

What We Know

ARTICLES & INSIGHTS

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Fourth Circuit Ruling Will Likely Impact North Carolina's "Bathroom Law"

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Few are now unfamiliar with the North Carolina General Assembly's March 23, 2016, enactment of the Public Facilities Privacy and Security Act, more commonly known as "HB2" or "the bathroom law." The law nullifies all city and county ordinances concerning wages, employment and public accommodations, as well as amends the North Carolina Equal Employment Practices Act (NCEEPA) by eliminating the pursuit of state court actions for wrongful discharge based on a violation of public policy stated in NCEEPA (a right that had been recognized by North Carolina courts since 1977). HB2 has attracted national attention and controversy for its provision amending all existing North Carolina statutes, ordinances, and regulations concerning public restrooms and changing facilities to restrict such usage to individuals based on the sex listed on that individual's birth certificate.

Specifically, the Act requires all government entities to designate multiple-occupancy bathrooms and changing facilities (i.e., locker rooms or other facilities in which more than one person may be changing clothes) for use by individuals on the basis of their "biological sex." This law regulates public schools and government agencies, including, for example, libraries, parks, courthouses, airports, public universities, and state hospitals.

A lawsuit challenging HB2 filed on March 28, 2016, in the United States District Court for the Middle District of North Carolina asserts that HB2 violates Title IX of the Education Act of 1972, a federal law that provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In a case that has been closely followed by transgender-rights advocates and public schools across the nation, a three-judge panel of the United States Fourth Circuit Court of Appeals, which includes North Carolina in its jurisdiction, overturned a Virginia federal district court's dismissal of a transgender high school student's Title IX sex discrimination claim and remanded the case for further proceedings consistent with its ruling. The plaintiff, in that case, was born female but identifies as male. He was allowed to use the

boys' bathroom at the school until the school board implemented a policy requiring students to use either the restroom that corresponds with their biological gender or a private, single-stall restroom. The plaintiff objected to the policy on the basis that it subjected him to stigma and exclusion.

Noting that "at the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity," the Fourth Circuit ruled that it does. Of note in the Fourth Circuit's ruling is its determination that an opinion letter issued by the federal Department of Education's Office for Civil Rights in January of 2015 is instructive. That letter stated that it is permissible for schools to permit the provision of separate bathroom, locker room, and shower facilities on the basis of sex as long as the facilities provided for one gender are comparable to what is provided to the other gender and that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." In determining that the district court had inappropriately dismissed the plaintiff's sex discrimination claim, the Fourth Circuit ruled that "[t]he Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity."

The Fourth Circuit's determination that gender identity is the appropriate standard, not biological sex as indicated via one's birth certificate, is inconsistent with HB2. Fourth Circuit decisions are binding in the state of North Carolina. An appeal to the United States Supreme Court is unlikely as the Court generally accepts such cases on the basis that there is a split in the federal circuits, which isn't the case here. As such, HB2's directive, as it pertains to public schools and universities, appears vulnerable on the basis that it violates Title IX, and thus subjects North Carolina's public schools and universities to the potential withholding of millions of dollars in federal funding.

Stay tuned as the impact of HB2 continues to reverberate throughout our state.

If you have questions regarding this court decision or other legal issues, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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