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Trials & TRIBULATIONS

Did election decide transgender restroom litigation?

On Oct. 28, 2016, the U.S. Supreme Court granted the application of the Gloucester County School board in Virginia to hear the case involving the school board's attempt to block a transgender student from using the boy's high school bathroom. It is likely the case will be heard and decided by June 2017.

As we all know, elections have consequences, and the recent presidential election will in all likelihood have a direct impact on the ultimate determination of the constitutionality of the school board's resolution, which provides that restroom facilities at the Gloucester County schools will be restricted to an individual's biological gender rather than to his or her present gender identity.

Background

The plaintiff in the controversial case is Gavin Grimm, who is a transgender male student at Gloucester High School. Although he was born in 1999 as a female, he claims that at 12 years of age he acknowledged his male gender identity. Gavin began identifying himself as male when he entered his freshman year of high school. He was subsequently diagnosed with Gender Dysphoria and a psychologist recommended that he begin living in accordance with his male gender identity in all respects. He sought to implement his psychologist's recommendation and petitioned the Circuit Court of Gloucester County to change his legal name to his present masculine name, which the court granted.

After Gavin entered high school, the principal agreed to allow him to use the boy's restroom. Shortly thereafter, several members of the community expressed their disapproval of the practice and petitioned the school board to prohibit it.



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As a result, on Dec. 9, 2014, the school board adopted a new policy, by a vote of 6-1, which provided that male and female restrooms at the schools would be limited to those students who corresponded to their biological genders. It further provided that students with gender identity issues would be provided an alternative private restroom facility.

As a result of the new policy, Gavin was advised that he would no longer be allowed to use the boy's restroom and would be disciplined if he did.

In June 2015, Gavin filed a lawsuit in the U.S. District Court for the Eastern District of Virginia, which challenged the school board's restroom policy under the Equal Protection Clause and Title IX of the Education Amendments of 1972. The lawsuit sought a preliminary injunction, which would permit Gavin to use the boy's bathroom until the case was decided at trial.

In a decision dated Sept. 17, 2015, the District Court denied Gavin's motion for a preliminary injunction and granted the school board's motion dismissing the complaint.

Court's reasoning

In reaching its decision, the court relied upon a regulation promulgated by the Department of Education, which was enacted to implement the Title IX prohibition against discrimination on the basis of sex, and which provides as follows:

A recipient may provide separate toilet,

locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex. (34 CFR Section 106.33)

The court further ruled that since this regulation allows schools to provide separate bathroom facilities based upon sex, so long as they are comparable, the school board's policy does not violate Title IX by limiting the students to the bathroom assigned to his birth sex rather than to his gender identity.

In support of the case, Gavin cited to a recent letter from the Department of Education dated Jan. 7, 2015, which concluded that "a school must treat transgender students consistent with their gender identity" and he argued that the Department of Education's interpretation of the Title IX regulation should be given deference.

The court dismissed the Department of Education's interpretation as erroneous and inconsistent with the regulation. In its view, the regulation interpreting the Title IX regulation is not ambiguous and therefore, the Department of Education's Jan. 7, 2015 letter should not be given any deference. The court furthermore suggested that if the Department of Education wanted to amend the regulation it would be entitled to do so, but it would have to provide the notice and comment period required by the Administrative Procedure Act. Finally, the court held that the Department of Education could not simply change the regulation by issuing its so called "newfound interpretation" by creating a de facto new regulation.

Fourth Circuit action

Gavin thereafter filed an appeal to the

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Fourth Circuit Court of Appeals. In a 2-1 decision dated April 19, 2016, the Court of Appeals reversed the District Court and remanded the case back to the District Court to further implement its decision.

The majority opinion of the Court of Appeals concluded that the regulation at issue, which provides for separate toilet and locker room facilities on the basis of sex, was in fact ambiguous in that it does not address transgender individuals. As a result, the court concluded that the Department of Education's interpretation of the regulation as contained in its Jan. 7, 2015 letter should be given deference unless it can be demonstrated that the interpretation is erroneous or inconsistent with the regulation. The court concluded that the interpretation was not erroneous and, therefore, should be given deference. The court therefore reversed and remanded to the District Court for the purpose of determining whether or not a preliminary injunction should be granted

based upon the evidence to be presented by Gavin.

On July 12, 2016, the Court of Appeals denied the school board's application for stay of the decision. However, on Aug. 23, 2016, the U.S. Supreme Court granted the stay pending the timely filing and disposition of a petition for a writ of certiorari.

A petition for certiorari was filed by the Gloucester County School Board and on Oct. 28, 2016, and the U.S. Supreme Court granted the application. The case will presumably be argued and decided by June 2017.

A new president

On Jan. 20, 2017, Donald Trump will be sworn in as the 45th President of the United States and his nominee for secretary of education, Betsy DeVos, will be presented to the United States Senate for confirmation. Based on an article in Politico, dated Nov. 25, 2016, by Benjamin Wermund and Kimberly Hefling, DeVos comes from a family that has a history of funding groups that have sought to restrict

the rights of the transgender community. If DeVos is confirmed, she could, by the stroke of a pen, rescind the Department of Education's interpretation of the regulation previously issued on Jan. 7, 2015, thereby undermining the argument that Title IX protects transgender students.

In the event the case proceeds to an argument and a decision without a ninth Supreme Court Justice being confirmed, and there is a 4-4 deadlock ruling, the decision of the Fourth Circuit Court of Appeals would be affirmed and Gavin Grimm's application striking down the Gloucester School board's Resolution would be successful.

At this point in time, this issue is far from being resolved and we will all be watching with interest.

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