Coates' Canons Blog: HB 2 and Bathrooms: What Must North Carolina Units of Government Do Now?

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Updated September 1, 2016: *Three federal court rulings in separate cases, all in August 2016, make the job of the school attorney described near the end of this blog post much more difficult. In G.G. v. Gloucester County School Board , cited in the blog post as controlling the school board attorney's advice, the U.S. Supreme Court on August 3 issued a stay , making it appear that the school board attorney should not rely upon the G.G. decision. But then, on August 26, a federal district court judge in North Carolina, ruling in an unrelated lawsuit concerning HB 2, held that the G.G. decision, despite the stay, remains controlling law. That ruling is in Carcano v. McCrory. The school board attorney will be put to a hard task to decide how to advise the school board. Must it abide by G.G. or not? The third court ruling was issued on August 21 by a federal district court in Texas, in litigation not involving North Carolina. State of Texas v. United States of America . That court issued a nationwide injunction barring federal agencies from enforcing guidelines that the G.G. court had relied on in its ruling. This ruling gives weight to the position that a federal government challenge to compliance with HB 2's bathroom use requirements is unlikely. The law of bathroom usage in public schools, in light of these three court rulings, remains very much in a state of confusion and change. Additional rulings will be necessary to discern a clear direction*

Here is the basic requirement with respect to bathrooms that HB 2 imposes on cities and counties and other units of government in North Carolina: "Public agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." GS 143-760(b). That requirement has two parts. First, it requires that multiple occupancy bathrooms be "designated" for use by persons based on their biological sex. Second, it requires that those bathrooms be "only used" by persons based on their biological sex.

What to do now to comply

What must a city or county (or other unit of government) do to be in compliance with the "designated" part? It seems to me that the unit of government is in compliance if it has signs labeling each multiple occupancy bathroom as "male" or "female" (or equivalent term). I do not read the statute as requiring more than that. Surely, virtually every unit of government in the state is already in compliance with this "designated" part.

What must a unit of government do to be in compliance with the "only used" part? It seems to me that a unit of government is in compliance if it appropriately responds to reports of the law's violation. Such a report would assert that a person of one biological sex is (or has been) using a multiple occupancy bathroom designated for the other sex. What would constitute an appropriate response to such a report will almost certainly vary with the circumstances. It might consist of an informal inquiry by the public officials in charge of the facilities. It might consist of seeking the assistance of law enforcement. (In that context, see Jeff Welty's blog post here.) In any event, I think the obligation with respect to the "only used" part does not require units of government to monitor facilities to ensure compliance.

In short, I think a unit of government has complied with both parts of HB 2's bathroom requirement by labeling multiple occupancy bathrooms "male" or "female" (or equivalent) and by standing prepared to respond to reports of violations in appropriate ways.

A unit of government is not required by the statute to undertake to construct single occupancy bathroom facilities. It may, of course, but it is not required to.

Leased facilities

The statute is not completely clear regarding a unit of government's obligations when the unit of government leases and uses privately-owned facilities or when a private entity leases and uses government-owned facilities. My guess is that a court, if called upon to decide, would hold that the law's obligations follow the actual user. That is, since a private entity is not governed by the HB 2 bathroom rules, the rules would not apply to a government-owned building that is leased to and used by a private entity. On the other hand, since the HB 2 bathroom rules do apply to units of government, I think they would apply when a unit of government leases and uses a privately-owned building.

The other side of the coin—handling complaints of discrimination

What happens if an individual wishes to use a multiple occupancy bathroom based on gender identity rather than biological sex? Perhaps a visitor to a governmental building or a citizen participating in a program or seeking services? Perhaps an employee of the unit of government? Or maybe a student in a public school or community college or the University of North Carolina?

To allow such use may be a direct violation of the "only use" requirement of HB 2. But to deny such use may amount to a violation of rights found in the United States Constitution or federal statutes. What is a unit of government to do?

The unit of government will need to determine whether there is any statutory or constitutional obligation to allow use based on gender identity as opposed to biological sex. That determination will require legal assistance. And, if the determination is "Yes," the unit of government will have to decide whether to impose the HB 2 "only use" requirement, on the one hand, and risk a discrimination challenge, or, on the other hand, to permit the individual to use bathroom facilities based on gender identity and fall out of compliance with HB 2.

Making the compliance vs. nondiscrimination determination

This dilemma puts the attorney for the unit of government on the spot.

The case of the citizen/visitor presents the attorney with the most open-ended situation. There is no federal anti-discrimination statute that clearly applies, no law that has been interpreted to guarantee to a citizen the right to use a unit of government's bathroom based on gender identity. The attorney will have to consider whether such a visitor might be able to put forward a claim based on equal protection or due process rights in the federal or state constitutions. This will require of the attorney the skill to interpret competing legal principles in an area of law that is simply not established.

The case of the governmental employee raises the question of nondiscrimination rights under Title VII of the federal Civil Rights Act of 1964. Would enforcement of the "only use" requirement amount to unlawful discrimination because of sex, within the meaning of Title VII? The attorney will have to consider recent and rapidly moving developments under that statute, developments that are moving definitely in the direction of finding that denial of use based on gender identity is unlawful. The attorney will have to consider, however, that such an interpretation is occurring chiefly at federal administrative enforcement level—there is no appellate court precedent in the employment context holding that denial of use based on gender identity is a violation of Title VII. The attorney's decision will not be an easy one.

The case of students in public educational institutions is a little bit different. Recent precedent from the federal Fourth Circuit Court of Appeals, in a decision in the case of G.G. v. Gloucester County School Board, may cause attorneys representing schools to determine that Title IX of the federal Education Amendments of 1972 clearly requires that students be permitted to use bathroom facilities based on gender identity. Enforcement of the "only use" requirement, by that interpretation would put the school directly in violation of Title IX. In that case, the advice is likely to be to allow use based on gender identity, as federal law trumps state law and carries with it the danger of serious financial consequences.

In any of these cases, the lawyers will be challenged in determining the proper legal analysis, and governmental officials will be tested as they weigh their lawyer's advice and ultimately decide how the unit of government will respond to the

request of a citizen, employee, or student to use bathroom facilities in a way that would appear to violate HB 2.

What now?

In sum, until a report of a violation of HB 2's "only used" requirement is made, I think a unit of government is in compliance with the statue simply by having proper bathroom signage. If there is a report of a violation, then the unit of government must decide how to respond. In the abstract, it is not possible to say just what an appropriate response would be. If an assertion of unlawful discrimination is made, then an analysis of the requirements HB 2 and possibly applicable federal law will be necessary. And not easy.

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