



CAMPUS COUNSEL

A legal blog written for administrators, HR professionals, in-house counsel, and deans at colleges and universities

Federal Courts Find Transgender Rights Rooted in Existing Laws

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In March, a U.S. District Court Judge [denied summary judgment](#) in the case of [Fabian v. Hospital of Central Connecticut](#), finding that employment discrimination on the basis of transgender identity is discrimination “because of sex” and constitutes a violation of Title VII of the Civil Rights Act. Shortly thereafter, in [G.G. v. Gloucester County School Board](#), the Fourth Circuit [ruled in favor of Gavin Grimm](#), a transgender high school student, holding that Title IX protects the rights of transgender students to use sex segregated facilities that are consistent with their gender identity.

Under Title VII, it is unlawful for an employer to refuse to hire anyone because of their race, color, religion, sex or national origin. Under Title IX, “[n]o 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.” Each of these cases hinged on the statutory interpretation of “sex.”

In [Fabian](#), the judge undertook an elaborate discussion of the case law split and noted that “although most of the earliest cases held that Title VII does not protect gender identity, the weight of authority has begun to shift the other way...” Some interpretations suggest that “sex” means nothing more than “discrimination against women because they are women and against men because they are men.” The alternate interpretation, and the one that ultimately prevailed in [Fabian](#), includes factors sufficiently “related to sex or that have something to do with sex.”

In [G.G.](#), the crux of the issue involved 34 C.F.R. § 106.33, which permits schools to 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.” 34 C.F.R. § 106.33. The Court declined to restrict the word “sex” to “a hard-and-fast binary division on the basis of reproductive organs,” and noted that the regulation is silent as to how the regulation should be applied to transgender students and “sheds little light on how exactly to determine the ‘character of being either male or female’ where those indicators diverge.” Because the Court found that the regulation was ambiguous, the Department of Education was entitled to deference on its novel interpretation of its own regulation.

Neither court adhered to a rigid interpretation of “sex” as simply biologically male or female.

Client Tip: *While Massachusetts law already covers gender identity as a protected characteristic in employment, housing, and credit, courts are also extending protections to the transgender community under interpretations of existing federal laws. Institutions should review their policies and remain mindful that gender identity discrimination claims may be brought by students or employees.*