

Transgender Student Issues Update

School Law Update - 2016



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Student Gender Issues Update

- **Recent events -**

- April 2016:

- 4th Circuit Court of Appeals decision in Virginia school case = transgender student access to restrooms.

- 2 to 1 court panel adopts DOJ/OCR definition of “sex” under Title IX to include gender with which person/student identifies.

- Addresses restrooms only – excludes locker rooms.

- Begins opinion with discussion of public comment at BOE meetings disparaging transgender students.

- Dissenting opinion very critical of majority opinion



Student Gender Issues Update

- **Recent events:**

- May 2016:

- OCR/DOJ “Dear Colleague” letter regarding restroom/locker room access and activity participation.

- June 2016:

- NFHS Meeting with OCR officials regarding application of May 13, 2016 Dear Colleague Letter.
- OCR/DOJ settlement of Dorchester School District in South Carolina case.



Student Gender Issues Update

- **Recent events:**

- July 2016:

- Nebraska Attorney General files law suit in the U.S. District Court for the District of Nebraska challenging the application of federal Title IX regulations:
 - Contrary to specific Nebraska schools law found at Neb. Rev. Stat. § 79-2,124.
 - Contrary to federal administrative procedures.
 - United States Supreme Court stays the decision of the 4th Circuit on the Virginia (Gloucester PSD) case.



4th Circuit on the Virginia (Gloucester PSD)

- In an unusual 5-to-3 decision, the high court said it would stay the judgment and halt the order until it decides whether to take the case. If the Supreme Court declines to take the case, it will lift the stay.



Restroom/Locker Rooms

- **OCR/DOJ “Dear Colleague Letter (DCL) of May 13, 2016, page 3:**
 - “Restrooms and Locker Rooms. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. **A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.**”



Restroom/Locker Rooms

- However, the DOJ/OCR recognize that notwithstanding the foregoing statement, it is appropriate for school to seek to **“confirm”** the student’s assertion of transgender status. The DOJ/OCR in the DCL incorporate “Examples of Policies and Emerging Practices for Supporting Transgender Students”.
- In those materials, at paragraph/item 2, they ask the question, **“How do schools confirm a student’s gender identify?”** In answering that question, they cite with approval the following:



Restroom/Locker Rooms

- In answering that question, they cite with approval the following:
 - “Alaska’s Anchorage School District developed administrative guidelines (“Anchorage Administrative Guidelines”) noting that being transgender “involves more than a casual declaration of gender identity or expression” but does not require proof of a formal evaluation and diagnosis. Since individual circumstances, needs, programs, facilities and resources may differ; administrators and school staff are expected to consider the needs of the individual on a case-by-case basis.”
- Thus, the DOJ/OCR allows that there is a measure of discernment involved in “confirming” that a student has a gender identify other than assigned at birth.



Current Suits on File

- Students and Parents for Privacy v. U.S. Dep't. of Educ., No. 16- 4945 (N.D. Ill. Filed May 4, 2016)
- State of Texas v. United States, No. 16-00054 (N.D. Tex. Filed May 25, 2016). - See below.
- Whitaker v. Kenosha (Wis.) Unified Sch. Dist., U.S. Dep't of Educ. Office for Civil Rights (filed May 12, 2016) – Green wrist band case



Texas A.G. Lawsuit

- August 21, 2016 - U.S. District Court rules on Texas A.G. suit for an injunction against enforcement by the OCR/DOJ of removal of federal funding if Dear Colleague letter not followed:
 - Order said federal agencies exceeded their authority under the 1972 law banning sex discrimination in schools.
 - The injunction applies nationwide, and follows a number of other recent court rulings against transgender students and employees.



Texas A.G. Lawsuit

- "This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school,"



Texas A.G. Lawsuit

- Ruling turned on the congressional intent behind Title IX of the Education Amendments of 1972, which requires that "facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."



Texas A.G. Lawsuit

- Cites - Auer v. Robbins, 519 U.S. 452, 461 (1997).
 - Agency’s interpretation of its regulation is controlling unless “plainly erroneous or inconsistent with the regulation.”
 - **Deference is only warranted when the language of the regulation is ambiguous.**
 - If a regulation is not ambiguous, the agency’s interpretation may be considered but only to its persuasive power.
 - When a term is not defined, courts will give words their common and ordinary meaning.



Texas A.G. Lawsuit

- "It cannot be disputed that the plain meaning of the term sex" in that law "meant the biological and anatomical differences between male and female students as determined at their birth," the judge wrote.



Texas A.G. Lawsuit

- "Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality was to protect students' personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex."



Texas A.G. Lawsuit

- The judge also ruled that the guidance failed to follow the law requiring that it get input from the public before drafting new regulations, and suggested that the federal guidance could be implemented if the Department of Education conducts a more formal rule-making process.



Whitaker v. Kenosha U.S.D.

- A.W. – Transgender “Boy” Student at Kenosha (Wis.) U.S.D. - Tremper High School.
- Senior for 2016-2017.
- Involved in activities:
 - Strings +orchestra;
 - Theater;
 - Tennis team;
 - NHS.



Whitaker v. Kenosha U.S.D.

- Alleged School District:
 - Denied A.W. access to boys' restrooms, requiring use of girls' or single occupancy restrooms;
 - Directed staff to monitor his restroom use and report to administrator if using boys' restroom.
 - Intentionally and repeatedly using A.W.'s birth name and female pronouns;



Whitaker v. Kenosha U.S.D.

- Alleged School District:
 - Instructed guidance counselors to issue “green” wrist bands to A.W. and any other transgender student to monitor and enforce R.R. use;
 - Required A.W. to room with female students on school trips; and,
 - Initially denied A.W. the opportunity to run for Prom King, only relenting after protest by classmates.



Whitaker v. Kenosha U.S.D.

- Alleged School District:
 - Different treatment than other male students;
 - Stigmatizing;
 - Humiliation;
 - Physical stress and harm to health due to lack of access to restrooms
 - Emotional distress;
 - Violation of rights under Title IX and Equal protection Clause.



Whitaker v. Kenosha U.S.D.

- Suit for injunction to allow A.W. to use restroom of gender with which he identifies
- OCR/DOJ complaint not pursued.
- Seek:
 - Declaratory relief;
 - Damages; and,
 - Attorney's fees.



Whitaker v. Kenosha U.S.D.

- Court decision on preliminary injunction entered at 12:00 noon TODAY!
 - Preliminary injunction granted.
 - Court ordered School District to allow A.W. use of the boys' restrooms.
 - Applies only to restrooms – not locker rooms.
 - Adopts OCR/DOJ approach to other students' privacy = If student uncomfortable, can choose to use other available restrooms – burden on other students, not on A.W.



Whitaker v. Kenosha U.S.D.

- Court decision on preliminary injunction entered at 12:00 noon TODAY!
 - School district to appeal – “Legal issue is something the 7th Circuit is going to have to resolve.”
 - “School represents the community, and community has said we have issues with allowing somebody to go into boys’ room whose gender is not that of being a boy.”



NE Attorney General Suit

- Nebraska law allows for school districts to adopt policies which maintain separate locker room and restroom facilities for different sexes.
- Neb. Rev. Stat. § 79-2,124 (Reissue 2014) provides: “The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes.”



Case-by-Case Approach

- **So, what should Nebraska Public Schools be doing to meet its obligations to students?**
 - We advise a “case-by-case” approach to restroom access:
 - We advise that schools NOT adopt a policy or policies on restroom use by transgender students, and suggest the handling of such issues on a “case-by-case” basis considering the realities of student privacy and student safety issues in working with transgender students and their parents or guardian.



Case-by-Case Approach

- **We advise a “case-by-case” and “balancing of interests” approach to locker room access:**
 - Paramount in the consideration of issues related to restroom use (and locker room use – discussed below) are the privacy and safety of all students; and, there are divergent opinions on the nature and extent of these concerns.
 - Possibly adopt an administrative practice to apply a “factors/protocol” like that included in the NSAA Gender Participation Policy.



Case-by-Case Approach

– Practical practices by schools with transgender students:

- There is no notice required to schools from parents or a student of transgender status, but once notified, school must keep identity of student as confidential as possible.
 - Parents may not know or support the student – no legal requirement that the school get student's permission to inform a parent of student's demeanor, issues, dress, etc..
 - Student privacy interests verses parents right to know about student.
 - » Consider student's age;
 - » Parent-student relationship;
 - » Report any suspected child abuse;
 - » Emotional or physical health.



Case-by-Case Approach

- **Practical practices by schools with transgender students:**
 - Once a student is identified, work to assist the student through availability of guidance counselors – engage student and work to prevent isolation.
 - Accommodate the special needs of the student while protecting the privacy of other students.
 - Restrooms and Locker rooms:
 - Provide private restrooms and locker room facilities.
 - Currently in Nebraska - Can require a transgender student to use single occupant restroom, private changing area instead of group restroom or locker room.



Case-by-Case Approach

- **Practical practices by schools with transgender students:**
 - Educate your staff about transgender students generally, and on a need to know basis about a specific student specifically.
 - Inform your staff about the current state of the law, even if you do not currently know if your school has a transgender student.
 - Train your staff regarding need for heightened awareness of the challenges faced by transgender students – include examples of bullying, harassing and discriminatory behaviors of student AND staff.
 - Ask staff to cooperate as directed with student's name or pronoun preferences.
 - Ensure that your schools are places where all students are made to feel welcome, respected and protected.

Case-by-Case Approach

- **Practical practices by schools with transgender students:**
 - Be attentive to bullying and harassment of the students, and inquire of the student and others (students, staff, parents).
 - If you get a complaint by a transgender student of discrimination, harassment or bullying, follow your harassment and discrimination policy to the letter – do NOT treat it any differently than any other such complaint.
 - Use names and pronouns requested by the students and/or parents – honor preferences, **and report to NDE based thereon.**



Case-by-Case Approach

– Practical practices by schools with transgender students:

- As noted, be attentive to a transgender student's mental and physical health.
- If a transgender student expresses an interest in self-harm, follow your existing suicide prevention policies and procedures.
 - See, 79-2,146 requiring all public school nurses, teachers, counselors, school psychologists, administrators, school social workers, and any other appropriate personnel shall receive at least one hour of suicide awareness and prevention training each year – reference in-service training programs offered by NDE.
 - https://www.education.ne.gov/Safety/Suicide_Prevention.html.



Case-by-Case Approach

- **Practical practices by schools with transgender students:**
 - **Activities:**
 - **NSAA Gender participation rules – see above.**
 - » Required to inform opposing teams under NSAA policy – No!
 - **School gender participation rules for non-NSAA activities:**
 - » Music – choirs, plays, etc.?
 - » Cheerleading or dance team?
 - » Homecoming or prom dress codes or royalty? Consider having a school “dress code” and “royalty” policy - apply “confirmation” protocol – see above.
 - » Graduation – Dress code? Gender neutral gown?
 - » Key – Policy must serve a legitimate educational goal or otherwise non-discriminatory purpose.



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Labor Relations Conference- 2016

E D U C A T I O N



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