
Transgender Equality: Coming to a School Bathroom or Locker Room Near You!

By Kara T. Rozin / Jun 27, 2017

On February 22, 2017, the U.S. Departments of Education and Justice issued a letter withdrawing the statements of policy and guidance reflected in the May 13, 2016 Dear Colleague Letter on OCR's enforcement of Title IX with respect to transgender students. On June 6, 2017, the Acting Assistant Secretary for Civil Rights for the U.S. Department of Education sent OCR Regional Directors a memorandum outlining the evaluation and investigation of complaints by transgender students. The memorandum contained the Assistant Secretary's directives and listed the following as allegations the OCR **continues to have subject matter jurisdiction over**:

- Failure to resolve promptly and equitably a transgender student's complaint of sex discrimination;
- Failure to assess whether sexual harassment or gender-based harassment of a transgender student has created a hostile environment;
- Failure to take steps reasonably calculated to address harassment that creates a hostile environment;
- Retaliation against a transgender student who has raised concerns about possible sex discrimination; and
- Different treatment based on sex stereotyping (e.g., based on a student's failure to conform to stereotyped notions of masculinity or femininity).

The memorandum directed the OCR Regional Directors to "evaluate each allegation separately, searching for a permissible jurisdictional basis for OCR to retain and pursue the complaint." The memorandum discussed Title IX and its implementing regulations, as interpreted in decisions of federal courts, which still remain in effect to protect individuals against sex discrimination, regardless if the individual is transgender.

Federal Courts across the country continue to address transgender rights. Recently, on May 30, 2017, the U.S. 7th Circuit Court of Appeals (setting precedent in Illinois, Indiana and Wisconsin)¹ unanimously affirmed a district court's grant of a preliminary injunction requiring a Wisconsin high school to permit a 17-year old transgender male to use the boys' restroom. In *Whitaker v. Kenosha Unified School District*, the student argued that the District's bathroom policy violated his rights under the 14th Amendment of the U.S. Constitution and Title IX.

With regard to the student's Title IX claim, the Court opined that regardless of whether Title IX provides protection for transgender persons, the student at least alleged sufficient facts to sustain a gender stereotyping claim. The Court reached this conclusion after drawing a parallel to the U.S. Supreme Court's decision regarding a Title VII discrimination claim in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."). The Court went on to state the District clearly treated the student differently because he did not conform to the gender stereotypes associated with being a biological female. The District suggested the student use bathrooms that other students were not required to use and endure surveillance by staff to monitor and police his bathroom use. The District repeatedly stated the reason it required the student to use separate bathrooms was because of District records that stated the student was a female, and District policy mandated students use bathrooms consistent with their biological sex. The Court noted that the discrimination against the student would not have occurred but for his sex, and a "policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."

Rejecting the District's privacy arguments, the Court stated:

"What the record demonstrates here is that the School District's privacy argument is based upon sheer conjecture and abstraction....A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates."

The Court's decision did not rely on, or even mention, the OCR transgender guidance that was withdrawn in February 2017. However, coupled with the June 6, 2017 OCR memorandum, this decision could have a ripple effect far beyond the 7th Circuit.

Each request by a transgender student to utilize school facilities or participate in school activities, consistent with their gender identity, involves a unique scenario that should be approached with legal caution. Further, as a result of the June 6, 2017 memorandum to OCR, school districts should ensure their Title IX and bullying investigations include investigating complaints brought by transgender students to avoid a subsequent OCR complaint. If you have any questions, please contact Kara Rozin at (616) 608-1110 | krozin@clarkhill.com, or another member of Clark Hill's Education Practice Group.

¹ The U.S. Court of Appeals for the 6th Circuit has jurisdiction over federal appeals arising from Michigan (as well as Kentucky, Ohio and Tennessee).