

# **Transgender Law and Litigation Update**

**Council of School Attorneys  
School Law Practice Seminar  
Friday, October 20, 2017**

## **Our Presenters**

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## **What We'll Cover**

- I. Background
- II. Federal Protection for Transgender Individuals
- III. State and Local Protection for Transgender Individuals
- IV. Summary and Conclusion

## **Our Goals**

- To assist school districts and their counsel in fulfilling mission to safeguard civil rights of all students
- To assist school attorneys in counseling schools given the status of the law
- To provide resources for implementing best practices

# I. Background

## Some Statistics

- Estimated 0.7 % of youth 13-17 are transgender
- Average age of trans-spectrum self-realization is 7.9
- 75.1% of transgender students feel unsafe at school
- 85.3% of transgender students reported facing discrimination at school

## **Some Statistics (cont'd)**

- More than 66% of transgender students avoid bathrooms at school
- 71.5% of LGBTQ students avoided school functions
- 31.8% of LGBTQ students missed school because of feeling unsafe
- 63.5% of LGBTQ students reporting bullying claimed they received no response from school

## **II. Federal Protection for Transgender Individuals**

## OCR and DOJ

- Policies have created significant uncertainty for schools
- 2015/2016 guidance: Transgender students are Title IX protected class
- 2017 Dear Colleague Letter withdrew guidance “to further and more completely consider the legal issues involved”

## OCR and DOJ (cont'd)

- 2017 Dear Colleague Letter:
  - Despite withdrawing previous guidance, OCR assured it will continue to protect all students, including LGBT students, from discrimination, bullying and harassment
- OCR/DOJ also withdrew participation in related transgender litigation
  - Resulted in Supreme Court’s decision to return G.G. v. Gloucester County Sch. Bd. case to 4th Circuit for “further consideration”

## **OCR and DOJ (cont'd)**

- Where do we stand regarding federal enforcement?
  - Some guidance documents remain in place
  - But change of approach on mandating policy
  - Internal OCR Memo (June 2017) indicates reduced review/oversight from D.C.
  - No legal determination on whether transgender students are protected under Title IX

## **OCR and DOJ (cont'd)**

- Unanswered questions:
  - How do we reconcile withdrawal of guidance with OCR assurances that it will continue to protect transgender students?
  - On what legal authority do federal protections of transgender students rest?
  - What will OCR do to enforce such protections?

## Snapshot on Litigation



- Whitaker v. Kenosha USD (7th Cir. 2017)
  - Student was identified as female at birth and transitioned to identifying as male in 8<sup>th</sup> grade
  - In junior year, teacher reported his use of male bathroom to school administration
  - School directed student to use either its gender-neutral bathroom or girls' bathroom
  - Student sued for injunction, claiming violation of Title IX and Equal Protection

## Snapshot on Litigation (cont'd)

- Whitaker v. Kenosha USD (7th Cir. 2017)
  - 7th Circuit upheld District Court's preliminary injunction allowing student's use of boys' bathroom during his senior year
  - Policy that requires individual to use bathroom that does not conform with his/her gender identity violates Title IX
  - Court said that student was also likely to succeed on Equal Protection claim

## Snapshot on Litigation (cont'd)



- Student and Parents for Privacy v. USDOE (N.D. Ill. 2016)
  - Bathroom access
  - Locker Room access

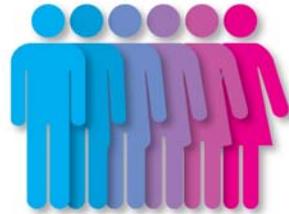
## Snapshot on Litigation (cont'd)

- Student and Parents for Privacy v. USDOE (N.D. Ill. 2016)
  - Magistrate judge found that non-transgender students do not have constitutional right to avoid sharing restrooms/locker rooms with transgender students
  - District's privacy options offered to all students reduced risk of any unwanted exposure
  - Case remains under review

## Evolving Litigation Issues

Evidence establishing gender identity

- Self Identification
- Parent Identification
- Medical
- Identity Documents
- Presentation



## Evolving Litigation Issues

Confidentiality

- FERPA
- IDEA
- State law
- Protective Order
- Is "Student X" enough?



## Americans With Disabilities Act

- “Gender identity disorders not resulting from physical impairments” excluded from consideration as disability
- But recent decision in Blatt v. Cabela’s Retail (E.D. Pa. 2017) is noteworthy
  - “Gender identity” can reasonably be interpreted as substantially limiting major life activities
  - Expansive interpretation likely to result in increase in transgender-related ADA claims

## Section 504

- Physical or mental impairment that impacts major life activity
- Major life activities include learning
- Gender identity is not disability in and of itself
- But 504 plan might be appropriate if mental health associated with gender identity impacts education

## **IDEA**

- Increasing requests for eligibility under “emotional disturbance” category
- Often seek funding for day treatment, wilderness programs or residential placement
- Must review mental health status within context of developmental history

## **IDEA (cont’d)**

- Gender dysphoria is recognized psychological diagnosis
- Discomfort with incongruity between gender assigned at birth and perceived gender or incongruity between desired gender and gender allowed to be expressed
- Range of gender dysphoria and its impact on ability to access education will determine whether student qualifies for special education

## **IDEA (cont'd)**

- Two due process cases are currently pending in California
  - Both involve students transitioning from female to male and who are placed in out-of-state RTCs
  - Both students making educational progress
  - School psychologist recommended no eligibility (depression/anxiety was not of marked degree and could be related to gender dysphoria)

## **III. State and Local Protection for Transgender Individuals**

## **State Legislation**

- 16 states have laws protecting transgender students and providing equal access rights
- States laws are not impacted directly by OCR 2017 Dear Colleague Letter
- Example: California Ed. Code § 221.5
  - Pupil must be permitted to participate in sex-segregated activities and use facilities consistent with gender identity

## **State Legislation (cont'd)**

- Application of state laws to public schools is not always clear
- Example: Illinois Human Rights Act
  - Protects from discrimination based on gender identity, but contains exception with respect to use of restrooms and locker rooms
  - No definitive cases yet

## **State Legislation (cont'd)**

- Example: Missouri Human Rights Act
  - State appellate court affirmed dismissal of deprivation of access claim against district
  - Student transitioning from one sex to another is not “member of one sex being deprived of public accommodation given to the other sex”
  - Claim did not fall within MHRA’s protections

## **Local Governance**

- Look to school board policies/regulations when providing advice
- Many districts have adopted policies consistent with 2015/2016 guidance
- Preemption issue arises when local policies conflict with established federal or state laws

## **IV. Summary and Conclusion**

### **Final Remarks**

- Core duty for schools is to protect and foster welcoming environments for all students
- Transgender students are at-risk students who have right to protection
- Critical to develop more awareness of transgender students' needs

**Thanks  
for attending!**

