UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 15-2056
(4:15-cv-0054-RGD-DEM)

G. G., by his next friend and mother, Deirdre Grimm,

Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant - Appellee.

APPELLEE'S MOTION FOR STAY OF MANDATE PENDING FILING OF PETITION FOR WRIT OF CERTIORARI

DAVID P. CORRIGAN (VSB No. 26341)
JEREMY D. CAPPS (VSB No. 43909)
M. SCOTT FISHER, JR. (VSB No. 78485)
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
P. O. Box 70280
Richmond, VA 23225
4951 Lake Brook Drive, Suite 100
Glen Allen, VA 23060
(804) 747-5200 (telephone)
(804) 747-6085 (facsimile)
Email: dcorrigan@hccw.com
Email: jcapps@hccw.com
Counsel for Defendant-Appellee Gloucester County School Board

Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Fourth Circuit Rule 41, Appellant Gloucester County School Board ("School Board") respectfully moves the Court to stay the issuance of the mandate pending application to the United States Supreme Court for a writ of certiorari. The School Board intends to file a petition for writ of certiorari with the United States Supreme Court within ninety (90) days of this Court's entry of judgment as permitted by Rule 13 of the Rules of the Supreme Court. See Sup. Ct. R. 13(1).

This Court denied the School Board's petition for rehearing *en banc* and entered judgment on May 31, 2016. Accordingly, the School Board's petition for a writ of certiorari must be filed by August 29, 2016. The School Board requests a stay that does not exceed that date, with a continuance of the stay until the Supreme Court's final disposition in accordance with Rule 41(d)(2)(B) of the Federal Rules of Appellate Procedure. This motion should be granted, because the petition for a writ of certiorari will "present a substantial question," "there is good cause for a stay," and the motion is "not frivolous or filed merely for delay." Fed. R. App. P. 41(d)(2)A); Fourth Circuit Rule 41.

Counsel for all parties have been notified of this motion pursuant to Fourth Circuit Rule 27(a). Counsel for Appellant has advised that Appellant does not consent to staying the mandate, and Appellant intends to file a response in opposition to this motion.

INTRODUCTION

This case is one of national significance. It directly affects every school district and college in this Circuit that receives federal funding and indirectly affects every such district and college in the United States.

The School Board's petition for certiorari will present substantial questions concerning: (1) the application of Auer deference with the attendant issues of federalism and separation of powers and (2) bodily privacy rights. The application of Auer deference was improper and calls into question the continuing propriety of the doctrine. The panel majority opinion gave Auer deference to a January 7, 2015 letter from the Acting Deputy Assistant Secretary of Policy for the Office of Civil Rights ("OCR") that replaced the term "sex" with the term "gender identity" in Title IX and its implementing regulations. On May 13, 2016, after the School Board petitioned for rehearing *en banc*, the Department of Education ("DOE") and the Department of Justice ("DOJ") released a "Dear Colleague" Letter on Transgender Students, characterizing it as significant guidance. The letter replaces the term "sex" under Title IX with the term "gender identity," advising that schools risk loss of federal funding by not treating transgender students of all ages consistently with their gender identity instead of their biological sex.

The DOE and DOJ guidance letter illustrates that this is a substantial question of national importance. Both the OCR letter and the DOE and DOJ

guidance letter were issued for litigation purposes, and both letters seek to do what Congress has not done – replace the term "sex" with "gender identity" in order to support an outcome unilaterally desired by the Executive Branch. This raises substantial questions concerning both federalism and the separation of powers.

Additionally, the balancing of the individual's right to bodily privacy against the needs of individuals who are transgender is an issue that has become the subject of significant national debate in recent months,[1] and it is certainly one that presents a substantial question. Title IX and its regulations intended to preserve bodily privacy by allowing separate facilities for the sexes. The Supreme Court, this Court, and other Courts of Appeals have also long recognized bodily privacy rights and the differences between the sexes. Yet, the panel majority opinion and the guidance issued by OCR, DOE, and DOJ do not consider the bodily privacy rights of students.

Finally, there is good cause to stay the mandate, because the School Board and school districts across the country will be irreparably harmed if a stay is not issued. The School Board will be distracted from the important work of educating students. The School Board will also be exposed to further litigation, because redefining sex to mean gender identity makes it difficult for the School Board to

[1] This issue has dominated the news and become a *cause célèbre*. Texas and ten other states have even filed a lawsuit challenging the legality of the DOE and DOJ guidance. See State of Texas, et al. v. United States of America, et al. 7:16-cv-00054, ECF Doc. 1 (N.D. Tex. May 25, 2016).

protect the privacy rights of its students. The monetary risk to the School Board – and to school boards throughout the country – is heightened by the DOE and DOJ threats that federal funding will be withheld if their May 13, 2016 guidance is not followed.

BACKGROUND

Appellant G.G. was born a girl and has female reproductive organs. G.G. enrolled in high school as a girl. At the beginning of G.G.'s sophomore year, school officials were informed that G.G. was transgender and identified as a boy. School officials immediately expressed support, and agreed to change G.G.'s name in the school records, refer to G.G. using his new name and male pronouns, and continue with home-bound physical education.

After G.G. asked to use the boys' restroom in school, the School Board considered the difficult issues associated with a transgender student using a restroom that does not correspond with the student's anatomical sex. Taking the safety and privacy of all students into consideration, the School Board adopted a restroom and locker room resolution that provided in pertinent part:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

The School Board also issued a news release that stated in part, "[t]he District also plans to designate single-stall, unisex restrooms, similar to what's in many other public spaces, to give all students the option for even greater privacy." Under the policy, the School Board provided three unisex, single-stall restrooms for any student to use. G.G. cannot use the boys' restrooms, but is permitted to use the girls' restrooms and the single-stall restrooms.

G.G. filed a Complaint and Motion for Preliminary Injunction, alleging that the School Board's policy violates the Equal Protection Clause of the Fourteenth Amendment and Title IX. The District Court granted the School Board's Motion to Dismiss the Title IX claim and denied the Motion for Preliminary Injunction. The District Court has not ruled on the Equal Protection claim.

On appeal, a divided panel reversed the District Court's dismissal of the Title IX claim. Based solely on the January 7, 2015, unpublished OCR letter, the majority opinion concluded that the District Court did not "accord appropriate deference to the relevant Department of Education regulations." See April 19, 2016 Opinion at 5 (ECF Doc. 74). The divided panel also vacated the denial of the preliminary injunction, remanding the case for further proceedings. Judge Niemeyer dissented, finding the majority opinion "misconstrues the clear language of Title IX and its regulations." Id. at 48. The School Board petitioned for

rehearing *en banc*, and that petition was denied on May 31, 2016. See May 31, 2016 Order (ECF Doc. 90).

ARGUMENT

The School Board intends to file a petition with the Supreme Court for a writ of certiorari. Staying the issuance of the mandate pending application for a writ of certiorari is appropriate, because (1) the petition will "present a substantial question" and (2) "there is good cause for a stay." Fed. R. App. P. 41(d)(2)A). This motion is "not frivolous or filed merely for delay," given the national importance of this case and its specific impact on the operations of the School Board. Fourth Circuit Rule 41.

I. This Case Presents Substantial Questions of National Importance, and the Mandate Should Be Stayed.

Judge Niemeyer correctly observed the "momentous nature" of this case in his dissent from the denial of the petition for rehearing. See May 31, 2016 Order at 4 (ECF Doc. 90). This case presents substantial questions concerning the meaning of Title IX and the application of Auer deference. It also presents substantial questions about the continuing legitimacy of the doctrine and concomitant issues of federalism and separation of powers that affect more than just how a school district governs itself and its students. Moreover, this case presents a substantial question concerning the right of bodily privacy. How these

issues are resolved affects every school district in the Fourth Circuit, and potentially the nation, that receives federal funding.

A stay is appropriate under this Court's precedent, because this case presents "a 'close' question or one that very well could be decided the other way." U.S. v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991) (per curiam) (defining "substantial question" when construing a standard in 18 U.S.C. § 3143 that is similar to the standard under Rule 41); see also Herzog v.United States, 75 S. Ct. 349, 351 (1955) (Douglas, J. in chambers) ("The fact that one judge would be likely to see merit in the contention is . . . enough to indicate its substantiality."). The panel's split decision and the Western District of Pennsylvania's ruling in Johnston v. University of Pittsburgh of Com. System of Higher Educ., 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015) both show that this case presents a close question.

A. The Application of Auer Deference In This Case Raises a Substantial Question that Has Far-Reaching Consequences.

Whether Auer deference should be given to a letter issued by DOE for litigation purposes in this case, or to the "significant guidance" issued by DOE and DOJ during the pendency of this appeal, has sweeping consequences for potentially every school district receiving federal funding. Moreover, the application of Auer deference in this case calls into question the scope of authority of the federal government and the Executive Branch in particular. Indeed, the

overly broad application of Auer deference raises substantial questions of federalism and separation of powers.

The term "sex" under Title IX and its regulations is unambiguous, and DOE's and DOJ's interpretation of that term does not warrant deference. Christensen v. Harris Cnty., 120 S.Ct. 1655, 1657 (2000); Dickenson-Russell Coal Co., LLC v. Secretary of Labor, 747 F.3d 251, 256-57 (4th Cir. 2014) ("When the regulation in question is unambiguous . . . adopting the agency's contrary interpretation would permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). Moreover, the DOE and DOJ interpretations of "sex" do not warrant deference, because their "interpretation is plainly erroneous [and] inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991).

The term "sex" has always been understood to mean biological sex. Yet, more than 40 years after the enactment of Title IX, DOE and DOJ have unilaterally changed its definition. As Judge Niemeyer recognized, "[a]ny new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome." See April 19, 2016 Opinion at 63 (ECF Doc. 74). The May 13, 2016

guidance issued by DOE and DOJ implicitly acknowledges what a reach their new definition of sex is.

The guidance mandates that students be permitted to use restrooms, locker rooms, and dorm rooms consistent with their gender identity. In the case of athletics, however, the guidance does not require schools to treat a student's gender identity as the student's sex for purposes of Title IX compliance. Instead, the guidance provides schools "may not . . . rely on overly broad generalizations or stereotypes" about students. Outside of that, schools apparently may field sports teams on the basis of biological sex.

The guidance is confounding. Sex either means gender identity for all purposes or it does not. Indeed, the panel majority found "that 'sex' should be construed uniformly throughout Title IX and its implementing regulations . . ." See April 19, 2016 Opinion at 26 (ECF Doc. 74); see also Sullivan v. Stroop, 496 U.S. 478, 484 (1990); Kentuckians for Commonwealth Inc. v. Riverburgh, 317 F.3d 425, 440 (4th Cir. 2003) ("[B]ecause a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well.").

The guidance does not support granting Auer deference in interpreting the term "sex" as gender identity. Gonzales v. Oregon, 546 U.S. 243, 257, 126 S. Ct. 904, 915 (2006) held Auer deference is only appropriate where an agency

interprets an ambiguity that is "a creature of the Secretary's own regulations." Deference does not protect regulations that merely repeat or paraphrase a statute. "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." Id. at 257. The efforts of DOE and DOJ to change the meaning of the statutory term "sex" under the guise of interpreting the same term in the regulations "cannot be considered an interpretation of the regulation." Id.

OCR initially redefined "sex" for litigation purposes, and the panel majority deferred to OCR's definition. Then, in what Judge Niemeyer accurately characterized as a "circular maneuver," DOE and DOJ in their May 13, 2016 guidance "rely on the panel majority's opinion to mandate application of their position across the country while the majority's opinion relied solely on [DOE's] earlier unprecedented position." See May 31, 2016 Order at 3 (ECF Doc. 90). This is precisely the type of case that calls for reconsideration of the propriety of the Auer deference doctrine.

Just last year, three Justices expressed their willingness to reconsider Auer in an appropriate case. See Perez v. Mortgage Bankers Ass'n v. Perez, 135 S. Ct. 1199, 1210-11 (Alito, J., concurring) ("I await a case in which the validity of [Bowles v.] Seminole Rock [& Sand Co., 325 U.S. 410 (1945) (Auer's

predecessor)] may be explored through full briefing and argument."); id. at 1213 (Scalia, J., concurring) (urging that Auer be "abandon[ed]"); id. at 1225 (Thomas, J., concurring) (asserting that "the entire line of precedent beginning with Seminole Rock raises serious constitutional questions and should be reconsidered in an appropriate case"); see also Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C. J., concurring) (recognizing "some interest in reconsidering [Seminole Rock and Auer]" at the Supreme Court in "an appropriate case.").

Just last month, Justice Thomas observed in a case involving DOE's interpretation of a different regulation that "[a]ny reader of this Court's opinions should think that the [Auer deference] doctrine is on its last gasp." United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting in the denial of a petition for a writ of certiorari). Justice Thomas further observed that:

> [B]y deferring to an agency's litigating position under the guise of *Seminole Rock*, courts force regulated entities like petitioner here to divine the agency's interpretations in advance, lest they be held liable when the agency announces its interpretations for the first time in litigation. By enabling an agency to enact vague rules and then to invoke *Seminole Rock* to do what it pleases in later litigation, the agency (with the judicial branch as its co-conspirator) frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.

Id. (internal quotations and citations omitted).

That is exactly what has happened here, except DOE and DOJ took another step past the precipice. They created an ambiguity where one never existed and replaced the term "sex" with "gender identity." The implications are endless if Executive Branch agencies are permitted to rewrite statutes and regulations whenever they are able to manufacture an ambiguity no matter how novel it may be. Principles of federalism and separation of powers are at stake, and "time is of the essence." See May 31, 2016 Order at 5 (ECF Doc. 90).

B. The Scope of the Right to Bodily Privacy is a Substantial Question Throughout the United States.

Replacing the term "sex" in Title IX with the term "gender identity" presents a substantial question of national importance. Such a shift in focus effectively obliterates the distinctions between the sexes and permits unfettered access to facilities intended for use of the opposite sex. Not only is it contrary to the historical norms of civilization, it is contrary to the intent of Title IX and well-established law recognizing the dignity and freedom of bodily privacy.

Title IX and its implementing regulations were designed and intended to preserve personal privacy, not to force biological males and females to share private facilities. Title IX specifically provides that "nothing contained herein shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. See also, e.g., 118 Cong. Rec. 5807 (1972) ("*These regulations would allow enforcing agencies*

to permit differential treatment by sex only—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities *or other instances where personal privacy must be preserved*.) (emphasis added); 117 Cong. Rec. 39260 (1971). Congress clearly recognized the need for bodily privacy for each biological sex. Further, DOE's own regulations implementing Title IX permit educational institutions to provide "separate toilet, locker room, and shower facilities on the basis of sex"; separate housing "on the basis of sex"; separate athletic teams "for members of each sex"; and to consider an employee's sex for employment in a sex-segregated locker room or toilet facility. 34 C.F.R. §§ 106.33, 106.32, 106.41, 106.61.

The Supreme Court also has recognized that there (1) are inherent "[p]hysical differences between men and women" that are "enduring" and render "the two sexes . . . not fungible" and (2) that each sex must be afforded privacy from the other sex. United States v. Virginia, 518 U.S. 515, 533, 550 n. 19 (1996).[2] This Court likewise has held that individuals have a right to bodily privacy. See Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981). In particular,

[2] In a 1975 *Washington Post* editorial, then Columbia Law School Professor Ruth Bader Ginsburg wrote that "[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy." Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21. (emphasis added).

this Court has acknowledged "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993).

This is not a revolutionary proposition, unlike the DOE guidance. Other courts also have found that there is a basic need for bodily privacy. See, e.g. Doe v. Luzerne Cty., 660 F.3d 169, 177 (3rd Cir. 2011) (individuals have "a constitutionally protected privacy interest in his or her partially clothed body," and this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 498 (6th Cir. 2008) ("the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"); Sepulveda v. Ramirez, 967 F.2d 1413, 1415-16 (9th Cir. 1992) ("[t]he right to bodily privacy is fundamental," and "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample).

Protecting bodily privacy is of particular concern when it comes to students. Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies"). Indeed, the School Board has a responsibility, particularly where children are still developing, both emotionally and physically, to ensure students' privacy. See,

e.g., Burns v. Gagnon, 283 Va. 657, 671, 727 S.E.2d 634, 643 (2012); Davis v. Monroe County Board of Education, 526 U.S. 629, 646-47 (1999).

How the right to bodily privacy is balanced against the needs of transgender individuals is a substantial question that demands attention at the highest level of the judiciary. In particular, the interest of children in the right to bodily privacy is of paramount importance. The practical effects of replacing "sex" with "gender identity" under Title IX is a substantial question affecting the entire country that begs a final answer only the Supreme Court can provide.

II. There is Good Cause to Stay the Mandate.

Good cause exists to stay the mandate pending a petition for a writ of certiorari, because the School Board will suffer irreparable harm in absence of the stay. Planned Parenthood of Se. Pennsylvania v. Casey, 510 U.S. 1309, 1310, 114 S. Ct. 909, 910 (1994).

It will become increasingly difficult for the School Board to focus on educating students if the mandate is not stayed. Adapting to the new circumstances put forth by the panel majority and the May 13, 2016 DOE and DOJ guidance requires profound changes in the operations of the School Board and school districts across the nation. These changes will distract the School Board from fulfilling its fundamental purpose of educating students.

Additionally, the School Board is left exposed to endless litigation. In addition to having to litigate this case at both the district court and Supreme Court levels if the mandate is not stayed, the School Board will have exposure to lawsuits from parents and students.

School administrators in Virginia have a responsibility "to supervise and ensure that students [can] have an education in an atmosphere conducive to learning, free of disruption, and threat to person." See, e.g., Burns v. Gagnon, 283 Va. 657, 671, 727 S.E.2d 634, 643 (2012). In that regard, the School Board has a responsibility to ensure the privacy of students while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. This is particularly true in an environment where children are still developing, both emotionally and physically. These issues are perhaps magnified at the middle school level where ages range from 11 to 14 years old. The prospect of a pubescent 14 year old biological male using the same facilities as an 11 year old biological female can create an uncomfortable situation for both students and the school system.

Permitting students to use facilities based on gender identity without regard for the bodily privacy of others as directed by DOE and DOJ is at odds with the School Board's obligations to ensure the bodily privacy of its students, and the prospects of conflict are high. At least one other school district has been sued for

implementing policies pursuant to the DOE and DOJ guidance. Just last month, students and parents in a school district in Illinois filed suit against the school district, because the school district entered into an agreement with DOE allowing a transgender student to use locker rooms consistent with that student's gender identity. See Students and Parents for Privacy v. DOE, DOJ, and School Directors of Township High School District 211, County of Cook and State of Illinois, 1:116-cv-04945, ECF Doc. 1 (N.D. Ill. May 4, 2016).

Moreover, under the panel majority's decision and the DOE and DOJ guidance, the School Board must now permit students to use locker rooms, restrooms, and other intimate facilities that correspond with their "gender identity" on any given day. No consideration is given to whether the School Board can consider the genuineness of a student's request, and the potential for abuse of the situation by those who are not transgender is too great. The School Board's solution of providing three single stall unisex restrooms that anyone could use was a practical, nondiscriminatory answer that met everyone's interests and properly balanced the needs of transgender students with other students' right to bodily privacy.

The DOE and DOJ guidance is really no guidance at all. The School Board's ability to exercise discretion in handling what is obviously a very difficult

issue has been taken away. The School Board will suffer irreparable harm if the mandate is not stayed.

Finally, DOE and DOJ have now made clear that the School Board's federal funding is in jeopardy. The May 13, 2016 guidance specifically provides:

> As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations. The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.

Threatened with the loss of federal funding, the irreparable harm that will be suffered by the School Board and other school districts like it clearly has been intensified.

CONCLUSION

For the foregoing reasons, this Court should stay the mandate in this case pending the filing of a petition for a writ of certiorari. Pursuant Rule 41(d)(2)(B), the stay should be extended upon the filing of the petition, and it should remain in place until the Supreme Court's final disposition.

GLOUCESTER COUNTY SCHOOL BOARD

By Counsel

/s/
David P. Corrigan (VSB No. 26341)
Jeremy D. Capps (VSB No. 43909)
M. Scott Fisher, Jr. (VSB No. 78485)
Attorney for Gloucester County School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 – Fax
dcorrigan@hccw.com
jcapps@hccw.com
sfisher@hccw.com

C E R T I F I C A T E

I hereby certify that on the 7th day of June, 2016, I caused this Motion for Stay of Mandate Pending Filing of Petition for Writ of Certiorari to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel that are registered CM/ECF users.

/s/ David P. Corrigan
David P. Corrigan
VSB No. 26341
Jeremy D. Capps
VSB No. 43909
M. Scott Fisher, Jr.
VSB No. 78485
Attorney for Gloucester County School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 – Fax
dcorrigan@hccw.com
jcapps@hccw.com
sfisher@hccw.com