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LEGAL UPDATES

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Trump Administration Withdraws Guidance on Use of Facilities by Transgender Students

In a joint letter issued February 22, 2017, the Departments of Education (ED) and Justice (DOJ) withdrew prior Title IX guidance from the Obama administration that required schools receiving federal funding to allow students to use sex-segregated facilities according to their gender identity, as opposed to their anatomical birth sex.

Obama-Era Transgender Guidance Withdrawn

The Obama administration provided the (now-revoked) guidance through two letters. First, on January 7, 2015, ED's Office for Civil Rights (OCR) issued an opinion letter in response to a lawyer's inquiry about a specific Virginia school district policy directing that students must use facilities corresponding to their anatomical birth sex. The letter stated that Title IX protected against discrimination based on sex, including gender identity, and that students must be allowed to use sex-segregated facilities according to their gender identity. On May 13, 2016, OCR and DOJ issued a Dear Colleague Letter more broadly confirming the departments' view that Title IX required schools to allow access to sex-segregated facilities according to each student's gender identity.

As we have extensively covered on our Higher Education and K-12 blogs, challenges to this guidance percolated through the courts. Most notably, the Supreme Court is scheduled to hear arguments on March 28, 2017, in *Gloucester County School Board v. G.G.*, the case involving the Virginia school district's policy and OCR's response. Meanwhile, a federal District Court in Texas issued a nationwide injunction prohibiting enforcement of the Dear Colleague Letter, a stay that remains in place.

Now, the Trump administration has expressly withdrawn both letters. OCR and DOJ did so in a short, two-page letter, explaining that the prior guidance documents do not “contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.” The departments state that they are withdrawing the guidance to “further and more completely consider the legal issues involved.”

The immediate impact of this action on pending litigation will likely become clearer over the coming days. Title IX contains a private right of action that does not directly rely on an agency’s interpretation or regulatory posture. *Gloucester County* is such a case. Thus, the Supreme Court still has a live controversy before it—whether Title IX’s prohibition on discrimination on the basis of sex includes gender identity. Whether the Court will still take up this question in light of the withdrawn guidance remains to be seen. It is possible the Supreme Court may simply remand the case to the Fourth Circuit for further consideration in light of the Trump administration’s action. This would also likely allow other circuits to weigh in on the issue as other similar cases make their way through the courts. On the other hand, the Supreme Court could proceed to address the scope of Title IX, despite these new developments.

OCR and DOJ’s stated basis for withdrawing this guidance—especially the criticism that the guidance was adopted without “any formal public process”—may telegraph a broader effort by the Trump administration to withdraw or rescind other Obama-era Dear Colleague Letters concerning Title IX. The most notable target for such action may be an April 2011 Dear Colleague Letter that arguably expanded institutions’ investigatory responsibilities concerning sexual harassment and sexual violence. Those reforms, too, are being litigated in several cases nationwide.

What This Means to You

OCR and DOJ make clear that they will not rely on the views expressed in either guidance letter on sex-segregated facility use by transgender students. Thus, from a federal regulatory perspective, institutions are not required to have a policy allowing students to use facilities according to their gender identity. Whether Title IX requires such an interpretation remains an open question subject to ultimate disposition by the courts. Additionally, the February 22 letter confirms that “schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.”

Separately, schools should continue to monitor developments at the state and local levels. In the wake of the Obama administration’s guidance, and in some cases even before that, a number of states and localities passed their own statutes and ordinances taking a wide variety of positions on issues related to the treatment of transgender persons. Such state and local laws are unaffected by the Trump administration’s action.

Contact Us

For more information on how regulatory changes may affect your organization, contact a member of Husch Blackwell's Education team.