No. 15-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.G., by his next friend and mother, **DEIRDRE GRIMM**,

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division

PLAINTIFF-APPELLANT'S RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

The petition for rehearing en banc should be denied. The panel's opinion properly recognizes that the dictionary definition of the term "sex" does not refer solely to a person's assigned sex at birth, but instead to the "sum of" varying "morphological, physiological, and behavioral" factors. Op. 22-23. Because the plain text of 34 C.F.R. § 106.33 does not resolve which restroom a transgender student should use, the panel properly deferred to the Department of Education's (the "Department's") interpretation of its own regulation pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997). The panel, therefore, did not have to decide whether the Department's interpretation—and the interpretation advocated by G.—is the *only* way to reconcile the regulation with Title IX's requirements.

According to the petition for rehearing en banc, the panel cannot defer to the Department's interpretation of 34 C.F.R. § 106.33 in the context of restrooms without issuing an advisory opinion on how every other type of sex-segregated facility or programming would be provided to transgender students under 20 U.S.C. § 1686 and 34 C.F.R. § 106 Subpart D. The Department has now issued comprehensive guidance addressing all of these various contexts.[1] In future cases,

[1] *See* U.S. Dep't of Educ. Office of Civil Rights & U.S. Dep't of Justice Civil Rights Div., *Dear Colleague Letter on Transgender Students* (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf; U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender*

the Court will have an opportunity to evaluate whether the Department's interpretations of those regulations and statutory provisions are clearly erroneous under *Auer* or have the power to persuade under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). But, in the meantime, the panel appropriately declined to rely on intuition and hypothetical scenarios to offer opinions outside the context of a specific case or controversy.

Moreover, the panel's decision does not violate any student's constitutional right to privacy. Schools can accommodate privacy interests by allowing any student who is uncomfortable using the same restroom as a transgender student—or any other student—to use a private restroom. There are also ample ways to accommodate privacy interests in the context of locker rooms. Even if it were possible to conceive of scenarios in which a student's constitutional privacy rights could actually be infringed, that possibility would not justify a facial challenge to the Department's interpretation in all of its applications.

Finally, *amici*'s argument based on *Pennhurst State Sch.& Hospital v. Halderman*, 451 U.S. 1 (1981), conflicts with controlling Supreme Court precedent and, in any event, provides no defense to claims for injunctive relief. Once an agency clarifies ambiguity in its regulations, *Pennhurst* does not entitle recipients

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Students (May 2016), http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

to continue receiving Title IX funding while ignoring the agency's authoritative interpretation.

I. The panel correctly determined that the plain meaning of the term "sex" does not unambiguously refer solely to a transgender student's sex assigned at birth.

"Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). The plain text of Title IX prohibits all disparate treatment "on the basis of sex"—including disparate treatment in classrooms, restrooms, and sports teams—unless that treatment is expressly permitted by one of the "specific, narrow exceptions to that broad prohibition" in the statute or regulations. *Id.*; *cf. Mercer v. Duke Univ.*, 190 F.3d 643, 646 (4th Cir. 1999) (Luttig, J.,) (without special regulation regarding contact sports, plain text of Title IX and implementing regulations "would require covered institutions to integrate all of their sports teams").[2]

The Gloucester County School Board (the "Board") does not dispute that providing separate restrooms for boys and girls (whether transgender or not)

[2] Congress was well aware that the statutory text would prohibit all sex-segregated facilities in the absence of a specific exemption. When asked how the text of the statute would affect sex-segregated facilities like locker rooms, Senator Bayh stated that "the rulemaking powers . . . give the Secretary discretion to take care of this particular policy problem"—not that the plain text of Title IX would not apply. 117 Cong. Rec. 30407 (1971); *accord* 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) ("[R]egulations would allow enforcing agencies to permit differential treatment by sex . . . where personal privacy must be preserved.").

facially discriminates "on the basis of sex." The question, therefore, is how to interpret the limited exception in 34 C.F.R. § 106.33, which authorizes schools to provide separate restroom facilities "for students of one sex" and "students of the other sex." The Department has authoritatively interpreted that regulation and concluded that "[w]hen a school elects to separate or treat students differently on the basis of sex" pursuant to 34 C.F.R. § 106.33, "a school generally must treat transgender students consistent with their gender identity." Op. 17.[3]

G. argues that the Department's interpretation of 34 C.F.R. § 106.33 is the only way to interpret the regulation in a manner consistent with the underlying antidiscrimination protections of Title IX. *See* Concurring Op. 37 ("[T]he weight of circuit authority conclud[es] that discrimination against transgender individuals constitutes discrimination 'on the basis of sex.'"). In contrast, the Board argues that the only way to interpret the unambiguous terms of the regulation is to allow schools to force a transgender boy like G. to use the girls' restroom or exclude him from the common restrooms entirely. Because the panel concluded that the plain text of the regulation did not resolve the issue, the panel deferred to the Department's interpretation of 34 C.F.R. § 106.33 pursuant to *Auer*. The panel,

[3] *Auer* deference applies not only to the Department's original opinion letter, but also to the United States' *amicus* brief in this case elaborating on the Department's position. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209 (2011). After the panel issued its decision, the Department issued additional guidance regarding its interpretation of the regulation. *See* ED & DOJ, *Dear Colleague Letter on Transgender Students*; ED, *Examples of Policies*.

therefore, did not have to decide whether the Department's interpretation—and the interpretation advocated by G.—is the *only* way to reconcile the regulation with Title IX's requirements.

Although the panel did not decide whether G.'s interpretation of "sex" is the only one consistent with the underlying antidiscrimination requirements of Title IX, the panel decisively rejected the Board's contention that the term "sex" in Title IX and its regulations unambiguously refers solely to that students' so-called "biological gender" or "biological sex." The panel looked to contemporaneous dictionaries, which defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral peculiarities . . . that is typically manifested as maleness or femaleness." Op. 22. Those dictionary definitions of the term sex indicate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive." *Id.* at 22-23. The panel therefore concluded that the dictionary definition of the term sex, "sheds little light on how exactly to determine the 'character of being either male or female'" where the morphological, physiological, and behavioral indicators of sex "diverge." *Id.* at 23.

The panel's recognition of ambiguity is also consistent with case law recognizing that, "although it may be useful to disaggregate the definition of 'gender' from 'sex' for some purposes," the term "sex" in Title VII and analogous

statutes encompasses *both* physical and behavioral characteristics typically associated with men and women. *Bauer v. Lynch*, 812 F.3d 340, 347 n.9 (4th Cir. 2016) (internal quotation marks omitted); *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); Concurring Op. 37. *But see* WV Amicus Br. 3, Dkt. 53-1 (incorrectly asserting based on cases before *Price Waterhouse* that "sex" is only a "biological category").

The panel's reference to "the sum of the morphological, physiological, and behavioral" differences between men and women does not, in the words of the dissent, create a "new definition of sex that excludes reference to physiological differences." Dissent 63. There are many "physiological differences" between most girls and a transgender boy undergoing hormone therapy, including secondary sex characteristics such as facial hair and other permanent physical changes. There are also many "physiological differences" between most boys and a transgender girl undergoing hormone therapy, including breasts and other visible physical differences. Moreover, scientific studies indicate that gender identity also is an immutable characteristic with biological roots. See Aruna Saraswat, M.D., et. al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (2015); WPATH Amicus Br. 14-15, Dkt. 24-1. The panel's opinion properly recognizes that the dictionary definition of the term "sex" does

not unambiguously resolve which particular morphological, physiological, and behavioral differences should be determinative.[4]

For similar reasons, the panel's recognition of ambiguity does not conflict with "the very demands inherent in human nature." Dissent 47. Like the definition of sex itself, social customs regarding modesty between men and women are based not only on genitals, but on "the sum" of various factors "typically manifested as maleness and femaleness." Op. 22-23. No one disputes that separating restrooms on the basis of sex reflects traditions of modesty and privacy between men and women. But, as the panel explained, "the truth of these propositions" does not answer the question of which restroom a transgender boy like G. should use. *Id.* at 27.

The Board, like the dissent, assumes that social customs regarding privacy are built entirely around a person's sex assigned at birth even when it conflicts with the person's gender identity. But that assertion is hardly self-evident. For one thing, customs regarding modesty involve other body parts besides genitals, such as breasts. Yet, under the dissent's view, a transgender girl with breasts should be changing in the boys' locker room despite the possible "sexual responses" of (heterosexual) boys prompted by exposure to those "private body

[4] For these reasons, current guidelines from the American Psychological Association (unlike the guidelines cited by the district court) no longer use the term "biological sex" when referring to sex assigned at birth. *See* Pl's Br. 4 n.3.

parts." Dissent 59. Moreover, customs regarding modesty involve more than just body parts. When a person walks into a restroom, no one else knows what that person's genitals or chromosomes look like, but they do see the outward manifestations of that person's gender identity. *See* Op. 25 n.8. For many people, the presence of a man (who may or may not be transgender) in the women's restroom would be far more disruptive and discomfiting than the presence of a woman (who may or may not be transgender).

In light of these realities, the panel appropriately recognized that the Department's interpretation is reasonable and, therefore, entitled to controlling *Auer* deference.

II. The panel's deference to the Department does not create uncertainty.

The Board's primary complaint in its petition for rehearing en banc is that the panel's decision does not go far enough. Pet. 7-10. According to the Board, the panel cannot defer to the Department's interpretation of 34 C.F.R. § 106.33 in the context of restrooms without issuing an advisory opinion on how every other type of sex-segregated facility or programming would be provided to transgender students under 20 U.S.C. § 1686 and 34 C.F.R. § 106 Subpart D.[5]

[5] The purportedly absurd results envisioned by the Board in these various contexts are—in fact—commonplace and unproblematic in schools across the country. *See generally* ED, *Examples of Policies*; School Admin. Amicus Br., Doc. 22-1.

The Department has now issued guidance addressing all of the scenarios raised by the Board. *See* ED & DOJ, *Dear Colleague Letter on Transgender Students*; ED, *Examples of Policies*. In future cases, in the context of concrete disputes, the Court will have an opportunity to evaluate that guidance under the framework established by the Supreme Court. In light of the panel's conclusion that the plain meaning of the term "sex" in 34 C.F.R. § 106.33 does not unambiguously refer solely to a transgender student's sex assigned at birth, the texts of similar provisions in 34 C.F.R. § 106 Subpart D and 20 U.S.C. § 1686 are likely to be found ambiguous as well. The Department's interpretations of its own regulations would, therefore, be evaluated under *Auer*, and the Department's interpretation of how to provide sex-segregated dorm rooms under 20 U.S.C. § 1686 would receive deference to the extent it has the power to persuade under *Skidmore*. *Cf. Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 647-48 (1999) (consulting OCR guidance in construing Title IX).

In a 28(j) letter, the Board asserts that the Department's interpretations are not entitled to *Auer* deference because *Auer* does not apply when regulations merely restate the terms of the underlying statute. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). No one argues that the Department's interpretations of regulations implementing 20 U.S.C. § 1686 should receive *Auer* deference. But there are no statutory analogs for the other exceptions throughout 34 C.F.R. § 106

Subpart D for restrooms, classes, sports teams, and other activities. The policy decisions to create limited exceptions in those contexts were made by the agencies, not Congress. Indeed, the sponsors of Title IX deliberately decided not to create a free-standing exception analogous to the "bona fide occupational qualification" exception in Title VII because, they believed, "all too often this is the hook on which discrimination can be hung." 117 Cong. Rec. 30407 (1971) (statement of Sen. Bayh). Instead, the sponsors delegated responsibility to the agency to address privacy concerns through the rulemaking process. *See*, *supra*, note 2.

At some point in the future, this Court may have to decide whether the Department's interpretations are not only permissible interpretations, but also the "best" ones. But, in the meantime, the panel appropriately declined to rely on intuition and hypothetical scenarios to offer opinions about other regulations and statutory provisions outside the context of a specific case or controversy.

III. The panel's decision does not threaten anyone's constitutional right to privacy.

Everyone is entitled to their own sense of privacy and modesty. But there are right ways to accommodate those concerns and wrong ways to accommodate them. Under the Department's interpretation of 34 C.F.R. § 106.33, no student at Gloucester High School ever has to use a restroom or locker room if they are uncomfortable with the presence of a transgender student—or any other student. All students may use a separate restroom or changing area for *their own* privacy,

but what schools cannot do is stigmatize transgender students by requiring them to use separate facilities to address the discomfort of others. *See* Concurring Op. 41.[6]

The constitutional right to prevent unwanted exposure of one's naked body is simply not at issue in this case, which concerns only restrooms. Op. 27 n.10. Nevertheless, the Board and its *amici* effectively seek to mount a facial attack on the constitutionality of the Department's interpretation of 34 C.F.R. § 106.33 based on the assertion that its interpretation would violate other students' constitutional privacy rights when applied in the context of locker rooms.

If the Board and its *amici* believe the Department's interpretation is unconstitutional as applied to the context of locker rooms, they can assert that argument in the context of a case that actually involves locker rooms. Even if it were possible to conceive of scenarios in which a student's constitutional privacy rights could actually be infringed, that possibility would not justify a facial constitutional challenge to the Department's interpretation in all its application. *Cf. EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1609 (2014) ("The

[6] Using a separate restroom to protect one's own privacy may be inconvenient. But that inconvenience is not equivalent to the stigma, isolation, and psychological harm from telling a transgender student "that there's something so freakish about you, and so many people are uncomfortable with you, that you have to use a completely separate restroom[.]" Sch. Admin. Br. 25. *Cf. Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting "hostile work environment" claim from female employee who did not want to use same restroom as a transgender employee but was free to use unisex restroom instead).

possibility that the rule, in uncommon particular applications, might [be invalid] does not warrant judicial condemnation of the rule in its entirety.").

In any event, the premise of the Board's privacy argument is wrong. As with restrooms, schools can provide privacy accommodations to any student (whether transgender or not) who is uncomfortable changing in the presence of anyone else (whether transgender or not). Indeed, at Gloucester High School, and at schools throughout Virginia, students already have access to "private showers with enclosed dressing rooms." Pl's Br. 41 n.13. Where private rooms do not exist, schools may install privacy curtains for anyone who wants additional privacy while changing, and most, if not all, locker rooms contain restrooms with private stalls where a student could change in a private space. Addressing privacy in locker rooms is an issue that should be addressed in a specific factual context based on the actual experience of real students, not decided as a matter of law based on intuition and abstract hypotheticals.[7]

IV. The panel's deference to the Department does not contravene *Pennhurst*.

The Board's *amici* (but not the Board itself) argue that because Title IX was passed pursuant to the Spending Clause, the panel's deference to the Department's

[7] Moreover, as noted above, if the fear is potential exposure to private body parts associated with a different sex, placing a transgender girl with breasts in the men's locker room is hardly a solution to the problem.

interpretation deprived the Board of "clear notice" required by *Pennhurst*, 451 U.S. at 25. Lack of notice under *Pennhurst*, however, would not affect "the scope of the behavior Title IX proscribes," but merely the availability of "money damages" for past violations. *Davis*, 526 U.S. 639; *accord Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). *Pennhurst* provides no defense to a claim seeking injunctive relief.

Amici's argument is also squarely foreclosed by *Jackson*, *Davis*, and *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74-75 (1992), which held that, for purposes of *Pennhurst*, the text of Title IX puts recipients on notice of liability for all forms of intentional discrimination.[8] Because the statute itself provides notice that all intentional discrimination is prohibited, Congress need not "specifically identif[y] and proscrib[e]" each condition in the legislation or "prospectively resolve every possible ambiguity concerning particular applications" of the statute. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 666, 669 (1985). *See Jackson*, 544 U.S. at 183 (citing *Bennett*); *Davis*, 526 U.S. at 650 (same). Indeed, a requirement of explicit enumeration would eliminate Title IX's

[8] *See Jackson*, 544 U.S. at 183 (recipients have been "put on notice by the fact that our cases since *Cannon* . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination"); *Davis*, 526 U.S. at 642 (*Pennhurst* "is not a bar to liability where a funding recipient intentionally violates the statute."); *Franklin*, 503 U.S. at 74-75 ("This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.").

private right of action because "Congress did not list *any* specific discriminatory practices when it wrote Title IX." *Jackson*, 544 U.S. at 175.

Once an agency clarifies ambiguity in its regulations, *Pennhurst* does not entitle recipients to continue receiving Title IX funding while ignoring the agency's authoritative interpretation. *See Bennett*, 470 U.S. at 670 (notice provided "by the statutory provisions, regulations, and other guidelines provided by the Department at t[he] time" the funds are received); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (lack of prior notice does not relieve parties of obligation to "conform their conduct to an agency's interpretations once the agency announces them"); *cf. Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) ("A Congress that intends the statute to be enforced through a private cause of action intends the [agency's] authoritative interpretation of the statute to be so enforced as well.").

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

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Dated: May 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2016, I filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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