No. 16-273

IN THE
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G. G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE, THE STATE OF MISSOURI, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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 If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?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

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INTEREST OF AMICUS CURIAE[1]

The State of Missouri provides free primary and secondary education to more than 900,000 public school students across the state at an annual cost of more than $10 billion. Nearly 10 percent of that funding comes from the federal government. As a condition of receiving federal money, Missouri must comply with Title IX of the Education Amendments of 1972 and the regulations promulgated thereunder by the U.S. Department of Education ("Department"), which generally prohibit educational programs and activities from discriminating "on the basis of sex." 20 U.S.C. § 1681(a). Under long-standing Department regulations, schools may provide "separate toilet, locker rooms, and shower facilities on the basis of sex" so long as the facilities are comparable. 34 C.F.R. § 106.33. This case presents the difficult question of how § 106.33 applies to persons whose anatomical sex is different from their gender identity, *i.e.*, persons with female anatomy who nonetheless self-identify as male, and *vice versa*.

While the Fourth Circuit's resolution of the foregoing question is not legally binding on any school outside of Gloucester County, Virginia, subsequent events have left Missouri public schools in limbo as to the current state of the law. In a May 13, 2016 "Dear Colleague" letter, the U.S. Departments of Education and Justice offered "significant guidance" to public school administrators across the country that, based on the Fourth Circuit's ruling, schools failing to "treat a student's

[1] Per Supreme Court Rule 37.2, Missouri provided ten days' notice to all parties of its intention to file this amicus brief in support of certiorari.

gender identity as the student's sex for purposes of Title IX and its implementing regulations" may lose their federal education funding. Cert. Pet. App. at 126a-142a. Then, on August 21, 2016, the United States District Court for the Northern District of Texas issued a nationwide injunction finding the Departments' "significant guidance" was contrary to the language of Title IX and the Departments' own regulations. *Texas v. United States*, 7:16-CV-00054-O, 2016 WL 4426495, at *15 (N.D. Tex. Aug. 21, 2016).

Missouri has a profound interest in the welfare of the State's 900,000 public school students and the continued solvency of the 567 local school districts in which those students are educated. As our school administrators strive in good faith to balance the privacy interests of those students who want to continue using locker rooms and showers segregated by anatomical sex, with the dignity and equality interests of transgender students who want to be accepted as the gender with which they identify, those administrators must have definitive guidance as to what the law requires of them in order to maintain federal funding.

SUMMARY OF ARGUMENT

Deferring under *Auer v. Robbins*, 519 U.S. 452 (1997) to the Department of Education's interpretation of 34 C.F.R. § 106.33 as expressed in an unpublished letter from the Acting Deputy Assistant Secretary for Policy within the Department's Office of Civil Rights to an undisclosed third party during the course of this litigation, the Fourth Circuit held that Title IX prohibits the Gloucester County School Board ("Board") from denying transgender students access to the sex-segregated restrooms, locker rooms, and showers corresponding to their gender identity rather than their anatomical sex.

Supreme Court review of that decision is warranted because the conflict between the Fourth Circuit and the Northern District of Texas decisions as to the effect of the Department's letter creates problematic uncertainty. And that uncertainty cannot be easily resolved in favor of the Fourth Circuit's holding for at least two reasons. First, the authorities cited by the Department in support of its interpretation do not stand for the propositions the Department ascribes to them. Second, the Department's interpretation of 34 C.F.R. § 106.33 defeats the essential purpose of the regulation itself.

ARGUMENT

1. The authorities cited by the Department in support of its interpretation do not stand for the propositions the Department ascribes to them.

In his unpublished January 7, 2015 letter to an undisclosed recipient, James A. Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy with the Department of Education's Office of Civil Rights, asserts that Title IX "prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity and failure to conform to stereotypical notions of masculinity or femininity." App. 121a. He further asserts that "OCR enforces and interprets Title IX consistent with case law, and with the adjudications and guidance of other Federal agencies." *Id.* at 121a-122a. However, none of the cases cited in his letter stands for the proposition that Title IX requires schools to permit students to elect between sex-segregated shower facilities based on their gender identity rather than their physical anatomy.

The Ferg-Cadima letter relies primarily on *Price Waterhouse v. Hopkins* and its progeny, which involved actionable discrimination based on the plaintiffs' failure to conform to gender stereotypes, 490 U.S. 228, 258, 109 S. Ct. 1775, 1795 (1989) (Title VII); *Barnes v. City of Cincinn*ati, 401 F.3d 729 (6th Cir. 2005) (Title VII); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act). The letter also cites a

number of prior opinions and publications from the Department of Education and other federal agencies. But like the court decisions cited above, most of these agency documents pertain to cases in which someone was discriminated against because his or her *behavior* or *appearance* was not sufficiently *masculine* or *feminine* for the discriminator.

The present case has nothing to do with gender *stereotypes*. A man need not behave in a stereotypically *manly* fashion in order to use the men's rest room; he just needs to have a man's body. To the extent Title IX prohibits gender stereotyping in the use of sex-segregated rest rooms, it guarantees that a woman whose appearance and demeanor do not conform with feminine stereotypes may still use the *women's* restroom.

Whatever the proper application of 34 C.F.R. § 106.33 to transgender students turns out to be, the administrators of Missouri's 567 public school districts need something more to go on than unpublished correspondence between the Acting Deputy Assistant Secretary for Policy at the Office of Civil Rights and some undisclosed third party. At least the "Dear Colleague" letter from the Departments of Education and Justice was sent directly to Missouri school officials, but the only legal support it adds to the inapposite authority in the Ferg-Cadima letter is a citation *to this case*. To enable our school administrators to treat *all* students with the dignity and respect they deserve without risking the federal dollars on which their education depends, this Court should provide clear guidance on the questions presented in the Board's petition for certiorari.

2. The Department's interpretation of 34 C.F.R. § 106.33 as expressed in the Ferg-Cadima letter defeats the essential purpose of the regulation itself.

Under federal regulations promulgated by the Department of Education, schools receiving federal financial assistance "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 C.F.R. § 106.33 (emphasis added).[2] These regulations are predicated on two fundamental assumptions. First, the regulation assumes it is *reasonable* for students not to want to expose their own bodies to, or be exposed to the bodies of, classmates of the opposite sex. Second, the regulation assumes it is *a legitimate policy choice* for schools to respect the privacy of their students by providing sex-segregated facilities in situations likely to involve the exposure of students' bodies.

To be sure, 34 C.F.R. § 106.33 does not *require* schools to maintain sex-segregated rest rooms, locker rooms, or shower facilities; it merely allows them to do so. But once a school makes the policy decision to offer separate facilities for boys and girls, it creates reasonable expectations of privacy from two distinct kinds of intrusion: (a) having one's own body exposed to persons of the opposite anatomical sex; and (b) being exposed to the bodies of persons of the

[2] In addition to toilets, locker rooms, and showers, the Department's regulations permit sex-segregation in housing, 34 C.F.R. § 106.32(b)(1), physical education classes and other activities that involve bodily contact, 34 C.F.R. § 106.34(a)(1); and classes on human sexuality, 34 C.F.R. §106.34(a)(3).

opposite anatomical sex. Of course, a school cannot create a reasonable expectation of privacy from exposure to students of the opposite anatomical sex without imposing a concomitant duty on those same students not to intrude upon the privacy of others. Students may waive their own expectations of privacy, but they cannot waive their *duty* to respect the expectations of others. For example, a boy who voluntarily enters the girls' locker room waives *his own* expectations of privacy from being exposed to the bodies of his female classmates and having his own body exposed to them, but he cannot waive *the girls'* expectations of privacy from being exposed to his body or having their own bodies exposed to him.

The Ferg-Cadima letter relied on by the Fourth Circuit acknowledges (without citing 34 C.F.R. § 106.33) that the "Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances." App. 100a. Nonetheless, the letter goes on to state the following:

> When a school elects to separate or treat students differently on the basis of sex in those situations, a *school generally must treat transgender students consistent with their gender identity*. OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

App. 123a (emphasis added). The letter purports to *allow* schools to protect their students' reasonable expectations of privacy by maintaining separate

locker rooms and showers for boys and girls. At the same time, the letter purports to *require* schools to permit transgender males—students with female anatomy who nonetheless self-identify as male—to use the same showers as anatomical males, and *vice versa*. The Department's interpretation of 34 C.F.R. § 106.33 abrogates the reasonable privacy expectations of those students who want to use the very sex-segregated restrooms, locker rooms, and showers the regulation permits, while releasing transgender students from their own duty not to expose their own bodies to, or intrude upon the exposed bodies of, unwilling students of the opposite anatomical sex.

Evidently, the Department and the Fourth Circuit assume that only transgender students will be affected by—and are therefore free to waive their own expectations of privacy from—exposure to bodies anatomically different from their own, or exposure of their own bodies to persons of the opposite anatomical sex. But that assumption ignores the privacy expectations of other students who prefer (a) not to expose their own bodies to persons of the opposite anatomical sex, or (b) not to be exposed to bodies of persons of the opposite anatomical sex—the very privacy interests 34 C.F.R. § 106.33 was promulgated to protect.

It is not enough that the law be just; it must also be reliable. The Department's current application of 34 C.F.R. § 106.33 to transgender students fails both tests. This Court should provide the guidance necessary for school administrations to balance the competing privacy and dignity interests at issue in this case without jeopardizing continued federal funding.

CONCLUSION

For the reasons stated above as well as those advanced in the Board's petition, this Court should grant certiorari to clarify how public school districts should apply 34 C.F.R § 106.33 to transgender students.

Respectfully Submitted,

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