

16-273 GLOUCESTER COUNTY SCHOOL BOARD V. G.G.

DECISION BELOW: 822 F.3d 709

LOWER COURT CASE NUMBER: 15-2056, 16-1733

QUESTION PRESENTED:

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent—who was born a girl but identifies as a boy—to use the boys' restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

GRANTED LIMITED TO QUESTIONS 2 AND 3 PRESENTED BY THE PETITION.

ORDER OF MARCH 6, 2017:

THE JUDGMENT IS VACATED, AND THE CASE IS REMANDED TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FOR FURTHER CONSIDERATION IN LIGHT OF THE GUIDANCE DOCUMENT ISSUED BY THE DEPARTMENT OF EDUCATION AND DEPARTMENT OF JUSTICE ON FEBRUARY 22, 2017.

CERT. GRANTED 10/28/2016