

Unsettled: Transgender Student Civil Rights

In a case garnering significant national attention, the U.S. Department of Education's Office of Civil Rights (OCR) has determined that an Illinois district has violated the civil rights of a transgender high school student. Over the last several years, Township High School District 211 has permitted transgender students to use the bathroom of their identified gender, to play on sports teams of that gender, and to use their identified gender on school records. But the District has refused to let the student at the center of an investigation, Student A, have equal access to the school's locker rooms and this, according to OCR, is a violation of Student A's civil rights.

Student A is a biological male living as a female. She had requested the opportunity to change clothes privately within the girls' locker rooms in an area such as a restroom stall, but the District refused, citing the privacy concerns of all its students. It said that (1) permitting Student A to be present

in the locker room would expose female students to being observed in a state of undress by a biologically male individual; and (2) it would be inappropriate for young female students to view a naked male in the locker room in a state of undress. Instead, it devised a number of alternative arrangements, including installing four privacy curtains in unused areas of the locker room and another one around the shower. Under the District's plan, Student A would be mandated to use the privacy curtains. OCR stated that it found the District's privacy concerns unavailing in this case. It determined that the District has violated Title IX, the federal law that prohibits discrimination on the basis of sex, because the student would be compelled to use the privacy curtains.

In its November 2, 2015, letter, OCR stated:

“Still the District refuses to provide access to Student A to any part of the girls' locker rooms, unless it requires her to use the private changing areas. The evidence shows that, as a result of the District's denial of access to the girls' locker rooms, Student A has not only received an unequal opportunity to benefit from the District's educational program, but has also experienced an ongoing sense of isolation and ostracism

throughout her high school enrollment at the School.”

In previous cases in California and Missouri, federal officials had been able to reach settlements giving access to transgender students in similar situations. But in this instance, OCR and the District have not yet come to an agreement, prompting the federal government to threaten sanctions. OCR gave the District just 30 days to reach a solution or face enforcement, which could include administrative law proceedings or a Justice Department court action. The District could lose some or all of its Title IX funding.

OCR’s determination in the District 211 case is in stark contrast to a federal opinion issued in September.

In *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), a transgender student, by his next friend and mother, brought an action against the school board under the Equal Protection Clause and Title IX, challenging the school board’s restroom policy requiring students to use restrooms consistent with birth sex, rather than gender identity. The court determined that the policy was constitutional. It should be noted that this case did not

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involve locker rooms. Nonetheless, U.S District Judge Robert G. Doumar took the opposite approach from OCR. Judge Doumar concluded that the Board's interest in protecting the privacy of students outweighed any hardship that may be imposed on the transgender student. Judge Doumar was also not persuaded by a January 7, 2015, Dear Colleague Letter that stated that under Title IX, a school must generally treat transgender students consistent with their gender identity. Instead, the Court determined that established DOE Regulations supersede the legal authority of a DOE guidance document. The student has indicated that he will appeal.

These cases involve a rapidly evolving area of the law where, as noted, the results thus far are not always consistent and represent just a handful of recent decisions by courts and government agencies. The adjudicators intensively review the specific facts of each case. If you have questions regarding these cases or about the rights of transgender students, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).