

**G. G. v. Gloucester Cnty. Sch. Bd.**

United States Court of Appeals for the Fourth Circuit

January 27, 2016, Argued; April 19, 2016, Decided

No. 15-2056

**Reporter**

822 F.3d 709 \*; 2016 U.S. App. LEXIS 7026 \*\*

G. G., by his next friend and mother, Deirdre Grimm, Plaintiff - Appellant, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant - Appellee. JUDY CHIASSON, Ph. D., School Administrator California; DAVID VANNASDALL, School Administrator California; DIANA K. BRUCE, School Administrator District of Columbia; DENISE PALAZZO, School Administrator Florida; JEREMY MAJESKI, School Administrator Illinois; THOMAS A ABERLI, School Administrator Kentucky; ROBERT BOURGEOIS, School Administrator Massachusetts; MARY DORAN, School Administrator Minnesota; VALERIA SILVA, School Administrator Minnesota; RUDY RUDOLPH, School Administrator Oregon; JOHN O'REILLY, School Administrator New York; LISA LOVE, School Administrator Washington; DYLAN PAULY, School Administrator Wisconsin; SHERIE HOHS, School Administrator Wisconsin; THE NATIONAL WOMEN'S LAW CENTER; LEGAL MOMENTUM; THE ASSOCIATION OF TITLE IV ADMINISTRATORS; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; THE WOMEN'S LAW PROJECT; LEGAL VOICE; LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH; PEDIATRIC ENDOCRINE SOCIETY; CHILD AND ADOLESCENT GENDER CENTER CLINIC AT UCSF BENIOFF CHILDREN'S HOSPITAL; CENTER FOR TRANSYOUTH HEALTH AND DEVELOPMENT AT CHILDREN'S HOSPITAL LOS ANGELES; GENDER & SEX DEVELOPMENT PROGRAM AT ANN & ROBERT H. LURIE CHILDREN'S HOSPITAL OF CHICAGO; FAN FREE CLINIC; WHITMAN-WALKER CLINIC, INC., d/b/a Whitman-Walker Health; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; TRANSGENDER LAW & POLICY INSTITUTE; GENDER BENDERS; GAY, LESBIAN & STRAIGHT EDUCATION NETWORK; GAY-STRAIGHT ALLIANCE NETWORK; INSIDEOUT; EVIE PRIESTMAN; ROSMY; TIME OUT YOUTH; WE ARE FAMILY; UNITED STATES OF

AMERICA; MICHELLE FORCIER, M.D.; NORMAN SPACK, M.D., Amici Supporting Appellant, STATE OF SOUTH CAROLINA; PAUL R. LEPAGE, In his official capacity as Governor State of Maine; STATE OF ARIZONA; THE FAMILY FOUNDATION OF VIRGINIA; STATE OF MISSISSIPPI; JOHN WALSH; STATE OF WEST VIRGINIA; LORRAINE WALSH; PATRICK L. MCCRORY, In his official capacity as Governor State of North Carolina; MARK FRECHETTE; JUDITH REISMAN, Ph.D.; JON LYNKY; LIBERTY CENTER FOR CHILD PROTECTION; BRADLY FRIEDLIN; LISA TERRY; LEE TERRY; DONALD CAULDER; WENDY CAULDER; KIM WARD; ALICE MAY; JIM RUTAN; ISSAC RUTAN; DORETHA GUJU; DOCTOR RODNEY AUTRY; PASTOR JAMES LARSEN; DAVID THORNTON; KATHY THORNTON; JOSHUA CUBA; CLAUDIA CLIFTON; ILONA GAMBILL; TIM BYRD; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND, Amici Supporting Appellee.

**Subsequent History:** Rehearing, en banc, denied by G.G. v. Gloucester Cnty. Sch. Bd., 824 F.3d 450, 2016 U.S. App. LEXIS 9909 (4th Cir., 2016)

Injunction granted at G.G. v. Gloucester Cnty. Sch. Bd., 2016 U.S. Dist. LEXIS 93164 (E.D. Va., June 23, 2016)

Stay denied by G. G. v. Gloucester Cnty. Sch. Bd., 654 Fed. Appx. 606, 2016 U.S. App. LEXIS 13052 (4th Cir., 2016)

Stay granted by Gloucester Cnty. Sch. Bd. v. G.G., 136 S. Ct. 2442, 195 L. Ed. 2d 888, 2016 U.S. LEXIS 4361 (U.S., 2016)  
US Supreme Court certiorari granted by, in part Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 369, 196 L. Ed. 2d 283, 2016 U.S. LEXIS 6408 (U.S., 2016)

Vacated by, Remanded by Gloucester County Sch. Bd. v. G. G., 2017 U.S. LEXIS 1626 (U.S., Mar. 6, 2017)

**Prior History:** [\*\*1] Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. (4:15-cv-00054-RGD-DEM). Robert G. Doumar, Senior

District Judge.

*G.G. v. Gloucester County Sch. Bd.*, 132 F. Supp. 3d 736,  
2015 U.S. Dist. LEXIS 124905 (E.D. Va., 2015)

**Disposition:** REVERSED IN PART, VACATED IN PART,  
AND REMANDED.

## Core Terms

restrooms, sex, regulation, gender, facilities, district court, biological, transgender, boys', locker room, male, basis of sex, privacy, preliminary injunction, female, girls', schools, shower, injunction, Dictionary, deference, individuals, provides, Rights, unisex, living facility, sex-segregated, physiological, school board, high school

## Case Summary

### Overview

**HOLDINGS:** [1]-In a suit by a transgender boy alleging that the local school board's policy banning him from the boys' restroom at his high school violated Title IX and Equal Protection, dismissal of the boy's Title IX claim for failure to state a claim was not warranted because the U.S. Department of Education's interpretation of 34 C.F.R. § 106.33 as requiring schools to provide transgender students access to restrooms congruent with their gender identity was entitled to deference as § 106.33 contained an ambiguity, the Department's interpretation was not plainly erroneous or inconsistent with § 106.33's text, and the interpretation resulted from fair and considered judgment; [2]-The district court erred in denying a preliminary injunction without considering the proffered evidence because it was appropriate consider hearsay or other inadmissible evidence when considering such relief.

### Outcome

Reversed in part, vacated in part, and remanded.

## LexisNexis® Headnotes

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

**HNI** [↓] Title IX of the Education Amendments Act provides: No person 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. 20 U.S.C.S. § 1681(a).

Education Law > ... > Gender & Sex Discrimination > Title IX > Protected Individuals

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

**HN2** [↓] The U.S. Department of Education's regulations implementing Title IX of the Education Amendments Act, 20 U.S.C.S. § 1681(a), permit the provision of 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. 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights interpreted how this regulation should apply to transgender individuals: When 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.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Appeals > Standards of Review > De Novo Review

**HN3** [↓] Appellate courts review de novo a district court's grant of a motion to dismiss. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

Governments > Courts > Authority to Adjudicate

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

**HN4** [↓] Appellate courts are courts of review, not of first view. They will not proceed to the merits of a claim on appeal without the benefit of the district court's prior consideration.

Education Law > ... > Gender & Sex Discrimination > Title IX > Enforcement of Title IX

Education Law > ... > Gender & Sex Discrimination > Title

IX > Proof of Discrimination

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

**HN5** [↓] Title IX of the Education Amendments Act (Title IX) provides: No person 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. 20 U.S.C.S. § 1681(a). To allege a violation of Title IX, a plaintiff must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused him harm. Courts look to case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., for guidance in evaluating a claim brought under Title IX.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

**HN6** [↓] The U.S. Department of Education's regulation pertaining to "Education programs or activities" provides: Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; (3) Deny any person any such aid, benefit, or service; (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.31(b).

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Protected Individuals

**HN7** [↓] Not all distinctions on the basis of sex are impermissible under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.S. § 1681 et seq. For example, Title IX permits the provision of separate living facilities on the basis of sex: nothing contained in Title IX shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes. 20 U.S.C.S. § 1686. The U.S. Department of Education's regulations implementing Title IX

permit the provision of 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. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights wrote: When 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.

Education Law > ... > Gender & Sex Discrimination > Title IX > Protected Individuals

**HN8** [↓] All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.S. § 1681 et seq. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes. Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014).

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

**HN9** [↓] Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, reflect the agency's fair and considered judgment on the matter in question. An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded Auer deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a post hoc rationalization.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

**HN10** [↓] Courts will not accord an agency's interpretation of an unambiguous regulation Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), deference.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Protected Individuals

**HNI1** [↓] 34 C.F.R. § 106.33 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.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Governments > Legislation > Interpretation

**HNI2** [↓] Determining whether a regulation or statute is ambiguous presents a legal question, which appellate courts determine de novo. Courts determine ambiguity by analyzing the language under the three-part framework set forth in Robinson v. Shell Oil Co., 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole.

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

**HNI3** [↓] The mere act of providing separate restroom facilities for males and females does not violate Title IX of the Education Amendments, 20 U.S.C.S. § 1681 et seq.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

**HNI4** [↓] Review of an agency's interpretation of an ambiguous regulation is highly deferential. It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. An agency's view need only be reasonable to warrant deference.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

**HNI5** [↓] Even a valid interpretation will not be accorded Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a post hoc rationalization.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

**HNI6** [↓] Novelty alone is no reason to refuse Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), deference.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

**HNI7** [↓] To win a preliminary injunction, plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest. Appellate courts review a district court's denial of a preliminary injunction for abuse of discretion. A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding. Appellate courts do not ask whether they would have come to the same conclusion as the district court if they were examining the matter de novo. Instead, appellate courts reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

Civil Procedure > Remedies > Injunctions > Preliminary &

## Temporary Injunctions

## Evidence &gt; Admissibility

**HN18** [↓] Preliminary injunctions are governed by less strict rules of evidence: The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

## Evidence &gt; Admissibility

## Civil Procedure &gt; Remedies &gt; Injunctions &gt; Preliminary &amp; Temporary Injunctions

**HN19** [↓] Although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it is error for a district court to summarily reject proffered evidence because it may have been inadmissible at a subsequent trial.

## Civil Procedure &gt; Remedies &gt; Injunctions &gt; Preliminary &amp; Temporary Injunctions

## Evidence &gt; Admissibility

## Evidence &gt; Admissibility &gt; Statements as Evidence &gt; Hearsay

**HN20** [↓] The circuit courts to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to weight, not preclusion and have permitted district courts to rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction. The U.S. Court of Appeals for the Fourth Circuit sees no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

## Civil Procedure &gt; ... &gt; Disqualification &amp; Recusal &gt; Grounds for Disqualification &amp; Recusal &gt; Prior Involvements

## Civil Procedure &gt; ... &gt; Disqualification &amp; Recusal &gt; Grounds for Disqualification &amp; Recusal &gt; Appearance of Impropriety

**HN21** [↓] Absent a claim that the district judge is biased, reassignment is only appropriate in unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality. In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

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**Judges:** Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge. Judge Floyd wrote the opinion, in which Senior Judge Davis joined. Senior Judge Davis wrote a separate concurring opinion. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part.

**Opinion by:** FLOYD

## Opinion

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[\*714] FLOYD, Circuit Judge:

G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. [\*715] G.G. alleges that the school board impermissibly discriminated against him in violation of *Title IX* and the *Equal Protection Clause of the Constitution*. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, [\*\*6] we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether *Title IX* requires schools to provide transgender students access to restrooms congruent with their gender identity. *HNI*[↑] *Title IX* provides: "[n]o person . . . 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." *20 U.S.C. § 1681(a)*. *HN2*[↑] The Department of Education's (the Department) regulations implementing *Title IX* permit the provision of "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." *34 C.F.R. § 106.33*. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this [\*\*7] regulation should apply to transgender individuals: "When 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." J.A. 55. Because this case comes to us after dismissal pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery.<sup>1</sup>

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom.<sup>2</sup> G.G. used this restroom [\*\*716] without incident

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<sup>1</sup>The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations [\*\*8] such as the American Medical Association and the American Psychological Association. *Id.* The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." J.A. 15. Hook proposed the following [\*\*9] resolution (hereinafter the "transgender restroom policy" or "the policy"):

Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and

Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and

Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore

It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 15-16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a "young lady." J.A. 16. Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault [\*\*10] in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or

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<sup>2</sup>G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case.