Rupp, Anderson, Squires & Waldspurger, P.A. Newsletter
February 24, 2017

Trump Administration Revokes Prior Guidance on Transgender Students

On February 22, 2017, the Departments of Justice and Education ("Departments") jointly released a Dear Colleague Letter revoking a Dear Colleague Letter issued by the Departments on May 13, 2016, under the Obama Administration. The May 13, 2016 letter advised school districts that the Departments took the position that Title IX protections extend to transgender students, and policies of nondiscrimination required school districts to treat transgender students consistent with the individual student's gender identity. In practice, that guidance meant that a school was required to allow a transgender student to use restroom and locker room facilities consistent with the student's gender identity, even if the student's gender identity differed from the sex the student was assigned at birth. If school districts failed to do so, they faced the potential of an enforcement action by the Office of Civil Rights ("OCR") and, potentially, a loss of federal funds.

The May 13, 2016 letter was the subject of several court challenges, including one in Texas. In August, the Federal District Court for the Northern District of Texas held that the May 13, 2016 letter did not constitute proper guidance because it did not go through the proper administrative channels. As a result, the court issued a nationwide injunction prohibiting the Departments from enforcing the guidance in the letter. The Departments appealed the decision, but recently withdrew the appeal.

The guidance in the May 13, 2016 letter is also part of a case currently before the United States Supreme Court. That case was a challenge by a female-to-male transgender student who sought to use boys' facilities. One of the legal issues on appeal was whether the lower court was entitled to

rely on the guidance from the Departments. It is unclear now whether the Court will consider this issue since the guidance has been revoked. Even if the Court does not consider that issue, the Court is still expected to address whether Title IX protections extend to transgender students. If the Court rules that Title IX requires that transgender students must be given access to facilities consistent with their gender identity, the Departments' new guidance may be irrelevant.

The new guidance from the Departments revokes the prior letter, but does not replace it with any significant new guidance. The letter notes "this withdrawal of these guidance documents does not leave students without protections from bullying, discrimination, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." The letter also notes that there "must be due regard for the primary role of the States and local school districts in establishing educational policy."

In Minnesota, the status of the law regarding the rights of transgender students in schools is unclear. Transgender students are specifically protected from discrimination by the definition of sexual orientation in the Minnesota Human Rights Act ("MHRA"), which includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363A.03, subd. 44. No Minnesota court has considered this definition in the context of an "educational institution" as defined in the MHRA, but the Minnesota Supreme Court did consider it in the context of a private employer. In Goins v. West Group, the Minnesota Supreme Court upheld a policy in which an employer designated restrooms that could only be used by individuals consistent with their biological sex. 635 N.W.2d 717 (Minn. 2001). In so holding, the Court noted that "the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological [sex]." Id. at 723.

For places of public accommodation, there is also a statutory exemption to the discrimination provisions of the MHRA for restrooms, locker rooms, and other similar places. Minn. Stat. § 363A.24. Thus, at least for places of public accommodation, entities in Minnesota have a right to determine whether to designate restroom use based on biological sex or gender identity without violating the anti-discrimination laws. However, this issue is not as clear for school districts, as schools are not explicitly included in the statutory definition of "places of public accommodation." Minn. Stat. § 363A.03, subd. 34.

At this point, the decision on access to locker rooms and restrooms for transgender students may be made by individual school districts. However, the course of action least likely to lead to litigation may still be to allow a student to use a restroom or locker room consistent with his or her gender identity, at least until the Supreme Court issues a decision on the matter. Although the Departments' guidance prohibits OCR from conducting investigations or withholding federal funds specifically related to bathroom or locker room designation, the United States Supreme Court may still find that restroom and locker room assignments based on gender identity are required by Title IX. If the Court reaches that conclusion, transgender students may then file OCR complaints and court actions alleging a violation of Title IX if schools prohibit them from accessing restrooms and locker rooms consistent with gender identity.

On the other hand, if the Court finds such protections are not required by Title IX, school districts can point to Goins to argue that they have the discretion to make such a determination on an individual level, at least until we get further guidance from the state. Overall, a school district is probably more likely to face a claim from a transgender student than it is from a non-transgender student. At least one case in our jurisdiction has found that a non-transgender individual did not have a claim of discrimination when she complained that allowing a transgender person to use the women's restroom violated her rights. Cruzan v. Special School Dist. No. 1, 294 F.3d 981 (8th Cir. 2002). A Minnesota case brought by a group of non-transgender students against a school district

that allowed a transgender student to use restroom and locker room facilities based on gender identity is also currently on hold pending resolution of the Supreme Court case.

Regardless of the position a school district takes on restroom and locker room access, it must ensure that transgender students are not discriminated against in the utilization of or benefits from an educational institution. Minn. Stat. § 363A.13, subd. 1. As you likely saw, yesterday the MDE released a statement encouraging school districts to continue to follow the Obama Administration's guidance regarding restroom and locker room access. Although the MDE does not have the authority to investigate claims of discrimination pursuant to the MHRA and does not have the authority to make policy or law without going through the rule-making process, the statement is indicative of MDE's position. Given that the federal government has asserted that states should make the policy determination, MDE's position eliminates any question about the policy that the MDE is likely to advance.

The rights of transgender students in schools is a constantly evolving issue. If you have questions about how the new guidance affects your school district, please contact us at 612-436-4300.

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