for G.G. and other transgender students. Just as VMI ran afoul of the Equal Protection Clause by failing to provide a sufficient justification for discriminating against female potential students, so too could the Board's policy of discrimination be held unconstitutional. This issue is dealt with in greater detail in Section IV.

III. PROCEDURAL POSTURE

To this point, the analysis in both the district court and the Fourth Circuit Court of Appeals concerned whether G.G. fulfilled the requirements for obtaining a preliminary injunction. It is important to note that the standard for a preliminary injunction is almost entirely the same as the standard for a permanent injunction, with the only difference being that the plaintiff must only show a *likelihood* of success on the merits, rather than actual success.[55] As such, while the holdings of the district court and Court of Appeals vis-à-vis G.G.'s

50. *Id*. at 531.

51. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

52. *Id*. at 545; *Virginia*, 518 U.S. at 533-34.

53. *Id*. at 547.

54. U.S. v. Virginia, 518 U.S. 515, 555 (1996) ("Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy offers no cure at all for the opportunities and advantages withheld from women who want a CMI education and can make the grade.").

55. Winter v. Nat. Res. Council, Inc., 555 U.S. 7, 32 (2008).

preliminary injunction have been vacated as a result of the Trump Administration's revocation of the Obama-era guidance documents, their reasoning remains relevant, and is likely to closely mirror their future decisions.

On the same day the suit was filed against the Board, G.G. and his attorneys filed a motion for a preliminary injunction, which would have allowed G.G. to use the bathrooms consistent with his gender identity while further issues were still before the court.[56] In response, the Board filed a motion opposing the preliminary injunction, as well as a motion to dismiss G.G.'s claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[57]

To succeed on a motion for a preliminary injunction, a party must demonstrate four factors. The modern preliminary injunction standard, as set forth by the Supreme Court in *Winter v. Natural Resources Council, Inc.*, requires a plaintiff to establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[58]

As to the standard under which a court judges a 12(b)(6) motion to dismiss, the general rule is that a court may grant a motion to dismiss if the plaintiff's complaint fails to "allege facts sufficient to 'raise a right to relief above the speculative level' and 'state a claim to relief that is plausible on its face.'"[59] Therefore, if a court determines that the factual assertions put forth in the plaintiffs claim, even if taken as true, do not give rise to a plausible claim to relief, the court may dismiss the action.

Therefore, in regard to G.G.'s claim under Title IX, the questions before the district court were not only whether G.G. was likely to suffer irreparable harm, whether the balance of hardships was in his favor, and whether an injunction was in the public interest, but also whether G.G. was likely to succeed on his claims—in essence, whether segregation of bathrooms based solely on biological sex, rather than gender identity, was prohibited by Title IX.[60] The district court's opinion examined first whether G.G. was likely to succeed on the merits of his Title IX claim, and then moved on to the third prong of the preliminary injunction test—the balance of hardships.

Regarding the merits of G.G.'s Title IX claim, the district court found that he had not succeeded. The district court acknowledged that Title IX prohibits discrimination in educational programs that receive federal funding.[61] However,

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56. G.G. *ex rel*. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 741 (E.D. Va. 2015).

57. *Id*.

58. Winter, 555 U.S. at 20.

59. Occupy Columbia v. Haley, 738 F.3d 107, 116 (4th Cir. 2013); *See also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (holding that in a motion to dismiss the general rule is that the plaintiff must allege facts sufficient to raise a right of relief above speculation).

60. G.G *ex rel*. Grimm, 132 F. Supp. 3d at 747.

61. G.G. *ex rel*. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 741 (E.D. Va. 2015).

while the court recognized that the Department of Education's Guidance Document spoke directly to the issue at hand, they dismissed the notion that it in any way controlled their decision.[62] In the district court's view, the Department of Education's regulations allowing for segregation based on sex unambiguously allowed for segregation based on biological sex.[63]

The district court examined whether G.G. had satisfied the third prong of the preliminary injunction test—whether the "balance of hardships" weighed in his favor. This test, in the court's opinion, required them to balance "G.G.'s claims of stigma and distress against the privacy interests of the other students protected by separate restrooms.[64]

Drawing a parallel to the constitutional right of prisoners to bodily privacy, the court stated that it would be "perverse" to suppose that prisoners had a right to bodily privacy higher than that which is held by individuals using state public bathrooms.[65] Citing precedent from the Second, Third, Sixth, and Ninth Circuit Courts of Appeal, the court held that "not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system."[66] The court held that G.G.'s presence in the boys' bathroom would violate this right to privacy, and would cause the other students discomfort.[67]

Against this right to privacy, the court balanced the hardships demonstrated by G.G. as a result of the Board's new policy. The court gave G.G.'s claims of hardship little credit, finding G.G.'s claims of distress and stigmatization to be "largely unsubstantiated."[68] The court also declared that the testimony presented by the psychologist retained by G.G. to be "almost completely devoid of facts specific to G.G." and dismissed the testimony as irrelevant.[69] Having found that G.G.'s case was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions," the court found that G.G. had not shown that the balance of hardships was in his favor.[70]

Because the court found both that Title IX allowed for segregation based on biological sex, and that the balance of hardships was not in G.G.'s favor even absent such a finding, the court denied G.G.'s motion for a preliminary injunction, and granted the Board's motion to dismiss.[71] The district court did not reach a determination with regards to G.G.'s Equal Protection claim.On appeal, the Fourth Circuit Court of Appeals reviewed whether the district court had erred when it dismissed G.G.'s claim under Title IX and denied his motion for a preliminary injunction. As the court recognized, "[a]t the heart of this appeal

62. *Id*. at 746.
63. *Id*.
64. *Id*. at 750.
65. *Id*. at 750-51.
66. *Id*. at 751.
67. G.G. *ex rel*. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 741 (E.D. Va. 2015).
68. *Id*.
69. *Id*. at 752.
70. *Id*. at 748, 751.
71. *Id*. at 746-47.

[was] whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity."[72] While the three-judge panel eventually came to a 2-1 holding on largely procedural grounds, the tone and reasoning of the concurring and dissenting opinions reflect the greater divide surrounding this issue.

With regard to the dismissal of G.G.'s Title IX claim, the Court of Appeals again reviewed the Department of Education's Guidance Document's sufficiency under the test created in *Auer v. Robbins*, and reversed.[73] Under *Auer*, an agency may only promulgate a controlling interpretation of its own regulations if those regulations are ambiguous, and if that interpretation is not plainly erroneous or inconsistent with the regulation itself.[74] Analysis of an interpretation under *Auer* is highly deferential, and the interpretation does not need to be the only possible reading of the regulation, or even the best one, to control.[75] However, if the regulation is not ambiguous, or if the interpretation is plainly inconsistent or erroneous as compared to the regulation itself, the interpretation is not given binding authority.[76]

The Court of Appeals reviewed the district court's finding of unambiguity *de novo*, reviewing the district court's findings under the three-part framework set forth in *Robinson v. Shell Oil Co.*, under which a court determines the plainness or ambiguity of language by reference to "(1) the language itself, (2) the specific context in which [the] language is used, and (3) the broader context of the statute or regulation as a whole."[77]

While the district court found the language of the Department of Education's regulations totally unambiguous, the Court of Appeals disagreed. First, the Court of Appeals found that the plain language of the regulation, allowing separate facilities "for students of one sex" and "students of the other sex," clearly referred to male and female students.[78] Second, the Court of Appeals found that in the context of the Department's regulation, the term "sex" referred to male and female students.[79] Third, the Court of Appeals found that, in the broad context of the regulation, the Department repeatedly refers to "one sex" and "the other sex."[80] The Court of Appeals was of the opinion that this pattern

72. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016).

73. Auer v. Robbins, 519 U.S. 452, 461 (1997); G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 746 (E.D. Va. 2015).

74. Auer, 519 U.S. at 461.

75. G.G. *ex rel.* Grimm, 822 F.3d at 721 (first quoting Dickenson—Russel Coal v. Sec'y of Labor, 747 F.3d 251, 257 (4th Cir. 2014); then quoting Decker v. Nw. Env't Def. Ctr. 133 S.Ct. 1326, 1227 (2013)).

76. Auer, 519 U.S. at 461 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

77. G.G. *ex rel.* Grimm, 822 F.3d at 720 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

78. G.G. *ex rel.* Grimm, 822 F.3d at 720.

79. *Id.*

80. *Id*.

of formulation clearly indicated two sexes, and that the only reasonable reading was that the two sexes referred to male and female.[81]

However, the Court of Appeals did not end its analysis at that conclusion. Although the Court of Appeals concluded that the regulation unambiguously referred to males and females, it took issue with the fact that the regulation did not directly speak to how a school should determine whether an individual is male or female.[82] The Court of Appeals concluded that the regulation was susceptible to two readings—one in which maleness or femaleness is determined exclusively by genitalia, and one in which it is determined by gender identity.[83] In their view, the regulation was therefore ambiguous.[84]

Having determined that the Department's regulations were ambiguous, the Court of Appeals moved to the second prong of *Auer* analysis—whether the Department's interpretation of its own regulation was "plainly erroneous."[85] For this prong, the Court examined two dictionary definitions from the era of Title IX's drafting.[86] While the Court recognized a general trend of "sex" specifically connoting biological sex—sex defined by a "binary division on the basis of reproductive organs"—the Court found that there was sufficiently broad language within the definition to suggest that "sex" was not limited to biological sex.[87] As such, because the definition of "sex" at the time of Title IX's drafting was sufficiently broad as to include aspects of gender identity in addition to biological sex, the Court found that the Guidance Document was not plainly erroneous.[88] As such, the Court reversed the district court's contrary conclusion and its subsequent dismissal of G.G.'s Title IX claim.[89]

The Court of Appeals also reversed the district court's denial of G.G.'s preliminary injunction, and remanded to the lower court for further proceedings. However, the Court did so on largely procedural grounds, holding that the district court applied an unnecessarily strict evidentiary standard when it refused to consider evidence it deemed to be hearsay or otherwise inadmissible.[90] The Court of Appeals did not reach the merits of G.G.'s claim with regards to the balance of hardships.

The concurring opinion, presented by Circuit Judge Andre Davis, agreed that remanding the case to the district court was acceptable, but pushed for a stronger holding. Taking for granted that "G.G. [had] surely demonstrated a likelihood of success on the merits of his Title IX claim," and examining the factors of irreparable harm, balance of hardships, and public interest, Judge Davis opined that the Court of Appeals would be justified in granting G.G.'s

81. *Id*.
82. *Id*.
83. G.G. *ex rel.* Grimm, 822 F.3d at 720.
84. *Id*. at 721.
85. *Id*. (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).
86. G.G. *ex rel.* Grimm, 822 F.3d at 721.
87. *Id*. at 721-22.
88. *Id*. at 722.
89. *Id*. at 723.
90. *Id*. at 725.

injunction itself, and that remand was unnecessary.[91] In his opinion, the record clearly showed that G.G. experienced daily psychological harm as a result of the Board's policy that put him at risk for significant long-term consequences, that his presence in the boys' bathroom did not pose a significant threat to the privacy of other students, and that public policy justified granting G.G.'s injunction *immediately*, rather than forcing him to wait on the pending litigation.[92] Having made these findings, Judge Davis concludes by stating his strong opinion that the Court of Appeals would be "on sound ground" in granting G.G.'s injunction, and that not doing so exposed him to further harm.[93]

In direct conflict with the majority and concurring opinions, Circuit Judge Paul Niemeyer's dissenting opinion stands as an example of the fundamental divide between the two sides of this debate. In his dissent, Judge Niemeyer states that the majority's holding was not only a misinterpretation of the clear language of Title IX—which he says clearly allows for segregation based on *biological sex*—but that it also a "completely trample[d] on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes," and "overrule[d] custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect."[94] Not only does he contend that Title IX and its regulations are unambiguous with regard to segregation based on biological sex, but also that failing to recognize a school's duty to segregate based on biological sex would create an "unworkable and illogical" system that would violate other students' privacy, and subject them to extreme psychological and emotional distress.[95] It is hard to imagine a series of opinions more diametrically opposed than the majority and dissenting opinions presented by the Fourth Circuit in this case.

IV. ANALYSIS

While the Circuit Court relied heavily upon the Obama-era Department's Guidance Document in reaching its holding, that guidance is now gone. As such, the question now before the courts, and the question at issue in this analysis, is whether Title IX, the Equal Protection Clause, or any other law protects transgender students even absent any specific guidance from the Department of Education.[96] Must all schools treat students consistent with their gender identity, even absent Department of Education guidance? Or is the idea of granting G.G. an injunction truly "trampl[ing] on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes," as proposed by Judge Niemeyer?[97] The answer to these questions may not be as black and white as one might think.

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91. G.G. *ex rel.* Grimm, 822 F.3d at 727-29 (Davis, J., concurring).
92. *Id*. at 728-29.
93. *Id*. at 727-29.
94. *Id*. at 730-31 (Niemeyer, J., dissenting).
95. *Id*.
96. *See* Amended Complaint, *supra* note 9, at 14-16.
97. G.G. *ex rel.* Grimm, 822 F.3d at 730 (Niemeyer, J., dissenting).

In this analysis, each of these issues will be examined in isolation, eventually concluding that while there are exceedingly strong policy reasons to protect the interests of transgender students like G.G., Title IX may not be the correct avenue to protect those interests, although there may be an alternative remedy under the Equal Protection Clause. Part A examines why public policy favors protecting transgender students' interests, and why the privacy interests of other students cannot justify bathroom bills. Part B examines whether the protections of Title IX require schools to allow students to use bathrooms consistent with their gender identity. Finally, Part C examines G.G.'s alternative claim under the Equal Protection Clause, which has not yet been addressed by either the district court or Court of Appeals.

A. Policy Considerations, Potential of Irreparable Harm, and G.G.'s Showing of Hardship

In April of 2016, presidential hopeful Ted Cruz announced his support for bathroom bills like North Carolina's House Bill 2. Cruz expressed his opinion that "as a father of daughters, [he was] not terribly excited about men being able to go alone into a bathroom with [his] daughters."[98] Despite Cruz's obvious and intentional misgendering of transgender women as "men," this is a sentiment that receives wide support from many groups of people.

But should these concerns override the concerns voiced by members of the LGBT community, who claim that these laws lead to anxiety, psychological distress, depression, and even suicide? Should students like G.G. have to suffer simply because Ted Cruz is worried about "men" going to the bathroom with his daughters? In the end, there seems to be a clear answer—compared to the very real problems bathroom bills and other forms of discrimination pose for the LGBTQ community, the claims of privacy and potential distress raised by bathroom bill supporters are not sufficient.

Whether individuals like Ted Cruz accept it or not, the issues faced by G.G. and other transgender students are real, and laws that take aim at their rights and freedoms have repercussions that go far beyond simply forcing them to use another bathroom. In 2015, the LGBTQ community was shocked and devastated when Blake Brockington, a transgender high school student in North Carolina who had risen to prominence after becoming his state's first transgender homecoming king, committed suicide.[99] Although he was able to achieve a limited amount of acceptance in his community as an openly transgender student, Blake dealt with intolerance and bigotry throughout the entire process, and was

98. Trudy Ring, *Ted Cruz: 'Men Should Not Be Going to the Bathroom With Little Girls'*, ADVOCATE (Apr. 14, 2016, 4:11 PM), http://www.advocate.com/transgender/2016/4/14/ted-cruz-men-should-not-be-going-bathroom-little-girls [https://perma.cc/TP5M-VPTK].

99. Karen Garloch, *Charlotte-Area Transgender Teens' Suicides Rock Community*, THE CHARLOTTE OBSERVER (Mar. 28, 2015, 5:00 PM), http://www.charlotteobserver.com/news/local/article16655111.html [https://perma.cc/2YG9-WEY9].

even rejected by his parents and sent into foster care.[100] Ultimately, these experiences led to Blake's death. This is nothing new to the transgender community—2015 saw a series of suicides by prominent transgender activists, including other teenagers in North Carolina, Ohio, and California.[101]

The psychiatric community has begun to examine psychological distress, depression, and suicide in the transgender community, with many studies showing a clear relationship between discrimination and these negative outcomes. General studies on gender nonconformity have found a strong correlation between nonconformity and depression among adolescents.[102] Even more strikingly, according to a 2016 study by Georgia State University's Kristie L. Seelman, being denied bathroom access because of gender nonconformity is substantially correlated with an increased risk of suicide attempts.[103] In her study, Seelman examined a sample of 2,325 transgender college graduates.[104] Within that group, she found that 60.5% of those who had been denied access to bathrooms and other facilities because of their nonconformity had attempted suicide—a 17.3% increase over those who had not.[105] Conversely, additional studies have shown that socially transitioned transgender children who are supported in their gender identity, rather than stigmatized, have normal levels of depression, and only slightly higher levels of anxiety.[106] Studies have shown that transgender children and adolescents with adequate social support and acceptance are more likely to have positive mental health outcomes, compared to those without social support or acceptance.[107]

When viewed in the light of clinical results supporting his claims, Dr. Ettner's testimony that the Board's policy caused "emotional distress to an extremely vulnerable youth and plac[ed] G.G. at risk for accruing lifelong psychological harm" becomes much more convincing.[108] It is abundantly clear that if policies like the Board's are allowed to remain in place, G.G. and other transgender students will be subjected to treatment that could have severely detrimental and psychological consequences, including a substantially increased risk of suicide.

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100. *Id*.

101. *Id*.

102. *See* Andrea L. Roberts et al., *Childhood Gender Nonconformity, Bullying Victimization, and Depressive Symptoms Across Adolescence and Early Adulthood: An 11-Year Longitudinal Study*, 52 J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 143, 148 (2013).

103. *See* Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. OF HOMOSEXUALITY 1378, 1387 (2016).

104. *Id*. at 1386.

105. *Id*. at 1388.

106. *See* Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, PEDIATRICS, 1, 5-7 (2016).

107. *Id*.

108. Corrected Expert Declaration of Randi Ettner, Ph.D at 8, G.G. *ex rel*. Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15-cv-00054-RGD-DEM), 2015 WL 11232703.

Against these substantial concerns for the psychological well-being of gender nonconforming students, the lone countervailing interest provided by the Board—the privacy of other students—seems a relatively minor concern. It is true that federal courts have recognized that separate public restrooms for men and women are justified based on privacy concerns, and that school children have an especially significant privacy interest in such situations.[109] It would, therefore, be entirely unreasonable to suggest that the children at G.G.'s school do not have a right to privacy. However, this argument must necessarily fail for two reasons. First, the measures taken by the Board do not substantially relate to the protection of privacy at all. Second, the privacy interests of other students, no matter how great, cannot possibly justify subjecting G.G. to potentially severe and life-altering mental and psychological harm. As G.G. and his attorneys correctly asserted at both the trial and appellate levels, the privacy of other students is more than adequately protected even with G.G. present in the restroom, and the students were never guaranteed true privacy in public restrooms even with G.G. excluded from those restrooms.

First, G.G.'s presence in the boys' restroom poses little threat to the privacy other students had in the restroom, if any. As noted above, Gloucester High School made significant improvements to their boys' bathroom facilities—these improvements include putting dividers between urinals and increasing the size of dividers around bathroom stalls.[110] Furthermore, no public restroom is truly private, by its very nature. Under the Board's current policy, any and all biologically male individuals, including adult instructors and visiting members of the public, are free to use the boys' restroom as they please. Any supposed lack of privacy in these bathrooms would necessarily be present when these other individuals are in the restroom, yet the Board's policy allows them to be there simply because they are biologically male.

This reinforces the notion that this policy is not about privacy at all, but rather about the right to exclude transgender individuals based on fear and bias. While Ted Cruz and other conservative thinkers may believe that equality in public facilities is "opening the door for predators,"[110] there is simply no evidence that allowing transgender students to use the bathroom of their choice will lead to the negative outcomes they predict—sexual assault, rape, harassment, etc.[111] In fact, the vast majority of these concerns have been debunked as complete myths, with many of them serving as justifications for discrimination against members of the transgender community. There is simply no evidence that allowing transgender students into school bathrooms will cause

109. Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); *see also* Thomas *ex rel*. Thomas v. Roberts, 261 F.3d 1160, 1168 (11th Cir. 2001) ("[T]here is no question that schoolchildren retain a legitimate expectation of privacy . . . .").

110. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716 (4th Cir. 2015).

111. Jessica Hopper, *Ted Cruz Says Not Having 'Bathroom Bill' Is Opening the Door for Predators'*, ABC NEWS (Apr. 23, 2016, 10:05 PM), http://abcnews.go.com/Politics/ted-cruz-bathroom-bill-opening-door-predators/story?id=38626340 [https://perma.cc/P5ND-CNFG] (internal quotations omitted).

abuse of that privilege, an increase in sexual assault, or any other negative result.[112] No one is suggesting that schools should allow boys or men to use the girls' bathroom, or vice versa, or that sexual predators be given free rein to terrorize the children of conservative politicians. In the end, all that G.G. and other transgender students are asking for is permission to use the bathroom that is consistent with their gender identity.

Furthermore, not only would the intrusion into the privacy of other students in public restrooms be minimal, but Gloucester High School even provides several single-person restrooms, all of which would ensure the total privacy of the user, should they feel uncomfortable using public restrooms with G.G. or other transgender individuals present.[113] Whereas G.G. was effectively being forced to use these bathrooms, thereby elevating his feelings of isolation and exclusion, there would be no serious negative social stigma attached to other students using these bathrooms—other students would be free to use these separate facilities of their own accord.

B. Merits, Title IX

Having established that there are numerous policy-based and ethical reasons for ensuring the protection of the rights and well-being of transgender students, this analysis must now turn to the difficult question of whether Title IX is capable of performing that job.

As covered above, the Department of Education's regulations as they relate to Title IX explicitly state that public schools "may provide separate toilet, locker room, and shower facilities *on the basis of sex* . . ." so long as "facilities provided for students *of one sex* [are] comparable to such facilities for students *of the other sex*."[114] Therefore, on its face, Title IX gives schools the ability to segregate their facilities based on sex. If it had not been rescinded, and if it held controlling weight, the Department's former guidance, which stated that schools "must treat transgender students in a way that is consistent with their gender identity" would have directly supported G.G.'s claim. However, given the complete reversal of the Department's position under President Trump, the question presented is whether Title IX can be read in a way that requires schools to allow transgender students to use bathrooms consistent with their gender identity, even absent explicit Department guidance.

At the outset, it is clear that the meaning of the Department's regulation is not entirely clear. The regulation states that schools "may provide separate toilet, locker room, and shower facilities on the basis of sex. . . ."[115] The regulation, notably, does not define the word "sex."[116] While the regulations do refer to "one

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112. Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, MEDIA MATTERS FOR AMERICA (Mar. 20, 2014, 10:01 AM), http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533 [https://perma.cc/CJ3B-J69R].

113. G.G. *ex rel.* Grimm, 822 F.3d at 716.

114. 34 C.F.R. § 106.33 (2017) (emphasis added).

115. *Id*.

116. *Id*.

sex" and "the other sex"—clearly referring to male and female—the Court of Appeals was again correct in noting that the language of the regulation makes no reference to how an individual is determined to be male or female for the purposes of bathroom segregation.[117] While it would certainly be possible to define one's "sex" simply as the state of being (from birth) biologically male or female, it is equally possible that one's "sex" could be defined in another way, such as by an individual's gender identity. The text itself offers no clarification on this point.

As such, one must therefore turn to the "statutory context, structure, history, and purpose" underlying Title IX.[118] The Department's Title IX regulations were adopted, unchanged, from previous regulations created in 1975 by the now-defunct Department of Health, Education, and Welfare.[119] For its part, the Circuit Court explored the regulation's context by examining dictionary definitions from the drafting era. It concluded that such definitions "suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not [considered] universally descriptive" by the standards of the time.[120] Although the period during which these laws and regulations were drafted was not a period of particular development in the history of transgender rights and activism, it would be unrealistic to say that the drafters of the Department's regulation were totally unaware of other possible definitions of sex other than biological birth sex.[121] While the strides taken by LGBTQ activists during the period may appear to be minor compared to recent achievements in public understanding and acceptance of the LGBTQ movement, the activists of the period did much to increase public awareness, with the publication of several best-selling autobiographies drawing significant attention to lives of transgender individuals.[122] Furthermore, "gender identity disorder," an early term for gender dysphoria, was included in the Diagnostic and Statistical Manual Third Edition in 1980, only a couple of years after the creation of the Department's Title IX regulations, indicating that it had been well understood and known of for some time.[123]

While it is possible that the Department, in drafting its regulation, intended to refer only to biological or birth sex, it is indisputable that gender nonconformity and other transgender issues were well known to at least a

117. *Id*.

118. *See* Abramski v. U.S., 134 S. Ct. 2259, 2267 (2014) (internal quotations omitted).

119. Establishment of Title and Chapters, 45 Fed. Reg. 30,802, 30,960 (May 9, 1980) (to be codified at 34 C.F.R. pt. 106).

120. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2015).

121. Genny Beemyn, *Transgender History in the United States*, TRANS BODIES, TRANS SELVES 1, 27, *available at* https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/transpeople/genny_beemyn_transgender_history_in_the_united_states.pdf [https://perma.cc/Y5V3-YRZL] (last visited Nov. 19, 2017) (describing the 1970s and early 1980s as "the contemporary nadir for transgender people.").

122. *Id*. at 27-28.

123. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261 (3rd ed. 1980).

segment of the population at the time.[124] Given that the language of the regulation itself gives no indication as to what version of "sex" was being referred to, and makes no mention of which sex transgender individuals were considered part of, it is quite possible that the word "sex" as used in the Department's regulation was meant to refer to a variety of things beyond simple biological sex.

However, even if there is more than one potential meaning of the Department's regulations, G.G.'s argument that Title IX requires schools to let transgender students use bathrooms consistent with the gender identity simply cannot conform to one indisputable and plain meaning of Title IX—allowing for, at the very least, segregation based on biological sex. While this produces the unfortunate result of invalidating G.G.'s claim under Title IX, judicial activism and policy cannot replace legislation.

A helpful comparison can be found in an examination of the word "sex" in the context of Title VII of the Civil Rights Act of 1964.[125] Although they apply to separate areas of law, cases interpreting employment discrimination based on sex under Title VII have often been used to help interpret claims of educational discrimination under Title IX.[126] In the context of discrimination on the basis of "sex," Title VII legislation has, over time, gradually been expanded to mean not only discrimination based on biological distinctions between men and women, but also discrimination based on gender norms, gender stereotyping, and failure to adhere to these stereotypes and norms.[127]

However, simply because the Title VII definition of "sex" has been expanded to include aspects of gender roles, gender norms, and gender stereotypes that go beyond simple biological sex does not mean that the original definition—biological sex—no longer exists. While the definition has been expanded to include additional concepts of gender and gender norms, those new concepts have not replaced the original definition of sex as biological sex.[128] Instead, these concepts have merely augmented it—no reasonable person would argue that it is now permissible to discriminate on the basis of an individual's biological sex at birth, as *both* definitions of "sex" still apply in the context of Title VII discrimination.[129]

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124. *See id.* at 261-66.

125. *See* 42 U.S.C. § 2000e-2 (2017).

126. *See, e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999)); Emeldi v. Univ. of Or., 698 F.3d 715, 724 (9th Cir. 2012) ("[T]he legislative history of Title IX 'strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII.'" (quoting Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988))).

127. Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) ("By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)).

128. *See id.*

129. *See id*. at 573 (citing Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Bibby v. Phila. Coca Cola Bottling

The definition of sex under Title IX can be thought of in a similar way, and Title IX's reliance on the substantive standards of Title VII supports this approach. It may very well be that the definition of sex for the purposes of Title IX includes concepts of gender, gender norms, and gender stereotypes that go well beyond simple biological or birth sex. Therefore, the broad precept of Title IX, that "no person in the United States shall [be discriminated against] on the basis of sex"[129] may very well mean that public institutions and educational programs are prohibited from discriminating against someone on the basis of *not only* that person's biological sex, but *also* on the basis of that person's gender non-conformity and gender identity.[130]

However, this expansion of the term "sex" does not support G.G.'s claim under Title IX. It is important to remember that Title IX states that schools "may provide separate toilet, locker room, and shower facilities *on the basis of sex* . . . ."[131] As explained above, we have expanded the term sex to have two definitions: one based on biological birth sex and one based on gender identity. Therefore, applying both definitions, 34 C.F.R. § 106.33 allows schools to segregate bathrooms based on both biological sex *and* gender identity. Stated differently, schools are allowed to segregate bathrooms based on *either* gender identity *or* biological sex, at their discretion. The fact that the term "sex" in Title IX has been expanded to include gender identity does not mean that it no longer has its other meaning—biological sex.

None of this is to say that Congress or the Department could not enact formal measures to protect transgender students. Congress, in its legislative capacity, could amend Title IX in a way that creates built-in protections for transgender students, directly contravening the Department's regulations. Furthermore, while the Department has not yet taken steps to formally amend Title IX, the Department could formally amend 34 C.F.R. § 106.33 to state that allowing schools to segregate based on "sex" requires them to do so on the basis of gender identity, rather than biological or birth sex. However, although then-candidate Donald Trump stated in the spring of 2016 that he was in favor of allowing transgender individuals to use any bathroom they felt comfortable using, recent administration action, which has at times been openly hostile to the transgender community as a whole, makes it seem unlikely that either Trump or his Department of Education would be amenable to such revisions to Title IX or its regulations.[132] While it is true that Department of Education Secretary Betsy DeVos has long been a quiet supporter of LGBTQ rights, her acquiescence to the

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Co., 260 F.3d 257, 262-63 (3d Cir. 2001); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001)).

130. 20 U.S.C. § 1681 (2015).

131. 34 C.F.R. § 106.33 (2016) (emphasis added).

132. Ashley Parker, *Donald Trump Says Transgender People Should Use the Bathroom They Want*, N.Y. TIMES (Apr. 21, 2016, 11:46 AM), https://www.nytimes.com/politics/first-draft/2016/04/21/donald-trump-says-transgender-people-should-use-the-bathroom-they-want/?_r=0 [https://perma.cc/3TG7-QGVU]; Reuters Staff, *Trump Administration Drops North Carolina 'Bathroom Bill' Lawsuit*, REUTERS (April 14, 2017, 11:18 AM), http://www.reuters.com/article/us-usa-trump-lgbt/trump-administration-drops-north-carolina-bathroom-bill-lawsuit-idUSKBN17G1B5 [https://perma.cc/2D6Y-YKVM].

stated policies of other members of the administration would seem to make unilateral action on her part unlikely.[133] Nevertheless, these formal changes remain an option, at least in theory.

C. Alternatice Avenue of Recourse—Equal Protection

Although it appears unlikely that Title IX in its current form can grant G.G. the remedy he seeks, his prospects look more favorable under the Equal Protection Clause. To reiterate, the Equal Protection Clause states that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." As stated above, discriminatory gender-based State action must be supported by an "exceedingly persuasive justification."[134] To qualify as "exceedingly persuasive," the defender of the discriminatory action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[135]

As stated under the analysis of G.G.'s Title IX claim, the terms "sex" and "gender" have become increasingly interchangeable when used in the context of discrimination.[136] This interchangeable approach to "sex" and "gender" has also been adopted in the context of discrimination under the Equal Protection Clause in a number of recent cases, as emphasized at the trial court level in G.G.'s case.[137] This is the appropriate decision for federal courts—it would only make sense for federal courts examining federal law regarding "sex" discrimination to apply a uniform definition of "sex" across multiple contexts—there is no real reason why sex in the context of Title VII and Title IX should have a meaning different from sex in the context of Equal Protection. If this is the case, then G.G. and other transgender students could raise an effective claim of discrimination under the Equal Protection Clause.

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133. Jeremy W. Peters, *Betsy DeVos, a Friend of L.G.B.T. Rights? Past Colleagues Say Yes*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/politics/betsy-devos-gay-transgender-rights.html [https://perma.cc/SC9S-N9V5]; Rebecca Mead, *Betsy DeVos's Spineless Transgender Bathroom Politics*, THE NEW YORKER (February 23, 2017), http://www.newyorker.com/news/news-desk/betsy-devoss-spineless-transgender-bathroom-politics [https://perma.cc/CDS8-87TT] ("According to the report, DeVos expressed her reservations [regarding rolling back the rights of transgender students] to Sessions, who could not be persuaded, and sought out Trump's support for his own position. The President reportedly told DeVos that she could get onboard or she could resign. DeVos chose to keep her job, and signed off on the new rules.").

134. United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

135. *Id*.

136. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 720-21 (4th Cir. 2015).

137. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015); Smith v. City of Salem, Ohio, 378 F.3d 566, 576-77 (6th Cir. 2004). *See also* Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (concluding that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.").

Furthermore, it is unlikely that government bodies, especially the Gloucester County School Board, could provide a justification for separate bathrooms for transgender students that would rise to the level of "exceedingly persuasive," as required by the Equal Protection Clause. As already stated, the only justification presented by the School Board was the protection of the privacy of other students. However, this justification hardly rises to the level of "exceedingly persuasive." As previously explained, no public restroom is truly private, and other students, instructors, and members of the public of the same gender are already free to use these public restrooms as they please. The School Board's claim is also weakened because Gloucester High School has already made improvements to protect the privacy of students who may feel uncomfortable. [138] While it is true that not all schools currently have these improvements, or have single-person stalls available, there is nothing to suggest that installing dividers between urinals or creating one or two single-person bathroom stalls is an overly burdensome requirement to protecting the constitutional rights of vulnerable transgender students. Therefore, taking anti-transgender measures, purportedly to further promote privacy, can hardly be said to be an "exceedingly persuasive justification."

There is, as of yet, no jurisprudence which explicitly states that the Equal Protection Clause of the Fourteenth Amendment protects the right of transgender students like G.G. with regards to public bathrooms. However, as Justice Harlan stated in his famous dissent to the Court's ruling in *Plessy v. Ferguson*, "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."[139] Just as the courts would eventually acknowledge the illegality of the "separate but equal" system of racial segregation in *Brown v. Board of Education*,[139] so too can they acknowledge the immorality of rules and laws that isolate, segregate, and stigmatize transgender students like G.G.—some of the most vulnerable members of our society.[140]

V. CONCLUSION AND CLOSING THOUGHT: *G.G.* MOVING FORWARD UNDER THE TRUMP ADMINISTRATION

For all the confusion it has created, the actions of the Trump administration send at least one clear message to members of the LGBTQ community: for the foreseeable future, they cannot rely on the assistance or understanding of their federal government. It is unlikely that the Trump administration will support challenges to potentially illegal bathroom bills. It is unlikely that the administration will attempt to rework the language of Title IX or its regulations to resolve this issue in the LGBTQ community's favor. Based on the administration's treatment of transgender military service members, it is even

138. G.G. *ex rel.* Grimm, 822 F.3d at 716.

139. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

140. *See generally* Brown v. Bd. of Ed., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

possible that the administration may soon begin rolling back any protections that Title IX does currently provide.[141]

In conclusion, while it seems unlikely that Title IX in its current form can grant G.G. the remedy he seeks, one benefit of our system of government is that the constitutional checks implemented to protect us remain in place despite the whims of the current administration. So long as the courts apply the principles of Equal Protection laid out above, there is still hope that G.G. and other transgender students may finally have the remedy they need and deserve. For now, however, this unfortunate debate regarding the rights of transgender students and their access to public facilities will continue.

141. *See* Jeremy Diamond, *Trump to Reinstate US Military Ban on Transgender People*, CNN (July 26, 2017, 9:23 PM), http://www.cnn.com/2017/07/26/politics/trump-military-transgender/index.html [https://perma.cc/DNG5-UUCJ].