Boys, Girls, or Unisex? An Analysis of the Title IX Arguments in G.G. v. Gloucester County School Board

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(A Work in Progress)

Introduction

For the first time in American history, a federal court of appeals was asked to decide whether or not the Equal Protection Clause of the United States Constitution or Title IX requires a public school district to allow a biologically female, but transgender male, to use the boys’ communal bathroom. For 7 weeks, G.G. used the boys’ restroom. In response to community disapproval of and complaints about G.G.’s access to the boys’ restroom, a discussion of restroom and locker room usage appeared on the school board’s agenda for the November 2014 meeting. At the end of that meeting, the board voted 4-3 to defer a decision on adopting a policy until its December meeting. At the December meeting, a policy was adopted by unanimous vote that limited restroom usage to biological sex. The policy was approved due to privacy and safety concerns.1 At the same time, physical improvements to student restrooms were made including partitions between urinals, higher doors and walls around stalls, and the addition of three unisex, single-stall restrooms were made to the school.2

G.G. believed using the girls’ restroom would isolate and stigmatize him,3 and the females reacted negatively to G.G.’s usage of the girls’ restrooms due to his more masculine appearance. When the district rescinded its permission for G.G. to use the boys’ restroom, G.G. filed suit in federal district court claiming the district’s restroom policy violated his rights under the Equal Protection Clause of the United States Constitution and Title IX. In September of 2015, the district court dismissed G.G.’s claims and denied his request for a preliminary injunction against enforcement of the district’s restroom and locker room usage policy. G.G. appealed the decision to the Fourth Circuit Court of Appeals.4

This dispute required the judges on the Fourth Circuit Court of Appeals to consider the seemingly basic question of how to define the terms sex and gender, deciding whether or not these terms are synonymous and, if not, how they are different. The court also had to decide how that information should inform an appropriate legal interpretation of the Equal Protection Clause and Title IX. A key area of disagreement between G.G. and the Gloucester County School Board is how to interpret section 106.33 of Chapter 34 of the Code of Federal Regulations (C. F. R.) which provides that, “A recipient [of federal funds] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”5 Does the provision of single-sex, single-stall restrooms for students satisfy the school’s burden of providing G.G. equal access to educational opportunity? In the absence of existing federal case law concerning the rights of transgender students, should the court rely on existing Title VII transgender case law, which addressed employment discrimination, to decide the merits of G.G.’s case?

3 Id. at 740
4 Id. at 741
5 34 C.F.R. § 106.33
Transgender rights are an emerging area of concern for every constituency of public schools, including attorneys who represent the interests of each. This paper will explore the decision of the Fourth Circuit Court of Appeals in *G.G. v. Gloucester County School Board*, focusing on a careful analysis of interpretation of Title IX, the Equal Protection Clause, and Department of Education regulations which seek to interpret compliance with those laws which have revealed ambiguity yet unsettled by courts. As the first federal court of appeal to address the issue of transgender student rights, it remains to be seen if success of transgender persons seen in Title VII litigation over the past 15 years translates to similar results in Title IX and Equal Protect student cases. In addition to analysis, this presentation will include suggested practices for school officials and guidance for attorneys who represent them.

**Factual Background of G.G. v. Gloucester County Board of Education**

The dispute at the heart of *G.G. v. Gloucester County* began in the fall of 2013 with G.G.’s anxiety over keeping his gender identity secret. Although born female, G.G. began to experience discomfort as a female at an early age and, before the age of six refused to wear girls’ clothes. At age 12, G.G. admitted to himself his male gender identity. After a stress-filled freshman fall semester, G.G. began to take classes during the spring of 2014 via homebound instruction. In April 2014, G.G. first informed his parents that he is transgender and, at G.G.’s request, he began seeing a psychologist who diagnosed G.G. with sexual dysphoria. The psychologist provided G.G. a letter describing his prescribed treatment and stating that he should be treated as being male, including usage of the boys’ restroom. In August, 2014, school officials were notified of G.G.’s transition to being male.

After meeting with school officials, G.G. initially agreed to use the restroom in the nurse’s office. However, after classes began, G.G. believed using the nurse’s restroom was “stigmatizing” and was given permission by the principal to use the boys’ restroom beginning in late October. Due to unfavorable reactions by community members, the Gloucester County Board of Education added a discussion of restroom and locker room usage to its November agenda. Twenty-seven persons addressed the board, including G.G. who urged that a proposed resolution requiring restroom usage be limited to biological gender be rejected. At the December 2014 board meeting, the board voted 6-1 to pass the proposed resolution. In addition, the board announced modification to school restroom facilities that included raised walls and doors on existing restroom stalls, partitions between urinals in the boys’ restrooms, and the addition of three unisex, single-user, student restrooms.

G.G. alleged that he could not use the girls’ restroom because those students who he would encounter in the restroom reacted negatively to his presence there. Further, G.G. claimed using the single user, unisex, student bathrooms would “stigmatize and isolate him; that the use of these restrooms would serve as a reminder that the school views him as ‘different’ and that the school community knows that the restrooms were installed for him.” On June 11, 2015, G.G. began legal action against the Gloucester County Board of Education.

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6 822 F.3d 709 (4th Cir. 2016).
7 132 F.Supp.3d at 739
8 Id at 740-741
9 Id at 741
Procedural Background of G.G. v. Gloucester County Board of Education

On June 11, 2015, G.G. filed suit against the Gloucester County Board of Education, claiming a violation of his rights under the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972. Further, G.G. filed a Motion for Preliminary Injunction and, on July 7, the Board filed a Motion to Dismiss. After a hearing conducted on July 27, 2015, the court granted the Board’s Motion to Dismiss G.G.’s Title IX claim and, in an order dated September 4, the court denied G.G.’s Motion for a Preliminary Injunction.10

The federal district court, citing both Title IX language as well as regulatory language from the U.S. Department of Education, found no basis for G.G.’s Title IX claim. Specifically, the court pointed to section 1686 which states, “nothing contained herein shall be construed to prohibit and educational institution from maintaining separate living facilities for the different sexes.”11 Further, the court cited Department of Education regulation: “A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex.”12 The district court held that Section 106.33 causes G.G.’s claim to fail, concluding that finding support for G.G.’s claim in light of Section 106.33 would limit its meaning to only sexual identity, to the exclusion of any other interpretation. In dismissing G.G.’s claim, the court reasoned that the only way to square G.G.’s allegations with Section 106.33 is to interpret the use of the term “sex” in Section 106.33 to mean only “gender identity.” Under this interpretation, Section 106.33 would permit the use of separate bathrooms on the basis of gender identity and not on the basis of birth or biological sex. Because the school board’s policy of providing separate bathrooms on the basis of biological sex is permissible under the regulation, the Court need not decide whether “sex” in the Section 106.33 also includes “gender identity.”13

Court then opined that, as long as the restroom facilities provided by the Gloucester County Board of Education were comparable between the sexes, there could be no violation of Title IX. Since nothing in G.G.’s argument even addressed the issue of comparability, the court concluded there was no violation of Title IX and thus, G.G.’s claim must fail. Further, the court dismissed recent documents disseminated by the Department of Education and the Office of Civil Rights urging educational institutions to interpret Title IX and Section 106.33 as allowing restroom usage based on sexual identity.

In his Motion for a Preliminary Injunction, G.G. reported not being allowed to use the boys’ restroom presented him with ongoing hardships relating to his diagnosis of sexual dysphoria. Specifically, G.G. reported his “depression and anxiety were so severe that [he] did not attend school during the spring semester which began in January 2014.”14 The court found G.G.’s argument not persuasive: “G.G. has not submitted enough evidence to establish that the balance of hardships weigh in his favor.”15

10 132 F. Supp.3d at 738
11 20 U.S.C. §1686,
12 34 C.F.R. §106.33
13 132 F.Supp.3d at 745
14 Id at 749
15 Id at 747
In response to G.G.’s arguments for allowing his use of the boys’ restroom, the Board argued its policy was designed to protect students’ right to bodily privacy protected by the Fourth Amendment. The court agreed, citing precedent that found a constitutional right to bodily privacy for prisoners\textsuperscript{16} and that it would be “perverse to suppose that prisoners, who forfeit so many privacy rights, nevertheless gained a constitutional right to bodily privacy.”\textsuperscript{12} The court then provided a detailed discussion of case law it believed supported the court’s conclusion that students in public schools also have bodily privacy rights protected by the Fourth Amendment, including decisions rendered by the Second, Third, Sixth, and Ninth Circuit Courts of Appeal.\textsuperscript{18} Following this discussion, the court specifically addressed the issue of bodily privacy in schools:

> Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public education is a protective environment. Furthermore, the School Board is tasked with providing safe and appropriate facilities for these students.”\textsuperscript{19}

G.G. next argued that improvements to the school’s restroom facilities minimized any privacy concerns by other students or the School Board. The court was unpersuaded by this argument:

> G.G. does not introduce any evidence that would help the Court understand the extent of the improvements. He fails to recognize that no amount of improvements to the urinals can make them completely private… He does not submit any evidence that would show that other students would be comfortable with his presence in the male restroom because of the improvements.”\textsuperscript{20}

Finally, G.G argued other students could use the unisex restrooms if they felt uncomfortable with his usage of the boys’ restrooms. The court believed G.G.’s argument sought to place on other students the same burden he claimed he should not have to bear: “It does not occur to G.G. that other students may experience feelings of exclusion when they can no longer use the restrooms they were accustom to using because they feel G.G.’s presence in the male restroom violates their privacy.”\textsuperscript{21} Further, the court opined that G.G. “would have any number of students use the unisex restrooms rather than use them himself while this Court resolves his novel constitutional challenge.”\textsuperscript{22} The district court granted the Board’s Motion to Dismiss the Title IX claim and denied G.G’s Motion for a Preliminary Injunction.

On September 10, 2015, G.G. joined by the American Civil Liberties Union of Virginia, filed an appeal in the Fourth Circuit Court of Appeals.\textsuperscript{23} Argument was heard on January 27, 2016, and on April 19, 2016, the court published its opinion.\textsuperscript{24} To begin its analysis of G.G.’s Title IX claim, the court established the required elements of a successful Title IX claim, namely that G.G. must show “(1) that he was excluded from participation in an education program because of his sex; (2) that the educational

\textsuperscript{16} Id at 750. See Lee v. Downs, 641 F.2d 1117 (4\textsuperscript{th} Cir. 1981).

\textsuperscript{17} Id at 750-751

\textsuperscript{18} 132 F.Supp.3d 751. See also Poe v. Leonard, 282 F.3d 123 (2\textsuperscript{nd} Cir. 2002) holding there is a right to privacy in a person’s unclothed body; Doe v. Luzerne County, 660 F.3d 169 (3\textsuperscript{rd} Cir. 2011) concluding that bodily exposure may can violated a person’s right to privacy; Brannum v. Overton County School Bd. 516 F.3d 489 (6\textsuperscript{th} Cir. 2008) holding a student is protected from being videotaped while changing clothes in a school locker room; York v. Story, 324 F.2d 450 (9\textsuperscript{th} Cir. 1963) holding the right of privacy in one’s naked body to be a basic privacy right.

\textsuperscript{19} Id

\textsuperscript{20} Id

\textsuperscript{21} Id at 752

\textsuperscript{22} Id

\textsuperscript{23} Petitioner’s Brief, p. 2

\textsuperscript{24} G.G. v. Gloucester Cnty. Sch. Bd., No. 15-2056 (4\textsuperscript{th} Cir. 2016).
institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm." The court then recited a list of “distinctions on the basis of sex” that are “permissible under Title IX.” These distinctions included the provision of separate living facilities, toilet, locker room, and shower facilities.

Although the court agreed that 34 C.F.R. § 106.33 (which gives schools the authority to provide separate restrooms for boys and girls) was subject to more than one interpretation, it then concluded, based on the contents of a letter authored by the Office of Civil Rights (OCR) on January 7, 2015, that any ambiguity of the meaning of § 106.33, had been settled. Further, the court held the OCR’s interpretation was entitled to deference in the case since the Board could not show that interpretation to be plainly erroneous. Since the U.S. Department of Education has consistently enforced Title IX to provide transgender students with access to restroom facilities consistent with their gender identity since 2014, the court held the Board’s policy to violate G.G.’s rights under Title IX.

Next, the Fourth Circuit Court of Appeals turned its attention to G.G.’s Motion for Preliminary Injunction. The Fourth Circuit concluded the district court “misstated the evidentiary standard governing preliminary injunction hearings.” Specifically, the appellate court held the district court erred by refusing to consider some evidence offered by G.G. due to its inadmissibility at a potential trial and by refusing to consider other evidence offered as hearsay. The Fourth Circuit agreed with the majority of the other Federal Circuit Courts of Appeal (“seven of our sister circuits ... have decided that the nature of evidence as hearsay goes to ‘weight, not preclusion.’”) that hearsay evidence should have been considered for the purposes of deciding whether or not to grant G.G.’s Motion for Preliminary Injunction. Based on this error, the district court’s order denying G.G. motion was vacated and remanded for further consideration by the district court consistent with the appellate court’s opinion.

Finally, G.G. requested the appellate court assign the rehearing to another district judge on remand. Finding no evidence that would impeach the judge’s ability to impartially hear the case on remand, G.G.’s request was denied. On August 3, 2016, the United States Supreme Court issued an order granting a stay of the opinion of the Fourth Circuit Court of Appeals pending the Board’s ability to file a timely application for a writ of certiorari.

**History of Title IX**

The parties contest whether discrimination based on gender identity is barred under Title IX. To support their respective contentions, both parties cite to cases interpreting Title VII, upon which courts have routinely relied in determining the breadth of Title IX. See Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir.2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”). Some background on Title IX is in order.

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25 Id p. 13
26 Id pp. 14-15
27 Id
28 Id at 21. See also Auer v. Robbins, 519 U.S. 452.
29 Id at 25
30 Id at 31
31 Id at 32
33 132 F.Supp.3d at 742
Congress enacted Title IX as a part of its 1972 reissue of the Elementary and Secondary Education Act. Its purpose was to protect the rights of women in educational settings. Title IX’s protections were expanded in the 1976 Civil Rights Attorney’s Fees Award Act (CRAFAA) by increasing remedies available to those with successful Title IX claims. In 1986, Congress enacted Section 1003 of the Rehabilitation Act Amendments, providing for the first time the ability for Title IX plaintiffs to recover damages against individual states in federal court. The 1988 Civil Rights Restoration Act (CRCA) was enacted by Congress to broaden Title IX’s scope by allowing claimants to receive damages from institutions receiving any federal funding, whether or not the claimant was the direct beneficiary of that funding. In another words, if program A of an institution was the sole recipient, a claimant with a Title IX judgment against that institution was entitled remedy whether or not claimant was a participant in program A.

**Title VII as a Guidepost for Title IX: Current Transgender Case Law**

Case law concerning the rights of transgender students under Title IX is very limited. A search of authorities cited in briefs supporting G.G. contention that Title IX provides protection for transsexuals revealed the following:

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<td>United States</td>
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<td>Nat’l Women’s Law Center</td>
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As reflected in the chart above, the case law concerning Title IX and transgender rights is almost non-existent. Across these three briefs, only one Title IX case concerning transgender rights was found: *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*. In *Johnston*, the court was asked to decide if refusing to allow Seamus Johnston, a female to male transsexual, to use men’s locker room and restroom facilities violated Title IX. The court’s reply: “The simple answer is no.”34 Because of the lack of case law addressing Title IX and transgender rights, the courts are beginning to look to Title VII case law for guidance. A brief synopsis of that body of case law follows.

**Pre-Price Waterhouse Case Law**

Case law prior to Price Waterhouse generally accepted a narrow interpretation of the phrase “because of . . . sex” when analyzing Title VII sex discrimination cases. In *Voyles v. Ralph Davies Medical Center*, Charles Franklin Voyles, a hemodialysis technician for the Ralph Davies Medical Center, informed the Center’s director of personnel his intention to undergo sexual reassignment surgery and become Carol Lynn Voyles. Shortly thereafter, Voyles was terminated. Voyles admitted the possibility of adverse reactions by his patients to his new gender and the Center admitted the reason for Voyles’s termination was Voyles’s intended sexual reassignment surgery. The court opined that in Title VII “No mention is made of change of sex or of sexual preference”35 and that neither legislative history nor case law

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35 403 F. Supp at 457
“nowhere indicate that ‘sex’ discrimination was meant to embrace ‘transsexual’ discrimination.” The court went further in its description of the legislative history of Title VII. The court wrote, that “Situations involving transsexuals, homosexuals, or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions.”

Michael D. Powell, legally and biologically a male, was living as a female in anticipation of undergoing sexual reassignment surgery. While presenting as a female and using the name Sharon, Powell applied for a job as a waitress at the Read’s in Baltimore, Maryland. Powell was terminated on the first day of employment allegedly because the woman Powell had replaced had returned. However, Powell claimed the termination occurred because information that Powell was still legally and biologically a male was given to the manager by persons who knew Powell prior to his presentation as a female. Powell filed suit, claiming discrimination on the basis of sex under Title VII. The court opined that a “reading of the statute [Title VII] to cover plaintiff’s grievance would be impermissibly contrived and inconsistent with the plain meaning of the words.”

Later that same year, Ramona Holloway, a male-to-female transgendered person, appealed her termination by Arthur Andersen and Company because of her transgendered status. Despite being given a pay raise and a promotion, Holloway was terminated from her job when she informed her employer of her intent to have sexual reassignment surgery. An official with Arthur Andersen suggested Holloway “would be happier at a new job where her transsexualism would be unknown.” Holloway argued that for Congress to exclude transsexuals from Title VII protection would be tantamount to a violation of the equal protection clause and her case should be decided based on the “cardinal principle” espoused by Justice Louis Brandeis that requires statutes to be construed “so that constitutional questions may be avoided if at all possible.”

A three-judge panel of the Ninth Circuit rendered a split decision that refused to recognize Title VII protection for transsexual persons. The court held that transsexuals are not a “suspect class” (i.e., historically discriminated against, possessing an immutable trait, or powerless to protect themselves through the political process); therefore, Title VII protection did not extend to transsexuals.

Audra Sommers, formerly known as Timothy Cornish, applied for and was hired in a clerical position with Budget Marketing, Incorporated, in April of 1980. Two days later, Sommers’ employment was terminated because Budget believed she misrepresented her gender (claiming to be anatomically female) during the interview process. The company claimed this created a significant disruption in the operation of their business because many of their female employees threatened to quit if Sommers was allowed to use the women’s restroom. To clarify Sommers’s claim, the district court requested her to amend her original complaint to clarify whether she was claiming discrimination because “she was male, female, or transsexual, and whether she had . . . undergone sexual conversion surgery.” The court

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36 Id. at 457
37 Id. at 457
38 Powell v. Read’s, Inc. (D. Maryland, 1977) 436 F. Supp. 369
39 Id. at 371
40 Holloway v. Arthur Andersen & Co (9th Cir.) 566 F.2d 659
41 Id. at 661
42 Id. at 663
44 667 F. 2d at 749
reasoned, “because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one’s transsexualism does not fall within the protective purview of the [Civil Rights] Act.”

The narrow interpretation of Title VII protection against discrimination on the basis of sex was further reinforced by the 7th Circuit Court of Appeals in Ulane v. Eastern Airlines. Kenneth Ulane, a decorated army pilot and veteran of Vietnam, was hired as a pilot by Eastern Airlines in 1968. In 1979, Ulane was diagnosed as a transsexual and sought psychiatric treatment. By 1980, Ulane had completed her transition and had become Karen Frances Ulane, where upon the State of Illinois issued her a revised birth certificate. Upon returning to work following surgery, Ulane was terminated.

In Ulane, the trial court judge held that sex was not merely a matter of chromosomes; sex was both a physical matter and a psychological one, and ordered the reinstatement of Ulane with back pay and seniority. In reversing the finding of the trial court, the appellate panel held that Congressional intent, and not biology or psychology prevails; therefore, Title VII offers no protection to transsexual persons. By the mid 1980s, three United States Circuit Courts of Appeals (Seventh, Eighth, and Ninth) agreed that a new or broader legal definition of sex should come from Congress and not the courts.

**Price Waterhouse v. Hopkins**

A shift in the judicial interpretation of “discrimination on the basis of sex” began to surface with the Supreme Court’s holding in Price Waterhouse v. Hopkins. Ann Hopkins, a senior manager in an office of the accounting firm of Price Waterhouse, had worked in the firm’s Washington, D.C., office for five years when the partners in that office proposed her for partnership in the firm. At this time, only 1% of the Price Waterhouse partners were women (7 out of 662). Hopkins was the only woman (out of 88 candidates) proposed for partnership that year (1982). Hopkins was one of 20 candidates whose applications for partnership were “held” for subsequent consideration the following year.

In the record before the trial court, Hopkins was described as “an outstanding professional,” a person of “strong character, independence and integrity,” and “strong and forthright, very productive, energetic and creative.” Hopkins’s work in securing a $25 million dollar contract from the U.S. Department of State was described as “an outstanding performance” that was “virtually at the partner level.” However, the record before the trial court also included troubling comments such as Hopkins “overcompensated for being a woman.” One partner had advised Hopkins take “a course at charm school” while another advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

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45 667 F. 2d at 750  
46 712 F. 2d 1081 (7th Cir.) 1984  
47 Id. at 1082-1083  
48 Id. at 1084  
49 Id. at 1086  
50 490 U.S. 228  
51 Id. at 233  
52 Id. at 234  
53 Id. at 233  
54 Id. at 235  
55 Id. at 235
The trial court held that Hopkins had been discriminated against based on her gender and found for Hopkins on the question of liability. The United States Court of Appeals for the District of Columbia affirmed. Both courts’ holdings required Price Waterhouse to prove by clear and convincing evidence that the firm would have made the same decision in the absence of the consideration of forbidden criteria of Hopkins’s gender, and that Price Waterhouse had not met this burden.\(^56\) The U.S. Supreme Court granted certiorari.

The Supreme Court focused attention on the liability phase of the litigation and what standard of proof should be required of Price Waterhouse in order to escape liability. The lower courts held that Price Waterhouse had to prove “by clear and convincing evidence” that absent the influence of Hopkins’s gender, partners at Price Waterhouse would have reached the same decision in regard to her application for partnership.\(^57\) A plurality of the U.S. Supreme Court reversed the lower courts’ decision and remanded the case to the district court. The Supreme Court held that the appropriate standard for liability required Price Waterhouse to prove “by a preponderance of the evidence that it would have made the same decision in the absence of the discrimination.”\(^58\)

Perhaps as important as the Supreme Court’s announcement of the appropriate burden of proof was the Court’s discussion of sexual stereotype. In its brief submitted to the Court, Price Waterhouse seemed to be aware of the possible issues surrounding the use of sexual stereotypes by some of its partners. According to the Court, “. . . the placement by Price Waterhouse of “sex stereotyping” in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in the case or that it lacks legal relevance. We reject both possibilities.”\(^59\) The court went further: “. . . we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.”\(^60\) Finally, the Court seemed to open the door to a broader interpretation of Title VII protection when it stated, “Congress intended to strike at the entire spectrum at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”\(^61\) Much of the post-Price Waterhouse case law seems to support this notion.

**Post-Price Waterhouse Case Law**

The Supreme Court’s expanded view of Title VII protection based on sex stereotypes was not immediately embraced by federal courts. In Etsitty v. Utah Transit Authority\(^62\) the Court of Appeals for the 10th Circuit held that Title VII discrimination did not extend to the transgendered.\(^63\) Krystal Etsitty, a transgendered individual who was diagnosed with gender identity disordered, believed herself to be female despite being born with a male body. In October 2001, Etsitty was hired by the Utah Transit Authority as a bus driver, assigned to relieve regular drivers who are sick or on vacation. During this time Etsitty described herself as a “pre-operative transsexual.” She was taking female hormones despite her presenting in her clothing and restroom usage as a male. Shortly after being hired, Etsitty informed her supervisor of her transsexual status. Another supervisor, Betty Shirley, confronted Etsitty’s supervisor

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\(^57\) 490 U.S. at 230

\(^58\) 490 U.S. at 228

\(^59\) Id. at 250

\(^60\) Id. at 251

\(^61\) Id. at 250

\(^62\) 502 F.3d 1215

\(^63\) Id
about a rumor about an employee who going through a sex change. Shirley expressed concern about which restroom Etsitty would use, either in the transit authority’s facility or along a bus route. Shirley contacted the Human Resources department and a meeting with Etsitty was scheduled.  

During the meeting with Human Resources, Etsitty confirmed she was taking female hormones, but still had male genitalia. Shirley repeated her concern about Etsitty’s restroom usage, particularly away from the transit authority’s building. As a fill-in driver, Etsitty would drive a variety of routes requiring her to use restrooms along the way, many in local businesses. Based on this concern, Etsitty was terminated. Shirley indicated that Etsitty would be eligible for re-employment with the transit authority following her sex reassignment surgery.

The Etsitty court began its analysis stating that to that point (2005) no federal court had found that Title VII discrimination protection extended to transsexuals and that Etsitty claimed she was discriminated against based on sex stereotyping, not her transsexual status, meaning the Supreme Court’s holding in Price Waterhouse controlled. The Etsitty court disagreed, holding Congress never intended to identify transsexuals as a protected class; therefore they were not entitled to Title VII protection. The court reasoned that the transit authority did not discriminate against Etsitty based on sex stereotypes (making Price Waterhouse not applicable), but only required her to “conform to the accepted principles established for gender-distinct public restrooms.” Summary judgment was granted to the transit authority. Etsitty stands in stark contrast to more current post-Price Waterhouse Title VII case law.

Jimmie Smith was a veteran member of the Salem, Ohio Fire Department, in which he held the rank of lieutenant. Seven years into his service with the department, Smith was diagnosed with Gender Identity Disorder (GID) and began treatment. As a result of his treatment, Smith began “expressing a more feminine appearance on a fulltime basis—including at work.” After Smith’s coworkers began questioning him about the changes, he spoke with his immediate supervisor, Thomas Eastek. Smith discussed his GID diagnosis and that treatment most likely would culminate in surgical transformation from male to female. Smith stated the purpose of this meeting was to “clear up” any questions Eastek might have and to ask Eastek to address Smith’s coworkers to alleviate the tension in the workplace. Smith also extracted a promise from Eastek that he would divulge the contents of the conversation to his superiors. Eastek immediately informed Walter Greenamyer, chief of the department, about Smith’s condition.

Chief Greenamyer met with the city of Salem’s legal counsel “with the intension of using Smith’s transsexualism and its manifestations as a basis for terminating his employment.” In a meeting with the city’s executive body, a plan was devised under which Smith would be required by the Salem Civil Service Commission to submit to a batter of psychological tests. The hope was that either Smith would resign or refuse to undergo the tests, in which case he could be terminated for insubordination. The meeting in which the plan was hatched also violated Ohio’s Open Meeting Act.

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64 Id. at 1215-1217
65 Id. at 1217
66 Id. at 1224
67 Smith v. City of Salem, 378 F.3d 566 (6th Cir.) 2004
68 Id. at 568
69 Id. at 568
70 Id. at 568-569
Smith filed suit against the City of Salem, claiming a violation of his rights under Title VII and a violation of his privacy rights under state law. The district court dismissed Smith’s claims and he filed an appealed. The Court of Appeals held the district court erred because it relied “on a series of pre-Price Waterhouse cases from other federal appellate courts holding that transsexuals are not entitled to Title VII protection because Congress . . . never considered nor intended that [Title VII] applied to anything other than the traditional concept of sex.”

Furthering a broader interpretation of Title VII’s protection, the Federal District Court for the District of Columbia decided Schroer v. James H. Billington, Librarian of Congress. Schroer, a male-to-female transsexual, sued the Library of Congress claiming discrimination based on sex. Schroer applied for a job analyzing documents pertaining to terrorism, an area in which he served with distinction in the armed forces. Genetically male and named David John Schroer at birth, Schroer was diagnosed with gender dysphoria, a disjunction between one’s gender identity and anatomical sex. As David J. Schroer, and attired as a male, the plaintiff attended the job interview but at the time, did not disclosed her transsexualism. Several days later, Charlotte Preece, an employee of the Library of Congress who was serving on the hiring committee, called Schroer to inform her she was on the “short list” and requested supplementary materials to complete Schroer’s application, including writing samples. Later, Preece called Schroer to offer her the job and asked if she would be willing to accept the job. After gaining assurance that she would receive pay comparable to her current job in the private sector, Schroer accepted the position. A few days later, Schroer contacted Preece to request a lunch meeting.

At the lunch meeting, Schroer disclosed her transsexualism and that she would begin work as Diane (presenting completely as a female), and not David. Preece’s initial reaction was to ask Schroer why she would do such a thing. Schroer responded that it was not a choice, and that her treatment would not require her to miss time at work. Necessary treatment could be done during vacation time. Preece asked several questions about whether or not Schroer’s name should be changed on her application materials and also raised concerns about Schroer’s ability to obtain security clearances necessary for the job. Schroer responded that several of her transgendered friends had obtained security clearances, so this issue should present no problem for her. Schroer then showed Preece pictures of herself, dressed as a woman. Later, Preece would describe these photos as “a man in women’s clothing.” Preece concluded the meeting by stating, “Well, you’ve given me a lot to think about. I’ll be in touch.”

After a series of meetings with various officials within the Library of Congress, the decision was made to rescind the offer to Schroer and Preece circulated a draft email to Schroer that related 5 specific reasons for rescinding the offer, most of which centered on the question of whether “David Schroer’s” clearance would be applicable to “Diane Schroer.” Later, a different email, asserting Schroer was “not a good fit” for the position was sent to Schroer. Schroer filed suit in federal district court,
claiming discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. At trial, Preece testified that hiring Schroer raised five concerns for her:

1. Would Schroer, as a woman, be able to maintain her contacts in the military?
2. Would Schroer be credible as a witness before Congress?
3. Since Schroer had not been forthcoming at the beginning of the interview process about her transsexual status, would she be a trustworthy employee?
4. Schroer’s transition to being a woman would distract her from her job.
5. Would Schroer, as a woman, be able to maintain the security clearances she held as a man?

Preece’s reasoning was based on her research into the Adjudication Guidelines and the Adjudication Desk Reference. These sources stated that sexual disorders could potentially be viewed as avenues for blackmailing or coercing an individual, thereby creating a security risk. Since Schroer had been open about her transsexuality, the court held this claim to be without merit. The Library’s professed concern about Schroer’s ability to maintain the necessary security clearance for the job were undermined by the Library’s own lack of effort in determining whether Schroer’s previously held clearance would be reciprocal, thereby applicable to her new job at the Library.

In finding that transsexual individuals were entitled to the protection of the Civil Rights Act of 1964, the court asserted: Discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.

The court held that Schroer’s claim against the Library of Congress should succeed on two different legal theories. First, the Library’s adverse employment decision discriminated against Schroer because she did not fit Library officials’ stereotypical conception of a woman triggered legal protection for Schroer under the Supreme Court’s decision in *Price Waterhouse*. Secondly, Schroer was discriminated against “literally because . . . of sex.”

Three years later, a judge for the Northern District of Georgia held that not only are transsexual individuals entitled to Title VII protection, but to discriminate against these individuals also violates the Equal Protection Clause of the United States Constitution. In 2005, Elizabeth Glenn, then known as Glenn Morrison, was hired as an editor for the Georgia General Assembly’s Office of Legislative Counsel where he would help draft bills for legislators, prepare revisions to the state code, and assist with the publication of the Georgia session laws. Prior to being hired, Glenn had to pass tests on grammar, spelling, proofreading, and vocabulary. On Halloween (October 31, 2006), Glenn came to work dressed as a woman. Her supervisor, Brumby, asked her to leave because, in Brumby’s opinion, Glenn’s

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79 2 U.S.C. § 140
80 577 F. Supp 2d. at 297-298
81 Id. at 301
82 Id. at 304
83 Id. at 300
appearance was in appropriate and, according to Brumby, “it’s unsettling to think of someone dressed in women’s clothing with male sexual organs inside that clothing.”

Following the Halloween Day incident, Glenn returned to work, presenting as a man. A year later, Glenn informed her immediate supervisor, Beth Yinger, of his intention to undergo the transition to become physically female, to begin coming to work presenting as female, and to legally change her name. At this time, Glenn provided Yinger with a photograph of herself presenting as a woman. Brumby and another staff attorney at the Office of Legislative Council researched the legal issue involved with terminating an employee based on gender transition. Both discovered legal authority supporting both the illegality and legality of such termination. Despite adequate job performance, Brumby terminated Glenn solely based on her transition from being a man to being a woman. Later, Brumby attempted to defend his termination of Glenn by claiming a fear of litigation by other employees over Glenn’s restroom usage.

Relying on the Supreme Court’s holding in *Price Waterhouse* and the Sixth Circuit Court of Appeals’ holding in *Smith*, the *Glenn* court concluded that although transgendered persons are not yet under the law considered a protected class, those transgendered persons who do not conform to standard sexual stereotypes are a protected class. The court asserted, “Transsexuality is not a bar to a sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.”

Brumby’s case was further weakened by evidence suggesting Brumby’s concerns about Glenn’s restroom usage did not arise until after she had been terminated.

**Analysis of Title IX Arguments in *G.G. v. Gloucester County School Board***

At the very heart of *G.G. v. Gloucester County Board of Education* is the definition of sex and what limitations that definition imposes on school officials. In his argument, G.G. views the definition of sex to encompass sexual identity: “By treating G.[G.] differently than every other boy because of the sex assigned to him at birth, the Board is treating him differently based on “sex” under Title IX. Therefore, G.[G.] argues the Board’s restroom policy violates Title IX:

The purpose, design, and effect of the policy—which states that students with “gender identity issues” will go to “an alternative appropriate private facility,”—is to single out transgender students and exclude them from the restrooms used by all the other students. The policy isolates G.[G.] from the rest of his peers, both literally and figuratively, and brands students with “gender identity issues” as unfit to share restrooms with other students. By singling out G.[G.] for different and unequal treatment because he is transgender, the Board has discriminated against him based on sex, in violation of Title IX.

The Board, in its brief, took an opposing view: “G.G. contends that ‘based on sex’ encompasses gender identity, so that schools are required to permit transgender students to use the restroom of their choice. The United States Supreme Court and this Court, however, have never held that 34 C.F.R. § 85 724 F. Supp 2d at 1291
86 724 F. Supp 2d at 1292-1293
87 724 F. Supp 2d at 1300
88 Pl. Br. 25
89 Id 20-21
106.33 does not apply to transgender students." This position was reinforced in the amicus brief filed by the Family Foundation of Virginia:

G.G.’s and the United States’ arguments hinge on the meaning of the word “sex.” To them, sex does not mean biological male and female; rather, it also includes the concepts of “gender identity and expression.” But the plain language of Title IX rejects this view. As the federal courts have consistently held in both Title IX and Title VII context, the term “sex” “means nothing more than male and female, under the traditional binary conception of sex consistent with one’s birth or biological sex.”

The Family Foundation of Virginia’s brief goes further, citing definitions of “sex” in dictionaries in use when Title IX was enacted in 1972: “These judicial definitions of the word “sex” reflect the common definition found in leading dictionaries before and after Title IX’s passage.” This statement is followed with the definition of sex from the 1961 edition of the Oxford English Dictionary: “the sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.” On page 18, the legislative history of Title IX is invoked to support the traditional view concerning restroom usage:

“Indeed, as the legislative history of Title IX illustrates, the bill’s sponsors were keenly aware of the privacy and safety implications of the law and specifically stated that is was not designed to deprive schools of the ability to have sex-specific facilities students where privacy and safety are paramount.”

The Board argued Title IX’s language itself confirms Congress’s intent toward a narrow definition of sex: “Title IX’s language further confirms a binary view, specifically using the phrase “both sexes”—referring to male and female—twice.”

In support of G.G., the National Women’s Law Center (NWLC) asserted the “modern line of cases supersedes older cases in which some courts reject sex discrimination claims brought by transgender plaintiffs on the ground that sex discrimination laws must be construed narrowly to prohibit discrimination only because a person is male or female.” NWLC states this logic would “fly directly in the face of the U.S. Supreme Court’s holding in Price Waterhouse v. Hopkins.” The United States amicus curiae brief provided further support for the inclusion of transgender rights under Title IX, based on the Supreme Court’s holding in Price Waterhouse: Since the Supreme Court’s decision in Price Waterhouse v. Hopkins, it is well-established that discrimination on the basis of “sex” is not limited to preferring males over females (or vice versa) but includes differential treatment based on any “sex-based consideration.” In strong language, the government concluded, “the Supreme Court “eviscerated” that approach in Price Waterhouse.

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90 Def. Br. 31
91 Family Foundation of Va Br. 15-16; internal citations omitted. See also Johnston v. Univ. of Pittsburgh of Com. Sys. Of Higher Educ., 97 F.supp.3d 657; Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), Sommers v. Budget Mktg., Inc., 667 F.2d 648 (8th Cir. 1982).
92 Id. 16
93 Id. 18
94 Def. Br. at 17
95 Nat’l Women’s Law Cen. Br. 10
96 Id. 11, internal citation omitted.
97 United States Br. 8
98 Id at 10
The Power to Interpret Title IX and Restroom Use

There is substantial disagreement concerning who has the legal authority to define sex in terms of the implementation of Title IX and restroom usage. In his own brief, G.G.’s attorney admits that 34 C.F.R. § 106.33 provides no definitive answer to the definition of the phrase “based on sex” particularly in terms of restroom usage:

The plain text of 34 C.F.R. § 106.33 allows schools to assign restrooms based on “sex” but does not resolve—or even address—whether schools may exclude transgender students from restrooms consistent with their gender identity. The regulation is silent “with respect to the crucial interpretive question” of how to assign restrooms based on “sex” for transgender students whose gender identity are not congruent with the sex assigned to them at birth.99

In the absence of specific, supporting language clearly defining sex, G.G. argues regulations clearly demonstrates the Board’s policy to violate Title IX: “The implementing regulations further prohibit recipients from using a student’s sex as a basis for providing different aid, benefits, or services ... By expelling G.[G.] from the restrooms used by other students, the Board has deprived him and other transgender students of equal educational opportunities protected by Title IX.”100

In support of the Board’s position, the Family Foundation of Virginia asserts that Title IX’s silence about restroom usage is conclusory of intent: “sex discrimination laws have never granted members of the opposite sex regular access to single-sex facilities where privacy rights are at their strongest and bodily exposure is commonplace.”101 Further, the Foundation argued, “The regulations [34 C.F.R. 106.32, 106.33] likewise require that facilities “of one sex” shall be comparable to those provided for “the other sex.”102

So, who decides how to define sex in terms of restroom usage and enforcement of Title IX? According to G.G., the Office of Civil Rights (OCR) has that power: “…the court misconstrued the plain text of the regulation [34 C.F.R. § 106.33] and failed to give proper deference to OCR’s interpretation ... OCR’s interpretation ... harmonizes the regulation with the statutory goal of providing equal access to educational opportunities.”103 In response, the Board argues the OCR’s interpretation is not owed deference: Here, 34 C.F.R. § 106.33 is not ambiguous, and deference should not be given to OCR’s attempt to create a completely new regulation concerning the rights of transgender students under Title IX.”104 The Board also argued the courts lack the authority to interpret the language of Title IX as well: “the exclusion of gender identity from the language of Title IX is not an issue for the court to remedy, but one within the province of Congress to identity the classifications which are statutorily prohibited.”105

99 Pl. Br. at 35
100 Id at 25
101 Supra note 90 at 14
102 Id at 17
103 Supra note 98 at 31
104 Supra note 93 at 32
105 Id at 36
Discussion

Whether or not Title IX provides protection to transgender students and, if it does, to what extent do those protections extend is, by any measure, a new area of the law. The lack of case law that directly addresses this question supports this conclusion. This lack of guidance heightens the importance of analyzing the claims and arguments in G.G. v. Gloucester County Board of Education. The only federal cases on point are Johnston v. University of Pittsburgh and Miles v. New York University. In Miles, a male to female transgender student filed suit after a professor made unwanted sexual advances toward her. The university’s defense of the professor was based on Miles’ physical male gender at the time of the harassment. The court held Miles could proceed with her claim. Miles v. New York University addressed the issue of professor on student sexual harassment, but not restroom or locker room usage unlike Johnston. The Johnston court held that assigning usage of a men’s locker room and men’s restroom facilities on campus according to physical gender as opposed to sexual identity did not violate Title IX.

In attempting to break new ground, G.G. has used a closely related area of law, Title VII of the 1964 Civil Rights Act which prohibits discrimination in employment practices. The watershed Title VII case is Price Waterhouse v. Hopkins in which a sharply divided Court held that “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” Court that have held Congress intended Title VII protection to include transgender persons have relied heavily on Price Waterhouse. Now, G.G. relies on the same authority. However, are transgendered persons a protected class under the law? The Supreme Court has yet to address this question. G.G. is the first to reach a federal court of appeal. As mentioned previously, the Glenn court pointed out that transgendered persons are not yet considered a protected class under the law. Neither the plain language of Title IX nor any U.S. Supreme Court decision has explicitly created such a class. Yet, the Glenn court seemed to identify a new protected sub-class: “transgendered persons who do not conform to standard sexual stereotypes.”

Although the Glenn court’s conclusion did not bode well for G.G. and other similarly situated students, the Fourth Circuit Court of Appeals did find that G.G.’s rights under Title IX were violated. However, the United States Supreme Court has stayed the implementation of the decision. Bryk argues that “Title VII has paved the way for claims by transgender individuals under Title IX.” If this be true, the paving process has been excruciatingly slow. The command of the Equal Protection Clause requires that the rights of transgender students be protected. However, it is also clear that privacy concerns also need to be addressed. On May 26, 2016, the Livingston Daily reported an incident in a local elementary school in which a girl entered the boys’ restroom. The district cited FERPA when officials declined to divulge whether or not the girl was transgender. A Freedom of Information request revealed the district

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108 490 U.S. at 251
109 724 F.Supp. 2d. at 1300
110 Amanda Bryk, Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students Under Title IX., 37 Cardozo L. Rev. 752, 791.
had no policy in place concerning transgender restroom usage.¹¹¹ In February, a man entered the girls’ dressing room at the Evans pool in Seattle, Washington and began disrobing in front of a young girls’ swim team.¹¹² While these incidents may be rare, they do happen and must be appropriately addressed.

While exact numbers are difficult to ascertain, according to Bryk, .3% of the population was reported as transgender as of 2011.¹¹³ Although a very small minority, the law needs to provide its members protection. Congress has repeatedly tried and failed to pass legislation that would explicitly expand Title VII protections. ENDA (Employment Nondiscrimination Act) has yet to find its way out of Congress. The courts, to date, haven’t stepped up to the plate either. Someone needs to.

¹¹² *Man strips in front of girls in locker room, says transgender law allows it.* (February 21, 2016.)
¹¹³ Supra note 110 at 751