G.G. v. Gloucester County Sch. Bd.

United States District Court for the Eastern District of Virginia, Newport News Division

September 17, 2015, Decided; September 17, 2015, Filed

CIVIL NO. 4:15cv54

Reporter
132 F. Supp. 3d 736 *; 2015 U.S. Dist. LEXIS 124905 **

G.G., by his next friend and mother, DEIRDRE GRIMM, Plaintiffs, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant.

Subsequent History: Reversed by, in part, Vacated by, in part, Remanded by *G. G. v. Gloucester Cnty. Sch. Bd., 2016 U.S. App. LEXIS 7026 (4th Cir. Va., Apr. 19, 2016)*

Core Terms

restroom, gender, sex, privacy, male, bathrooms, preliminary injunction, regulation, biological, declaration, transgender, facilities, Dysphoria, allegations, injunction, female, psychologist, hardships, girls', birth, sex discrimination, motion to dismiss, locker room, unisex, individuals, parties, boys', basis of sex, high school, nurse's

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Judges: Robert G. Doumar, Senior United States District Judge.

Opinion by: Robert G. Doumar

Opinion

[*738] **MEMORANDUM OPINION**

This matter is before the Court on Plaintiff G.G.'s challenge to a recent resolution (the "Resolution") passed by the Gloucester County School Board (the "School Board") on December 9, 2014. This Resolution addresses the restroom and locker room policy for all students in Gloucester County Public [**2] Schools. Specifically, G.G. brings claims under both the *Equal Protection Clause of the Fourteenth Amendment* (the "*Equal Protection Clause*") and *Title IX of the Education Amendments of 1972* ("Title IX"), seeking to contest the School Board's restroom policy under the Resolution.

On June 11, 2015, G.G. filed a Motion for Preliminary Injunction, ECF No. 11, and on July 7, 2015, the School Board filed a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court **GRANTED** the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court **DENIED** the Motion for Preliminary Injunction. ECF No. 53. This opinion memorializes the reasons for these orders.

I. FACTUAL AND PROCEDURAL HISTORY

The following summary is taken from the factual allegations contained in Plaintiff's Complaint, which, for purposes of ruling on the Motion to Dismiss as to Count II, the Court accepts as true. Nemet [*739] Chevrolet, Ltd. v. Consumeraffairs.com, Inc., *591 F.3d 250, 253 (4th Cir. 2009)*.

This case arises from a student's challenge to a recent restroom policy passed by the School Board. Plaintiff G.G. was born in Gloucester County on [REDACTED BY COURT], 1999 and designated female.[1] Compl. ¶¶ 12, 14. However, **[**3]** at a very young age, G.G. did not feel like a girl. *Id. ¶ 16*. Before age six, Plaintiff "refused to wear girl clothes." *Id. ¶ 17*. Starting at approximately age twelve, "G.G acknowledged his male gender identity to himself."[2] *Id. ¶ 18*. In 2013-14, during G.G.'s freshman year of high school, most of his friends were aware that he identified as male. *Id. ¶¶ 18-19*. Furthermore, away from home and school, G.G. presented himself as a male. *Id. ¶ 19*.

During G.G.'s freshman year of high school, which began in September 2013, he experienced severe depression and anxiety related to the stress of concealing his gender identity from his family. *Id. ¶ 20*. This is the reason he alleges that he did not attend school during the spring semester of his freshman year, from January 2014 to June 2014, and instead took classes through a home-bound program. *Id.* In April 2014, G.G. first informed his parents that he is transgender, that is, he believed that he was a man.[3] *Id. ¶ 21*. Sometime after informing his parents that he is transgender in April 2014, G.G., at his own request, began to see a psychologist, who subsequently diagnosed him with Gender Dysphoria.[4] *Id. ¶ 21*. As part of G.G.'s treatment, his psychologist recommended that G.G. begin living in accordance with his male gender identity in all respects. *Id. ¶ 23*. The psychologist provided G.G. with a "Treatment Documentation Letter" that confirmed that "he was receiving treatment for Gender Dysphoria and that, as part of that treatment, he should **[**5]** be treated as a boy in all respects, including with respect to his use of the restroom." *Id.* The psychologist also recommended that G.G. "see an endocrinologist and begin hormone treatment." *Id. ¶ 26*.

Subsequently, G.G. sought to implement his psychologist's recommendation. *Id. ¶ 25*. In July 2014, G.G. petitioned the Circuit Court of Gloucester County to change his legal name to his present masculine name and, the court granted his petition. Id. At his own request, G.G.'s new name is used for all purposes, and his friends and family refer to him using male pronouns. *Id.* Additionally, when out in public, G.G. uses the boys' restroom. *Id.*

G.G. also sought to implement his lifestyle transition at school. In August 2014, G.G. and his mother notified officials at **[*740]** Gloucester High School that G.G. is transgender and that he had changed his name. *Id. ¶ 27*. Consequently, **[**6]** officials changed school records to reflect G.G.'s new masculine name. *Id.* Furthermore, before the beginning of the 2014-15 school year, G.G. and his mother met with the school principal and guidance counselor to discuss his social transition. *Id. ¶ 28*. The school representatives allowed G.G. to email teachers and inform them that he preferred to be addressed using his new name and male pronouns. *Id.* Being unsure how students would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office. *Id. ¶ 30*. G.G. was also permitted to continue his physical education requirement through his home school program. *Id. ¶ 29*. Consequently, G.G. "has not and does not intend to use a locker room at school." *Id.*

However, after 2014-15 school year began, G.G. found it stigmatizing to use a separate restroom. *Id. ¶ 31*. G.G. requested to use the male restroom. *Id.* On or around October 20, 2014, the school principal agreed to G.G.'s request. *Id. ¶ 32*. For the next seven weeks, G.G. used the boys' restroom. *Id.*

Some members of the community disapproved of G.G.'s use of the men's bathroom when they learned of it. *Id. ¶ 33*. Some of these individuals contacted members of **[**7]** the School Board and asked that G.G. be prohibited from using the men's restroom. *Id.* Shortly before the School Board's meeting on November 11, 2014, one of its members added an item to the agenda, titled "Discussion of Use of Restrooms/Locker Room Facilities," along with a proposed resolution. *Id. ¶ 34*. This proposed resolution stated as follows:

> Whereas the [Gloucester County Public Schools] recognizes that some students question their gender

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[1] For the sake of brevity occasionally in this opinion the term "birth sex" may be used to describe the sex assigned to individuals at their birth. "Natal female" will be used to describe the gender assigned to G.G. at birth.

[2] The American Psychiatric Association ("APA") defines "gender identity" as "an individual's identification as male, female, or, occasionally, some category other than male or female." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) ("DSM"). The DSM is "a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders." Id. at xli. Although the DSM was included in G.G.'s briefs, it was not alleged in the Complaint **[**4]** and will consequently not be considered for the purpose of the Motion to Dismiss. However, the Court finds it instructive for definitional purposes.

[3] The APA defines "transgender" as "the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender." *Id.*

[4] The APA defines "gender dysphoria" as "the distress that may accompany the incongruence between one's experienced and expressed gender and one's assigned gender." *Id.*

> identities, and
> Whereas the [Gloucester County Public Schools] encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
> Whereas the [Gloucester County Public Schools] 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 [Gloucester County Public Schools] 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.

Id. ¶ 34. At the meeting, a majority of the twenty-seven people who spoke **[**8]** were in favor of the proposal. *Id.* ¶ 37. Some proponents argued that transgender students' use of the restrooms would violate the privacy of other students and might "lead to sexual assault in the bathrooms." *Id.* It was suggested that a non-transgender boy could come to the school in a dress and demand to use the girls' restroom. *Id.* G.G. addressed the group and spoke against the proposed resolution and thus identified himself to the entire community. *Id.* ¶ 38. At the end of the meeting, the School Board voted 4-3 to defer a vote on the policy until its meeting on December 9, 2014. *Id.* ¶ 39.

On December 3, 2014, the School Board issued a news release stating that regardless of the outcome, it intended to take measures to increase privacy for all students using school restrooms, including "expanding partitions between urinals in male restrooms"; "adding privacy strips to the doors of stalls in all restrooms"; and "designat[ing] single-stall, unisex restrooms, similar to what's in many other public spaces." *Id.* ¶ 41. On December 9, 2014, the School Board held a meeting to vote on the proposed resolution. *Id.* Before **[*741]** the vote was conducted, a Citizens' Comments Period was held to allow a discussion **[**9]** on the proposed resolution. *Id.* Again, a majority of the speakers supported the resolution. *Id.* ¶ 42. Speakers again raised concerns about the privacy of other students. *Id.* After thirty-seven people spoke during the Citizens' Comment Period, the School Board voted 6-1 to pass the Resolution. *Id.* ¶ 43.

On December 10, 2015, the day after the School Board passed the Resolution, the school principal informed G.G. that he could no longer use the boys' restroom and would be disciplined if he did. *Id.* ¶ 45.

Since the adoption of the restroom policy, certain physical improvements have been made to the school restrooms at Gloucester High School. The school has installed three unisex single-stall restrooms. *Id.* ¶ 47. The school has also raised the doors and walls around the bathroom stalls so that students cannot see into an adjoining stall. *Id.* Additionally, partitions were installed between the urinals in the boys' restrooms. *Id.*

Sometime after the actions of the School Board, G.G. began receiving hormone treatment in December 2014. *Id.* ¶ 26 These treatments have deepened his voice, increased the growth of his facial hair, and given him a more masculine appearance. *Id.*

It is alleged that "[u]sing the **[**10]** girls' restroom is not possible for G.G." *Id.* ¶ 46. G.G. alleges that prior to his treatment for Gender Dysphoria, girls and women who encountered G.G. in female restrooms would react negatively because of his masculine appearance; that in eighth and ninth grade, the period from September 2012 to June 2014, girls at school would ask him to leave the female restroom; and that use of the girls' restroom would also cause G.G. "severe psychological stress" and would be "incompatible with his medically necessary treatment for Gender Dysphoria." *Id.*

G.G. further alleges that he refuses to use the separate single-stall restrooms installed by the school because the use of them would stigmatize and isolate him; that the use of these restrooms would serve as a reminder that the school views him as "different"; and that the school community knows that the restrooms were installed for him. *Id.*

From these alleged facts, on June 11, 2015, G.G. brought the present challenge to the School Board's restroom policy under the *Equal Protection Clause* and Title IX. ECF No. 8. On that same day, G.G. filed the instant Motion for Preliminary Injunction, requesting that the Court issue an injunction allowing G.G. to use the boys' bathroom **[**11]** at Gloucester High School until this case is decided at trial. ECF No. 11. On June 29, 2015, the United States ("the Government"), through the Department of Justice, filed a Statement of Interest, asserting that the School Board's bathroom policy violated Title IX. ECF No. 28. The School Board filed an Opposition to the Motion for Preliminary Injunction on July 7, 2015, ECF No. 30, along with a Motion to Dismiss, ECF No. 31. On July 27, 2015, the parties appeared before the Court and argued their respective positions as to both motions. ECF No. 47. At that hearing, the Court took both motions under advisement. From the bench, the Court granted the Motion to Dismiss as to Count II, G.G.'s claim under Title IX. On September 4, 2015, the Court denied the Motion for Preliminary Injunction. ECF No. 53. This opinion memorializes the reasons for these orders.

II. MOTION TO DISMISS

A. Standard of Review

The function of a motion to dismiss under *Rule 12(b)(6)* is to test "the sufficiency of a complaint." *Occupy Columbia v. Haley, 738 F.3d 107, 116 (4th Cir. 2013)*. **[*742]** "[I]mportantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*. "To survive such a motion, the complaint must allege facts sufficient 'to raise a right to **[**12]** relief above the speculative level' and 'state a claim to relief that is plausible on its face.'" *Haley, 738 F.3d at 116*. When reviewing the legal sufficiency of a complaint, the Court must accept "all well-pleaded allegations in the plaintiff's complaint as true" and draw "all reasonable factual inferences from those facts in the plaintiffs favor." *Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)*. Legal conclusions, on the other hand, are not entitled to the assumption of truth if they are not supported by factual allegations. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. However, a motion to dismiss should be granted only in "very limited circumstances." *Rogers v. Jefferson—Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989)*.

B. Count II - Title IX

G.G. also alleges that the School Board's bathroom policy violates Title IX. 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 . . . ." *20 U.S.C. § 1681(a)*. "Under Title IX, a prima facie case is established by a plaintiff showing (1) that [he or] she was excluded from participation in (or denied the benefits of, or subjected to discrimination in) an educational program; (2) that the program receives federal assistance; and (3) that the exclusion was on the basis of sex." **[**13]** *Manolov v. Borough of Manhattan Comm. Coll., 952 F. Supp. 2d 522, 532 (S.D.N.Y. 2013)* (quoting *Murray v. N.Y. Univ. Coll. of Dentistry, No. 93 Civ. 8771, 1994 U.S. Dist. LEXIS 13880, 1994 WL 533411, at *5 (S.D.N.Y. Sept. 29, 1994)*); *Bougher v. Univ. of Pittsburgh, 713 F. Supp. 139, 143-44 (W.D. Pa. 1989)*, aff'd, *882 F.2d 74 (3d Cir. 1989)*).

The School Board Resolution expressly differentiates between students who have a gender identity congruent with their birth sex and those who do not. Compl. ¶ 34. G.G. alleges that this exclusion from the boys' bathroom based on his gender identity constitutes sex discrimination under Title IX. Compl. ¶¶ 64, 65.

1. Arguments

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

The School Board argues that sex discrimination does not include discrimination based on gender identity. For support, the School Board cites *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education, 97 F. Supp. 3d 657, 2015 U.S. Dist. LEXIS 41823, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015)*. In *Johnston*, the Western District of Pennsylvania found that a policy separating the bathrooms by birth sex at the University of Pittsburgh did not violate Title IX because sex discrimination does not include discrimination against transgender individuals. *2015 U.S. Dist. LEXIS 41823, 2015 WL 1497753, at *12-19*. The School Board asserts that *Johnston* establishes **[**14]** that Title IX does not incorporate discrimination based on gender or transgender status.

In response, G.G. maintains that sex discrimination includes discrimination based on gender. G.G. cites to a number of Title VII cases in which courts have found sex **[*743]** discrimination to include gender discrimination. See, e.g., *Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011)*; *Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004)*; *Finkle v. Howard Cnty., Md., 12 F. Supp. 3d 780, 788 (D. Md. 2014)*; *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008)*; see also *Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000)* ("'[S]ex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.").

In addition, G.G. contends that the cases Johnston cited to support its proposition, *Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)*, and, *Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982)*, cert. denied, *471 U.S. 1017, 105 S. Ct. 2023, 85 L. Ed. 2d 304 (1985)*,[5] are no longer good law. In both Ulane and Sommers, the courts refused to extend sex discrimination to include discrimination against transgender individuals or those with nonconforming gender types.

[5] The more recent case Johnston cites is a Tenth Circuit case, in which the court avoided deciding the issue. *Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007)* ("This court need not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex' and we need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex.").

However, G.G. asserts that *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)*, overruled these cases. In Price Waterhouse, the Supreme Court considered a Title VII claim based on allegations that an employee at Price Waterhouse was denied partnership because she was considered "macho" and "overcompensated for being a woman." *490 U.S. at 235*. She had been advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Court found **[**15]** that such comments were indicative of gender stereotyping, which Title VII prohibited as sex discrimination. The Court explained that

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

Id. at 251 (quoting *L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978)*). Accordingly, the Court found 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 sex. *Id. at 251*.

Other courts have found that Price Waterhouse overruled the cases cited in *Johnston*. "[S]ince the decision **[**16]** in Price Waterhouse, federal courts have recognized with near-total uniformity that 'the approach in . . . Sommers, and Ulane . . . has been eviscerated' by Price Waterhouse's holding." *Glenn, 663 F.3d at 1318 n.5* (quoting *City of Salem, 378 F.3d at 573*)); see also *Schwenk, 204 F.3d at 1201* ("The initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse."); *Lopez, 542 F. Supp. 2d at 660*. Based on Price Waterhouse and its progeny, G.G. claims that discrimination against transgender individuals or other nonconforming gender types is now prohibited as a form of sex discrimination. Accordingly, G.G. asserts that the Resolution's differentiation between students **[*744]** who have a gender identity congruent with their birth sex, and those who do not, amounts to sex discrimination under Title IX.

2. Analysis

Although the primary contention between the parties is whether gender discrimination fits within the definition of sex discrimination under Title IX, G.G.'s claim does not rest on this distinction. Rather, the Court concludes that G.G.'s Title IX claim is precluded by Department of Education regulations. As noted above, Title IX provides that [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied **[**17]** the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *20 U.S.C. § 1681*. However, this prohibition on sex-based decision making is not without exceptions. Among the exceptions listed in Title IX is a provision stating that "nothing contained herein 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. § 1686*. Although the statute does not expressly state that educational institutions may maintain separate bathrooms for the different sexes, Department of Education regulations stipulate:

> 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.

34 C.F.R. § 106.33. This regulation (hereinafter, "*Section 106.33*") expressly allows schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable. When Congress delegates authority to any agency to "elucidate a specific provision of the statute by regulation, any ensuing regulation is binding on the courts **[**18]** unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp., 533 U.S. 218, 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*. The Department of Education's regulation is not "arbitrary, capricious, or manifestly contrary to the statute."[6] Rather, *Section 106.33* seems to effectuate Title IX's provision allowing separate living facilities based on sex.[7] Therefore, *Section 106.33* is given controlling weight.

In light of *Section 106.33*, G.G. fails to state a valid claim under Title IX. G.G. alleges that the School Board violated Title IX by preventing him from using the boys' restrooms despite the fact that his gender identity is male. **[**19]** Compl.

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[6] It is significant that neither party raised, nor even hinted at raising, a challenge to the validity of *Section 106.33* under Title IX.

[7] The term "living facilities" in *20 U.S.C. § 1686* is ambiguous, and legislative history of Title IX does not provide clear guidance as to its meaning. This term could be narrowly interpreted to mean living quarters, such as dormitories, or it could be broadly interpreted to include other facilities, such as bathrooms. See Implementing Title IX: The New Regulations, 124 U. Pa. L. Rev. 806, 811 (1976). Because the Department of Education's inclusion of bathrooms within "living facilities" is reasonable, the Court defers to its interpretation. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*.

¶¶ 64, 65. According to G.G., the School Board's determination was based on the belief that Plaintiff is biologically female, not biologically male.[8] Id. ¶ 65. However, *Section 106.33* **[*745]** specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable. Therefore, the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex.

In fact, the only way to square G.G.'s allegations with *Section 106.33* is to interpret the use of the term "sex" in *Section 106.33* to mean *only* "gender identity." Under this interpretation, *Section 106.33* would permit the **[**20]** use of separate bathrooms on the basis of gender identity and *not* on the basis of birth or biological sex. However, under any fair reading, "sex" in *Section 106.33* clearly includes biological sex. Because the School Board's policy of providing separate bathrooms on the basis of biological sex is permissible under the regulation, the Court need not decide whether "sex" in the *Section 106.33* also includes "gender identity."

Instead, the Court need only decide whether the School Board's bathroom policy satisfies *Section 106.33*. *Section 106.33* states that sex-segregated bathrooms are permissible unless such facilities are not comparable. G.G. fails to allege that the bathrooms to which he is allowed access by the School Board—the girls' restrooms and the single-stall restrooms—are incomparable to those provided for individuals who are biologically male. In fact, none of the allegations in the Complaint even mention or imply that the facilities in the bathrooms are not comparable. Consequently, G.G. fails to state a claim under Title IX.

Nonetheless, despite *Section 106.33*, the Government urges the Court to defer to the Department of Education's interpretation of Title IX, which maintains that a policy that segregates bathrooms based on biological sex and without **[**21]** regard for students' gender identities violates Title IX. In support of its position, the Government attaches a letter (the "Letter"), dated January 7, 2015, issued by the Department of Education, through the Office for Civil Rights, apparently clarifying its stance on the treatment of transgender students with regard to sex-segregated restrooms. Statement of Interest 9, ECF No. 28; id. Ex. B, at 2, ECF No. 28-2. In the Letter, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights, writes:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school must treat transgender students consistent with their gender identity.

Id. at 9-10, Ex. B, at 2. The Letter cites a Department of Education significant guidance document (the "Guidance Document") published in 2014 in support of this interpretation. According to the Guidance Document:

> Under Title IX, a recipient must generally treat transgender students **[**22]** consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.

See Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (Dec. 1, 2014). Despite the fact that *Section 106.33* has been in effect since 1975,[9] the Department of Education **[*746]** does not cite any documents published before 2014 to support the interpretation it now adopts.

The Department of Education's interpretation does not stand up to scrutiny. Unlike regulations, interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines "do not warrant Chevron-style deference" with regard to statutes. *Christensen v. Harris Cnty., 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)*. Therefore, the interpretations in the Letter and the Guidance Document cannot supplant *Section 106.33*. Nonetheless, these documents can inform the meaning of *Section 106.33*. An agency's interpretation of its own regulation, even one contained in an opinion letter or a **[**23]** guidance document, is given controlling weight if (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. *Id. at 588* ("Auer deference is warranted only when the language of the regulation is

[8] The Court is sensitive to the fact the G.G. disapproves of the School Board's term "biological gender." See Compl. ¶ 66 (placing biological in dismissive quotation marks). G.G. may also take issue with the Court's phrase biological sex. The Court is guided in its usage by the APA "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" from 2011, which the School Board submitted with its Brief in Opposition to Motion for Preliminary Injunction. Ex. 3, ECF No. 30. The APA defines "sex" as "a person's biological status," and identifies "a number of indicators of biological sex." Id.

[9] Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and adopted by the Department of Education upon its establishment in 1980. *45 Fed. Reg. 30802, 30955 (May. 9 1980)* (codified at *34 C.F.R. §§ 106.1-.71*).