PULLMAN &COMLEY

Flushed: Supreme Court Vacates Fourth Circuit's Title IX Transgender Bathroom Decision in Gloucester County v. G.G.

Education Law Notes

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In a not particularly surprising development, on March 6, 2017, the United States Supreme Court vacated the United States Court of Appeals for the Fourth Circuit's judgment in the controversial case of Gloucester County School Board v. G.G. and remanded it to the Fourth Circuit for further consideration. Click here to read the order. The Fourth Circuit had previously held in G.G. – or as it has colloquially come to be known, the "transgender bathroom case" -- that Gloucester County's refusal to allow transgender students to use bathrooms and locker rooms of the gender with which they identify violated Title IX of the Education Amendments of 1972. This was, in turn, a reversal of the trial court, which had held that so long as the school district provided separate toilets, locker rooms, and shower facilities on the basis of gender – in other words, to both boys and girls – it was in compliance with Title IX.

The Fourth Circuit had predicated its decision primarily upon a January 7, 2015 unpublished letter that had been issued by the United States Department of Education's Office for Civil Rights ["OCR"] in response to a private citizen's inquiry and by a May 13, 2016 "Dear Colleague" letter that the United States Department of Education and the Civil Rights Division of the United States Department of Justice had jointly promulgated nationwide. In both documents, the federal government advised that Title IX's prohibition of gender-based discrimination required educational entities that received federal funds to permit students access to sex-segregated facilities based on gender identity. Although the Fourth Circuit characterized OCR's interpretation of Title IX as a "novel," it nonetheless deferred to the Department of Education in reaching its decision.

On February 22, 2016, however, OCR and the Department of Justice's Civil Rights Division issued another joint Dear Colleague letter, this time *withdrawing* their prior interpretation of Title IX. Click here to read the Dear Colleague letter. The Departments rationalized this by writing in part that the prior "guidance documents do not . . . contain extensive legal analysis or explain how the position is consistent with the express language of Title IX." Also on February 22, the United States Deputy Solicitor General sent a letter to the Clerk of the Supreme Court, enclosing a copy of the Dear Colleague letter and advising the Court of "their decision to withdraw that [January 7, 2015] guidance and [May 13, 2016] joint guidance letter, not to rely on the views expressed in the guidance, and instead to consider further and more completely the legal issues involved." Click here to read the Deputy Solicitor General's Letter.

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As noted, the Fourth Circuit predicated its decision on Department of Education's and Department of Justice's prior interpretation of Title IX. Thus, once those Departments collectively decided to withdraw that guidance, there was, like Gertrude Stein's Oakland, no longer any there there. Consequently, while on its surface the Supreme Court's summary order vacating the Fourth Circuit's decision provided the *sturm und drang* upon which the 24-hour news cycle relies, the Court had little choice but to proceed how it did, for it is a fundamental tenet of jurisprudence that a court cannot act without an actionable case and controversy before it.

So What Does It Mean?

While G.G. is not dead, the Department of Education's and the Department of Justice's change in position has essentially created a jurisprudential do-not-resuscitate. Granted, the Supreme Court returned the case to the Fourth Circuit "for further consideration," but given the circuit court's prior reliance upon how the Department of Education and the Department of Justice interpreted Title IX, it is difficult to imagine that it would now sharply deviate from that approach and ignore the Departments' express withdrawal of that interpretation. Consequently, it would appear highly likely at this juncture that transgender student access to the bathrooms and locker rooms of the gender with which they identify will be limited to those states which provide their own protections. For example, and as we have noted in prior posts, Connecticut has specific statutory protections for transgender students, and in the wake of the federal government's reversal, the state's governor issued an executive order that essentially adopted OCR's prior interpretation.

Posted in Diversity, Federal Legislation, Title IX, Transgender, U.S. Supreme Court

Tags: Dear Colleague Letter, U.S. Department of Education, U.S. Department of Justice (DOJ)