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I. INTRODUCTION

Across the country, courts, legislatures, and citizens have been involved in a bathroom battle. The heated debate about whether transgender students should be required to use the restroom that corresponds to their biological sex, or whether they can choose to use the facilities which align with their gender identity, was recently addressed by the United States Court of Appeals for the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board*.[1] In the first ruling of its kind, the Fourth Circuit interpreted the federal anti-discrimination law known as Title IX as requiring schools to allow transgender students access to the restrooms that fit their gender identity.[2]

Following the decision, the Obama Administration "issued guidance to the nation's public schools, directing them to allow transgender students to use bathrooms that match their gender identity."[3] Both the Fourth Circuit's opinion and the federal guidelines were met with much controversy, and the Supreme Court of the United States announced that it would review the *G.G. ex rel. Grimm v. Gloucester County School Board* decision. However, upon the new presidency, "[o]fficials with the federal Education and Justice departments notified the U.S. Supreme Court . . . that the [Trump] administration . . . order[ed] the nation's public schools to disregard memos the Obama Administration issued."[4] In light of this, the Supreme Court remanded the case back to the Fourth Circuit for consideration based on the Trump Administration's revocation of the Obama Administration's guidance.[5] This is a rapidly evolving area, but the issue can be settled once and for all by a court adopting the Fourth Circuit's reasoning in its Title IX analysis and by going even

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1. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016).

2. David G. Savage, *Supreme Court Asked to Weigh in on Transgender Bathroom Dispute*, L.A. TIMES (Aug. 2, 2016), http://www.latimes.com/nation/la-na-court-transgender-students-20160802-snap-story.html.

3. Robert Barnes & Moriah Balingit, *School Board, Sued by Transgender Student, Asks for Supreme Court Review in Bathroom Case*, WASH. POST (Aug. 20, 2016), https://www.washingtonpost.com/local/education/school-board-sued-by-transgender-student-asks-for-supreme-court-review-in-bathroom-case/2016/08/29/7c5c5fc4-6bc3-11e6-ba32-5a4bf5aad4fa_story.html.

4. Sandhya Somashekhar, Emma Brown & Moriah Balingit, *Trump Administration Rolls Back Protections for Transgender Students*, Wash. Post (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_html?utm_term=.bfec25e3e552.

5. *Gloucester County School Board v. G.G.*, SCOTUSBLOG (March 5, 2017), http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/.

further to hold that forcing students to use bathrooms that correspond with their biological sex is also unconstitutional under the Equal Protection Clause.

This Note will address the outcome of *G.G. ex rel. Grimm v. Gloucester County School Board*, beginning in Part II with the legal background of an approach to a Title IX claim, including how courts have interpreted the same language in the context of a Title VII claim. Part III will discuss the facts of *G.G.* and the Fourth Circuit's rationale, explaining the differences between the majority and dissenting opinions. Part IV will analyze the reasoning behind the Fourth's Circuit's Title IX decision and explain why it is still relevant to finding the Gloucester County School Board's bathroom policy to be a violation of Title IX even after the revocation of the Obama Administration's guidance. Lastly, this Note will argue that the bathroom policy should also be found to be unconstitutional under the Equal Protection Clause.

II. LEGAL BACKGROUND

A. Title IX

Title IX prohibits discrimination on the basis of sex under "any education program or activity receiving Federal financial assistance."[6] However, the Department of Education's regulations stipulate that "[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 provided for students of the other sex."[7] The issue this regulation creates is whether "on the basis of sex" means a student's biological sex, or whether sex also includes a student's gender identity. To address this problem, the Obama Administration issued an opinion letter confirming that a policy that segregates bathrooms based on biological sex and without regard for students' gender identities violates Title IX.[8] Courts then struggled with whether to give the opinion letter deference, which would make forcing students to use the facilities that align with their biological sex a clear violation of Title IX, or whether to view the regulation as the controlling authority, perpetuating the unresolved question of whether separating bathrooms "on the basis of sex" is permissible under Title IX.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established the test for determining whether to grant deference to a government agency's statutory interpretation.[9] In that case, the Court explained that "[w]hen a court reviews an agency's construction of the statute which it administers," it is confronted first with the question of "whether Congress has directly spoken to the precise question at issue."[10] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[11] However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[12] If so, the agency

6. 20 U.S.C. § 1681(a) (2012).
7. 34 C.F.R. § 106.33 (2016).
8. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016).
9. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
10. *Id.* at 842.
11. *Id.* at 842-43.
12. *Id.* at 843.

interpretation must be sustained.[13] Further, an interpretation of an agency's own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[14]

Therefore, if Congress does not address the issue, then the agency's interpretation is given deference if it is a permissible construction of the statute, especially when it is an interpretation of an agency's own regulation.

B. Title VII

The difficulties that transgender students are currently facing in schools mirror the past history of discrimination that transsexual employees have endured in the workplace.[15] Because courts have already grappled with the "on the basis of sex" language in the employment context, case law interpreting Title VII of the Civil Rights Act of 1964 provides guidance in evaluating claims brought under Title IX.[16]

Title VII makes it unlawful for employers to discriminate on the basis of sex. Initially, courts found that the definition of "sex" should be given its "common and traditional interpretation" for purposes of interpreting Title VII.[17] In *Ulane v. Eastern Airlines, Inc.*, the United States Court of Appeals for the Seventh Circuit used the traditional definition of sex to hold that Title VII "means only that it is 'unlawful to discriminate against women because they are women and men because they are men.'"[18] Thus, "[b]ecause the [employee] could only show that she was discriminated against as a transsexual, rather than as a woman or a man, the court concluded Title VII could provide no protection."[19]

However, cases like *Ulane* were effectively overruled by the Supreme Court's decision in *Price Waterhouse v. Hopkins*. In that case, the Court held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[20] As the Sixth Circuit acknowledged:

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13. Auer v. Robbins, 519 U.S. 452, 457 (1997).

14. *Id.* at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

15. "Transgender refers to people who identify differently from their biological sex" whereas a "transsexual is a person who physically transitions from male to female or vice versa." *What is the difference between transsexual and transgender?*, INTERNATIONAL SOCIETY FOR SEXUAL MEDICINE, http://www.issm.info/sexual-health-qa/what-is-the-difference-between-transsexual-and-transgender/ (last visited Dec. 5, 2016). The situations that transsexuals have faced in the Title VII context provide an example of what Gavin Grimm, the plaintiff in G.G. *ex rel.* Grimm v. Gloucester County School Board, has dealt with as a transgender boy. Moreover, as a high school student, Gavin is not yet permitted to have sex reassignment surgery, as the Standards of Care developed by the World Professional Association for Transgender Health "do not permit sex reassignment surgery for persons who are under the legal age of majority." G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 n.1 (4th Cir. 2016).

16. *See* Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 75 (1992) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)) (reasoning that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' . . . [and] the same rule should apply when a teacher sexually harasses and abuses a student.").

17. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).

18. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (quoting Ulane, 742 F.2d at 1085).

19. *Id.*

20. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

> By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.[21]

Thus, in the context of Title VII, gender stereotyping is prohibited as sex discrimination. In fact, nearly every circuit has relied on *Price Waterhouse* to "expressly recognize a Title VII cause of action for discriminating based on an employee's failure to conform to stereotypical gender norms."[22] That Title VII includes gender in defining sex discrimination is instructive in a Title IX claim of sex discrimination, because it provides an example of how to define the term "sex" in the context of an anti-discrimination law.

Moreover, Title VII cases also provide guidance for interpreting agency guidelines. In 1980, the Equal Employment Opportunity Commission ("EEOC") issued guidelines specifying that sexual harassment is a form of sexual discrimination prohibited by Title VII. In *Meritor Savings Bank v. Vinson*, the Court reasoned that although the administrative interpretations of the Act by the enforcing agency were "'not controlling upon the courts by reason of authority, [they did] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[23] The Court subsequently concluded that "[t]he EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII."[24] Likewise, courts can properly look to administrative interpretations of Title IX for guidance, as they represent an informed judgment on the issue.

III. *G.G. v. Gloucester County School Board*

A. Factual Background

Gavin Grimm is a transgender male student at Gloucester High School.[25] After his freshman year, Gavin informed his parents he was transgender and began seeing a psychologist who diagnosed him with gender dysphoria.[26] As part of his treatment,

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21. Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004).

22. *Etsitty*, 502 F.3d at 1223; *see* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263-64 (3d Cir. 2001) (recognizing that a plaintiff alleging same-sex sexual harassment may demonstrate that the harassment amounted to discrimination by showing the harasser was acting to punish the victim's noncompliance with gender stereotypes); *Smith*, 378 F.3d at 572 (finding that the plaintiff sufficiently pleaded claims of sex stereotyping and gender discrimination after alleging that failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind the defendants' actions); Doe by Doe v. City of Belleville, 119 F.3d 563, 581 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998) (holding that "a man who is harassed because . . . he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.").

23. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

24. *Id*.

25. ACLU, *G.G. v. Gloucester County School Board*, https://www.aclu.org/cases/gg-v-gloucester-county-school-board (last updated Oct. 28, 2016) [hereinafter ACLU].

26. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 739 (E.D. Vir. 2015).

"his psychologist recommended [Gavin] begin living in accordance with his male gender identity in all respects . . . including with respect to his use of the restroom."[27] Gavin changed his legal name to his present masculine name, and his friends and family refer to him using male pronouns.[28] "Additionally, when out in public, [Gavin] uses the boys' restroom."[29]

Further, "[a]s part of Gavin's medical treatment for severe gender dysphoria, Gavin and his mother notified administrators of his male gender identity at the beginning of his sophomore year so that he could socially transition in all aspects of his life."[30] "At first, Gavin exclusively used unisex facilities in the nurse's office, but found that experience to be stigmatizing and isolating."[31] Subsequently, "[w]ith permission from school administrators, Gavin used the boys' restroom for almost two months without any incident."[32]

However, in response to complaints from some parents, the School Board adopted a policy that limited the use of Gloucester County Public School facilities to the corresponding biological sexes and required that students with "sincere gender identity issues" be provided an "alternate private facility."[33] Using the female restroom was not an option for Gavin: girls and women would react negatively because of his masculine appearance, which would cause Gavin severe psychological distress and would be incompatible with his treatment for gender dysphoria.[34] Additionally, using a separate, single-stall restroom would "serve[] as a daily reminder that the school view[ed] him as 'different.'"[35]

Consequently, Gavin sued the School Board, claiming that the Board "impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution."[36] The United States District Court for the Eastern District of Virginia did not address Gavin's Equal Protection claim and granted the Board's motion to dismiss Gavin's claim under Title IX, concluding that requiring Gavin to use the female facilities did not impermissibly discriminate against him on the basis of sex.[37] Gavin subsequently appealed to the Fourth Circuit.[38]

B. The Decision

A divided panel for the Fourth Circuit reversed the District Court, holding that the School Board's policy was a violation of Title IX.[39] To arrive at its decision, the majority relied on an opinion letter by the Obama Administration's Department of Education's Office for Civil Rights ("the Department"), which stated that "[w]hen a

27. *Id.* (internal quotation marks omitted).
28. *Id.*
29. *Id.*
30. ACLU, *supra* note 25.
31. Letter from ACLU Found. to Educ. Opportunities Section, U.S. Dep't of Justice Civil Rights Div. (Dec. 18, 2014) at 2 [hereinafter Complaint Letter].
32. ACLU, *supra* note 25.
33. Complaint Letter, *supra* note 31, at 2.
34. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716 (4th Cir. 2016).
35. *Id.* at 716-17.
36. *Id.* at 717.
37. *Id.*
38. 822 F.3d 709.
39. *Id.* at 715.

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."[40] The court determined that the Department's regulations implementing Title IX contained ambiguity, and that the opinion letter resolved that ambiguity.[41] Because the Department's interpretation was a fair and considered judgment on the matter, and was not erroneous or inconsistent with the regulation or statute, the court gave it controlling weight.[42] Thus, giving the agency interpretation deference, the court held that the School Board's policy was a violation of Title IX.[43]

C. The Dissent

Conversely, the dissent disagreed with the majority's holding, finding that it "misconstrue[d] the clear language of Title IX and its regulations."[44] Following the reasoning of the District Court, the dissent focused on the implementing regulations of the Act, which "specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities."[45] Because the dissent further concluded that "Title IX and its implementing regulations [were] not ambiguous," the dissent argued that the opinion letter should not be accorded deference.[46] Thus, when the School Board assigned restrooms on the basis of biological sex, the dissent determined that "it was clearly complying precisely with the unambiguous language of Title IX and its regulations."[47]

Additionally, the dissent stressed that the majority's holding "completely trample[d] on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes."[48] The dissent explained that "separating restrooms based on 'acknowledged differences' between the biological sexes serves to protect" the fundamental interest of privacy.[49]

Accordingly, because the dissent held that the School Board did not violate Title IX and its implementing regulations in adopting the policy for separate restrooms, the dissent "would affirm the district court's decision dismissing [the] Title IX claim . . . ."[50]

D. Implications of the Decision

The Fourth Circuit decision on April 19, 2016, granted an injunction, which required the School Board to allow Gavin to again use the boys' restroom at his school. The Obama Administration's Department of Education "cited this ruling in

40. *Id.* at 718 (quoting Joint App. 55).
41. *See id.* at 720-21.
42. *See id.* at 719, 721.
43. *Id.* at 723.
44. *Id.* at 731 (Niemeyer, J., dissenting).
45. *Id.* at 734.
46. *Id.* at 731.
47. *Id.* at 737.
48. *Id.* at 730. The dissent further reasoned that, as a result of the majority's holding, "schools would no longer be able to protect physiological privacy as between students of the opposite biological sex." *Id.* at 731.
49. *Id.* at 735 (internal citation omitted).
50. *Id.* at 739.

May when it said that according to its interpretation of the federal anti-discrimination law known as Title IX, schools and colleges 'must allow transgender students access' to restrooms, locker rooms and dormitories that fit their 'gender identity.'"[51] That same week, the Obama Administration's "Justice Department sued the state of North Carolina over its law, known as House Bill 2 or HB2."[52] HB2 defines sex as "the physical condition of being male or female which is stated on a person's birth certificate," and requires that schools maintain restrooms that are segregated by sex.[53] "Since May, lawyers for Texas, Nebraska and 20 other Republican-led states have joined suits challenging the Education Department's policy."[54]

As a result of the Fourth Circuit ruling, Gavin was preparing to begin his senior year knowing he could use the restroom at school without feeling isolated.[55] However, the Supreme Court issued an emergency stay on Gavin's injunction, which prevented him from using the boys' bathroom until the Court could decide whether to review the Fourth Circuit's decision.[56] Then, on October 28, 2016, the Supreme Court announced that it would hear Gavin's case.[57] Subsequently, due to the Trump Administration revoking the guidance that the Obama Administration issued regarding transgender student rights, the Supreme Court vacated the judgment and remanded the case to the Fourth Circuit.[58]

IV. ANALYSIS

The Fourth Circuit decided Gavin's Title IX claim by according deference to the Department's opinion letter. In doing so, the Fourth Circuit correctly followed the Supreme Court's precedent of giving controlling weight to an agency's interpretation of its own regulation.[59] First, this Note argues that the Fourth Circuit correctly decided Gavin's Title IX claim. However, because the Trump Administration revoked the guidance that the Fourth Circuit relied on for its ruling, this Note further argues that the Fourth Circuit's reasoning provides a basis for adopting the interpretation that the Obama Administration announced in that opinion letter. Second, this Note analyzes Gavin's Equal Protection claim. This has not yet been addressed by the District Court or by the Fourth Circuit.[60] Nevertheless, for the reasons this Note provides, the School Policy is a violation of the Equal Protection

51. Savage, *supra* note 2.

52. *Id*.

53. *Id*.

54. *Id.*; *see also* Gregory Korte, *Judge in Texas Blocks Obama Transgender Bathroom Rules*, USA TODAY (Aug. 22, 2016), http://www.usatoday.com/story/news/politics/2016/08/22/texas-judge-temporarily-blocks-obamas-transgender-directive/89094722/ (stating that "U.S. District Judge Reed O'Connor's 38-page order said federal agencies exceeded their authority under the 1972 law banning sex discrimination in schools.").

55. Joshua Block, *Did the Supreme Court Really Just Issue an Emergency Order to Stop a 17-Year-Old Transgender Boy From Using the Boys Bathroom at School?* ACLU (Aug. 4, 2016, 1:00 PM), https://www.aclu.org/blog/speak-freely/did-supreme-court-really-just-issue-emergency-order-stop-17-year-old-transgender.

56. ACLU, *supra* note 25.

57. *Id.*

58. SCOTUSBLOG, *supra* note 5.

59. *See* Auer v. Robbins, 519 U.S. 452, 457 (1997).

60. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 717 n.3 (4th Cir. 2016) (declining to preemptively dismiss Gavin's equal protection claim before it had been considered fully by the District Court).

Clause. If an Equal Protection claim is addressed by any court, a policy that separates restrooms on the basis of biological sex should be held to be a violation. The Title IX analysis and the Equal Protection analysis will each be discussed in turn.

A. Title IX

The Fourth Circuit correctly decided Gavin's Title IX claim for the following reasons. In addressing a government agency's interpretation of a statute, a court should first look at the statute in question and ask "whether Congress has directly spoken to the precise question at issue."[61] In this case, the statute in question is Title IX, which provides that "[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."[62] Congress does not address whether "on the basis of sex" means biological sex or whether it includes gender identity. Instead, the statute is silent with respect to the specific issue of how it should apply to transgender students. Importantly, "if the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute."[63] Rather, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[64] If so, the Department's approach must be sustained.[65]

Under authority from Congress, the Department of Education elucidated the Title IX statute by implementing the regulation 34 C.F.R. § 106.33, which allows for separate toilet facilities on the basis of sex as long as facilities provided for one sex are comparable to such facilities provided for students of the other sex.[66] Under the Obama Administration, the Department further clarified this regulation in an opinion letter which stated that "'[w]hen 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.'"[67] This interpretation did not alter the regulation; it simply clarified how the regulation should apply to transgender students. Because they were "based on best practices from schools across the country that have already taken up the issue," the Obama Administration's guidelines were fully considered determinations on these issues, and the protections should not have been withdrawn.[68]

When the Fourth Circuit decided Gavin's case, the opinion letter was still in effect, and the majority opinion correctly gave it deference. An agency's interpretation of its own regulation, even one contained in an opinion letter, is given controlling weight if: (1) the regulation is ambiguous; and (2) the interpretation is

61. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

62. 20 U.S.C. § 1681 (2012).

63. *Chevron*, 467 U.S. at 843.

64. *Id.*

65. *See* Auer v. Robbins, 519 U.S. 452, 457 (1997).

66. 34 C.F.R. § 106.33 (2016).

67. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd, 822 F.3d 709, 718 (4th Cir. 2016) (quoting Joint App. 55).

68. Ariane de Vogue, Mary Kay Mallonee & Emanuella Grinberg, *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN POLITICS (Feb. 23, 2017), http://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/.

not plainly erroneous or inconsistent with the regulation.[69] Thus, analysis of whether the Department's interpretation of its own regulation is accorded deference begins with a determination of whether the Department's regulation contains an ambiguity.[70] The regulation at issue, 34 C.F.R. § 106.33, allows for separate toilet facilities "on the basis of sex" so long as facilities provided for "students of one sex" are comparable to facilities provided for "students of the other sex."[71] Because the regulation is silent on what the phrases "students of one sex" and "students of the other sex" mean in the context of transgender students, the regulation is ambiguous.[72] Although it could be argued that the term "sex" should be given its traditional interpretation of biological sex, both the Department's interpretation, as well as case law in the Title VII context, include gender within the definition. As the majority noted, "the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity."[73] As such, the Fourth Circuit was correct in ruling that the regulation is ambiguous.

After determining that the regulation is ambiguous with respect to the precise issue of how it applies to transgender students, the next step is to determine if the interpretation of the regulation in the opinion letter is plainly erroneous. In essence, § 106.33 states that schools may separate restrooms on the basis of sex. The issue for transgender students like Gavin stems from the fact that the term "sex" is not defined. The opinion letter issued under the Obama Administration clarifies that, in the context of transgender students, the term sex includes gender identity. The Fourth Circuit held that "the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects . . . included in the term 'sex.'"[74] Moreover, the opinion letter is not plainly erroneous for two reasons.

First, the interpretation in the opinion letter is not inconsistent with the regulation. The regulation is still controlling; however, when separating restroom facilities on the basis of sex, transgender students shall be treated consistent with their gender identity. Second, including gender identity within the meaning of the term "sex" is consistent with Title VII claims, federal court cases, and the Justice and Education Departments' stances on the issue under the Obama Administration. In the employment discrimination context, the term "sex" was initially given its common and traditional interpretation, which narrowly construed sex discrimination to refer only to biological differences between men and women.[75] However, the Supreme Court's decision in *Price Waterhouse v. Hopkins* established that, in the context of a Title VII claim, "sex" encompasses biological differences as well as gender stereotypes.[76] Federal courts have held that Title IX's protection from discrimination based on sex includes discrimination based on gender identity or

69. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 746 (E.D. Va. 2015).
70. *G.G.*, 822 F.3d at 719-20.
71. 34 C.F.R. § 106.33.
72. *G.G.*, 822 F.3d at 719.
73. *Id.* at 720.
74. *Id.* at 722.
75. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).
76. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

transgender status.[77] Similarly, the Departments of Justice and Education under the Obama Administration made clear that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity . . . ."[78]

Therefore, because § 106.33 is ambiguous, and because the Department's interpretation of its own regulation—in place at the time of the Fourth Circuit's decision—was not clearly erroneous, the Fourth Circuit correctly concluded that the opinion letter should be given deference. Applying appropriate deference to the opinion letter as the Fourth Circuit did, a policy that segregates bathrooms based on biological sex and without regard for students' gender identities violates Title IX.[79]

Further, even with the revocation of the Department's opinion letter, the above reasoning supports interpreting the regulation as the Obama Administration did. Without the opinion letter, the regulation is ambiguous because it is unclear how the term "sex" should be construed in the context of transgender students. Interpreting it to encompass a student's gender identity is not inconsistent with the regulation because, as the Fourth Circuit noted, it is "susceptible to more than one plausible reading."[80] Additionally, this interpretation is not erroneous because it is consistent with federal court opinions and with Title VII claims defining that same term. Accordingly, although the Trump Administration withdrew the Obama Administration's guidance, it is appropriate for any court to interpret the regulation at issue in the same way that the Obama Administration did in its opinion letter.

Thus, when the opinion letter was still valid, the Fourth Court correctly held that it should be given deference. Now that the guidance has been withdrawn, the same reasoning that the Fourth Circuit initially considered in Gavin's case can still be relevant in determining whether forcing students to use a restroom that corresponds with their biological sex is prohibited under Title IX. Because the regulation elucidating Title IX is ambiguous, as it does not define the term "sex," a court should hold that interpreting the term to include gender identity is appropriate because it is consistent with the definition that others have given to it, especially in the context of a Title VII claim. This would lead to the same result that the Obama Administration correctly announced in its guidance on this issue.

B. Equal Protection

Although the District Court, the Fourth Circuit, and the Supreme Court have yet to take on the issue, Gavin's Equal Protection claim should be addressed. If and when a court decides to rule on it, a court should find that the School Board's policy is a violation of the Equal Protection Clause.

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77. *See, e.g.*, Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 150-52 (N.D.N.Y. 2011); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000); *cf.* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

78. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

79. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."); Auer v. Robbins, 519 U.S. 452, 462 (1997) ("There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.").

80. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd, 822 F.3d 709, 720 (4th Cir. 2016).

The Fourteenth Amendment of the United States Constitution provides:

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[81]

The latter part of the provision is known as the Equal Protection Clause. In order to determine if there has been a violation of the Equal Protection Clause, the first question is whether there has been a government action.[82] In this case, the action is the enacting of the policy that required students to use the bathroom that corresponds with their biological sex, and the question is whether the School Board that enacted that policy is a governmental entity. "As a general matter, school boards are . . . governmental entities."[83] Thus, because the Gloucester County School Board is a governmental entity, its enactment of the bathroom policy at issue is a government action.

Second, it must be determined whether there was a classification, or some action taken by the governmental entity to single out one group from another.[84] Because the bathroom policy specifically limits bathroom use to the corresponding biological sexes, transgender students are singled out because they are being forced to comply with a rule that requires them to use the bathroom that corresponds with their biological sex even though, like Gavin, these individuals may wish to use the bathroom that corresponds with their gender identity. Thus, there is a classification. It could be argued that, because the policy classifies students on the basis of biological sex, and requires that each sex use separate facilities, the policy thus discriminates against everyone on the basis of sex and does not single out transgender students. However, the policy deprives only transgender students access to the facilities matching their gender identity: no one else suffers that deprivation. Thus, that argument fails; transgender students are the only class that is treated differently because of the policy.[85]

The third issue in an Equal Protection analysis is the level of scrutiny that the court will apply. First, when the governmental action involves suspect classifications, Equal Protection analysis requires application of strict scrutiny.[86] Under strict scrutiny, the State's interest must be compelling, and the law must be the least discriminatory means of achieving its goal.[87] Second, under "intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."[88] Third, all other governmental actions get rational basis review, which asks whether "there is a rational relationship between disparity of

81. U.S. CONST. amend. XIV, § 1.

82. *The Equal Protection Clause*, CONSTITUTIONAL LAW REPORTER, https://constitutionallaw reporter.com/amendment-14-01/equal-protection-clause/ (last visited Dec. 5, 2016) [hereinafter CONSTITUTIONAL LAW REPORTER].

83. Linhart v. Lawson, 540 S.E.2d 875, 878 (Va. 2001).

84. CONSTITUTIONAL LAW REPORTER, *supra* note 82.

85. *See* Brief of Plaintiffs-Appellants at 20-21, Carcaño v. McCrory, No. 1-16-CV-236, 2016 WL 4508192 (M.D. N.C. Oct. 18, 2016) (No. 16-1989) [hereinafter Carcaño Brief].

86. CONSTITUTIONAL LAW REPORTER, *supra* note 82.

87. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

88. Clark v. Jeter, 486 U.S. 456, 461 (1988).

treatment and some legitimate governmental purpose."[89] The Gloucester County School Board's bathroom policy must be analyzed under some form of heightened scrutiny and not rational basis. It involves sex discrimination, which gets intermediate scrutiny, and the transgender students that it impacts are a suspect class, which triggers strict scrutiny.

Discrimination against transgender individuals is a form of sex discrimination, which requires intermediate scrutiny at a minimum.[90] As previously discussed, in the context of Title VII, gender stereotyping is prohibited as sex discrimination. The Court in *Price Waterhouse v. Hopkins* established that sex discrimination encompassed social expectations concerning how a woman should look and behave.[91] Enforcing a policy that limits bathroom use to an individual's biological sex necessarily requires consideration of society's expectation of what an individual of that biological sex should look like and whether an individual's appearance corresponds with that expectation. Under *Price Waterhouse*, that is gender stereotyping, which is prohibited as sex discrimination.[92] This same reasoning applies to students in a Title IX claim and likewise extends to an Equal Protection claim.[93] Because this is sex discrimination, it is subject to heightened scrutiny.[94]

Alternatively, the government action may be subject to strict scrutiny because "transgender discrimination bears all the indicia of a suspect classification."[95] In identifying whether the policy singles out a suspect class, many factors are to be considered, including whether the group has been subjected to discrimination, whether the group exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group, and whether the group is a minority or politically powerless.[96] A recent national survey found that "[t]ransgender students experience alarming rates of harassment (78%), physical assault (35%), and sexual violence (12%), leading one in six to drop out of school."[97] Further, gender identity is not a characteristic that an individual can voluntarily change or should be expected to change.[98] Lastly, "as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group."[99] Because transgender students meet all the criteria for a suspect class, their classification in the School Board's policy warrants strict scrutiny.

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89. Cent. State Univ. v. Am. Ass'n. of Univ. Professors, 526 U.S. 124, 128 (1999).

90. Carcaño Brief, *supra* note 85, at 28.

91. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989).

92. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 722 n.8 (4th Cir. 2016) ("Accepting the Board's position would equally require the school to assume 'biological sex' based on 'appearances, social expectations, or explicit declarations of [biological sex].'").

93. Carcaño Brief, *supra* note 85, at 28 ("It would be anomalous to conclude that the exclusion of a transgender individual from a facility matching his gender identity discriminates on the basis of 'sex' under Title IX but not under the Equal Protection Clause. That is particularly so given that courts draw upon a common body of law in analyzing discrimination claims, as *G.G.* itself recognized.").

94. Craig v. Boren, 429 U.S. 190, 197 (1976).

95. Carcaño Brief, *supra* note 85, at 28.

96. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

97. Carcaño Brief, *supra* note 85, at 38.

98. *Id.* at 39.

99. Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., No. 216-CV-524, 2016 WL 5372349, at *16 (6th Cir. 2016).

Regardless of whether it is subject to intermediate or strict scrutiny, the Gloucester County School Board's bathroom policy fails. In analyzing the government action under some form of heightened scrutiny, we must first ask if the policy's classifications serve important governmental objectives.[100] It is critical to note that what must be justified is not the exclusion of men from the women's room and women from the men's room, but rather the policy's exclusion of transgender students from the facilities they previously used without any problem.[101]

The Gloucester County School Board stated in its policy that its goal was "to provide a safe learning environment for all students and to protect the privacy of all students."[102] Neither safety interests nor privacy interests can justify the policy's discrimination against transgender students.

First, Gavin and other transgender students using the bathroom that corresponds with their gender identities did not present a safety concern. As the Fourth Circuit noted, "the record is devoid of any evidence tending to show that [Gavin's] use of the boys' restroom creates a safety issue."[103] The court also found that "the Board has been, perhaps deliberately, vague as to the nature of safety concerns it has . . . ."[104] Because there was no identifiable safety concern before the policy was enacted, safety is not an important justification here.

Second, while privacy may be necessary because of the inherent "physical differences between men and women," physiological differences cannot trump the obligation to provide "genuinely equal protection."[105] The dissent suggested that privacy concerns in this case must be weighed strongly.[106] However, the majority addressed those concerns, stating that "[w]e doubt that [Gavin's] use of the communal restroom of his choice threatens the type of constitutional abuses present in the [privacy] cases cited by the dissent."[107] Thus, because there is no violation of privacy by allowing transgender students to use the bathroom that corresponds with their gender identity, privacy is not an important justification here.

Even if privacy and safety concerns were accepted as important justifications in this case, the policy is not substantially related to achieving those interests. "[A] state cannot needlessly discriminate where a neutral option will work."[108] Here, the School Board is needlessly discriminating because Gavin's bathroom use before the policy was enacted did not create any problems at his school. In fact, there is now a greater risk for Gavin. "The utter lack of close tailoring . . . is underscored by the fact that [the policy] now *creates* potential 'alarm and suspicion.'"[109] This is because Gavin has a male appearance, yet the policy forces him to use a female restroom. Gavin has explained that this is not a viable option for him because girls and women react negatively because of his masculine appearance, and this causes him severe psychological distress and is incompatible with his treatment for gender dysphoria.[110]

100. Craig v. Boren, 429 U.S. 190, 197 (1976).
101. *See* Carcaño Brief, *supra* note 85, at 27.
102. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716 (4th Cir. 2016).
103. *Id.* at 723 n.11.
104. *Id.*
105. United States v. Virginia, 518 U.S. 515, 533, 557 (1996).
106. *G.G.*, 822 F.3d at 730.
107. *Id.* at 723 n.10.
108. Carcaño Brief, *supra* note 85, at 53.
109. Id. at 54 (emphasis in original).
110. *G.G.*, 822 F.3d at 716.

Thus, rather than protecting interests of safety and privacy, it is likely that more problems will be created by requiring transgender students who appear as the sex with which they identify to use facilities designated for the opposite sex.[111] "A classification that not only fails to serve its purported justification but, in fact, actively undermines it by endangering a vulnerable minority, cannot survive any level of constitutional review."[112]

Therefore, because a governmental entity enacted a policy that discriminates against transgender students, which is sex discrimination and targets a suspect class, the policy must be reviewed under a form of heightened scrutiny. The policy's justifications of safety and privacy are not sufficient here because there is no evidence that these concerns were implicated by allowing transgender students to use the bathroom that corresponds with their gender identities. Even if safety and privacy were important governmental objectives in enacting the policy, the policy is not substantially related to achieving those interests because the Board is needlessly discriminating and creating more problems than were present before enactment of the policy, while also endangering a suspect class. Because the policy fails review under any form of heightened scrutiny, any court addressing this issue should find the School Board's policy to be a violation of the Equal Protection Clause.

V. CONCLUSION

The Fourth Circuit correctly accorded deference to the Department of Education's opinion letter and held that the Gloucester County School Board's policy separating bathrooms based on biological sex was a violation of Title IX. Even considering the Trump Administration's revocation of that opinion letter, the Fourth Circuit's reasoning supports adopting the interpretation that the opinion letter announced. Further, if a court decides to hear Gavin's Equal Protection claim, it should find that forcing students to use restrooms that correspond with their biological sex—without consideration of students' gender identities—is unconstitutional under the Equal Protection clause.

111. *See* Carcaño Brief, *supra* note 85, at 54.
112. *Id.* at 45.