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Supreme Court Takes Up School Bathroom Issue

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Transgender high schooler Gavin Grimm’s effort to use boys’ facilities could establish key precedent

BY ARTHUR S. LEONARD

In a case that could have significant implications for how the courts view gender identity discrimination — and perhaps sexual orientation, as well — the Supreme Court, on October 28, announced it will review the Fourth Circuit Court of Appeals’ decision in Gloucester County School Board v. G.G., which upheld the Department of Education’s requirement that a Virginia school district let a transgender teenage boy use the boys’ restroom facilities.

The April 19 ruling by the Fourth Circuit overturned a 2015 district court ruling that found that the DOE overstepped its authority in its interpretation of Title IX of the Education Amendments Act of 1972.

The Gloucester case has been closely watched by LGBT lawyers and legal commentators because it provides the high court with a vehicle to examine the broader question of whether federal laws prohibiting discrimination “because of sex,” most passed decades ago, can now be construed to forbid gender identity discrimination and, maybe, also sexual orientation discrimination, despite the obvious fact that legislators in 1960s and 1970s had no such intent when enacting those statutes.

Framed a different way, the question is one repeatedly raised by the late Justice Antonin Scalia: Are we governed by the intentions of our legislators or should the courts rely instead on reasonable interpretations of the actual text of the law? Scalia, who was an ardent foe of using “legislative history” as a method of statutory interpretation, decisively argued that courts should focus on the language of the statute, not viewed in isolation but rather in the context of the overall law, including any specific declaration of congressional purpose contained in it.

On that point, ironically, this justice who was notoriously hostile to gay rights claims won unanimous concurrence by his colleagues in a significant 1998 ruling that laid the groundwork for advances in LGBT rights. In Oncale v. Sundowner Offshore Services, Inc., the court held that a man employed in an all-male workplace could maintain an action for hostile environment sexual harassment under Title VII of the 1964 Civil Rights Act, even though it was unlikely that Congress at that time was thinking about same-sex harassment when it included “sex” as a forbidden grounds for workplace discrimination.

Relying on the statutory text, Scalia wrote that Joseph Oncale, who was sodomized with a bar of soap and threatened with rape, would have a valid Title VII claim if he could prove that he was harassed “because of sex” as specified by the 1964 law. The Equal Employment Opportunity Commission (EEOC) has prominently quoted from Scalia’s Oncale opinion in its federal employment rulings in the last several years holding that discrimination because of gender identity and sexual orientation is “necessarily” discrimination “because of sex,” even though the 1964 Congress would not have thought so.

Though the claims of Gavin Grimm, the transgender plaintiff in the Gloucester case, do not directly involve Title VII, federal courts have generally followed Title VII precedents when they interpret the sex discrimination ban in Title IX, as the Fourth Circuit explained in this case.

The controversy arose when fellow students and their parents objected to Grimm using the boys’ restrooms during fall term of his sophomore year, in 2014. The high school’s principal had given Grimm permission to use the boys’ restrooms after learning of his transition and his discomfort with continuing to use the girls’ restrooms, since he was dressing, grooming, and — most significantly — strongly identifying as male.

Responding to the complaints, the Gloucester County School Board established a policy under which students were required to use the restroom consistent with their “biological sex” as identified on their birth certificate or to use a private gender-neutral restroom, of which there were a few in the high school. Grimm enlisted the American Civil Liberties Union of Virginia to sue the school board, and the case was assigned to District Judge Robert G. Doumar, who was appointed by President Ronald Reagan in 1981. Grimm’s complaint relied on Title IX as well as the Equal Protection Clause of the 14th Amendment.

In ruling on Grimm’s motion for preliminary injunction, Doumar found that he could not sustain a Title IX claim because its regulations expressly allow schools to maintain separate restroom facilities for boys and girls based on “sex,” so it was not unlawful for Grimm’s school to require him to use restrooms consistent with his “sex” which, in the school board’s view, was female.

The district judge rejected the ACLU’s claim that he should defer to the DOE interpretation of the “bathroom regulation,” articulated in a letter the department’s Office of Civil Rights (OCR) sent in January 2015 as a “party in interest” in response to Grimm’s request for its assistance. The OCR took the position, consistent with recent developments in sex discrimination law, that Grimm should be treated as a boy because it was undisputed that this is his gender identity and so under the regulation he was entitled to use the boy’s restroom — though he could also request as an accommodation to have access to a private gender-neutral facility.

To Doumar, the regulation’s text was clear and unambiguous, so the OCR’s attempt to interpret the regulation in favor of Grimm’s claim was not entitled to deference from the court. To accord that interpretation deference, he wrote, would allow the OCR to “create a de facto new regulation.” If the OCR wanted to change the regulation, the judge found, it should go through the time-consuming procedures set out in the Administrative Procedure Act, which would be subject to review in the Fourth Circuit Court of Appeals.

In his opinion, Doumar referred to Grimm as a “natal female,” unwilling to credit the idea that for Title IX purposes he should be treated as a boy. The case, the judge concluded, presented the simple question whether the school board had to let a girl use the boy’s restroom, and under the “clear” regulation the answer was “no.”

Doumar dismissed Grimm’s Title IX claim, and reserved judgment on his Equal Protection claim.

When Grimm appealed to the Fourth Circuit, Doumar was reversed in a 2-1 opinion this past April 19. Where Doumar saw clarity in the regulation, the Fourth Circuit majority saw ambiguity. Though Title IX clearly called for separate facilities for boys and girls, it said nothing directly about which restrooms transgender students could use. Unlike Doumar, the majority was unwilling to accept the school board’s argu-
ment that a person’s sex is definitely established by their birth certificate, taking note of the developing case law in other circuits and in many district courts accepting the proposition that sex discrimination laws are concerned not just with genetic or “biological” sex but rather with the range of factors and characteristics that go into gender, including gender identity and expression.

Many federal courts, including several on the appellate level, now accept the proposition that gender identity and sex are inextricably related, that gender dysphoria and transgender identity are real phenomena that deeply affect the identity of people, and that transgender people are entitled to be treated consistently with their gender identity.

Given the ambiguity it identified, the Fourth Circuit relied on Auer v. Robbins, a 1997 Supreme Court ruling that an agency’s interpretation of its own ambiguous regulation should be given controlling weight by the court unless that interpretation is “plainly erroneous or inconsistent with the regulation or statute.” A reasonable agency interpretation of an ambiguous regulation, then, should be given deference by the court. The majority sent the matter back to Doumar for reconsideration and stressed the urgency of the matter.

Doumar responded quickly, granting Grimm the preliminary injunction he sought on June 23. Seeking a stay of that injunction, the school board was unsuccessful with both Doumar and the Fourth Circuit, but won a stay from the Supreme Court on August 3 in a 5-3 vote, before Grimm was able to start his senior year.

One among the five-court majority, Justice Stephen Breyer, took the unusual step of explaining his decision to vote with the court’s four-member conservative faction, saying it was an “accommodation.” In retrospect, it seems likely Breyer understood the four conservatives would provide the votes necessary to hear the case on appeal and was voting to maintain the status quo pending final resolution at the Supreme Court.

After the school board filed its petition for high court review, more than a dozen amicus briefs in support or opposition were quickly filed, as well, including briefs from a number of states and members of Congress. Media interest in the case will undoubtedly remain very high.

The Supreme Court has agreed to consider two questions raised in the school board petition: whether the 1997 Auer precedent is appropriately applied in a case the school board described as “an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought,” and whether the DOE’s interpretation of Title IX and the bathroom regulation should be “given effect.”

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The court could go down several different paths in resolving these questions. It might agree with the school board that no deference is due to an agency position formulated in response to a particular case and expressed in an unpublished agency letter — though the Fourth Circuit noted that the DOE published online an OCR statement setting forth the same view a month before its letter in the Grimm case. The court making this finding would send the case back to the Fourth Circuit for its reconsideration of whether the Title IX claim was properly dismissed by Doumar at the outset in the absence of any requirement to defer to the DOE interpretation.
Or, the high court could tackle the substantive issue and decide whether interpreting Title IX to extend to gender identity discrimination claims is a viable interpretation, in light of its seminal 1989 ruling in Price Waterhouse v. Hopkins that an employer’s use of sex stereotypes in denying an employee’s promotion was evidence of intentional discrimination based on “sex.” It was that ruling that eventually led federal courts to conclude that because transgender people generally do not conform to sex stereotypes concerning their “biological” sex at birth, discrimination against them is a form of “sex discrimination” in violation of federal laws including the Fair Credit Act, the Violence Against Women Act, and Title VII of the Civil Rights Act.

The EEOC also relied on Price Waterhouse in reaching its 2012 conclusion that transgender plaintiffs could assert discrimination claims under Title VII. The Sixth and 11th Circuit Courts of Appeals have similarly looked to that 1989 case in finding that claims of gender identity discrimination asserted by public employees should be treated the same as sex discrimination claims under the 14th Amendment’s Equal Protection Clause.

Were the Supreme Court to rule by majority vote that laws banning discrimination “because of sex” also “necessarily” cover discrimination because of gender identity, rather than issuing a narrower ruling focusing solely on Title IX, one could plausibly argue that the pending Equality Act need not include the category of “gender identity” in order to establish a federal policy against gender identity discrimination under all sex discrimination laws. The Supreme Court, however, has generally preferred to decide statutory interpretation cases on narrow grounds.

This case will most likely be argued early in 2017, and it may not be decided until the end of the Court’s term in June. Thus, it is possible that Grimm could win but never personally benefit as a student at Gloucester County’s high school, since he should complete his studies there next spring.

The Supreme Court has not granted as many petitions as usual so far this fall, leading to speculation that it is trying to avoid granting review in cases where the justices might be predictably split evenly on the outcome and so not be able to render a decision establishing a precedent. If the Senate Republicans stand firm on their position that President Barack Obama’s nominee for the vacant seat, US Court of Appeals Judge Merrick Garland, will not be considered for confirmation, it is possible that the Court will have only eight justices when the Gloucester case is argued.

A tie vote by the court would leave in place the Fourth Circuit’s decision in Grimm’s favor, but it would not establish any precedent beyond there. And there is also the possibility that Grimm’s graduation from high school will be found to have mooted the case. Since the case was brought by him rather than the DOE or the Justice Department, Grimm’s standing remains an issue throughout consideration of this case.

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