



LEGAL CONSIDERATIONS REGARDING TRANSGENDER STUDENTS

The Department of Education's Office for Civil Rights (OCR) issued a decision last month reaffirming its position that transgender students have rights protected by federal anti-discrimination laws. The decision is at odds with two federal district court decisions issued earlier this year as well as pending legislation in Wisconsin. In the wake of these conflicting authorities, many school boards question whether and how to currently address issues of student transgender rights, in particular the use of restrooms and locker rooms. This FYI will briefly summarize relevant federal civil rights law, the decisions from OCR and the federal district courts, the proposed legislation in Wisconsin, and other relevant law and policy. In addition, this FYI will highlight important legal issues and provide several options for districts to consider in determining how to proceed.

RELEVANT LEGAL BACKGROUND

1. Federal Law.

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in any education program or activity operated by recipients of federal financial assistance. OCR is charged with enforcing Title IX and its implementing regulations. To remedy a violation of Title IX, individuals may file a complaint with OCR. OCR is authorized to investigate the complaint; negotiate a resolution agreement between the district and the individual; initiate proceedings to suspend, terminate, or refuse to grant federal funding; or refer the case to the United States Department of Justice (DOJ) for judicial proceedings. An aggrieved individual may also file a lawsuit in federal court seeking monetary damages, equitable relief (such as requiring a school to adopt and implement a plan to remedy the violations), and attorney fees under Title IX.

Consistent with its authority, on November 2, 2015, OCR issued a Letter of Finding to Township High School District 211 in Palatine, Illinois stating that the district was in violation of Title IX for discriminating against a transgender high school student by denying her access to the girls' locker rooms. This marked the first time OCR issued a decision applying Title IX to transgender students. The student was born male but identified as a female and sought to use the girls' locker room facilities in her school. OCR found that the district treated the student consistent with her gender identity in all aspects, except for access to the locker room. District officials called her by her female name and with female pronouns, she had access to female restrooms, and she participated in girls' athletics. The sole dispute was over the district's requirement that she change for gym class, athletics, and swimming in an isolated changing facility and not in the girls' locker rooms. According to OCR and the student, the isolated facilities were not of equal quality, were not conveniently located, and served to ostracize the student from her classmates and teammates.

On December 3, 2015, OCR reached a resolution agreement with Township High School District 211 in which the district, without admitting liability, agreed to allow the student to use the girls' locker room provided that she change in the locker room in a private changing station which the district had designated by privacy curtains. The district also agreed to: protect the privacy of its students by installing sufficient privacy curtains within the girls' locker rooms at the high school to accommodate the transgender student and any other students who wished to be assured of privacy; provide a reasonable alternative for any student requesting additional privacy—beyond the privacy afforded by the privacy curtains—in the girls' locker rooms; coordinate with hosts of off-campus, district-sponsored activities to arrange for the transgender student to be provided access to facilities for female students; engage a consultant to support and assist the district in implementing

the agreement; establish a support team for the student, if requested, to ensure equal access and protection from gender-based discrimination; adopt and publish a revised notice of nondiscrimination on the basis of sex; and provide OCR with a detailed description of all gender-based discrimination or harassment complaints or incidents.

OCR's findings in Township High School District 211 stand in contrast to two federal district court decisions issued earlier this year. In September 2015, a federal district court in Virginia dismissed a transgender student's Title IX claim. In *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-54 (E.D. Va. Sept. 17, 2015), the student asserted that the school discriminated against him by not allowing him to use the school's bathroom that corresponded to his gender identity. In dismissing the student's claim, the court held that the Title IX claim was precluded by the Department of Education regulations implementing Title IX that allow schools to provide separate bathroom facilities based on a student's sex at birth. This case has been appealed to the Fourth Circuit Court of Appeals. Similarly, in *Johnston v. University of Pittsburgh*, No. 3:13-213 (W.D. Pa. March 31, 2015), a district court in Pennsylvania dismissed a college student's Title IX claim, finding that a policy requiring students to use sex-segregated bathrooms based on their birth sex did not violate Title IX.

While federal courts have declined to expand the term "sex" in Title IX to include gender identity, there is federal guidance on the meaning of the term "sex" as it is used in Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex. In 1989, the United States Supreme Court held that "sex stereotyping" is a form of "sex" discrimination protected by Title VII. *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In addition, several federal district courts as well as the Equal Employment Opportunity Commission, the DOJ, and President Obama have concluded that Title VII prohibits employment discrimination on the basis of gender identity. The Seventh Circuit Court of Appeals, which construes federal law applicable to Wisconsin employers, has not ruled on this issue.

2. Wisconsin's Proposed Legislation, Statutes, and Policy.

There are no Wisconsin or Seventh Circuit Court of Appeals cases addressing the issue of transgender student rights in school. However, Wisconsin lawmakers recently addressed the issue of a transgender student's right to use school restrooms and changing rooms in 2015 Assembly Bill 469. This proposed legislation would require schools to designate each student restroom and changing room accessible by multiple students for the exclusive use of students of one sex. Sex is determined by the individual's anatomy at birth. Upon written request from a parent, a school must also designate a single-occupancy changing room and restroom to a student who identifies as a sex other than his or her sex at birth. The proposed law further permits a student or parent to file a complaint with the school board if the board does not follow the bill's requirements, and requires the board to investigate and resolve the complaint within 30 days. If the complaint is not resolved to the student's or parent's satisfaction, the student or parent may file a lawsuit against the board seeking declaratory relief (such as a ruling that the district's policy violates the law), injunctive relief (such as a ruling that prohibits the district from implementing the policy), and damages, including attorney fees. The bill remains in the Wisconsin Assembly where public hearings were held on November 19, 2015. On December 15, 2015, the author of the bill proposed an amendment that would allow schools to open a gender-neutral multi-use bathroom, provided it has two or more stalls with floor-to-ceiling doors that can be locked, and floor-to-ceiling partitions or walls. The likelihood of the bill becoming law is unknown at this time. If the bill becomes law in its current form, policies that allow transgender students access to bathrooms and changing rooms for the gender with which they identify will be in violation of this state statute.

While not explicitly addressing transgender students, two existing sections of the Wisconsin Statutes may provide a framework for ensuring that transgender students are protected from discrimination and bullying in school. Section 118.13(1) prohibits a public school from discriminating against an individual because of the person's sex, and requires all school boards to adopt nondiscrimination policies. The term "sex" is not defined in the statute or in Chapter PI 9 of the Wisconsin Administrative Code, which establishes procedures for compliance with section 118.13. However, section 9.02(5) of PI 9 does contain a definition of "discrimination" which references "any action, policy or practice, including bias, stereotyping and pupil harassment, ... based, in whole or in part, on sex" or any of the other protected characteristics. In addition, section 9.02(14) of PI 9 defines "stereotyping" as "attributing behaviors, abilities, interests, values and roles to a person or group of persons on the basis, in whole or in part, of their sex" or any of the other protected characteristics.

Section 118.46 requires all school boards to adopt a policy prohibiting bullying by students. While the statute itself is silent with respect to the contents of such a policy, the model policy published by the Wisconsin Department of Public Instruction pursuant to the statute specifically references gender identity as a motivating factor for bullying, along with other characteristics such as race, religion and disability.

The rights of Wisconsin's transgender student athletes are also addressed in the Wisconsin Interscholastic Athletic Association's (WIAA) transgender participation policy. Districts that are members of the WIAA are required to follow it. This policy applies to bona fide transgender students and requires written notification from a student's parents declaring that the student is a transgender individual. Upon receipt of this, the school must determine on which gender of team to place the student based upon several factors: school registration information; a written statement from the student; documentation from parents, friends and teachers affirming that the student has a consistent gender identification; verification from a health-care professional; and medical documentation of compliance with any required hormone therapy.

DETERMINING HOW TO PROCEED

While the specific legal obligations of school districts are unsettled, all school boards are faced with the challenge of providing a safe and supportive environment for all students, and minimizing things that interfere with students' ability to benefit from the educational program. While waiting for the outcome of AB 469 and/or additional guidance from courts with jurisdiction in Wisconsin, boards have several options for proceeding in light of current law.

Boards that have adopted a comprehensive policy. If a board has already adopted a comprehensive policy regarding transgender students that is aligned with the recent OCR decision, the board should simply monitor the status of AB 469. If the bill becomes law in its current form, a policy that allows transgender students access to bathrooms and changing rooms for the gender with which they identify will be in violation of this state statute and boards may need to consider revising the policy at the board level.

Boards that have considered but rejected a policy. If a board has considered but rejected the adoption of a policy with respect to transgender students and no transgender issues have arisen in the district, the board should watch for the Fourth Circuit Court of Appeals decision in the Gloucester case, monitor the Legislature's consideration of AB469, comply with section 118.13 and PI 9 with respect to any applicable discrimination components, and comply with WIAA regulations.

Boards that have not addressed the issue and no issue is pending. If a board has not addressed transgender issues, and there currently are no such issues pending in the district, the board should consider conferring with legal counsel as to the advisability of developing administrative guidance or a formal policy. In doing so, the board will want to monitor AB 469; understand OCR's recent decision and authority to investigate and enforce Title IX; consider existing district policies prohibiting discrimination, bullying and harassment; and consider how to address issues that may arise with respect to facility use, curriculum, confidentiality, and school records.

Boards that have not addressed the issue and an issue is pending. If a board has not addressed transgender issues and is confronted with an issue presented by a transgender student, the board should either: (1) Follow an established practice if one exists or implement a practice specific to the individual student; or (2) If the issue cannot be resolved with respect to the individual student, confer with legal counsel in addressing the matter through administrative guidance or formal policy keeping in mind the status of AB 469; OCR's recent decision and authority to investigate and enforce Title IX; existing district policies prohibiting discrimination, bullying and harassment; and issues with respect to facility use, curriculum, confidentiality, and school records. The development of a policy or administrative guidance should be completed by the board and implemented by the administration.

In addition to the above, if a board wants solely to protect transgender students from being bullied in school, the board could revise its policy prohibiting bullying to include bullying on the basis of gender identity. Under any scenario above, districts that use policies drafted by other organizations should review their policies to determine if these issues have been addressed therein. In particular, districts should review their nondiscrimination policies to determine whether they have included gender identity as a protected characteristic.

CONCLUSION

Additional guidance on the issue of transgender rights in school may be slow to come from state and federal authorities. In the meantime, school boards may proceed in different ways but all are advised to be aware of the potential issues that may arise with respect to transgender students, determine whether existing district policies address these issues, monitor state and federal law, and understand the potential legal ramifications that could arise should a dispute occur regarding transgender rights.

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