Published May 16, 2016

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Transgender Student Rights. . . A Little More Clear?

On May 13, the U.S. Department of Education and U.S. Department of Justice issued a joint Dear Colleague Letter on Transgender Students. The Dear Colleague letter cemented in policy what the agencies had previously determined through a series of decisions and settlements. The letter asserts that a school that fails to comply with Title IX, the 1972 law that prohibits discrimination on the basis of sex, jeopardizes its federal funding.

The Dear Colleague Letter is wide-ranging. It makes clear that schools must provide a safe and non-discriminatory environment, must use pronouns and nouns consistent with a student's gender identity, and must provide sex-segregated activities and facilities. Importantly, a school cannot require a student to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. But, it may make individual-user options available to all students who voluntarily seek additional privacy, whether they are transgender or not. The Dear Colleague Letter also

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notifies schools that they must ensure that transgender students' education records do not disclose confidential information.

The Department of Education also released an "Examples of Policies and Emerging Practices for Supporting Transgender Students," a compilation of policies and practices that schools across the country are already using to support transgender students. This is a helpful document for districts considering adoption of transgender policies.

Neither the Dear Colleague Letter nor the Policies and Practices document have the effect of law, but both agencies assert that their interpretations of Title IX are consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.

In fact, the Dear Colleague Letter comes right on the heels of a recent U.S. Court of Appeals decision in a case involving the right of a transgender student to use a facility consistent with his gender identity.

In December, we told you about a federal case in the Eastern

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District of Virginia that was garnering substantial national attention. (*Unsettled: Transgender Student Civil Rights*, https://petrarcagleason.com/unsettled-transgender-student-civil-rights-2/). 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 of the U.S. Constitution 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. U.S District Judge Robert G. 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 reviewed the Department of Education's regulations implementing Title IX, which permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. He also contemplated how the Department had delineated how this regulation should be applied

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to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote in a Dear Colleague Letter: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."

Judge Doumar was not persuaded by the Dear Colleague Letter. Instead, the Court determined that established Department Regulations supersede the legal authority of a guidance document.

The student, Gavin Grimm, who was born as a female but identifies as a male, appealed to the U.S. Court of Appeals for the 4th Circuit, and won. In backing Grimm, the Court of Appeals took the opposite approach. It deferred to the Department's interpretation of its own regulation and ruled that transgender students should have access to the bathrooms that match their gender identities rather than being forced to use bathrooms that match their biological sex.

This ruling obviously aligns to the Department of Education's interpretation of its own regulations, the Dear Colleague

Letter, and its enforcement efforts to date. A perfect example is the matter which was recently resolved between OCR and the Board of Education of Township High School District 211. In that case, a biological male alleged the District discriminated against her by denying her access to the girls' locker rooms because of her gender identity and gender nonconformity. Although the District treated her as a female in all other respects, it refused to allow her to change in the female locker rooms, instead providing a separate private area in which she could change. In its findings, OCR concluded that the District violated the Student's rights under Title IX by requiring her to use separate, private locker rooms to change and shower. The District and OCR ultimately settled the matter. For more information on the settlement, see our previous posting (*Board Enters Settlement Agreement with OCR to Resolve Claims of Transgender Discrimination*, https://petrarcagleason.com/board-enters-settlement-agreement-with-ocr-to-resolve-claims-of-transgender-discrimination/)

Despite these developments, neither the OCR findings nor the 4th Circuit's decision or the Dear Colleague letters are binding authority in Illinois. As such, the law remains unsettled as it

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relates to transgender students in Illinois. Earlier this month, however, a group of students and their parents sued Township High School District 211 and the federal government in the Northern District of Illinois in response to the settlement reached between OCR and that district. A final decision in that matter – although it is still far away – may provide more direction and guidance on the rights of Illinois' transgender students.

We are also following the litigation between the federal government and the State of North Carolina. In that case, the question is whether a North Carolina law that bans transgender people from using public bathrooms consistent with their gender identity, and bans cities from passing anti-discrimination ordinances protecting LGBT people, is constitutional. Although the case does not specifically apply to students, the resolution of the matter will be insightful and perhaps will serve as a preview to the Supreme Court's ultimate determination of the matter.

Until we have final clarity, given the Dear Colleague Letter, OCR's determination and the 4th Circuit's ruling, districts

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should tread lightly if considering policies arguably discriminatory to transgender students. Courts have not yet opined on a policy that would require a transgender student to use a private, unisex bathroom although the Department of Education has been clear that this approach violates Title IX. In District 211, the Department of Education specifically noted the ostracism the student in District 211 felt when the District presented her with that option.

If you have questions regarding developments on this topic, please contact one of our attorneys in Oak Brook (630.928.1200) or Flossmoor (708.799.6766).