

## The free development of the personality and protection for the expression of sexuality and gender identity within the higher education setting

(Judgment T-363/16, Fifth Chamber of the Constitutional Court of Appeals of Colombia; 2016)

### Case at a glance

#### Full citation (with link to the decision)

[Corte Constitucional \[C.C.\] \[Constitutional Court\], Sala Quinta de Revisión, julio 11, 2016, Sentencia T-363/16, M.P: Gloria Stella Ortiz Delgado, Expediente T-5.442.396, \(Colom.\).](#)

#### Forum

Fifth chamber of the Constitutional Court of Appeals of Colombia

#### Date of decision

11 July 2016

#### Summary of decision

In this action brought by a transgender student against the National Service of Education (SENA), the Constitutional Court defended the right to education and the free development of the person by ordering that the student be allowed to wear a male uniform, that he be treated in accordance with his identity as a transgender man, and that the SENA implement a plan that promotes the respect and free development of the person, particularly regarding expressions of gender identity and sexual orientation.

#### Significance to the right to education

This case represents a significant step in the promotion of inclusion, equality and respect for the fundamental rights of the LGBTQI population in the area of higher education by allowing students to be treated according to their gender identity in order to fulfil the guarantee of accessibility to education.

#### Issues & keywords

Equality; non-discrimination; sexual orientation; gender identity; education system; students; LGBTQI

*This case summary is provided for information purposes only and should not be construed as legal advice.*

# Facts

After not being allowed to attend class at SENA if he did not wear a female uniform, the claimant Erika Comas Gómez asked SENA to allow him to wear a male uniform and be treated according to his gender identity as a transgender man. SENA denied the request, and responded that the student could not wear the male uniform until he changed his name on his identification card.

As such, an action was filed before the Eighth Civil Municipal Court in September, 2015. The action was denied, and then brought before the Tenth Civil Municipal Court where the previous ruling was revoked. In this second action, the Court explained that the school had violated the student's right to education by not allowing him to wear a male uniform, not treating him according to his gender identity and asking him to modify his identification card. The court ordered SENA to allow him to attend class wearing a male uniform and to be treated according to his gender identity. SENA appealed and brought the present action.

# Issue

The main issue for the court related to the right to education is whether SENA violated the student's rights to equality and education when the institution refused to treat him in accordance with his gender identity, forbade him from wearing a male uniform, and informed him that he would have to modify his identification card in order to receive such treatment.

## Article 67 of the [Constitution of Colombia](#)

Education is an individual right and a public service that has a social function. Through education individuals seek access to knowledge, science, technology, and the other benefits and values of knowledge.

Education shall train the Colombian when it comes to respect for human rights, peace, and democracy, and in the practice of work and recreation for cultural, scientific, and technological improvement and for the protection of the environment. The state, society, and the family are responsible for education, which shall be mandatory between the ages of five and fifteen years and which shall minimally include one year of preschool instruction and nine years of basic instruction.

Education shall be free of charge in the State institutions, without prejudice to those who can afford to defray the costs. It is the responsibility of the State to perform the final inspection and supervision of education in order to oversee its quality, for fulfilling its purposes, and for the improved moral, intellectual, and physical training of those being educated; to guarantee an adequate supply of the service, and to guarantee for minors the conditions necessary for their access to and retention in the educational system. The nation and the territorial entities shall participate in the management, financing, and administration of state educational services within the limits provided for in the Constitution and statute.

# Decision

The actions taken by the institution in response to the student's request to be treated according to his gender identity violated the right to education by not allowing him to wear a male uniform, not treating him according to his gender identity, and asking him to modify his identification card. The orders made by the appellate judge were confirmed so that the student was allowed to wear a male uniform and to be treated according to his gender identity.

# Reasoning

Article 67 of the Colombian Constitution describes education as a right and a public service that must respect human rights. General Comment No. 13 of the United Nations Committee on Economic, Social and Cultural Rights states that education, as a public service, must comply with the guarantees of accessibility, adaptability and acceptability. The Court reasoned that by asking the student to take the steps to change the name on his identification card, the SENA demonstrated a lack of interest and support of the student's right to education. The equality clause, particularly the prohibition of discrimination based on grounds such as sex, was violated by the SENA when restrictions were imposed on the student's expression of gender identity without justification. By not allowing the student to wear a male uniform and be treated according to his gender identity, his right to education was affected. As such, the Court issued orders to protect that right, including a general measure to promote inclusion, equality, and free development of the person in the institution.

In Judgment T-804 of 2014, the Court declared that for a human being to be treated according to his human nature is the 'essential nucleus of human dignity'. In Judgment T-562 of 2013, the Court concluded that educational institutions have the legitimate right to assign uniforms. However, by imposing a uniform on a student that goes against that student's gender identity, access to education is affected, and the rights of free development of the person violated. As such, the Court clarified that the measures ordered by the appellate judge did not encroach on the autonomy of the institution. This autonomy must be limited by respect for the fundamental rights of students, which includes the right to education as a public service that meets the guarantees of accessibility, adaptability, and acceptability.

# Impact

The right to education was enforced by eliminating a barrier to acceptance of transgender students in such institutions on the basis of discrepancies between the name on a student's identification card, and the uniform and treatment a student may receive based on his or her gender identity.

## Relevant Legal Provisions

### National

- Article 67 of the Colombian Constitution

### International

- General Comment No 13 of the United Nations Committee on Economic, Social and Cultural Rights

### Cases

- Judgment T-804 de 2014
- Judgment T-562 de 2013

# Commentary

The decision aligns with the right to education in international law. General Comment No. 13 of the United Nations Committee on Economic, Social and Cultural Rights and Article 26 of the Universal Declaration of Human Rights establish that education, as a public service, must comply with the guarantees of accessibility, adaptability and acceptability. Thus, by ordering the SENA to allow the student to wear the male uniform and treat him according to his gender identity, the decision conforms to the guarantee of accessibility and the right to education.

## Related cases

[Corte Constitucional \[C.C.\] \[Constitutional Court\], noviembre 4, 2014, Sentencia T-804/14, M.P.:Jorge Ivan Palacio Palacio, Expediente T-4428833 \(Colom.\)](#)

By not accepting transgender students, the institution violated the fundamental rights to education, equality, and free development of the person.

[Corte Constitucional \[C.C.\] \[Constitutional Court\], agosto, 23, 201, Sentencia T-562/13, M.P.:Mauricio Gonzalez Cuervo, Expediente T-3867025 \(Colom.\)](#)

Educational institutions have a legitimate right to assign uniforms. However, if the uniform does not match the gender identity of a student, access to education is affected and the rights of free development of the person are violated.

## Additional Resources (Spanish)

[Colombia: Corte afirma que las instituciones educativas tienen la obligación de brindar a sus estudiantes un trato acorde con su identidad de género](#)

[The constitutional court affirms the obligations of educational institutions to treat their students in a way that respects their gender identity]

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