

# TRANSGENDER UPDATE: A MOVING TARGET

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# THANKS ...

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# AGENDA

- The federal agency(ies)' interpretation of law
- Status of pending litigations
- Best practices pending resolution of the legal battles
- Resources
- What ifs

# PRIMARY FEDERAL AGENCIES

The EEOC is the federal agency that addresses employment issues associated with transgender individuals.

**The OCR addresses transgender student issues.**

**The focus of this presentation is transgender student issues.**

# THE LAW: TITLE IX

Statutory language:

- “No person shall, on the bases of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 USC § 1681. [Emphasis added]
- “An educational institution may maintain “separate living facilities for the different sexes.” 20 USC § 1686.
- “Schools may provide separate but comparable dorms, bathrooms, locker rooms, and shower facilities on the basis of sex.” 34 CFR §§ 106.32 and 106.33.

# NM LAW: NM HUMAN RIGHTS ACT

NMSA 28-1-7, subsection D is the NM statute that recognizes gender identity as a protected class in the employment context, and states in relevant part:

“[A]ny person, employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, to use any form of application for employment or membership or to make any inquiry regarding prospective membership or employment that expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, national origin, ancestry, sex, sexual orientation, *gender identity*, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation, unless based on a bona fide occupational qualification[.] [Emphasis added]”

# OCR DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS

On May 13, 2016, the U.S. Departments of Education and Justice jointly issued a “Dear Colleague” letter regarding transgender students, stating:

Title IX’s prohibition on sex discrimination requires schools to treat transgender students – those whose gender identity is different from the sex they were assigned at birth – in the same manner that it treats other students of the same gender identity. [Emphasis added]

<http://www2.ed.gov/about/offices/list/ocr/letter/colleague-201605-title-ix-transgender.pdf>

# DEAR COLLEAGUE LETTER CONT.

- Student or parent notice that a student will assert a new gender identity is sufficient to require a school to begin treating the student consistent with the student's gender identity.
- Schools cannot require a medical diagnosis, evidence of treatment, or a new birth certificate.
- Schools cannot discipline or exclude transgender students from activities for behavior consistent with gender identity or that does not conform to stereotypical notions of masculinity or femininity.
- FERPA prohibits schools from publicly disclosing a transgender student's birth name or biological sex; schools should change the gender on school records and directions when asked.



# DEAR COLLEAGUE LETTER CONT.

- Eligibility for single-sex teams may not rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex.
- Schools must ensure nondiscrimination on the basis of sex, which includes providing transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns.
- The desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

# DEAR COLLEAGUE LETTER CONT.

## OCR'S EVOLUTION ON THIS ISSUE:

- **April 2, 2014:** OCR Chief Catherine Lhamon tells COSA to advise school board clients to allow transgender students to use the bathroom of the gender with which they identify.
- **April 29, 2014 Q&A on Title IX and Sexual Violence:** “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity....”
- **Jan. 7, 2015 opinion letter interpreting Title IX bathroom regulations to transgender individuals:** “When a school elects to separate or treat students differently on the basis of sex... a school generally must treat transgender students consistent with their gender identity.”

# DEAR COLLEAGUE LETTER CONT.

## OCR'S EVOLUTION ON THIS ISSUE:

- Prior to April 2014, OCR had not taken a formal position in any nationwide guidance. However, beginning in 2013, OCR resolved several complaints with school systems through resolution agreements in which the school systems in question agree to treat the complaining student consistent with his or her gender identity:
  - Arcadia Unified School District, California, July 2013
  - Downey Unified School District, California, October 2014
  - Township High School District 211, Palatine, Illinois, December 2015

# ARGUMENTS CHALLENGING OCR

- OCR/DOJ's guidance document violates the federalism and separation-of-powers guarantees of the U.S. Constitution.
- OCR/DOJ's guidance document, which incorporates "gender identity" into Title IX's definition of "sex," is a legislative rule adopted without the procedures mandated in the Administrative Procedure Act.
- Allowing transgender students in the restroom or locker room of their gender identity produces sexual harassment and creates a hostile environment on the basis of sex under Title IX.
- Allowing transgender students in the restroom or locker room of their gender identity violates the other students' constitutional right to bodily privacy.

# ARGUMENTS CHALLENGING OCR CONT.

- OCR/DOJ's guidance documents, which incorporates "gender identity" into Title IX's definition of "sex," are a violation of the Spending Clause in Article 1, Section 8 of the U.S. Constitution.
- Allowing transgender students in the restroom or locker room of their gender identity violates the other parents' constitutional right to direct the education and upbringing of their children.
- Title IX's regulations state that schools may provide "separate but equal" facilities on the basis of sex, and the boys' and girls' locker rooms are equal.
- Allowing transgender students in the restroom or locker room of their gender identity burdens the other students' practice of religion.

## Is OCR's INTERPRETATION ENTITLED TO DEFERENCE?

- OCR claims that its interpretation of its own regulations is entitled to deference under *Auer v. Robins*, 519 U.S. 452 (1997).
- In *Auer*, police officers brought suit alleging they were entitled to overtime pay.
- Commissioner argued officers were exempt under Fair Labor Standards Act (FLSA) as executive, administrative, or professional employees.
- The trial court held that the police officers were exempt under FLSA and Court of Appeals affirmed.

## Is OCR's INTERPRETATION ENTITLED TO DEFERENCE?

- Supreme Court granted certiorari to determine whether the Secretary of Labor had adequately interpreted the “salary-basis” test related to the exempt status of any employee.
- The Supreme Court stated that “[b]ecause the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.” *Id.*, at 461.

# JUDICIAL CHALLENGES TO OCR'S INTERPRETATION

## PALATINE, ILLINOIS LITIGATION

- 5-2 board vote to enter settlement agreement with OCR.
- Two hours of public comments in front of a crowd of about 250.
- Three-hour closed-door board meeting.
- “Based on Student A’s representation that she will change in private changing stations in the girls’ locker rooms, the District agrees to provide Student A access to female locker room facilities and to take steps to protect the privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls’ locker rooms to accommodate Student A and any students who wish to be assured of privacy while changing.”



# JUDICIAL CHALLENGES TO OCR'S INTERPRETATION

## PALATINE, ILLINOIS LITIGATION

- Applies only to the student in question and is not a districtwide policy.
- District: “By reaching this mutual agreement with OCR, the threat of further litigation specific to the initial complaint has ended, and the district will retain full access to its federal funds used primarily to serve at-risk students.”
- District “categorically refutes the notion of any violation of the law or form of discrimination.”

# MORE JUDICIAL CHALLENGES

## STUDENTS AND PARENTS FOR PRIVACY V. U.S. DEP'T. OF EDUC., No. 16-4945 (N.D. ILL. FILED MAY 4, 2016)

- Some of the parents reacted angrily after the vote and approached the school board until police intervened.
- A parent and student group has filed suit against the Dept. of Ed. alleging that the resolution agreement violates other students' privacy rights and that the Department's inclusion of "gender identity" in Title IX's definition of "sex" violates the law.

# MORE JUDICIAL CHALLENGES

## WHITAKER V. KENOSHA UNIFIED SCH. DIST., U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (FILED MAY 12, 2016)

- Transgender student brought suit against school district alleging violation of Title IX and Equal Protection Clause.
- September 20, 2016: Federal district court enters injunction requiring school district to permit transgender student to use restroom consistent with gender identity.
- Order limited to restrooms; does not apply to locker rooms.

# MORE JUDICIAL CHALLENGES

## BD. OF EDUC. OF HIGHLAND LOCAL SCH. DIST. V. U.S. DEP'T. OF EDUC., No. 16-524 (S.D. OHIO FILED JUNE 10, 2016)

- Sept. 26, 2016: Court denied **HLSD's motion** for preliminary injunction barring enforcement of ED/DOJ's Title IX guidance and **granted the intervenor student's motion** for a preliminary injunction, order HLSD to allow the student to use the girls' restroom.
- “[N]o evidence” that the student is likely to violate other students’ privacy or put their safety at risk when using the girls’ restroom: The “[s]chool districts that have encountered these very issues have been able to integrate transgender students fully in to the academic and social community without disruption, and certainly without the doomsday scenarios Highland predicts, such as sexual predators entering an elementary-school restroom.”
- TX district court order halting enforcement of guidance does not apply – OH not a party, and this litigation began before that order.

# GLOUCESTER CO. SCHOOL BOARD V. G.G.

- A three-judge panel of the Fourth Circuit Court of Appeals relied on *Auer* when it issued its ruling on April 19, 2016.
- The plaintiff student, G.G., is challenging a Board resolution that requires students to use the restroom that corresponded with their gender at birth and allowed transgender students to be provided “an alternative appropriate private facility.”
- The district court dismissed G.G.’s claim under Title IX, concluding that prohibition on discrimination on the basis of sex referred unambiguously to biological sex, rather than gender identity.

# GLOUCESTER CO. SCHOOL BOARD V. G.G.

- The Fourth Circuit Court of Appeals reversed the trial court's ruling, on the grounds that "the district court did not accord appropriate deference to the relevant Department of Education regulations."
- The Fourth Circuit concluded that , "Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms ....
- The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity."

# GLOUCESTER CO. SCHOOL BOARD V. G.G.

- Therefore, the DOE's interpretation of the regulation is entitled to deference under *Auer*.
- On remand, the district court granted G.G. a preliminary injunction, allowing him to use the boys' restroom during his senior year.
- However, the SCOTUS granted (5-3) the Board's emergency petition seeking a stay of the Fourth Circuit panel's April 2016 mandate and the district court's preliminary injunction.

# GLOUCESTER CO. SCHOOL BOARD V. G.G.

- The stay will remain in effect pending the district's petition for certiorari, which was filed August 29.
- If the petition is denied, the stay automatically terminates; if granted, the stay terminates upon SCOTUS' ruling.
- The issues for review:
  - Whether the Title IX regulations on separation of students by “sex” (34 C.F.R. 106.33) are ambiguous; and
  - If so, whether the Department of Education's interpretation is entitled to deference under *Auer v. Robbins* (1997).



## N.C.'s HOUSE BILL 2

- N.C. General Assembly passed a law in March 2016 that states: “Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.”
- Biological sex is defined as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate.”
- The law covers both locker rooms and restrooms.
- It does not prohibit local boards from “providing accommodations such as single occupancy bathroom or changing facilities upon a request due to special circumstances....”

## ACLU LAWSUIT (M.D. N.C.)

- The ACLU quickly filed suit against the State and the University system. The individual plaintiffs include a transgender employee at UNC Chapel Hill, a transgender student at UNC Greensboro, and a transgender high school student at UNC School of the Arts.
- The claims in the suit are brought under the 14<sup>th</sup> Amendment, as a violation of plaintiffs' equal protection and privacy rights, and Title IX.
- The University has indicated that it does not intend to enforce H.B. 2.
- On August 1, 2016, federal district court judge Thomas Schroeder held a hearing on the plaintiffs' motion for a preliminary injunction. Judge Schroeder allowed the U.S. Dept. of Justice to participate in the hearing.

## ACLU LAWSUIT (M.D. N.C.)

- On August 26, Judge Schroeder issued a narrow injunction under Title IX, preventing the University-system and the State from enforcing HB2 against the three individual plaintiffs named in the suit while the suit is pending. Judge Schroeder denied plaintiffs' request for injunctive relief under the equal protection clause and sought additional briefing on the due process claims.
- The plaintiffs have filed an appeal in the Fourth Circuit, seeking to have the injunction expanded statewide.
- The trial in the case has been moved from November to May 2017 (to await the outcome of the Supreme Court petition).

## OTHER N.C. LAWSUITS

- In addition to the ACLU suit, the State has sued the U.S. Dept. of Justice and vice versa. The State's suit came in response to a letter from the Justice Dept., seeking assurances that the State would not comply with or enforce H.B. 2.
- DOJ alleges that the state law violates Title IX; Title VII of the Civil Rights Act, which also prohibits discrimination based on sex; and the Violence Against Women Act, which explicitly protects “gender identity,” or “actual or perceived gender-related characteristics.” See 42 USC § 13925(b) (13)(A); see also 18 USC § 249(c)(4).
- There is a preliminary injunction motion pending in the suit in which DOJ is the plaintiff.

# TEXAS V. USA (N.D. TEX.)

- In response to the May 2016 Dear Colleague letter, 11 states filed suit against the United States, in the Northern District of Texas in late May.
- The 11 original plaintiffs were Alabama, Arizona, Georgia, Louisiana, Maine, Oklahoma, Tennessee, Texas, West Virginia, Wisconsin, Utah, and two local school districts (in Arizona and Texas).
- The plaintiffs claim that the guidance issued by the departments is a legislative rule, and the Administrative Procedure Act requires notice and comment to adopt a rule.
- Plaintiffs also claim that the administration's interpretation of Title IX conflicts with the clear language of the law and the legislative history surround the law and "manufactures" ambiguity regarding the term "sex" in Title IX.

## TEXAS V. USA (N.D. TEX.)

- On August 22, the court issued a preliminary injunction bring the federal government from enforcing the OCR/DOJ guidance.
- The court ruled that this injunction applies nationwide, not only to the eleven states that were party to the lawsuit.
- According to the court, while the injunction is in place, OCR/DOJ may not initiate, continue, or conclude any investigation based on the interpretation that Title IX's definition of "sex" discrimination includes the "gender identity" discrimination.

# STATE OF NEBRASKA V. USA, No. 16-03117

## (D. NEB. FILED JUL. 8, 2016)

- Similar to Texas case; Nebraska in 8<sup>th</sup> Circuit
- NE + 9 states allege ED/DOJ May 13 guidance violates Administrative Procedure Act in writing in “gender identity” where Title VII and Texas IX say “sex”
- Nebraska’s Attorney General Doug Peterson: “The recent action by these two federal agencies to require showers, locker rooms, and bathrooms to be open to both sexes based solely on the student’s choice, circumvents this established law by ignoring the appropriate legislative process necessary to change such a law. It also supersedes local school districts’ authority to address student issues on an individualized, professional and private basis.”

## OTHER CASES

- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII).
- *Kastl v. Maricopa Cnty. Cmty. College Dist.*, 325 Fed. Appx. 492 (9<sup>th</sup> Cir. 2009) (Title VII).
- *Smith v. City of Salem*, 378 F. 3d 566, 568 (6<sup>th</sup> Cir. 2004) (Title VII).
- *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (Title IX).
- *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII).



# BEST PRACTICES NOW

- Begin cultural training for staff and students that promotes inclusiveness, as well as discussions about respect, tolerance and empathy.
- Students feigning transgender status to gain access to facilities generally reserved for the opposite sex should be addressed under the district's code of conduct.
- Consider public meetings and permit fair and balanced positions to be shared in a civil and respectful manner.

# BEST PRACTICES NOW

- Meet with the parent and student:
  - Learn exactly what requests are being made.
  - Ensure student sincerely wants the requested consideration.
  - Ensure student is aware of potential backlash for the requested consideration.
  - Set a follow-up period to regularly evaluate how the requested consideration is working and what adjustments need to be made.
  - Parties should work together to address what information will be shared with other parents and students, and what protections are needed to minimize retaliation.

# BEST PRACTICES NOW

Examples of considerations that may be requested:

- Being called by a different name or pronouns in class.
- Wearing feminine or masculine clothes, hairstyles, or makeup.
- Changing the student's name on permanent educational records.
- Participating in sports or extracurricular activities with students matching their gender identity.
- Accommodating medical concerns (such as gender dysphoria, depression, or anxiety).
- Accessing restrooms and locker rooms of their gender identity.
- Staying in overnight housing with students matching their gender identity during overnight field trips.

# BEST PRACTICES NOW

Create local policies or procedures

- Have your school board and/or district administration ready to address transgender student issues in these areas (creation of policies, or on case-by-case basis):
  - Recordkeeping
  - Privacy and confidentiality
  - Student transitions
  - Restrooms and related facilities
  - Dress code and appearance
  - Gender-based activities

# BEST PRACTICES NOW

Weigh the legal risks:

- If school refuses to grant the requests, student may have standing to challenge that decision and argue violation of rights under Title IX and/or 42 U.S.C. Section 1983 (or applicable state statutes).
- Granting the requests of transgender students by giving access to facilities and programs may result in claims of other students/parents based on privacy and/or religious rights.
- Consider insurance coverage implications for failing to act in a manner that is inconsistent with law.

# BEST PRACTICES NOW

Questions to ask about legal risks:

- Which option is most likely to cause harm to students?
- How significant is harm? What is the scope and type of harm?
- Will the proposed action minimize the harm sufficiently to be worth the risk of taking the action?
- How many students are involved?
- How vulnerable are the students and what protections are already in place?
- Do all students involved have a sufficient ally for guidance and support?
- Are the concerns being raised by students and/or parents?
- Have you put your carrier on notice?
- Is your lawyer on speed dial?

# REMEMBER

- Unless there is statutory prohibition (e.g. North Carolina), local jurisdictions can provide more protections to transgender students than the law requires.
- However, districts must be sensitive to the needs and fears of other students and weigh risks of taking action.
- Looking at student needs on a case-by-case basis is appropriate and advisable.
- District leaders need to make a decision in the best interest of students, being sensitive to but not blindly loyal to the current status of the law.

# RESOURCES

- NSBA/COSA
  - Transgender Students in Schools FAQs and Answers for Public School Boards and Staff, Version 7.0, updated 11/18/2016.
- Department of Education (DOE)
  - Resources for Transgender and Gender-Nonconforming Students - <http://www.ed.gov>
  - Examples of Policies and Emerging Practices for Supporting Transgender Students, May 2016.
- Contact your school attorney for assistance in accessing these materials.



# THANKS!

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