PUBLICATION

Supreme Court Steps Back, Punts on Student Transgender Bathroom Access Case for Now

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When the United States Supreme Court agreed last October to hear the appeal of the Gloucester County School Board from the United States Court of Appeals for the Fourth Circuit in the matter of *Gloucester County School Board v. G.G.*, 822 F.3d 709, it signaled its foray onto one of the biggest remaining battlegrounds for LGBTQ rights and looked to be taking on one of the highest profile issues of late: transgender bathroom access. On Monday, the Court stepped back – at least for now – and, in a one-sentence opinion, vacated the Fourth Circuit's judgment in favor of the plaintiff and remanded the case back to appellate court for further consideration in light of recent guidance issued by the Department of Education and Department of Justice. This means the Court likely will not hear the case for at least another year, if it hears it at all, and likely not until all nine seats on the Court are filled. In the meantime, the Court's opinion wipes out what was perceived as a preliminary victory for the LGBTQ community in the lower courts.

At the center of the case is Gavin Grimm, a 17-year-old transgender boy. Mr. Grimm was assigned female gender when he was born in 1999, but he identifies as male. When his high school in Gloucester Courthouse, Virginia denied him access to the boys' bathroom, Mr. Grimm and his mother sued the school board under Title IX, which bans discrimination "on the basis of sex" in education programs and activities receiving federal financial assistance, as well as the Equal Protection Clause of the United States Constitution.

The United States District Court for the Eastern District of Virginia dismissed Mr. Grimm's Title IX claim and denied his request for a preliminary injunction that would have permitted him to use the boys' bathroom at the school. Among other things, the district court held that Title IX's ban on sex-based discrimination does not extend to concepts such as gender identity. On appeal, the Fourth Circuit cited then-recent guidance issued by the Department of Education indicating that transgender students should be permitted to use restrooms and locker rooms consistent with their gender identities, and concluded that the district court failed to afford that guidance sufficient deference in rendering its determination. The Fourth Circuit reinstated Mr. Grim's claims, and on remand, the district court granted an injunction permitting him to use the boys' restroom at the school.

In August 2016, the Supreme Court split in deciding to put Mr. Grimm's injunction on hold pending a decision from the Court on whether to review the proceedings to date. On October 28, 2016, the Court announced that it would review the case, indicating it would focus on whether the Department of Education's guidance on transgender bathroom access should be viewed as having the force of law.

Last month, the Department of Education as well as the Department of Justice, now under the leadership of President Donald Trump's Administration, withdrew their previously-issued guidance documents on the transgender bathroom access issue. While both Mr. Grimm and the School Board urged the Supreme Court to move forward nonetheless with its review of the case, the Supreme Court with its Monday opinion declined to do so, sending the case back to the Fourth Circuit.

It is hard to say what the Fourth Circuit will do with Mr. Grimm's claims this go-around, but it will likely ask the parties to submit new briefing on the Trump Administration's recent guidance withdrawal and may even press

the new Administration to spell out where it stands on the meaning and reach of Title IX's ban on sex discrimination. Ultimately, the Supreme Court may not be able to avoid issuing its own opinion as to what Title IX's protections mean and how far they extend.

Gloucester County School Board v. G.G. is a Title IX case, but it has implications for the workplace and the protections afforded employees under federal employment laws, including Title VII. While the Supreme Court has for now punted on the issue, this case – and the executive guidance it is likely to prompt in areas including not only education but potentially federal employment law – warrant a close watch over the next year.