

# The Fourth Circuit Court of Appeals Sets Precedent, Undermining Rationale For Anti-Transgender Legislation and Policies

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On Tuesday, the Court of Appeals for the Fourth Circuit issued a 2-1 ruling in *Grimm v. Gloucester County School Board*, No. 15-2056, finding that a transgender student has the right to sue his school board under Title IX for discrimination after they barred him from using the restroom matching his gender identity. Title IX forbids schools which receive federal funds from discriminating on the basis of sex. The Department of Education promulgated regulations to enforce Title IX, including a regulation which permits schools to create separate bathrooms on the basis of sex provided that they are comparable to each other. 34 C.F.R. 106.33. In an opinion letter, dated January 7, 2015, the Department's Office for Civil Rights interpreted how Section 106.33 should apply to transgender students: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." The Court of Appeals held that the Department's interpretation of how its regulations should apply to transgender students was entitled to deference under fairly well-settled law governing agency decision-making.

While the decision does not arise under Title VII or other typical civil rights statutes and does not directly apply to workplaces, the Court's analysis and discussion of the issue is nevertheless illuminating for employers who may be dealing with these issues in their workplaces. In fact, the Court noted that the Department of Education's policy was "in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities," citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management. [We have previously reported](#) on the EEOC's progressive stance and recent court actions on this issue. We've also covered the new New York City guidance which specifically addresses the issue of bathroom access for transgender employees.

Also of possible import for employers, the *Grimm* Court explicitly rejected the school board's (and the dissent's) concern that allowing transgender students to use the bathroom matching their gender identity would undermine privacy or safety of the other students: "We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the

existence of danger caused by ‘sexual responses prompted by students’ exposure to the private body parts of students of the other biological sex.’ The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent’s formulation, present a safety risk because of the ‘sexual responses prompted’ by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.”

This decision is also particularly timely given the recent spate of so-called “bathroom bills” being introduced around the country – including the one passed in North Carolina, which is governed by the Fourth Circuit. [We have covered these bills in this blog](#) as well. The *Grimm* ruling provides a powerful precedent which may undermine the already-shaky legal rationale for such bills and clearly calls out the anti-trans bias implicit in such legislation. The *Grimm* court noted, however, that the policy decision of the current administration to permit transgender students to use the bathrooms matching their gender identity may be changed by future administrations or by Congressional action amending Title IX. Thus, as with the EEOC’s recent action to protect the rights of transgender workers, it is important to stay up to date on these issues as more courts address them and as agency positions shift over time.