

## Publications

### Fourth Circuit Strikes Down School Bathroom Policies Segregating Transgender Students

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In line with the Supreme Court's recent holding in *Bostock* that Title VII prohibits discrimination on the basis of sexual orientation and transgendered status, the Fourth Circuit ruled Wednesday that policies segregating transgender students from their peers are unconstitutional and violate federal law prohibiting sex discrimination in education.

The case, *Grimm v. Gloucester County School Board*, involved a school policy requiring all students to use restrooms that corresponded with their "biological gender," while also providing a private single-stall restroom for any student with "gender identity issues."

Writing for the majority, U.S. Circuit Judge Henry Floyd stated that "[a]t the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender." The Court held that the answer is "resoundingly yes."

The Court began its analysis by determining that though the *Bostock* decision involved Title VII, it would guide the Court's analysis because Congress intended claims under Title VII and Title IX to be interpreted similarly.

In defending the policy, the Board insisted that its policy treated all students equally, regardless of sex. But the Court found, "that is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race. No one would suppose that also providing a "race neutral" bathroom option would have solved the deeply stigmatizing and discriminatory nature of racial segregation; so too here."

The Court continued that the Board's policy was based on hypothetical fears, misconceptions, and prejudices. Floyd wrote that the policy was embedded with the Board's bias that gender identity is a choice and its decision to privilege sex-assigned-at-birth over a student's persistent and consistent gender identity.

In his dissent, U.S. Circuit Judge Paul Niemeyer said the Board's bathroom policy was constitutional and consistent with Title IX. "At bottom, Gloucester High School reasonably provided separate restrooms for its male and female students and accommodated transgender students by also providing unisex restrooms that any student could use," Niemeyer opined. "The law requires no more of it."

The Fourth Circuit's ruling comes after another appeals court, the Eleventh Circuit, ruled earlier this month in favor of a transgender teen who sued to force his Florida high school to allow him to use the boy's restroom. A federal judge in Idaho last week also blocked a state law that barred transgender women from participating in women's sports.

While the Court's holding in this case pertains to educational institutions under Title IX, the law will continue to develop in this area in ways that will impact employers, covered by Title VII, as well. Contact your Vorys lawyer if you have questions about sexual orientation, gender identity, or gender expression discrimination.