



West Virginia
P O Box 3952
Charleston WV 25339-3952

(304) 345-9246
www.acluww.org

Superintendent
Barbour County Schools
45 School Street
Philippi, WV 26416

September 9, 2020

Re: Schools Obligation to Protect LGBTQ Students

Dear Superintendent:

Welcome back for what we all hope is a successful, fulfilling school year for students, teachers, staff, administration and parents across the state. I am writing to ensure that you are aware of recent court decisions that clarify West Virginia school districts' obligations to protect LGBTQ students under federal law.

The United States Court of Appeals for the Fourth Circuit recently issued a decision in *Grimm v. Gloucester County School Board*, No. 19-1952 (4th Cir. 2020) holding that school districts, including those in West Virginia, may not discriminate against students based on their sexual orientation or gender identity. West Virginia is in the Fourth Circuit, and therefore the decision in this case applies to West Virginia school districts. The specific facts in the case dealt with a transgender boy who sought to amend his school records to accurately reflect his gender and to use the boys' bathroom. The school district refused the student's requests to change his school records or to use the facility that matches his gender identity, instead offering him the right to use a single stall bathroom. The Fourth Circuit held that by refusing to let the student change his school records and by refusing to let him use the bathroom that comports with his gender identity, the school district violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972.

The Court specifically addressed concerns over cisgender student privacy and cisgender students pretending to be transgender in order to obtain access to opposite-gender bathrooms. The Court found that neither concerns were borne out by real world experience and were merely "philosophical." The Court pointed out that "[n]early half of Virginia's public-school students attend schools prohibiting discrimination or harassment based on gender identity...Those Virginia school boards have had no difficulty implementing trans-inclusive bathroom policies and explain that they 'have seen none of the negative consequences predicted by opponents of such policies.'" *Id.* at 47.

Having held that the school's bathroom policy violated the student's equal protection rights, the Court "easily conclude[d] that the Board's continued refusal to update his school records similarly violate[d] those rights. The Court reasoned that "[u]nlike students whose gender matches their sex-assigned-at-birth, [the student] is unable to obtain a transcript indicating that he is male."

In holding that the school's actions violated Title IX, the Court relied heavily on the recent U.S. Supreme Court case *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In that case, the Supreme Court held that employers that discriminate against employees because of their sexual orientation or gender identity violate Title VII's prohibition on discrimination in employment "because of sex." The Fourth Circuit determined that under the *Bostock* rationale, Title IX's prohibition on discrimination in education "on the basis of sex" must likewise ban discrimination based on sexual orientation and gender identity. Moreover, at least one federal court has already held that the ruling in *Bostock* similarly clarifies that the West Virginia Human Rights Act also prohibits discrimination based on sexual orientation and gender identity. See *Jarrell v. Hardy Cellular Telephone Company*, 2020 WL 4208533 (S.D. W.Va., July 22, 2020).

The Fourth Circuit's decision in *Grimm* makes clear that Title IX and the Equal Protection Clause prohibit schools from discriminating against students because of their sexual orientation or gender identity. This decision is binding on all public schools (and many private schools) in the State of West Virginia. As such, many West Virginia school districts must immediately change their policies and practices in order to comply with law.

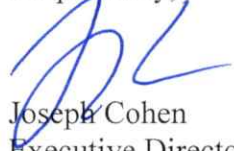
To avoid violating students' statutory and constitutional rights, schools must ensure that:

- Students are protected from harassment and bullying related to their sexual orientation and gender identity
- Students are free to start or join LGBTQ clubs, such as a gay-straight alliance
- Students are called by the name and pronouns that match their gender identity
- Students are free to use the bathroom and changing facilities that match their gender identity, and cannot be forced to use separate facilities
- Students are free to change their school records to ensure that they match their gender identity
- Students are free to dress in accordance with their gender identity, including at school dances, graduation ceremonies, and other school functions
- Students are otherwise not discriminated against because of their sexual orientation or gender identity.

While West Virginia schools' legal obligations to protect the rights of LGBTQ students are now crystal clear, it is important to keep in mind the real-world impact of creating a welcoming and affirming educational environment. According to a recent study by the Trevor Project, 71% of LGBTQ youth have been discriminated against because of their sexual orientation or gender identity; a full 39% of LGBTQ youth seriously considered attempting suicide in the past twelve months, with more than half of transgender and non-binary youth having seriously considered suicide. According to a study by the Williams Institute, WV has the highest proportion of teens that self-identify as trans in the country. We know that kids who feel safe and welcome at school engage in less risky behaviors, have improved mental health, and do better academically. Instituting affirming policies are not only required by law, they simply make schools better.

If you have any questions or would like to discuss this matter further, please do not hesitate to reach out to me at jcohen@acluwv.org.

Respectfully,



Joseph Cohen
Executive Director
ACLU of West Virginia