

# School Law Update

February 24, 2017

## Federal Transgender Guidance Withdrawn

On Wednesday, February 22, 2017, a Dear Colleague Letter (“DCL”) issued by the U.S. Departments of Justice and Education (“Departments”) withdrew two statements of policy and guidance related to transgender students. The withdrawn guidance had taken the position that Title IX’s prohibition on discrimination on the basis of “sex” included discrimination on the basis of gender identity and required districts to allow students access to sex-segregated facilities of the gender with which they identify. The new DCL indicates that these Departments will no longer rely on this interpretation of Title IX. The new DCL further emphasizes that the States and local school districts are the primary source for educational policy on this issue.

In addition to eliminating the Departments’ reliance on this earlier interpretation in future Title IX enforcement actions, the guidance issued this week may affect whether the United States Supreme Court moves forward in hearing oral arguments scheduled for March 28, 2017, in a case involving a transgender student’s right to access bathrooms consistent with his gender identity. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016). When the Department of Education notified the Supreme Court of its decision to withdraw the guidance, the Court asked the parties to the case to submit their views on how the case should proceed in light of the Departments’ decision. It is unclear at this date how the Supreme Court will proceed.

While the Departments and the Supreme Court grapple with the meaning of Title IX, school districts in Wisconsin continue to work through issues related to transgender students at the local level. Districts should be aware that there is currently no binding legal authority in Wisconsin which requires a district to accommodate the requests of a transgender student to utilize sex-segregated facilities based on gender identity or which prohibits a district from doing so. However, on March 29, 2017, the Seventh Circuit is scheduled to hear oral arguments in a case involving Kenosha Unified School District’s decision not to allow a transgender student to access bathrooms of the gender with which he identifies. A decision in this case will be binding on Wisconsin school districts, and therefore further define the law in Wisconsin with respect to the rights of transgender students.

School districts should also continue to monitor Wisconsin law. While not explicitly addressing transgender students, two existing sections of the Wisconsin Statutes may provide a framework for protecting transgender students from discrimination and bullying in school. Wis. Stat. § 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 § 118.13. However, PI 9.02(5) 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, PI 9.02(14) 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. State courts have not interpreted these provisions of state law in the context of transgender students, but these provisions could arguably be the basis for protection from discrimination for transgender students. In addition, Wis. Stat. § 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 specifically references gender identity as a motivating factor for bullying, along with other characteristics such as race, religion, and disability.

Finally, districts should continue to watch for state legislation on this issue. In 2015, Wisconsin lawmakers introduced a bill addressing the issue of transgender students' right to use school restrooms and changing rooms (2015 Assembly Bill 469). This proposed legislation required schools to designate each student restroom and changing room accessible by multiple students for the exclusive use of students of one sex. Sex was determined by the individual's anatomy at birth. The bill failed to pass. Recently, however, a state legislator stated that he is likely to reintroduce a state law requiring students to use the bathroom and locker rooms corresponding to their gender at birth.

## Determining How to Proceed

The Departments' withdrawal of the previous federal guidance on transgender students calls into question how the Department of Education's Office for Civil Rights ("OCR") will investigate and resolve claims of discrimination based upon gender identity. The new DCL explicitly states that the Departments will not rely on the interpretation of Title IX in the previous guidance. This at least suggests that OCR's enforcement activity will be modified in the future. However, the DCL also states that schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. It remains to be seen how OCR will respond to complaints of discrimination based on gender identity, including allegations related to facilities access.

Certainly, the issue of transgender student rights continues to be addressed in school districts in Wisconsin where many school boards have already adopted policies that prohibit discrimination on the basis of gender identity and many transgender students continue to request accommodations that include access to facilities based on gender identity. How then do school districts proceed in responding to these requests in light of the continuing uncertainty in the law?

School boards should first review their existing policies. Boards should be certain that their policies prohibit discrimination based upon sex and that their policies comply with Wisconsin Statutes § 118.13 and Wis. Admin. Code Ch. PI 9. Boards should also determine whether their policies address discrimination based upon gender identity. If the district already has such a policy, there is nothing in state or federal law that would require a district to change it.

If a district has a policy prohibiting discrimination based upon sex but does not have a policy directly addressing gender identity, and there is no issue pending with respect to such matters, the district can proceed with the policies as they are written or revise to include gender identity if the school board so desires. If issues arise, the district may be well advised to address each individual situation with the student and family on a case-by-case basis relying upon established practice or procedures. If a district cannot resolve an issue with the transgender student and family, the board should consult with legal counsel.

## Conclusion

The withdrawal of federal guidance does not resolve the legal uncertainty surrounding transgender student rights (or the rights of transgender employees). Additional guidance from state and federal authorities may be slow to develop. In the meantime, school boards may proceed in different ways, but all are advised to review their own policies, be aware of the potential issues that may arise with respect to transgender students, and monitor state and federal court cases and legislative developments. Students may still file discrimination complaints with DPI and with OCR and may bring federal lawsuits if they experience discrimination based on gender identity. School boards are encouraged to work with legal counsel proactively to assess the district's current position in anticipation of requests by transgender students.

For questions or more information about this topic, please contact one of the attorneys listed below.

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