

Management Alert



Supreme Court Remands Transgender Rights Case to Court of Appeals After Trump Administration Withdraws Obama Era Guidance

By Abigail Cahak, Sam Schwartz-Fenwick and Mary Kay Klimesh

Seyfarth Synopsis: On March 6, 2017, the Supreme Court remanded a highly anticipated transgender rights case back to the Court of Appeals after the Trump Administration withdrew Obama era guidance regarding the rights of transgender students at Title IX institutions. The Court of Appeals itself is likely to remand the case back to the district court, to give the parties a chance to brief their position in light of the changed guidance.

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Starting in 2014, the U.S. Department of Education (“DOE”) and other federal agencies, including the U.S. Department of Housing and Urban Development, Occupational Safety and Health Administration, U.S. Office of Personnel Management, and Equal Employment Opportunity Commission, interpreted and enforced their respective statutes and regulations prohibiting sex discrimination to include a ban on gender identity discrimination.

On October 28, 2016, the U.S. Supreme Court [agreed to hear](#) an appeal in the matter of *Gloucester County School Board v. G.G.*, which asked the Court to weigh in on the issue of restroom access for transgender students. The case appealed the [decision](#) of the U.S. Court of Appeals for the Fourth Circuit, which concluded that a Virginia school board violated Title IX when it decided not to allow a transgender male student to use the boys’ restroom. The Fourth Circuit’s ruling was based on deference to the Obama Administration’s position that the term “sex” as used in Title IX incorporates gender identity. The school board [petitioned](#) the Supreme Court to hear the case arguing that the Fourth Circuit erred because the Obama Administration’s interpretation actually altered the meaning of Title IX.

On February 22, 2017, the Trump Administration issued a [Dear Colleague Letter](#) expressly withdrawing and rescinding the DOE’s prior interpretation, which served as the basis for the Fourth Circuit’s deference in *G.G.* That letter stated that the DOE believes states and local school districts should establish educational policy and criticized the Obama Administration’s guidance as without “extensive legal analysis[,] expla[nation of] how the position is consistent with the express language of Title IX, [or] undergo[ing] any formal public process.” However, the Dear Colleague Letter did reiterate that schools subject to Title IX remain obliged to protect students—including LGBT students—from discrimination, bullying, and harassment.

On March 1, 2017, both the [school board](#) and [ACLU](#) (counsel for the student G. G.) submitted letters to the Supreme Court indicating that they believe that the new Trump Administration guidance should *not* prevent the Court from hearing the case. Nonetheless, five days later, the Court [vacated the judgment and remanded](#) the case back to the Fourth Circuit for further consideration. The Fourth Circuit itself is likely to remand the case back to the district court, to give the parties a chance to brief their position on Title IX’s application to transgender students in light of the changed guidance.

The vacating of the lower court ruling underscores the unsettled nature of federal law regarding transgender rights. As a practical matter, absent legal mandates to the contrary, schools can continue to offer protections to their transgender students consistent with their beliefs as to what is in the best interest of students.

It is presently unknown how the Department of Education will address the rights of transgender students. It is possible, the Department will issue further guidance clarifying how federal law prohibits LGBT discrimination, bullying and harassment but leaves it to States to determine rules regarding bathroom and locker room access. Finally, it is also possible that the Department will investigate claims of gender-identity discrimination including claims related to bathroom access.

Regardless of the position ultimately taken by the Department of Education, it is expected that individuals will continue to bring their own lawsuits testing the boundaries of Title IX as it relates to transgender students. The position federal courts will take on the scope of these statutes is unsettled but will likely be uneven, a trend that will continue until the Supreme Court weighs in or express federal legislation is passed.

If you would like further information, please contact your Seyfarth attorney, [Abigail Cahak](mailto:acahak@seyfarth.com) at acahak@seyfarth.com, [Sam Schwartz-Fenwick](mailto:sschwartz-fenwick@seyfarth.com) at sschwartz-fenwick@seyfarth.com or [Mary Kay Klimesh](mailto:mklimesh@seyfarth.com) at mklimesh@seyfarth.com.

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