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Denial in 4th Circuit transgender case opens door to Supreme Court review -- or not

Getting the Supreme Court to take up a case when there is no split among the Circuit Courts is a tough sell any day of the week. But getting the Court to take up a case when the only Circuit Court to consider an issue declined to review a ruling by a subset of that court is even tougher.

That's the situation in Gloucester County, Va., where on May 31 the [school board](#) lost in its [attempt](#) to get the 4th U.S. Circuit Court of Appeals to review a ruling by a three-judge panel upholding the right of a transgender boy who wanted to use the boys' bathroom to invoke [Title IX](#).

"No judge having requested a poll [of their colleagues] on the petition for rehearing en banc, the petition is denied," the court said in *G.G. v. Gloucester County School Board*, [116 LRP 15374](#) (4th Cir. 04/19/16), *petition for reh'g en banc denied*, [116 LRP 22951](#) (4th Cir. 05/31/16).

It is conceivable, however, that the Supreme Court would take up the case, assuming the school board appeals, according to Jose Martín, a school attorney at Richards, Lindsay and Martín in Austin, Texas.

"The legal questions are not of great importance, but the underlying policy issues are huge in the culture wars, [similar] to the same-sex marriage questions, where the equal protection arguments seemed pretty straightforward," he said in an email. "I would guess that the Supremes might review."

Also confident of Supreme Court review, if not in *G.G.* then in a similar case, is school attorney Melinda Jacobs of the [Law Firm of Melinda Jacobs](#) in Townsend, Tenn.

"My opinion is that we have known for some time that this issue would proceed to the U.S. Supreme Court," she said in an email. "So, the question is not whether this will be decided by the Supreme Court, but whether Virginia will have THE CASE that becomes infamous and will be taught in law schools for years to come."

Similar sentiments were expressed by school attorney Richard Boothby of [Bowles Rice](#), which has offices in Virginia, Pennsylvania, and West Virginia.

"It would be unusual for the Supreme Court to take this up so quickly -- but stranger things have happened," he said in an email. "Given that 11 states, at least, have already filed suit to block the DOE's enforcement of its interpretation of the relevant Title IX regulation, it is entirely possible that this matter will end up in front of the High Court via a different route -- or perhaps multiple routes."

In short, the question of whether Title IX covers transgender students must be resolved, according to John Comegno II of the [Comegno Law Group](#) in Moorestown, N.J.

Ordinarily, he said, "the Supreme Court is expected to disregard what is, quote-unquote, a hot topic, and look at, as a matter of law: Is there confusion -- do we need to explain to the lower courts what the law means?"

"This is the first Circuit that has found these quote-unquote rights, if you will, under Title IX," he continued. "So I think conventional wisdom is, 'Not yet,' for the Supreme Court to accept certiorari."

Comegno says he's hedging his bets, however.

"I don't know if I share the conventional wisdom," he said. In school administration, he said, "this is the hottest issue in the land, or at least one of them."

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