

Trump and Transgender Student Rights -- An Early Decision For The President-Elect In Gloucester County School Board v. G.G.?

Education Law Notes

11.17.2016

By Zachary Schurin

Well here we are. We will soon have a new president. As we move away from the “hows” and “whys” of the election and on to the “whats” of President-Elect Trump’s impending presidency there are a wide-number of education law issues to consider. For instance, the “School Choice And Education Opportunity Act” – a major education-policy bill that President-Elect Trump plans to enact in the first **100 days of his presidency** would purportedly end Common Core and introduce a voucher-based school choice plan. *Education Law Notes* will certainly address this piece of legislation as details emerge.

Before his first 100 days in office have passed, however, President-Elect Trump may have a major transgender-student rights decision on his hands -- namely whether his administration should effectively rescind prior informal guidance from the U.S. Department of Education’s Office of Civil Rights (OCR) indicating that Title IX of the Education Amendments Act of 1972 (a federal law which prohibits discrimination on the basis of gender in programs receiving federal financial assistance, such as school districts) generally requires schools to treat transgender students consistent with their gender identity rather than their biological sex. Time may be of the essence on this issue because on October 28, 2016 – less than two weeks before the election – the U.S. Supreme Court agreed to hear *Gloucester County School Board v. G.G.* – a case involving a transgender high-school student’s challenge to a the Gloucester County, Virginia board of education’s policy requiring all district students to use restroom and locker room facilities corresponding with their biological sex rather than their gender identities.

We have discussed the *G.G.* case previously. Specifically, G.G., a transgender boy previously allowed to use the boy’s bathroom before the enactment of the school’s bathroom and locker room policy, sued in federal court for an injunction blocking the school board’s implementation of said policy. G.G. argued that Title IX and the Equal Protection Clause of the U.S. Constitution entitled him to use school bathroom and locker room facilities corresponding with his gender identity (not his biological sex).

In April, the Fourth Circuit Court of Appeals -- the federal circuit court with jurisdiction over appeals originating from the federal district courts in Maryland, North Carolina, South Carolina, Virginia and West Virginia – issued a decision in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), cert. granted in part, 2016 WL 4565643 (U.S. Oct. 28, 2016), that found that OCR’s interpretation of what it

pullcom.com  @pullmancomley

BRIDGEPORT
203.330.2000

HARTFORD
860.424.4300

SPRINGFIELD
413.314.6160

WAKEFIELD
401-360-1533

WATERBURY
203.573.9700

WESTPORT
203.254.5000

WHITE PLAINS
914.705.5355

Trump and Transgender Student Rights -- An Early Decision For The President-Elect In Gloucester County School Board v. G.G.?

deemed to be an ambiguous Title IX regulation providing for sex-segregated bathroom and locker room facilities should be afforded judicial deference and struck down the school district's policy as in violation of Title IX. In its "**grant of certiorari**" agreeing to hear the case, however, the U.S. Supreme Court specifically identified the degree of deference that should be applied to the OCR letter as the issue before it on appeal. In essence as it heads to the Supreme Court, the case now turns on the issue of how much deference OCR's opinion letter on transgender-students' use of bathroom and locker room facilities should be granted.

What does this all mean for President-Elect Trump? Well given the centrality of the OCR guidance to the case, it would appear that the Trump-administration, if it were so inclined, could effectively "moot" the G.G. case before it ever gets heard by the Supreme Court by issuing new OCR transgender-student accommodation guidance stating that gender identity is not "sex" for purposes of Title IX. If this were to happen, G.G.'s victory before the Fourth Circuit Court of Appeals would presumably be nullified since the OCR guidance on which the Fourth Circuit's decision rests would no longer be effective. G.G. and other transgender students could certainly find other legal avenues to challenge biologically-sex based bathroom and locker room policies, but the legal hurdles would likely be much higher.

So in a nutshell, it would appear that President-Elect Trump has a potentially momentous decision to make when it comes to transgender students' rights. During the campaign, Trump appeared to indicate that it was his belief that **transgender people should use bathrooms corresponding with their gender identities**, but Vice President-Elect Pence took a sharply different view as governor of Indiana and **specifically rejected the Department of Education OCR guidance at issue in the G.G. case.**

Will Trump stay out of the issue and let the Supreme Court tackle the transgender-student rights question on its own, or will the Trump-administration's Department of Education adopt a new position on transgender student bathroom and locker room issues? Only time will tell of course, but time may be running short since the G.G. case is slated to be heard during the Court's October 2016 term and the Court's term expires in late June of 2017 – less than six months after President-Elect Trump takes the oath of office.

Finally, as we have noted several times, the issue of transgender students' use of locker rooms and restrooms in **Connecticut's** public schools is largely settled. Connecticut has enacted specific anti-discrimination protections based upon "gender identity" that apply to – and provide additional protections for – transgender students. These laws have been interpreted by Connecticut's Commission on Human Rights and Opportunities and its Department of Education as specifically providing transgender students with the right to use locker rooms and restrooms consistent with their asserted **gender identity**. However, the battle over federal law (Title IX) may be relevant to the extent that Department of Education OCR guidance addresses topics that have not been settled in Connecticut (for example, overnight accommodations on school trips and how much consistency and proof can be required with respect to a student's transgendered status).

Trump and Transgender Student Rights -- An Early Decision For The President-Elect In Gloucester County School Board v. G.G.?

Posted in Board of Education, Discrimination, Diversity, Federal Legislation, Privacy, Transgender, U.S. Supreme Court

Tags: Office for Civil Rights (OCR), U.S. Department of Education