

Management Alert



Supreme Court to Rule on Case Addressing Bathroom Access Based on Gender Identity

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Seyfarth Synopsis: *The Supreme Court is poised to hear and rule on the Obama Administration's position regarding coverage of gender identity within Title IX's prohibition on sex discrimination. However, the status of the case is uncertain in light of who the incoming Trump Administration will appoint to the currently vacant ninth seat vacancy on the Court.*

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 asks the Court to weigh in on the issue of restroom access for transgender students. The Supreme Court's ruling is anticipated to address whether the U.S. Department of Education ("DOE") may interpret a federal law prohibiting sex discrimination to cover claims based on gender identity.

The case appeals 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 District Court Dismisses the Case

The U.S. District Court for the Eastern District of Virginia initially dismissed the plaintiff's case, reasoning that, although Title IX prohibits discrimination on the basis of sex, it does not include concepts such as gender, gender identity, or sexual orientation in that prohibition. The District Court concluded that Title IX's regulations allow schools to provide separate restrooms on the basis of sex, that the plaintiff's biological sex is female, and that requiring him to use the girls' restroom did not constitute sex discrimination.

The Fourth Circuit Reverses Due to Deference to the DOE's Interpretation

The Fourth Circuit reversed based on deference to the DOE's position that the term "sex" as used in Title IX incorporates gender identity.

Since 2014, the 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, have interpreted and enforced their respective statutes and regulations prohibiting sex discrimination to include a ban on gender identity discrimination.

In a January 7, 2015 [opinion letter](#), the DOE stated 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" and cited its prior statements in a December 2014 [policy document](#) to similar effect. More recently, in May 2016, the DOE issued a [Dear Colleague letter](#) reiterating its position that, when a school is notified by a parent or guardian that their child will assert a

gender identity different from previous representations or records, the school must begin treating the student consistent with that gender identity and that Title IX imposes no medical diagnosis or treatment requirement as a prerequisite.

The Fourth Circuit concluded that the DOE's interpretation of its own Title IX regulations was entitled to *Auer* deference, which requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent. The court found the DOE's interpretation permissible because "[a]lthough the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female." Further, "[t]he regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects." And although the DOE's interpretation was "novel," this alone "does not render the current interpretation inconsistent with prior agency practice," particularly where the DOE and other federal agencies have consistently enforced the position since 2014.

An Uncertain Future

The school board [petitioned](#) the Supreme Court to hear the case arguing that the Fourth Circuit erred because the DOE's interpretation actually alters the meaning of Title IX. The Supreme Court agreed to hear the case and has granted certiorari on two questions: first, whether *Auer* deference should extend to an unpublished agency letter and, second, whether, regardless of deference, the DOE's interpretation of Title IX and its regulations should be given effect.

It is unclear how President-elect Trump will handle the pending case once in control of the DOE and he has not clearly indicated his intentions on the matter. However, Vice President-elect Pence has stated his position that the issue should be resolved at the local level. As a practical matter, the new Administration could withdraw the DOE's policy statements which could render the case-or-controversy requirement moot or which could otherwise prompt the Supreme Court to remand the decision to the lower courts for reconsideration.

Assuming the case proceeds forward, it will be heard during the Supreme Court's October 2016 Term, which runs through June 2017. The Supreme Court's ruling will likely have a broader impact beyond education and could also have application to cases interpreting prohibitions on sex discrimination contained in other federal statutes, including Title VII of the Civil Rights Act of 1964. The decision is expected to be sharply divided amongst the justices and, with Justice Scalia's seat still sitting vacant, it is unknown how the lack of a ninth justice or the appointment of that position may impact the ruling.

As of November 21, 2016, arguments in the case had not yet been scheduled.

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