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Should Your District Take an Official Position on the MSHSL's Proposed Policy Related to Transgender Students?

by Mick Waldspurger

The Minnesota State High School League ("MSHSL") is considering adopting a policy related to transgender students. The MSHSL Board of Directors is scheduled to vote on the proposed policy on December 4, 2014. The policy is highly controversial and has generated a strong emotional reaction from opponents and supporters. In an effort to exert pressure on the MSHSL, opponents and supporters have begun asking school districts to take an official position supporting or opposing the proposed policy. School boards and school officials should review the law, including recent developments, and carefully consider the risks of taking an official position on this issue.

Minnesota Law

The Minnesota Human Rights Act ("MHRA") prohibits discrimination based on sexual orientation. The MHRA broadly defines "sexual orientation" to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Interpreting these provisions, the Minnesota Supreme Court and the Minnesota Court of Appeals have both held that the MHRA does not give a transgender employee the right to use a restroom designated for the gender with which the employee identifies rather than his or her biological gender. The decisions, which are discussed below, apply with equal force to public school students.

In *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), the Minnesota Supreme Court held that the

MHRA "neither requires nor prohibits restroom designation according to self-image or according to biological gender." Thus, under *Goins*, a school district may require transgender employees and students to use the restroom designated for their biological gender. Similarly, in *Doe v. City of Minneapolis*, 2002 WL 31819236 (Dec. 17, 2002), the Minnesota Court of Appeals dismissed a lawsuit alleging that an employer had violated the MHRA by refusing to use male pronouns when referring to a transgender employee who was genetically a female and by prohibiting the employee from using restrooms and shower facilities designated for men. In dismissing the lawsuit, the Court of Appeals noted that the MDHR had concluded that the MHRA does not require an employer to provide accommodations based on sexual orientation.

Federal Law

Federal law arguably produces a different result for public school students. The United States Department of Justice ("DOJ") and the United States Office for Civil Rights ("OCR") have concluded that federal law, and specifically Title IX of the Education Amendments of 1972, not only prohibits school districts from discriminating against transgender students but also requires school districts to accommodate transgender students. Toward that end, on July 24, 2013, the DOJ and the OCR entered into a resolution agreement with a California school district. Among other things, the resolution agreement requires the California school district to accommodate a transgender student by allowing the student, who is biologically female, to use restroom and locker room facilities that had previously been designated for use only by male students.

The California school district was faced with the choice of entering into the resolution agreement or spending substantial sums of money litigating over the issue with the federal government and, if unsuccessful, potentially losing federal funds. While claiming that the resolution agreement does not constitute a formal statement of policy, the DOJ and the OCR have clearly indicated that they will pursue legal action against any public school district that adopts a policy or otherwise acts in a manner that would deny transgender students the benefits established in the resolution agreement. As a result, every public school district now faces essentially the same choice as the California school district that entered into the resolution agreement. Although the validity of the position being taken by the DOJ and OCR is not free from doubt, the financial and political cost of challenging that position could be very high.

Additional Considerations

When asked to take a position opposing or supporting the MSHSL's proposed policy, school boards and school administrators may want to consider informing the requester of the interpretation of federal law that the DOJ and the OCR are advancing. School boards and school officials may also want to consider developing a response that highlights certain points. For example:

- School districts must comply with both federal law and state law. Where a conflict exists, federal law generally trumps state law.

- Regardless of whether school board members and school administrators agree or disagree with the federal government's interpretation of federal law, publicly taking an official position on this issue could invite an investigation by the OCR and litigation, which could have significant financial and legal consequences for the school district.

- School boards and school administrators are tasked with the responsibility of using limited financial resources to educate students in the most efficient manner possible.

- Protracted litigation with the federal government would divert significant resources from the classroom and could potentially result in the loss of federal funding. Both outcomes would harm students.

- Given existing budget constraints, most public school districts are not well equipped to challenge the federal government's interpretation of federal law.

- Community members who disagree with the federal government's position should direct their concerns to their senators and representatives, who have the authority to take action to affirm, clarify, or amend the law to ensure it reflects the will of their constituents.

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