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RIGHTS OF TRANSGENDER STUDENTS

Perhaps no issue in school law has evolved as rapidly as lesbian, gay, bisexual and transgender rights. In order to understand why the evolution has been so dramatic, a little background is useful. Several federal statutes explicitly prohibit discrimination on the basis of specific protected categories, such as race or disability status. Most states, including Pennsylvania, have also enacted their own non-discrimination statutes. However, no federal law explicitly prohibits discrimination on the basis of sexual orientation or gender identity. Similarly, the Pennsylvania Human Relations Act, 43 P.S. §§ 951, et seq., does not include sexual orientation or gender identity in its list of protected categories. It should be noted that 34 counties and municipalities have enacted local ordinances extending protection on the basis of sexual orientation, most of which also address gender identity. To date, however, the scope of these ordinances has not been tested in court.

Against this backdrop, the U.S. Department of Education, Office of Civil Rights (OCR), beginning roughly in 2012, actively began to take the position that discrimination based on gender identity is covered by Title IX. Title IX prohibits discrimination on the basis of “sex.” OCR issued guidance indicating that “sex” discrimination includes discrimination on the basis of gender identity. If a student was assigned a gender of “male” at birth, but identifies as “female” in school, OCR has asserted that schools must provide access to “female” facilities and programs or risk being found in violation of Title IX.

As has been widely reported in the news, a Fourth Circuit Court of Appeals panel of three judges has reversed a federal trial judge in *G.G. v. Gloucester County School Board*, 2016 WL 1567467 on precisely this issue. The Fourth Circuit is comprised of Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Consequently, the decision is not binding on the federal courts in Pennsylvania. In addition, it is worth noting that the Gloucester County School Board is asking the entire Fourth Circuit to reexamine the decision. However, the nature of the decision has significant implications for our clients and, if upheld, is very likely to be followed by other Circuits, including the Third Circuit which covers Pennsylvania.

The case involves G.G., a transgender boy, who wishes to use the restroom facilities for boys at his school. While school administrators had initially permitted this use, the School Board adopted a policy prohibiting any student from using a restroom not affiliated with that student’s “biological gender.” G.G. filed suit challenging this policy as a violation of Title IX. OCR filed a position in the case supporting G.G.’s argument.

The regulations for Title IX specify that a school may maintain sex segregated facilities, so long as the facilities are comparable. However, OCR and G.G. argued that “sex” as used in Title IX is broader than simply the gender associated with genitalia. The court determined that the word “sex” is ambiguous in the context of Title IX. More specifically, it determined that while “sex” means “male” or “female” in the context of Title IX, the language of the statute is ambiguous about how to determine what “sex” any individual might be. It made this determination by noting that even when Title IX regulations were adopted in 1975, the dictionary definitions of “sex” used words like “typically” and by noting that any definition based solely on genitalia would ignore individuals who are intersex or had lost their genitalia.

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The Fourth Circuit concluded by noting that when the language of a statute is ambiguous, it is bound to give deference to the agency tasked with enforcing the statute, in this case, the Department of Education. As a consequence, the court held that Gloucester County's policy was a violation of Title IX.

OCR's position on the rights of transgender students in the school setting is quite clear. Indeed, after Gloucester County School District asked the Fourth Circuit to review its decision, on Friday, May 13, 2016, OCR issued a "significant guidance" letter to all public schools. The guidance takes the position that transgender students are entitled to be treated in all respects in a manner consistent with their gender identity. While the Gloucester County case involved bathroom access, OCR applies the same reasoning to programs, locker rooms, and student records, such as names and pronouns. Furthermore, OCR has taken this position with at least two Pennsylvania school districts, which have elected to enter into resolution agreements rather than contest OCR's position.

While the state of the law in Pennsylvania continues to evolve, we urge our Pennsylvania school district clients to be prepared to address these complicated issues before being embroiled in a controversy. We are available to assist in developing policies and procedures. We also offer trainings in the legal requirements as well as workshops on best practices around gender identity. Feel free to contact us for assistance.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

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