

BEARD LEGAL GROUP

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Federal District Court in Virginia Upholds Transgender Student's Right to Use the Bathroom That Aligns With His Gender Identity

As we reported in the June 2018 edition of the Education Law Report, the United States District Court for the Eastern District of Virginia ruled in *Gavin Grimm v. Gloucester County School District* that Mr. Grimm had pled sufficient facts to support his claims that the School Board's policy of assigning students to restrooms based on their biological sex constituted a Title IX claim of sex discrimination under a gender stereotyping theory and violation of the Equal Protection Clause of the Fourteenth Amendment.

Following the filing of motions for summary judgment and oral argument, U.S. District Judge Arenda Wright Allen ruled on August 9, 2019 that the School District violated plaintiff's rights under Title IX and the Fourteenth Amendment.

Judge Allen reaffirmed her prior Order from May 22, 2018 that "claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory." She noted that other courts since May 2018 have agreed with her analysis, including the Third Circuit Court in *Doe v. Boyertown Area Sch. Dist.*, (3d Cir. 2018). As such, the *Gloucester* policy singled out transgender students, "subjected [them] to discriminatory treatment, and excluded [them] from spaces where similarly situated students are permitted to go."

After full consideration of the facts, the Judge found that the policy continued to harm plaintiff, particularly the District's refusal to update Mr. Grimm's transcripts and education documents to

reflect his sex as male despite receipt of an amended birth certificate. Accordingly, the Judge held that Mr. Grimm had established that he was excluded from District restrooms on the basis of gender stereotypes and that the improper discrimination had caused him harm.

With respect to the Equal Protection claim, Judge Allen continued to rely on the May 22, 2018 ruling that it was appropriate to apply heightened

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Cross Sitting on Public Land as a War Memorial Does Not Violate the Establishment Clause

In a June 2019 Decision, the U.S. Supreme Court ruled that a 32-foot tall Latin cross sitting on a tall pedestal on public land, which was erected as a memorial to area soldiers who died serving in World War I, did not violate the Establishment Clause of the United States Constitution.

In 2014, the American Humanist Association (AHA) and others filed suit in the Federal District Court, alleging that the cross's presence on public land, and the Maryland-National Capital Park and Planning Commission maintenance of the memorial, violated the First Amendment's Establishment Clause.

By way of background in 1918, residents of Prince George's County, Maryland, formed a committee for the purpose of erecting a memorial for the county's soldiers who fell in World War I.

The committee decided that the memorial should be a cross, which was not surprising since the plain Latin cross had become a central symbol of the war. The image of row after row of plain white crosses marking the overseas graves of soldiers was emblazoned on the minds of Americans at home. The memorial would stand at the terminus of another World War I memorial – the National Defense Highway connecting Washington to Annapolis.

When the committee ran out of funds, the local American Legion took over the project, completing the memorial in 1925. The 32-foot tall Latin cross displays the American Legion's emblem at its center and sits on a large pedestal bearing, *inter alia*, a bronze plaque that lists the names of the 49 county soldiers who had fallen in the war.

At the dedication ceremony, a Catholic priest offered an invocation and a Baptist pastor offered a benediction. The Bladensburg Cross has since been the site of patriotic events honoring veterans on, e.g.,

Veterans Day, Memorial Day, and Independence Day. Monuments honoring the veterans of other conflicts have been added in a park near the Cross. As the area around the Cross developed, the monument came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission acquired the Cross and the land where it sits, but the American Legion reserved the right to continue using the site for ceremonies. The Commission has used public funds to maintain the monument ever since.

In rendering its decision, the Supreme Court got into a very detailed analysis outlining at least four (4) considerations showing that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones.

In its decision, the Court stated:

Applying these principles here, the Bladensburg Cross does not violate the Establishment Clause. The image of the simple wooden cross that originally marked the graves of American soldiers killed in World War I became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials. The Cross has also acquired historical importance with the passage of time, reminding the townspeople of the deeds and sacrifices of their predecessors as it stands among memorials to veterans of later wars. It has thus become part of the community. It would not serve that role had its design deliberately disrespected area soldiers, but there is no evidence that the names of any area Jewish soldiers were either intentionally left off the memorial's list or included against the wishes of their families. The AHA tries to connect the Cross and the American Legion with anti-Semitism and the Ku Klux Klan, but the monument, which was dedicated during a period of heightened racial and religious animosity, includes the names of both Black and White soldiers; and both Catholic and Baptist clergy participated in the dedication.

It is also natural and appropriate for a monument commemorating the death of particular individuals to invoke the symbols that signify what death meant for those who are memorialized. Excluding those symbols could make the memorial seem incomplete. This explains why Holocaust memorials invariably feature a Star of David or other symbols of Judaism and why the memorial at issue features the same symbol that marks the graves of so many soldiers near the battlefields where they fell.

The Court also stated:

The fact that the cross is undoubtedly a Christian symbol should not blind one to everything else that the Bladensburg Cross has come to represent: a symbolic resting place for ancestors who never returned home, a place for the community to gather and honor all veterans and their sacrifices for this Nation, and a historical landmark. For many, destroying or defacing the Cross would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment.

The Supreme Court reversed and remanded the case to the United States Court of Appeals for the Fourth Circuit for further disposition.

Changes to the School Code

Use of Topical Sunscreen Without Physician's Note or Prescription

Act 105 of 2018 was enacted on October 24, 2018. Under Act 105, schools must allow students during school hours, at school sponsored activities or while under the supervision of school personnel to use sun-protective clothing (such as a hat) and to use a topical sunscreen product without a physician's note or prescription. In order for the student to possess sunscreen without a physician's note, the parent or guardian of the student must submit a form regarding application of the sunscreen. Students who misuse the sunscreen may be subject to revocation or

restriction of its use.

PDE to Create Curriculum for Teaching CPR

On June 12, 2019, Act 7 of 2019 was enacted requiring the Pennsylvania Department of Education to create a model curriculum for teaching CPR to students in grades 9 through 12. Act 7 requires the District's curriculum to include information to teach a "hands-only" technique for CPR training in addition to providing information on the use of an automated external defibrillator (AED). The law allows the District to choose the model curriculum from PDE or develop its own. The new Law is effective the beginning of the 2019-2020 school year.

Transgender Student's Right to Use the Bathroom

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scrutiny to claims of discrimination against transgender individuals. In short, the District was required to show that the sex-based classification in the policy served "important governmental objectives" and the "discriminatory means employed are substantially related to the achievement of those objectives." While the District contended that the policy was to protect the "privacy interests that students have in protecting their unclothed bodies," the Court held that there was no evidence that the policy was substantially related to protecting student privacy. Rather, the District's privacy concerns were contradicted in light of the fact that Mr. Grimm used the male restrooms for seven weeks without incident. Ultimately, Judge Allen entered an Order that the District's refusal to update official school records and the *Gloucester* policy itself violated Title IX and the Fourteenth Amendment.

This case further supports the Third Circuit's decision in *Bovertown* regarding transgender students and their right to use the restroom or locker room of their choice.

A Refresher on Board Member Training

By Act 55 of 2017, the State Legislature incorporated School Director training programs into the Public School Code 24 P.S. §3-328. Section 1 provided that “Each newly elected or appointed School Director shall complete, during the first year of the School Director’s first term, a training program made available by the Department of Education, in consultation with the Statewide organization representing School Directors and a Statewide organization representing School Business officials, pertaining to the skills and knowledge necessary to serve as a School director.” Prior to the amendments of Act 18 of 2019, the Program had to consist of a minimum of four (4) hours of instruction, including at a minimum, information regarding the following:

- (i) Instruction and academic programs.
- (ii) Personnel.
- (iii) Fiscal management.
- (iv) Operations.
- (v) Governance.
- (vi) Ethics and open meetings, to include the requirements under 65 Pa.C.S. Pt. II (relating to accountability).

Sub-section 2 of Section 328 required, in pertinent part, within one (1) year after each reelection or reappointment to the board of school directors, each school director shall complete an advanced training program made available by the Department of Education in consultation with a Statewide organization representing school directors and a Statewide organization representing school business officials. The advanced training program shall consist of a minimum of two (2) hours of instruction, including information on relevant changes to Federal and State public school law and regulations, fiscal management and other information deemed appropriate by the Department of Education to enable the school director to serve effectively.

Now with the passage of Act 18 of 2019, School Board Members must also receive training in

the area of “Best practices related to trauma/informed approaches, which shall comprise a minimum of one (1) hour of instruction.”

Query: So what does this all mean moving forward to a newly elected or appointed board member?

Answer: Newly appointed and newly elected School Directors are required to complete, during their first year of service, a training program consisting of five (5) hours of training, including instruction and academic programs, one hour of which must be on Best Practices, related to Trauma Informed approaches, personnel, fiscal management, operations, governance and ethics in open meetings. All reappointed and re-elected School Directors must complete three (3) hours of instruction within one (1) year after reelection or reappointment, including relevant changes to Federal and State public school law and regulations, fiscal management, Trauma Informed approaches and any other information deemed necessary by the Pennsylvania Department of Education.

Practice Note:

Please be aware that the Pennsylvania School Boards Association is an approved provider to support School Directors in meeting their training requirements. School Board members will be able to access these required courses and complete them as part of a Certificate of Board of Governance, whether or not they currently are required to take them by law. Interested individuals are encouraged to access those online courses by logging on to psba.org, look for and click on “myspsba” app.

Chief School Administrators are encouraged to provide information to School Board Members as well as to confirm to the School Board’s Members their obligations under the Act. Failure to secure the necessary training could result in an audit citation from the Auditor General’s Office as part of their audit cycle review.

These requirements are outlined in School District policy. If your District belongs to PSBA's Policy Service, it can be found in Policy 004 entitled "Membership."

An IEP Must Be Reasonable, Not Ideal

In the case of *K.D. v. Downingtown Area School District*, 904 F.3d 248 (3d Cir. 2018), the Third Circuit Court of Appeals which has jurisdiction over Pennsylvania and New Jersey, affirmed the Eastern Federal District Court Decision wherein that Court rejected the parents' claim that their child was denied a free and appropriate public education (FAPE).

The student in this case had a low average IQ and ADHD. The parents brought suit alleging that the student's IEP failed to provide her with FAPE in violation of the IDEA. After four years of expressing disappointment with their daughter's IEPs and her education in the District, the parents placed their daughter in a private school and sought reimbursement.

The matter was presented to an Administrative Hearing Officer who ruled in favor of the District. The parents then pursued the matter to Federal District Court in the Eastern District of Pennsylvania and that Court granted judgment on the Administrative record for the School District finding that "... the IEPs contained meaningful changes" and that "in light of her circumstances, K.D. made appropriate and meaningful progress."

After looking at the record in the whole, in addition to upholding the Decisions of the Hearing Officer and the Federal District Court, the Third Circuit Court of Appeals affirmed, reiterating longstanding principles as follows:

- Courts may not substitute their views of sound educational policy for those of school authorities under review.

- A child's intellectual abilities and potential are among the most important considerations for crafting an IEP that offers FAPE.
- For a child who has significant needs, "fragmented progress" can reasonably be anticipated. Children who are not and cannot be fully integrated into a regular education classroom are not specifically expected under the IDEA to be given grade-level goals or advance at a grade-level pace.
- IEPs must be reasonable but need not be ideal. The mere fact that a student's progress is slow does not invalidate an IEP. The IEP must aim to allow a child to make progress, but courts will not "rely on hindsight to second-guess an educational program that was reasonable" when offered.

Practice Note:

This case is a good read as to what Districts must do to ensure a student receives a free and appropriate education (FAPE). Here the District reviewed the results of an Independent Educational Evaluation, met with the parents, performed more evaluations and offered additional services and modified the IEP. Ultimately, the parents rejected the program offered by the District and unilaterally placed the student (K.D.) in a private school.

BEARD LEGAL GROUP is honored to be selected as an Inductee to the 2019 Blair County Chamber Business Hall of Fame on October 21, 2019.



This Award would not be possible without the trust and confidence of our clients and our dedicated attorneys and staff.

U.S. Supreme Court to Hear 3 Cases on Sexual Orientation or Gender Identity

The U.S. Supreme Court will hear three cases from different parts of the country on whether existing federal bans on sex discrimination in the workplace also prohibit discrimination based on sexual orientation or gender identity. In *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019), the Second Circuit Court of Appeals ruled that Title VII prohibited sexual orientation discrimination. A gay former employee brought action alleging, among other things, gender stereotyping discrimination in violation of Title VII and New York State's sexual orientation discrimination laws. Interestingly, the U.S. District Court granted summary judgment in favor of the employee on the Title VII claim. The ultimately jury found for the employer on the state law claim. On appeal, the Second Circuit affirmed in part, vacated in part, and remanded it back to the Federal District Court. In so doing, the Court held that sexual discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination for purposes of Title VII. As such, the employee was entitled to bring the Title VII claim for discrimination based on sexual orientation.

In the Sixth Circuit Court of Appeals case of *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) the Sixth Circuit Court of Appeals found that Title VII prohibits discrimination against transgender employees. The EEOC brought a Title VII action against the employer alleging the employer fired a transitioning transgender employee based on gender stereotypes. Besides being entitled to bring a Title VII claim on the grounds that the employer discriminated against the employee on the basis of her transgender and transitioning status, the court found Title VII also prohibits sex discrimination against transgender employees.

The final case consolidated to be heard is out of the Eleventh Circuit Court of Appeals. The Plaintiff in *Bostock v. Clayton County Board of Commissioners*, 723 Fed. Appx. 964 (11th Cir. 2018), (Alabama, Florida and Georgia) alleged that he was fired as a Child Welfare Services Coordinator for being gay. The Federal District Court dismissed the employee's suit under Title VII for failure to state a claim. On appeal, the Eleventh Circuit affirmed the ruling of the Federal District Court relying on case law that allowed for discharge of employees due to sexual orientation.

What this means: U.S. Supreme Court will decide if Title VII prohibits discrimination against transgender people based on 1) their status as transgender; and 2) sex stereotyping under the landmark case of *Price Waterhouse v. Hopkins*. These cases are sure to bring a lot of attention from various groups all across the United States including a lot of amicus curiae ("friends of the court") briefs addressing this important issue.

By way of information, in 2001 in the U.S. Third Circuit Court of Appeals (Pennsylvania, New Jersey, and Delaware), in the case of *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001), expressly held that Title VII does not prohibit employment discrimination based on sexual orientation.

Observation: We should know within a year how the U.S. Supreme Court will rule. In the meantime, Pennsylvania school districts must also be mindful of the fact that the PHRC issued guidance in August 2018 on discrimination on the basis of sex under the Pennsylvania Human Relations Act (PHRA) outlining discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition and gender express is unlawful.

To that end, the PHRC will accept sex discrimination complaints arising out of complaints of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity and gender expression using any and all legal theories available and based on the facts of the individual case.

It appears at this time this will continue to be a hotly contested area of litigation for both public and private sector employers and in particular, school districts.

The Guidance issued by the PHRC can be accessed through their website at PHRC.pa.gov

** Registration Open **

Registration form available upon request.

*The Pennsylvania School Study Council, Penn State Law, Penn State College of Education,
and the Partners of Beard Legal Group invite you to join us for:*

Education Law Day 2019

A Day with Legal Experts and Educational Topics:
Tough Topics that Occupy Instructional Time and Resources

Wednesday, September 25, 2019

8:30 AM - 3:30 PM

Pennstater Conference Center
University Park, Pennsylvania

Introduced by Dr. Lawrence Wess, Executive Director of the Pennsylvania School Study Council
and

Welcome by Dr. Kim Lawless, new Dean, PSU College of Education (invited)

Presentations:

- **Sarah M. Castillo**, Assistant Chief Counsel within the Chief Counsel's Office for PA Department of Education - **"Dealing with Educator Misconduct"**
- **Dr. David Bateman**, Author & Professor of Special Education, Shippensburg University - **"Special Education Litigation is Not the Price of Doing Business"**

Education Law Day is Coordinated by Beard Legal Group

- **Carl P. Beard**, Managing Partner - **"Special Education & Student Discipline Update: You Don't Know What You Don't Know"**
- **Elizabeth Benjamin**, Partner - **"Ten Years of the Right to Know Law or Amendments to School Code in 2019"**
- **Ronald Repak**, Partner - **"What has changed for School Police, SROs and Arming Teachers, & What is SB621's Impact?"**

For further information, contact Lawrence Wess at lwess@psu.edu or 814-330-6312 Directions and information will be sent to all registrants a week prior to the event

Beard Legal Group Education Law Focus

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Lawrence Wess at ljw11@psu.edu.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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