A Journey "Delayed But Not Finished": Granting *Auer* Deference to Regulatory Interpretations Guiding Transgender Rights in *G.G. ex rel. Grimm v. Gloucester County School Board*

I. OVERVIEW

G.G. is a student at Gloucester High School in Virginia, a junior at the time of this lawsuit.[1] G.G. lives his life as a male, having done everything—including legally changing his name and undergoing hormone therapy—except sex reassignment surgery.[2] Beginning in his sophomore year, G.G. and his mother told the school officials that he was a boy, and the school took measures to guarantee that he would be treated accordingly, including allowing him to use the male restroom.[3]

About seven weeks later, in November 2014, a member of the Gloucester County School Board (the Board) proposed a resolution that limited male and female restroom and locker room use "to the corresponding biological genders" and provided private facilities for

1. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016).
2. *Id.*
3. *Id.*

students with "gender identity issues."[4] The Board ultimately voted 6-1 to adopt the policy, banning G.G. from using the boys' restroom.[5] During the period preceding the vote, many individuals commented in disparaging ways toward G.G.: he was referred to as a "freak" and a "dog," and he was frequently referred to as a girl.[6] As a result of the policy change, G.G. alleged that he felt even more stigmatized than before, even in the unisex restrooms.[7] He suffered "severe and persistent emotional and social harms," and avoided using the restroom while at school, to the point where he developed several urinary tract infections.[8]

The following year, G.G. sued the Board, claiming that it violated Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution by discriminating against him.[9] The district court dismissed his Title IX claim and denied his request for an injunction, but it did not issue a ruling on G.G.'s equal protection claim.[10] G.G., on appeal, asked the U.S. Court of Appeals for the Fourth Circuit to reverse the district court's dismissal of his claims under Title IX and to grant the injunction against the Board policy.[11] He also asked for a different district judge on remand based on comments the judge had made.[12] The United States Court of Appeals for the Fourth Circuit *held* that the district court erred in not giving deference to the Department of Education's interpretation of the regulation that allowed G.G. to use the bathroom that corresponds with his identity and that it used the wrong evidentiary standard in refusing to grant a preliminary injunction in G.G.'s favor. *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 723, 725 (4th Cir. 2016).

II. BACKGROUND

Title IX states 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[.]"[13] However, schools may make certain distinctions on the basis of sex under Title IX, like providing

4. *Id.* at 716.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 717.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. 20 U.S.C. § 1681(a) (1986).

separate locker room, toilet, and shower facilities, provided that those provided for one sex are comparable to those provided for the other sex.[14] In December 2014, the Department of Education's (Department) Office of Civil Rights issued a Dear Colleague letter on that regulation, stating that recipients of federal funds must treat transgender students in a manner consistent with their gender identity.[15]

A. The Nexus of Requirements To Grant Auer Deference to Agency Interpretations of Regulatory Law

An agency's own regulatory interpretation, such as the Department's interpretation of the Code of Federal Regulations, receives deference unless plainly erroneous or inconsistent with the regulation.[16] Courts generally grant deference when an agency interprets its own regulations, as opposed to statutes.[17] An agency has extremely wide latitude to interpret its own rules.[18]

In *Auer v. Robbins*, the Supreme Court held that the Secretary of Labor's interpretation of regulations governing overtime pay exemptions was entitled to deference.[19] The Court in *Auer* expounded the prior jurisprudence in *Robertson v. Methow Valley Citizens Council*, which similarly held that courts generally defer to agency interpretations of regulations.[20]

In order for a court to grant *Auer* deference, the agency must demonstrate that the regulation is ambiguous and is not "plainly erroneous or inconsistent with the regulation."[21] The interpretation must also be the result of a "fair and considered judgment on the matter in

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14. 34 C.F.R. § 106.33 (2000).

15. OFFICE OF CIVIL RIGHTS, DEP'T. OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

16. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (internal citations omitted)).

17. *See Auer*, 519 U.S. at 461; *see also* Humanoids Grp. v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004) (citing Christensen v. Harris Cty., 529 U.S. 576, 587-88 (2000)).

18. *See generally* Nicholas Bednar, *Defying* Auer *Deference*, 100 MINN. L. REV. (June 24, 2015), http://www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association/.

19. *See* 519 U.S. at 462-63; *see also* 29 C.F.R. § 541.118(a) (1996) (regulating exemptions for overtime pay under the Fair Labor Standards Act).

20. *See Robertson*, 490 U.S. at 358-59 (holding that regulations of the U.S. Forest Service were "promulgated pursuant to a broad grant of authority" and did not require the Forest Service to condition the grant of special use permits on implementing mitigation measures).

21. *Auer*, 519 U.S. at 461 (quoting *Robertson*, 490 U.S. at 359 (internal citations omitted)); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

question."[22] In *Auer*, police sergeants sued the police commissioner in St. Louis for violations of the Fair Labor Standards Act, claiming they were not exempt from the salary-basis test for overtime pay, because their pay could theoretically be deducted for a number of disciplinary violations.[23] The Secretary of Labor filed an amicus brief, stating that the office interpreted the salary-basis regulation as denying overtime exemption when there is a policy of pay deductions, as opposed to a mere possibility.[24] Because the Secretary's interpretation of the regulation was not inconsistent with the language of the regulation, the Supreme Court granted deference.[25]

The ambiguity of a regulation or statute is a legal question considered *de novo*.[26] A court must determine whether the language of the regulation is ambiguous under a three-part test.[27] First, the inquiry stops if the language used in the statute is unambiguous and "the statutory scheme is coherent and consistent."[28] Second, a court looks at the specific context in which the language is used.[29] Finally, a court looks at the broader context of the statute as a whole.[30]

Courts are highly deferential to agencies in determining whether their interpretations are erroneous or inconsistent.[31] However, if "an alternative reading is compelled by the regulation's plain language," the court will not grant deference.[32] In order to be reasonable, the interpretation must "sensibly conform[] to the purpose and wording of the regulations."[33] Additionally, the interpretation does not have to be the most conventional or natural to warrant deference.[34] The fact that an interpretation is new is not grounds for judging it inconsistent with previous interpretations.[35]

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22. *Auer*, 519 U.S. at 462.
23. *Id.* at 455.
24. *Id.* at 461.
25. *Id.* at 461-62.
26. *See* Humanoids Grp. v. Rogan, 375 F.3d 301, 306 (4th Cir. 2004)
27. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).
28. *See Robinson, 519 U.S.* at 340 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989)).
29. *Id.* at 341.
30. *Id.*
31. *See* Dickenson-Russell Coal Co. v. Sec'y of Labor, 747 F.3d 251, 257 (4th Cir. 2014).
32. *See Dickenson-Russell*, 747 F.3d at 257 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).
33. *See Dickenson-Russell*, 747 F.3d at 257 (quoting Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 150-51 (1991) (internal citation omitted)).
34. *See* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991) (citing E.E.O.C. v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988)).
35. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 63 (2011).

The interpretation must also be the result of the agency's "fair and considered judgment[.]"[36] Thus, it will not receive deference when it "conflicts with a prior interpretation, or when it appears that the interpretation is no more than a convenient litigating position, or when interpretation is a post hoc rationalization."[37] An interpretation is considered a post hoc rationalization if it is "advanced by an agency seeking to defend past agency action against attack."[38]

B. The Preliminary Injunction Test and Evidentiary Standards for Balance of Hardships

A circuit court reviews a district court's denial of a preliminary injunction for abuse of discretion, meaning that erroneous legal principles or facts had guided the court's decision.[39] For a court to grant a preliminary injunction, the burden rests on the plaintiff to show 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."[40] The mere possibility of irreparable harm is insufficient; the plaintiff must demonstrate that irreparable injury is likely to occur in the absence of an injunction.[41]

In considering a preliminary injunction, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[42] Additionally, in determining the balance of hardships and the public interest, a district court may grant a preliminary injunction on less formal procedural and evidentiary grounds.[43]

In *League of Women Voters of North Carolina v. North Carolina*, the United States Court of Appeals for the Fourth Circuit reversed the district court's denial of a preliminary injunction on provisions of North

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36. Christopher v. Smithkline Beecham Corp., 132 S. Ct. 2156, 2166 (2012).

37. *Id.* (quoting Auer v. Robbins, 519 U.S. 452, 462).

38. *Auer*, 519 U.S. at 461-62 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)). The Supreme Court held that the Secretary of Labor's amicus brief was the result of the agency's fair and considered judgment, and therefore it was not a post hoc rationalization. Additionally, the brief was filed "at the request of the Court." 519 U.S. at 461.

39. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 235 (4th Cir. 2014); *see also* Morris v. Wachovia Sec., Inc., 448 F.3d 268, 277 (4th Cir. 2006).

40. *League of Women Voters*, 769 F.3d at 236 (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

41. *See Winter*, 555 U.S. at 21.

42. *See Winter*, 555 U.S. at 23 (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)).

43. *See* Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

Carolina's House Bill 589.[44] The bill would have eliminated same-day voter registration and prohibited counting out-of-precinct ballots.[45] However, the Fourth Circuit affirmed the district court in denying an injunction on other voting restrictions, such as a reduction in early voting days.[46] The Fourth Circuit's decision was informed by a balance-of-hardships analysis, as reinstating early voting would have put the state on a very tight timeframe to conduct elections—two weeks from the date of the court's decision.[47]

The court held that the plaintiffs failed to prove irreparable injury regarding the elimination of pre-registration for sixteen- and seventeen-year-olds, the removal of discretion from county boards of elections to keep polls open longer, and the rollout of voter identification requirements.[48] The plaintiffs could show no harm, for example, from denying pre-registration of minors, because they could not vote in the election already.[49] Similarly, there was not enough evidence that the other provisions would hinder the right to vote.[50]

C. The Extraordinary Case of Remand to a Different Judge

Generally, circuit courts remand cases to district courts without directions concerning which trial judge considers the case.[51] Absent a judge's personal bias, only in unusual circumstances does the court specifically assign the case to a different judge.[52] These circumstances exist when "'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.'"[53]

Courts consider three factors in determining whether these circumstances exist and to remand to a different judge:

> (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,

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44. *League of Women Voters*, 769 F.3d at 230.
45. *Id.*
46. *Id.*
47. *Id.* at 236.
48. *Id.* at 236-37.
49. *Id.* at 236.
50. *Id.* at 236-37 (noting that even individuals who were told they needed photo identification at the polls were, in fact, allowed to vote in the May 2014 primaries).
51. *See generally* United States v. Robin, 553 F.2d 8, 9 (2d Cir. 1977).
52. *Robin*, 553 F.2d at 10; *see* 28 U.S.C. § 144 (2012).
53. United States v. Guglielmi, 929 F.2d 1001, 1007 (4th Cir. 1991) (quoting *Robin*, 553 F.2d at 9-10).

(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.[54]

The United States Court of Appeals for the Second Circuit developed these factors, and they have become influential in numerous other circuits.[55] The first factor applies when a trial judge makes findings based on erroneously admitted evidence, such that the judge cannot be expected to erase earlier impressions from his mind or might overcompensate to appear impartial.[56] In *Guglielmi*, the Fourth Circuit noted that this factor weighs in favor of reassignment when "a judge has repeatedly adhered to an erroneous view after the error is called to his attention."[57]

Regarding the second factor, the Second Circuit noted that it is not unusual to remand to a different judge even when the "appearance of partiality" is possible.[58] The court considered the public interest in "promot[ing] public confidence" in the judiciary, which tipped the balance in favor of recusal to minimize even a "suspicion of partiality."[59] Finally, the court considers whether assignment to a different judge on remand would expend considerable resources.[60]

III. COURT'S DECISION

In the noted case, the Fourth Circuit held that the Department's interpretation of 34 C.F.R. § 106.33 was a reasonable resolution of an ambiguous regulation and was the result of the agency's fair and considered judgment.[61] Thus the court granted *Auer* deference to the

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54. *Id.*

55. *See Robin*, 553 F.2d at 10; *see also Guglielmi*, 929 F.2d at 1007; United States v. Garcia, 694 F.2d 294, 296 (1st Cir. 1982); Bercheny v. Johnson, 633 F.2d 473, 476-77 (6th Cir. 1980); United States v. Sears, Roebuck & Co. 785 F.2d 777, 780-81 (9th Cir. 1986); United States v. White, 846 F.2d 678, 696 (11th Cir. 1988).

56. *See Robin*, 553 F.2d at 10.

57. *Guglielmi*, 929 F.2d at 1007 (quoting *Robin*, 553 F.2d at 11). (The district court judge in *Guglielmi* had stated that exposure to sexually explicit material increased a propensity for sexual violence.) *Guglielmi*, 929 F.2d at 1003.

58. *See* Ligon v. City of N.Y., 736 F.3d 118, 128-29 (2d Cir. 2013).

59. *Id.* at 123-24.

60. *See, e.g.*, *Guglielmi*, 929 F.2d at 1008; O'Shea v. United States, 491 F.2d 774, 779 (1st Cir. 1974) ("[R]econsideration by the original judge may be affirmatively desirable when familiarity with the case is important, and for a new judge to achieve familiarity would require wasteful delay or duplicated effort . . . .").

61. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721-23 (4th Cir. 2016).

Department's interpretation of Title IX regulations.[62] The court also held that G.G. was entitled to a preliminary injunction allowing him to use the boys' restroom, vacating the district court's denial thereof.[63] However, the court held that G.G.'s motion for reassignment did not meet the *Guglielmi* standard because there was no reason to believe that the judge would refuse to consider contrary evidence.[64]

A. Ambiguity in the "Male" and "Female" Distinction in Departmental Regulations

As an initial matter, the court noted that Title IX does not prohibit all distinctions on the basis of sex, but hinging sex segregation on a binary male/female differentiation necessarily creates confusion for transgender individuals.[65] The Department's regulations provide that "a recipient of Title IX funds 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."[66] In an effort to clarify this regulation as it applies to transgender students, the Department issued a Dear Colleague letter stating that a Title IX recipient must treat transgender students "consistent with their gender identity."[67]

The district court held that § 106.33 of the Code of Federal Regulations was not ambiguous as it pertains to sex.[68] As such, it held that the Department's interpretation was not entitled to deference, as it would have effectively created a new regulation.[69] However, the Fourth Circuit reversed, holding that the Department, in issuing its Dear Colleague letter, interpreted an ambiguous regulation with regard to how a school should treat transgender individuals.[70]

The Fourth Circuit determined that the regulation was ambiguous by applying the three-part test set forth in *Robinson v. Shell Oil Co.* It looked to the language of the regulation itself, the context in which the

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62. *Id.* at 723.
63. *Id.* at 726.
64. *Id.* at 727; *Guglielmi*, 929 F.2d at 1007.
65. *G.G.*, 822 F.3d at 718, 720-21.
66. 34 C.F.R. § 106.33 (2000).
67. OFFICE OF CIVIL RIGHTS, *supra* note 15, at 25.
68. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 746 (E.D. Va. 2015), *rev'd in part and vacated in part*, 822 F.3d 709.
69. *Id.*
70. *See G.G.*, 822 F.3d at 720 ("[The regulation] is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."); *see* OFFICE OF CIVIL RIGHTS, *supra* note 15, at 37.

language was used, and the broader context of the regulation as a whole.[71] Under that test, the court held that the regulation unambiguously refers to male and female students only.[72] This is because in all three contexts, the language used to refer to students is confined only to "'of one sex' and 'of the other sex,'" and "males and females" only.[73] Because the regulation said nothing about how to define sex, the court concluded that the regulation was susceptible to two different interpretations—defining "male" and "female" as either corresponding with genitalia or with gender identity.[74]

As a result, the Department's interpretation was entitled to *Auer* deference, unless its interpretation was "plainly erroneous or inconsistent with the regulation[.]"[75] The court emphasized that an interpretation need only be reasonable—not necessarily the most conventional—to warrant deference.[76] The definition of "sex" as the "typical dichotomous occurrence [that] is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness" is ambiguous, the court determined, because it suggests that there is not a "hard-and-fast binary division" in all cases.[77] Although the Department of Education's interpretation was not the typical one, the court held that it was not plainly erroneous or inconsistent.[78]

Finally, the court decided whether the Department's interpretation was the result of its "fair and considered judgment."[79] Courts do not defer if an interpretation conflicts with previous interpretation, appears to be no more than a convenient litigating position, or is a *post hoc* rationalization.[80] The court observed that this interpretation was new, and "novelty alone is no reason to refuse deference."[81] The Department issued this interpretation only once schools started citing the regulation as a justification for restricting the access of transgender students to the

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71. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

72. *G.G.*, 822 F.3d at 720.

73. *Id.* (noting that "'of one sex' and 'of the other sex' refers to male and female students").

74. *Id.*

75. *Id.* at 721; *see* Auer v. Robbins, 519 U.S. 452, 461 (1997).

76. *See G.G.*, 822 F.3d at 721; *see also* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991) (citing E.E.O.C. v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988)).

77. *G.G.*, 822 F.3d at 721-22 (citing *Sex*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2081 (Philip Babcock Gove ed., 1971)).

78. *Id.*

79. *Id.* at 722.

80. *Id.*

81. *Id.* (quoting Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 64 (2011)).

restrooms of their choice, and therefore it was not inconsistent with prior practice.[82]

The court also held that the interpretation was not a convenient litigating position because the Department had been consistently enforcing this position since before the Board's challenge.[83] The court further held that the interpretation was not a *post hoc* rationalization because it was consistent with regulations across numerous federal agencies, including the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, and the Department of Housing and Urban Development.[84]

The court thus granted *Auer* deference to the agency's interpretation of its regulations because the regulation was ambiguous and the interpretation was not plainly erroneous, not inconsistent with the regulation, and was the result of the agency's "fair and considered judgment."[85]

B. Keeping the Court in Line with Evidentiary Standards for Preliminary Injunctions

The court then looked to the district court's denial of G.G.'s motion for a preliminary injunction. The district court required that the evidence it considered conform to the Federal Rules of Evidence.[86] However, the Fourth Circuit noted that "a preliminary injunction is customarily granted on the basis of . . . evidence that is less complete than in a trial on the merits."[87] The court determined that the district court misapplied the evidentiary standard for preliminary injunction hearings.[88] The Fourth Circuit instead held that for the purposes of a preliminary injunction, the affidavits by the plaintiff and his medical expert were sufficient under a balance of hardships analysis, even if they would be considered hearsay in a trial on the merits.[89]

Because the district court excluded evidence that it should have considered, contravening Supreme Court precedent, the district court was

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82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 722-23.
86. *Id.* at 725 (citing G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 747 (E.D. Va. 2015), *rev'd in part and vacated in part*, 822 F.3d 709).
87. *G.G.*, 822 F.3d at 725 (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395(1981)).
88. *Id. at* 724 (citing *G.G.*, 132 F. Supp. 3d at 748).
89. *Id.* at 724-25.

"guided by erroneous legal principles," and the Fourth Circuit vacated its decision.[90]

C. The Appearance of Justice

Finally, the court considered the question of whether or not to grant the plaintiff's request for a different judge on remand.[91] The plaintiff argued that the judge would be reticent to put aside his erroneous views and that remand to a different judge would be necessary to preserve the appearance of justice under the standards set forth in *Guglielmi*.[92] Noting that reassignment on remand is typically reserved for unusual circumstances where it is in the public interest to "minimize[] even a suspicion of partiality," the court held that the plaintiff did not meet this burden, because there was no reason to believe that the original judge would not be amenable to contrary evidence.[93]

IV. ANALYSIS

The Fourth Circuit decided this case correctly, as there exists a strong case for irreparable harm, and the balance of hardships weighs in G.G.'s favor such that a preliminary injunction should have been granted. Transgender children are more likely than other children to experience gender dysphoria, and they exhibit higher rates of depression, anxiety, and impaired social functioning.[94] The American Psychological Association states that evidence-based practices support a "gender affirmative" psychological approach to transgender children because gender identity is "resistant, if not impervious to" outside interference.[95] Thus, an intervention that seeks to harmonize a child's gender identity with society at large will foster resilience and self-confidence.[96]

In the absence of such a gender-affirming environment, transgender children may experience "self-harm, suicidality, post-traumatic stress disorder, substance abuse, and body image issues" by the time they reach

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90. *Id.* at 725-26; *see Camenisch*, 451 U.S. at 395.

91. *G.G.*, 822 F.3d at 726.

92. *Id.*; United States v. Guglielmi, 929 F.2d 1001, 1007 (4th Cir. 1991); *see* Corrected Br. of Pl.-Appellant 53-54 (stating that the judge did not believe one could develop a urinary tract infection from delaying using the restroom and that he believed that G.G. suffers from a mental disorder).

93. *G.G.*, 822 F.3d at 726 (quoting *Guglielmi*, 929 F.2d at 1007).

94. COLT MEIER & JULIE HARRIS, AM. PSYCHOLOGICAL ASS'N, FACT SHEET: GENDER DIVERSITY AND TRANSGENDER IDENTITY IN CHILDREN 1 (2017), http://www.apadivisions.org/division-44/resources/advocacy/transgender-children.pdf.

95. *Id.* at 2.

96. *Id.*

early adolescence.[97] When compared to the general population's suicide rate (4.6%), that of transgender individuals is exceptionally high (42% for transgender women and 46% for transgender men).[98] Younger cohorts have an even higher risk of suicide (45% for transgender individuals between ages 18 and 24).[99] Additionally, transgender individuals who come out in a school setting are more likely to attempt suicide than those who do not (45% compared to 35%).[100]

Gender-affirming policies in schools, like the one the plaintiff is fighting for, have the power to save lives. Transgender individuals are subject to denial, bullying, abuse, and sexual and physical assault because of their gender identity. Of all gender nonconforming respondents who had attempted suicide, between 50% and 54% were harassed or bullied in school, and between 63% and 78% experienced physical or sexual violence in school.[101]

The plaintiff is a young transgender male student, so he falls into the highest risk categories for suicide in addition to the psychosocial symptoms of dysphoria. The associated mental health problems are not the result of "gender diversity in and of itself,"[102] but they are instead the result of a "marked difference between the individual's expressed/experienced gender and the gender others would assign him or her[.]"[103] Thus, the balance of hardships tips heavily in G.G.'s favor and the court correctly granted a preliminary injunction.

In his concurring opinion, Judge Davis fleshed out the brevity of the court's opinion regarding the preliminary injunction and gave credence to this balancing test of hardships.[104] He cautiously forewarned that by the time the district court has made a decision, G.G. may have already suffered irreparable harm, because an additional school year will have passed without protection from the courts.[105] Judge Davis claimed that

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97. LAUREN MIZOCK, EFFIE MOUGIANIS & COLT MEIER, AM. PSYCHOLOGICAL ASS'N, FACT SHEET: GENDER DIVERSITY AND TRANSGENDER IDENTITY IN ADOLESCENTS 1 (2017), http://www.apadivisions.org/division-44/resources/advocacy/transgender-adolescents.pdf.

98. ANN P. HAAS, PHILIP L. RODGERS & JODY L. HERMAN, AM. FOUND. FOR SUICIDE PREVENTION, SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-COMFORMING ADULTS 2 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf.

99. *Id.* at 7-8.

100. *Id.* at 9.

101. *Id.* at 2.

102. MEIER & HARRIS, *supra* note 94, at 1.

103. AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA 1 (2013), http://www.dsm5.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf.

104. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd.*,* 822 F.3d 709, 727 (4th Cir. 2016) (Davis, J., concurring).

105. *Id.* at 729.

irreparable harm would result without an injunction because G.G. would suffer psychological damage if the school continued to deny his gender identity.[106] He also asserted that the balance of hardships weighed in G.G.'s favor because, while he would suffer irreparable harm without the injunction, the Board had already made alterations to school restrooms, such that the privacy of other boys would not be harmed.[107] Finally, Judge Davis said that "G.G.'s right to be free from discrimination on the basis of sex . . . is plainly in the public interest."[108] As a result, the Fourth Circuit should have granted a preliminary injunction as it had done in previous cases.[109]

Judge Niemeyer, on the other hand, concurred only with the denial of the motion to assign to a different judge and dissented with the rest of the court's opinion.[110] Like the district court, Judge Niemeyer focused on the "privacy and safety concerns" that have dictated sex segregation in restrooms "[a]cross societies and throughout history."[111] He attacked the court's holding regarding the ambiguity of the regulation, claiming that the word "sex" was clearly understood at the time of the regulation's promulgation to refer to the physiological distinctions between males and females, "with respect to their reproductive functions."[112]

Judge Niemeyer predicates the dissenting part of his opinion on several flawed premises. The first is his broad statement that "[a]cross societies and throughout history," the sexes were separated.[113] Even if it were a historical truism that the sexes were always segregated, it overlooks the fact that there has been gender fluidity throughout the same history and across the same societies.[114] The second error is that Judge Niemeyer presupposes that the students will lose their constitutional right to privacy.[115] As Judge Davis noted in his concurring opinion, any other male student who feels uncomfortable using the restroom around G.G. is

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106. *Id.*, at 727-28.

107. *Id.* at 728-29.

108. *Id.* at 729.

109. *Id.* (citing League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 248 (4th Cir. 2014); Eisenberg *ex rel.* Eisgenberg v. Montgomery Cty. Pub. Schs., 197 F.3d 123, 134 (4th Cir. 1999)).

110. *G.G.*, 822 F.3d at 730 (Niemeyer, J., concurring in part and dissenting in part).

111. *Id.* at 734-35; *see* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp 3d 736, 750-51 (E.D. Va. 2015), *rev'd in part and vacated in part*, 822 F.3d 709 (noting that the Board is protecting a constitutional right to privacy).

112. *Id.* at 736 (Niemeyer, J., concurring in part and dissenting in part).

113. *Id.* at 734.

114. *See* MIZOCK ET AL., *supra* note 97, at 1 ("History suggests that [transgender and gender fluid individuals] have existed in a wide range of cultures for thousands of years.").

115. *G.G.*, 822 F.3d at 735-36 (Niemeyer, J., concurring in part and dissenting in part).

free to use the single-stall restrooms that the school built.[116] This does not cause the same stigma as G.G.'s use of the single-stall restrooms, which is "tantamount to humiliation and a continuing mark of difference among his fellow students."[117]

The final error is that Judge Niemeyer conflates privacy with safety and hints that this decision would open the door to sexual predators in American schools.[118] This assumption is simultaneously too broad and too narrow. It is too narrow because it does not do justice to the fact that, as a public policy issue, forcing transgender individuals into the bathrooms that correspond with the sex on their birth certificate can actually put their lives at risk.[119] Indeed, in one study of bathroom use, nearly 70% of transgender individuals polled experienced verbal harassment, while close to 10% experienced physical assault.[120] These rates are especially troubling considering a school setting, where bullying is common. It is too broad because it does not actually reduce rates of sexual assault; many local governments and states have banned discrimination against transgender individuals in using the bathroom that corresponds with their gender identity, and they have not seen an increase in such attacks.[121]

G.G.'s victory, though monumental, was short lived. On remand, the district court yielded and granted the preliminary injunction,[122] but the United States Supreme Court issued a stay on the injunction pending the disposition of a petition for a writ of certiorari.[123] The Supreme Court then granted certiorari, and the stay remained in place throughout G.G.'s junior year.[124] G.G. once again was forced to use the solitary bathrooms.

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116. *Id.* at 728-29 (Davis, J., concurring).

117. *Id.* at 729.

118. *Id.* at 735 (Niemeyer, J., concurring in part and dissenting in part) (referring to "safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex").

119. *See* Alia E. Dastagir, *The Imaginary Predator in America's Bathroom War*, USA TODAY (Apr. 28, 2016), http://www.usatoday.com/story/news/nation/2016/04/28/transgender-bathroom-bills-discrimination/32594395/ ("'Trans women are killed for using the men's restroom, and they're jailed for using the women's restroom,' she said. 'In the end, what choice do we have?'").

120. *See* Katy Steinmetz, *Why LGBT Advocates Say Bathroom "Predators" Argument Is a Red Herring*, TIME (May 2, 2016), http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/ (internal citations omitted).

121. *Id.*

122. G.G. v. Gloucester Cty. Sch. Bd., No. 4:15CV54, 2016 WL 3581852 (E.D. Va. June 23, 2016).

123. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016). The Supreme Court held that, should the writ be denied, the stay will terminate.

124. Gloucester Cty. Sch. Bd v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2016).

This turned into a case where justice delayed became justice denied for G.G. Indeed, on February 22, 2017, the Department of Education and Department of Justice under the Trump Administration issued a new letter rendering the case moot.[125] The Supreme Court vacated the noted decision and remanded the case to the Fourth Circuit for further consideration.[126] The Fourth Circuit, in turn, was forced to vacate the preliminary injunction that G.G. had won less than ten months earlier.[127]

Because this case vindicated what transgender individuals have long been saying—that the current male/female paradigm erases their identities—it proved to be a watershed in the area of transgender rights, but it was met with fierce opposition. Just thirteen days after the Supreme Court granted certiorari, the State of Texas, joined by twelve other states, won a federal lawsuit against the Department and other federal agencies, challenging the same regulatory interpretations.[128] In contrast to the noted case, the court there held that the regulation was not ambiguous because it originally intended to refer to "the biological and anatomical differences between male and female students as determined at their birth."[129] The Obama Administration promptly filed for appeal in the United States Court of Appeals for the Fifth Circuit.[130]

Had the Supreme Court decided this case on its merits, they should have granted *Auer* deference.[131] Reasonability, not conventionality, is the crucial factor in granting judicial deference,[132] however it is becoming more commonly accepted that referring to "one sex" and "the other sex" leaves many American students outside of the scope of the regulation at issue.[133] The regulation "is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."[134] Thus, to students who either do

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125. Gloucester Cty. Sch. Bd. v. G. G. *ex rel.* Grimm, No. 16-273, 2017 WL 855755, at *1 (U.S. Mar. 6, 2017).

126. *Id.*

127. *See* Mark Joseph Stern, *Judge Pens Poignant Tribute to Trans Teen Gavin Grimm, a "Modern-Day Human Rights Leader,"* SLATE (Apr. 8, 2017), http://www.slate.com/blogs/outward/2017/04/08/judge_pens_tribute_to_trans_teenager_gavin_grimm.html.

128. Texas v. United States, 201 F.Supp.3d 810 (N.D. Tex. Aug. 21, 2016).

129. *Id.* at 833.

130. Lauren McGaughy, *Obama Appeals Texas Transgender Bathroom Case to 5th Circuit*, DALL. MORNING NEWS (Oct. 20, 2016), http://www.dallasnews.com/news/politics/2016/10/20/obama-appeals-texas-transgender-bathroom-case-5th-circuit.

131. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

132. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991) (citing E.E.O.C. v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988)).

133. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016); 34 C.F.R. § 106.33 (2000).

134. *G.G.*, 822. F.3d at 720.

not identify as male or female or who identify as a different sex than the one assigned at birth, the regulation is already ambiguous.

Gender diversity is more prevalent in children than adults.[135] Yet, instead of applying this regulatory interpretation *a fortiori* to children, the Gloucester County School Board seeks to force children to conform to the preconceived gender binary. Transgender identities are thus erased, and gender fluidity is necessarily stigmatized as a result.

The Supreme Court could have taken a major step towards equality and safety for all persons by acknowledging that this agency regulation leaves transgender and gender fluid American children in the shadows. Even though G.G. will likely never get to set foot in the boys' restroom at his school, his fight could lead to greater legal recognition of the right of transgender individuals to exist on the same terms as everyone else. It is time that the Court grant them that fundamental right.[136] Perhaps the only consolation G.G. received was the praise of Judge Davis, who likened his efforts to those of Dred Scott, Fred Korematsu, the Lovings, and Jim Obergefell, among others, in an opinion concurring with the vacation of the preliminary injunction:

> These individuals looked to the federal courts to vindicate their claims to human dignity, but as the names listed above make clear, the judiciary's response has been decidedly mixed. Today, G.G. adds his name to the list of plaintiffs whose struggle for justice has been delayed and rebuffed; as Dr. King reminded us, however, 'the arc of the moral universe is long, but it bends toward justice.' G.G.'s journey is delayed but not finished.[137]

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135. MEIER & HARRIS, *supra* note 94, at 1 (suggesting that the prevalence of gender fluidity decreases with age either because of the social pressures of conformity or because gender expression changes into sexual identity later in life).

136. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."). Although the Court in *Lawrence* reserves the right of sexual identification and association to the private sphere, sexual identity remains a distinctly private matter. Sexual identity is only made public, in the first place, through the segregation of restrooms.

137. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., No. 16-1733 4:15CV54 at 3 (4th Cir. Apr. 7, 2017), http://www.ca4.uscourts.gov/Opinions/Published/161733R1.P.pdf.

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