International Municipal Lawyers Association



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Contracts: City Cannot Unilaterally Terminate Tax Increment Financing Agreement Based on Arbitrary Interpretation of Contract Terms

Acciona Windpower North America, LLC v. City of West Branch, No. 16-1735 (8th Cir. Feb. 7, 2017).

Rebuffing a proposed interpretation of a tax increment financing agreement which would essentially make tax rebates owed to a wind power company payable at the option of the city, the Sixth Circuit has upheld the lower court's determination awarding the power company nearly $500,000 in unpaid rebates.

West Branch, Iowa (City) entered into a tax increment financing agreement with Acciona Windpower North America (Acciona), under which the city was to rebate Acciona's taxes for eight years in exchange for the company expanding operations in the City. Payments were subject to city council approval and from 2010 to 2012 the council approved the rebates, by passing a resolution in the fall and then included such amount in the city budget, which was subsequently adopted in March the following year. In 2013 and 2014 however, after the resolution was passed and the budget adopted, an amendment was enacted that removed the rebate. Moreover, in 2013 West Branch cancelled the agreement, saying Acciona was failing to meet its obligations. Acciona filed suit and the district court held the City violated the agreement by cancelling it without cause. The district court then ruled in a bench trial that Acciona was entitled to $494,924.48 for payments due in 2013 and 2014.

West Branch appealed, arguing that since the agreement stated tax rebate payments are "subject to annual appropriation of the City Council," a rebate is *not appropriated* until the moment it is paid. The Sixth Circuit interpreted this novel theory as implying that the West Branch had the power to decide *not* to pay the tax rebates it already obligated for appropriation *until the moment the rebate checks were sent*. The Circuit said under this interpretation West Branch could choose at any time not to issue a rebate it had obligated for appropriation, meaning the contractual provision addressing the deadline for appropriating Acciona's rebate (December 1) would have no effect.

Interpreting contracts so as to rob provisions of effect is highly and fundamentally disfavored in contract law, and the Circuit found it easy to support the interpretation that gave all the contract provisions full effect--specifically that the City could change its mind about its appropriation resolution anytime time *up until Acciona paid its taxes* for the given fiscal year. Thus, as the Court put it, "a legal obligation to pay rebates that have been obligated for appropriation by the city council and approved as part of the city's budget arises under the agreement once Acciona pays its taxes for a given fiscal year."

The City's alternative theory-that under the Circuit's interpretation the contract itself would become null and void because it "purports to contract away the city's legislative power and duty to make-and reconsider-annual appropriation decisions"-was also unconvincing. The Court noted that Iowa law allows municipalities to enter into tax increment financing agreements, and municipalities regularly avoid bargaining away their appropriation authority by making the payments under such agreements subject to annual appropriation. This is precisely what the City had agreed to with Acciona. The damage award of $494,924.28 was upheld.

LINK

Employment: Under FMLA, Employers Must Seek Additional Input from Employees Requesting Leave; Failure to Specify *in Loco Parentis*

Status Not Fatal to Employee's Request

Coutard v. Municipal Credit Union, No. 15-1113 (2d Cir. Feb. 9, 2017).

Vacating a lower court decision in favor of the employer, the Second Circuit has found that FMLA regulations do not require an employee seeking leave to specify every relevant fact; if the facts indicate the employee *may* qualify for FMLA leave, the employer is obligated to seek additional clarification.

Frantz Coutard worked for the Municipal Credit Union ("MCU"). In 2013 his grandfather, who had raised him as a son since the age of four *in loco parentis*, became seriously ill, needing constant care. Until Coutard could obtain nursing care at their house he sought leave under the Family and Medical Leave Act of 1993 (FMLA). His request was summarily denied by his employer, saying "he could not take FMLA leave to care for his grandfather, because the statute does not apply to grandparents." Coutard sued, arguing his request was wrongly denied since FMLA can be used for those in an *in loco parentis* relationship. He acknowledged he did not state in his application for FMLA that he and his grandfather had such a relationship, but argued he would have had his employer asked. The Eastern District of New York granted summary judgment to the employer holding that, although FMLA provides that an eligible employee may be entitled to take leave in order to care for a person with whom he had an *in loco parentis* relationship as a child, Coutard had not informed MCU of that fact.

The Second Circuit vacated and remanded. It looked to the Department of Labor's implementing regulations, which require employees to provide "sufficient information to for the employer to determine if the leave may qualify for FMLA protection," and require employers to "inform employees requesting leave whether they are eligible under FMLA . . . [and i]f they are, the notice must specify any additional information required . . . ." It found that Coutard had provided MCU with all the information needed to determine whether his request was within the scope of FMLA--and it was incumbent on MCU to ask for additional information it might need to make a determination.

LINK

Guns: Maryland Ban on Assault Weapons and Large Capacity Magazines is Subject to Intermediate Scrutiny Review and is Not Prohibited by Second Amendment

Kolbe v. Hogan, No. 14-1945 (4th Cir. Feb. 22, 2017).

Reversing its prior invalidation of Maryland's Firearm Safety Act which bans assault weapons and large-capacity magazines, the Fourth Circuit has now upheld the ban, citing *Heller's* language which excluded M-16's and similar weapons of war from Second Amendment protection and applying intermediate scrutiny review.

In 2013 the Maryland General Assembly passed the Firearm Safety Act (FSA) which prohibits the possession, sale, offer to sell, transfer, purchase or receipt of an "assault weapon," which includes the "Colt AR-15," "Bushmaster semi-auto rifle," and "AK-47" in all forms. The FSA further restricts magazine size to not more than 10 rounds. Penalties for violation include up to three years' incarceration and fines not to exceeding $5,000, with longer terms for those who use an assault weapon or large-capacity magazine in the commission of a felony or crime of violence (i.e., five to twenty years for the first such violation, and ten to twenty years for each subsequent violation).

The FSA allows possession of an assault weapon or large-capacity magazine by a retired Maryland law enforcement officer if the weapon or magazine was obtained from his law enforcement agency or in connection with his law enforcement employment.

Two Maryland residents who wanted to purchase assault weapons sued, asking for declaratory and injunctive relief. They alleged the FSA is facially unconstitutional because the assault weapons ban and magazine ban contravene the Second Amendment; the exception for retired Maryland law enforcement officers violates the Equal Protection Clause; and a companion provision outlawing "copies" of the banned weapons violates the Due Process Clause.

The district court had upheld the ban, only to be reversed by the Fourth Circuit. However, reconsidering the case *en banc*, the 14-member Circuit vacated its prior decision, 10-4, and found that the FSA did not violate the Constitution. It joined the Second, Seventh, Ninth and DC Circuits in coming to such a conclusion.

The Circuit quoted *Heller's* statement that "another important limitation on the right to keep and carry arms" is that the right "extends only to certain types of weapons." The Supreme Court had explained that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," and expressly stated that "weapons most useful in military service" including M-16's would not be protected under the Second Amendment as a means of defending one's home.

The Fourth Circuit found that assault weapons are analogous to M-16's, and are therefore not protected under the Second Amendment. Even if those weapons were deemed to be protected under the Second Amendment, said the court, the FSA would only need to meet the intermediate scrutiny standard, because it does not unduly burden the core Second Amendment right to own and use firearms for self-defense. Thus the FSA was merely required to be "reasonably adapted to achieve a substantial governmental interest"-in this case, Maryland's interest in reducing the potentiality for mass murder within its borders.

The court further dispensed with plaintiffs' Equal Protection argument, finding little comparability between the plaintiffs and retired law enforcement officers who have been required to undergo significant assault weapons training. It also found that the FSA's provisions applicable to "copycat" AR-15-type weapons was not unduly vague and survived Due Process challenges.

DISSENT: The dissent criticized the majority for conjuring up a new "useful for military purposes" test not representative of *Heller*-the fact that the AR-15 and other similar assault weapons are already owned by over 8 million citizens, the vast majority of whom use them lawfully, makes comparisons to the M-16-which was never commonly available to retail purchasers---invalid. "Simply put, if the firearm in question is commonly possessed for lawful purposes, it falls within the protection of the Second Amendment." Furthermore, the only appropriate standard of review for this potential deprivation of a fundamental right was strict scrutiny, and the state had not demonstrated that the FSA was narrowly tailored to achieve a compelling governmental interest.

LINK

Jails: "State Created Danger" Liability Did Not Arise Where Repeat Offender Inmate Allowed to Work Unsupervised Outside Jail and Murdered Nearby Resident

Long v. County of Armstrong, No. 16-3027 (3d Cir. Feb. 14, 2017).

Without additional factors indicating foreseeability by jail officials that a particular inmate would use his position as a trustee to escape and murder a nearby resident, the decedent's estate could not succeed on a § 1983 action under a State Created Danger theory.

Robert Crissman violated his parole and was incarcerated in Pennsylvania's Armstrong County Jail (Jail). Despite his history of convictions for theft, breaking and entering, use and possession of drugs--and, allegedly, the prison officials knowing he was addicted to heroin and going through withdrawal, he was assigned to the Jail's Trustee Program. Under the program he worked outside the jail without supervision and in civilian clothing. Once outside the prison walls one day, Crissman escaped by running into the woods. He ran to an acquaintance's house, in which Tammy Long lived and, after the acquaintance left, he beat and murdered Long. Long's family filed suit against Armstrong County (County) under a state-created danger theory of § 1983 liability. Long's estate claimed deficiencies in the Jail's policies and decisions with respect to Crissman resulted in a violation of Long's Fourteenth Amendment rights, a theory the district court dismissed for failure to state a claim.

The Circuit began with a review of the state-created danger theory, namely that although the Fourteenth Amendment does not obligate the state to protect citizens from private conduct, under the this exception a claim lies when: "(1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state-actor acted in willful disregard for the plaintiff's safety; (3) there was some relationship between the state and the plaintiff; and (4) the state-actor used his authority to create an opportunity for danger that otherwise would not have existed."

The district court had dismissed the case because of a failure to meet the third element, and the Circuit agreed that Long was not a foreseeable victim. The element requires a "sufficiently close" relationship such that the victim was a foreseeable one. No such relationship exists "where the state actor creates only a threat to the general population." Long's estate argued that Crissman's friendship with Long's roommate created the relationship needed between the state and Long, but the claim lacked any allegation that the Jail knew of the relationship itself, let alone that Long was living in the house with the acquaintance. The alternative argument that Long lived in "close proximity" to the Jail and this created a sufficient relationship for the County to be liable also failed. The Circuit found this fact more appropriately analyzed under the first element - where the Court asked "whether the harm ultimately caused was a foreseeable and a fairly direct result of the state's actions." It affirmed the lower court.

LINK

Legislative Prayer: Commencement of Every County Commissioners' Meeting with Christian Prayer Delivered by a Commissioner Violates Establishment Clause

Bormuth v. County of Jackson, No. 15-1869 (6th Cir. Feb. 15, 2017).

Reversing the district court, the Sixth Circuit has found that a municipality's practice of opening every meeting with a prayer delivered by a member of the Board of Commissioners, all of whom are Christian-to the exclusion of any other type of invocation-is subject to challenge by a non-Christian resident on Establishment Clause grounds.

Jackson County, Michigan (County) opens every Board of Commissioners' meeting with a request that all in attendance rise and bow their heads, after which a Commissioner delivers an

invocation. All nine Commissioners are Christian, as are all prayers; many invoke the name of the Lord and Jesus. Peter Bormuth, a self-described Pagan and Animist resident of the County, challenged the Board's policy on First Amendment grounds, arguing that it constituted an establishment of religion and was coercive to non-Christians. He further argued that, following his objections about the prayer policy, the Commissioners refused to consider his application to join the County's Solid Waste Committee, despite the fact that he had already worked with the County on the subject of solid waste for more than three years.

The district court held in favor of the County, finding that the Commissioners' policy was merely a function of their own religious makeup, was not inconsistent with *Town of Greece* and did not constitute an establishment of Christianity.

The Sixth Circuit disagreed. It found that the County's policy differed significantly with *Marsh* and *Town of Greece* in a crucial respect-the prayer givers were not clerics or volunteers from the community, they were the County's own elected officials. This inherently colored the invocations as government speech and constituted an impermissible establishment of religion. The Circuit also saw evidence of coercion in that all members of the public were expected to stand and bow their heads, making it very obvious if any attendee did not follow suit. And the fact that Bormuth was ostensibly passed over for a position for which he seemed eminently qualified only added to the suspicion that allegiance to Christianity (or not objecting thereto) was a de facto predicate for consideration by Commissioners.

The majority challenged the dissent which had pointed to the Fourth Circuit's *Rowan County* decision (upholding a North Carolina county's practice which was very similar to the defandant's)-noting that the Fourth Circuit has decided to rehear *Rowan County* en banc. (IMLA had questioned *Rowan County* in the November-December 2016 *Municipal Lawyer*).

LINK

Speech: County Attorney's Firing of Assistant County Attorney Who was Elected to City Council Does Not Violate First Amendment

Loftus v. Bobzien, No. 15-2164 (3d Cir. Feb. 8, 2017).

Citing a long line of precedent and numerous municipal policies nationwide that prohibit a public servant from holding elected office while being otherwise employed by the municipality, the Third Circuit has upheld the firing of a Virginia assistant county attorney who won a seat on the local City Council.

Nancy Loftus worked in Virginia's Fairfax County (County) Attorney's Office from 1997 to 2014 as an assistant county attorney, when she was terminated after getting elected to the Fairfax City Council (City Council). While these are separate and distinct jurisdictions, upon considering her run the County Attorney, David Bobzien, indicated that if she were elected, significant conflicts might well make it impossible for her to keep her job. Loftus and Bobzien went back and forth via email and letter on the issue. Both also contacted the Virginia State Bar Ethics committee, which issued a Legal Ethics Opinion analogizing the County Attorney's Office to a law firm--and found that a partner in a law firm could not serve as a governmental public servant where the firm might find itself representing a party adverse to the governmental entity.

Ultimately, Bobzien terminated Loftus when she was elected, arguing the conflicts were too significant for her to maintain employment, because her role in City Council would extend those conflicts to the entire County Attorney's office. Loftus initially challenged her termination through administrative processes at the County, wherein she was denied reinstatement, then before the

Fairfax County Civil Service Commission, and after exhausting these administrative remedies, took her case to the district court, wherein she alleged she was fired "solely because she had been elected to the City Council," which violated her First Amendment rights. She sought an injunction and $6 million in damages. Her claim was dismissed under FRCP 12(b)(6). She appealed.

The Circuit identified Loftus' two First Amendment arguments: 1) that she had an unfettered and inherent First Amendment right to hold public office and 2) that she should prevail under the *Pickering* balancing test when her First Amendment rights, "whatever they may be, are balanced against the concerns of her employer." The Court noted it had never answered the first issue Loftus raised, but need not do so, because precedent makes clear that public employees that seek elected office face limitations different from the general public. Since the mid-1900s the Supreme Court upheld restrictions on public employee political rights in a variety of ways and has "deferred to the reasoned judgment of the legislative body or government entity charged with making determinations about the intersection of public employment and elected office." This trend has continued and courts have upheld a slew of laws limiting public employees' First Amendment rights to hold office, including Indiana's "resign-to-run" law; the City of Dallas' automatic resignation law (which states that any Dallas public employee who wins an elected office in a municipality having a contract with Dallas is deemed to have resigned from his or her public employment); and St. Louis's Police Department rule prohibiting officers from becoming candidates for elected office. The Court thus easily affirmed the lower court under this first theory.

Loftus' alternative argument - framing her termination as a violation of her First Amendment right to comment on matters of public concern - fared no better. The Circuit noted that cases under the first argument addressed *Pickering* and thus foreclosed success on her alternative argument, but also took the opportunity to apply the test. This was relative easily given that the burden on Bobzien and the County under such an analysis was not to show Loftus' termination stemmed from an *actual* interference in the workplace, but a "reasonably" apprehended one. This "plainly favor[ed] Bobzien" and the County, according to the Court.

LINK

Taxation: ACA Provision Requiring States and Municipalities to Contribute Additional Funds to Insurers Does Not Violate Tenth Amendment

State of Ohio v. United States of America, No. 16-3093 (6th Cir. Feb. 17, 2017).

Ohio and its local governments have failed in a challenge to the "premium-stabilization arrangement" of the ACA, which requires them to contribute additional monies to offset shortfalls incurred by insurers covering high-risk individuals. The Sixth Circuit found that such a requirement does not constitute commandeering under the Tenth Amendment and does not violate the Intergovernmental Tax Immunity Doctrine.

One of the lesser known elements of the Affordable Care Act (ACA) is a "premium-stabilization arrangement." Its goal is to reduce volatility in the health care market by collecting payments from "health insurance issuers" and "group health plans" and then distributing those payments over a three-year period to health insurers that cover high-risk individuals in the individual market. Ohio and its local governments, all of which have been paying these contributions - totaling $5.4 million in 2014 alone - filed suit alleging this tax provision should not apply to state and local government as it does to private employers.

Specifically, Ohio *et al* alleged "1) [t]he United States illegally or erroneously assessed or collected tax revenue from Plaintiffs; 2) [t]he Secretary's interpretation of group health plans is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; and 3) Defendants collected tax revenues in violation of the Tenth Amendment to the United States Constitution, anti-commandeering principles, and the Intergovernmental Tax Immunity Doctrine." The district court granted the United States' motion to dismiss for failure to state a claim, finding the ACA applies to state and local government and does not violate the Tenth Amendment.

The Circuit tackled Ohio's argument that it cannot be required to remit a tax for its group health plans because Congress never made a "plain statement" regarding such a tax against the states. While the Court agreed that in *Michigan v. U.S*., 40 F.3d 817 (6th Cir. 1994) it stated "before a federal tax can be applied to activities carried on directly by the States . . . the intention of Congress to tax them should be stated expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue," but determined Ohio makes too much of this and "asks too much of the ACA." It found the "cross-reference scheme" in the ACA makes perfect sense since the Supreme Court has "never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time."

Ohio's charge that the tax cannot be applied under the anti-commandeering doctrine by commandeering the state's regulatory apparatus relied on in *Printz* - where a federal firearms law required that the chief law-enforcement officer in each local jurisdiction conduct certain checks to ensure compliance with the statute - and *New York* - where the federal government mandated that the States provide for disposal of certain low-level radioactive waste. In both of these cases the Supreme Court held the federal laws at issue "commandeered" the state's apparatus unconstitutionally.
The Circuit Court determined these cases were not on-point and that instead *SAMTA* - where federal law required state government employers to meet the overtime and minimum-wage requirements of the Fair Labor Standards Act and which was upheld against a commandeering challenge - was on-point because it shows the *federal government can require state government entities to comply with generally applicable laws* on par with private employers.

Ohio's argument that the payments violate the intergovernmental tax immunity doctrine, under which federal and state governments should not tax each other, also failed. The Circuit rejected this theory because it only applies to *discriminatory* taxes levied on one by the other, and here the ACA applies the mandatory contributions to private-sector employers and state and local government employers *equally*. The Circuit thus affirmed the lower court.

LINK

Trials: Federal Courts Lack Subject Matter Jurisdiction over Compensation Claim by Foreclosed Michigan Taxpayers

Wayside Church v. van Buren County, no. 15-2525 (6th Cir. Feb. 10, 2017).

Reversing a lower court which had declined a jurisdictional challenge to a case brought by foreclosed taxpayers, the Sixth Circuit has found that Michigan's statutory scheme does not foreclose the taxpayers from bringing their Fifth Amendment-based compensation claim in Michigan courts-and that the federal judiciary lacks subject matter jurisdiction to hear such a case.

Wayside Church, Myron Stahl and Henderson Hodgens owned real property in Van Buren County, Michigan (County) in but failed to pay property taxes for 2011. In 2012, pursuant to

Michigan's General Property Tax Act (GPTA), their properties became subject to forfeiture and foreclosure. In 2014, the Michigan circuit court issued a foreclosure judgment, resulting in title to all three properties passing to the County-which sold them at auction. The minimum bid for each of the properties was calculated by totaling "[a]ll delinquent taxes, interest, penalties, and fees due on the property" plus the "expenses of administering the sale, including all preparations for the sale." The debt on the Wayside Church property was $16,750, but it sold for $206,000. The debt on the Stahl property was $25,000, and the property sold for $68,750. Mr. Hodgens' debt was $5,900, but it sold for $47,750.

The plaintiffs sued to be paid the excess funds, citing 42 U.S.C. 1983 and alleging a deprivation of a cognizable property interest in their foreclosed properties and in the surplus proceeds generated by the sales under the Fifth Amendment. The district court dismissed for failure to state a claim, but did not grant defendants' motion to dismiss for lack of jurisdiction.

On appeal, the Sixth Circuit examined whether the case should have been before the federal courts to begin with. The district court had accepted plaintiffs' argument that the wording of the GPTA required all GPTA cases to be heard exclusively in Michigan's Court of Claims-and that relevant statutory language states that the Court of Claims does not have jurisdiction if the parties have a remedy at federal courts-essentially meant that only cases involving claims of inadequate notice to the taxpayer could be brought in Michigan courts; all other disputes under the GPTA required resolution in the federal court system. The Circuit Court found this narrow interpretation of the GPTA and related statutes to be erroneous and unconstitutional. Pursuing such state claims in federal court was barred by the Tax Injunction Act and under principles of comity. It reversed as to the district court's denial of defendant's dismissal motion on jurisdictional grounds, finding that the federal courts had no subject matter jurisdiction over this claim.

LINK

Trials: No Right for Jury Trial where Each Separate Offense Carries Sentence of Less than Six Months

Hwang v. Township of Hillsborough, No. 15-3900 (3d Cir. Feb. 15, 2017).

The Third Circuit, upholding a District Court determination, has held that a DUI violator could not invoke the Sixth Amendment's right to jury trial where each of her related offenses carried a maximum six-month sentence; she could not aggregate the separate sentences to satisfy the Supreme Court's constitutional threshold.

Cynthia Hwang, an attorney, was charged in New Jersey with refusal to provide a breath sample, DUI, failure to maintain lane, resisting arrest, and having a cracked windshield. She tried in the local township court for these offenses-none of which carried a jail sentence of more than six months--but was not given a jury trial. She appealed to the federal district court that she had a constitutional right to a jury trial. The District Court for the District of New Jersey disagreed, holding Supreme Court precedent dictates that there is no right to a jury trial for "petty" offenses. She appealed to the Third Circuit.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968) the Supreme Court held that the Sixth Amendment's broad pronouncement that people have a right to trial by an impartial jury "in all criminal prosecutions" was not that broad, but instead that it was "doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States."

In *Lewis,* a 1996 Supreme Court case, the Court held "an offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious." Hwang had a slight twist on this issue, arguing that there is a right to a jury trial when *multiple charges carrying a penalty of six months are charged*, such that in aggregate the loss of liberty would exceed six months. The Third Circuit held the *Lewis* also answered this, holding even when multiple charges lie that together would exceed six months in jail, no right to jury trial exists. Hwang's final argument was one of policy, saying this precedent is "an unjustified departure from both the letter and underlying philosophy of the Constitution." Whether or not the Third Circuit agreed with this philosophically it did not say, it noted instead simply that "Supreme Court decisions are binding precedent in every circuit" and affirmed the lower court.

LINK

THIS JUST IN:

No Controversy, No Case? The Department of Education Rescinds its Gender Identity Bathroom Letter, Clouding SCOTUS' *Gloucester County* Proceedings

On the heels of yesterday's DOE letter revoking a prior directive that school districts allow transgender students to use bathrooms of their choice, Lisa Soronen posted this note:

The fate of the most controversial case the Supreme Court has agreed to decide this term is uncertain now that the Department of Education (DOE) has issued a "Dear Colleague" letter withdrawing a previous letter requiring school districts to allow transgender students to use the bathroom consistent with their gender identity.

Title IX prohibits school districts that receive federal funds from discriminating "on the basis of sex." A Title IX regulation states if school districts maintain separate bathrooms (locker rooms, showers, etc.) "on the basis of sex" they must provide comparable facilities for the other sex. In a 2015 letter DOE interpreted the Title IX regulation to mean that if schools provide for separate boys' and girls' bathrooms, transgender students must be allowed to use the bathroom consistent with their gender identity. The new "Dear Colleague" letter takes no position on whether the term "sex" in Title IX includes gender identity.

G.G. is biologically female but identifies as a male. The Gloucester County School Board prevented him from using the boy's bathroom. He sued the district arguing that is discriminated against him in violation of Title IX.

The Supreme Court has agreed to decide two questions in *Gloucester County School Board v. G.G.* First, should it defer to DOE's letter interpreting the regulation? Second, putting the letter aside, should the Title IX regulation be interpreted as DOE suggests?

The Fourth Circuit ruled in favor of G.G. The court gave *Auer* deference to DOE's letter.

Per *Auer v. Robbins* (1997) a court generally must defer to an agency's interpretation of its ambiguous regulations. According to the Fourth Circuit, the Title IX regulation is ambiguous because it is "susceptible to more than one plausible reading because it permits both the Board's reading-determining maleness or femaleness with reference exclusively to genitalia-and the Department's interpretation-determining maleness or femaleness with reference to gender identity."

Despite the 2015 letter being rescinded both parties still want the Supreme Court to decide this case. At SCOTUSblog Amy Howe describes some of the Court's options: "Among other things, they could

send the case back to the 4th Circuit for it to weigh in more fully on the Title IX question in light of the government's changed position, or they could forge ahead and rule on that question themselves. At the very least, we should know more about the justices' inclinations when they hear oral argument in the case next month, if not before."

Putting aside the factual context of this case, state and local governments, acting through the State and Local Legal Center, have criticized *Auer* deference in Supreme Court *amicus* briefs. The Gloucester County School Board asked the Supreme Court to decide whether to overturn *Auer*. The Court refused to consider this question.

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