

Management Alert



Trump Administration Withdraws Prior Department of Education Interpretations Regarding Title IX Protections Afforded to Transgender Students

By Abigail Cahak, Sam Schwartz-Fenwick, and Mary Kay Klimesh

Seyfarth Synopsis: *The U.S. Departments of Justice and Education jointly issued a Dear Colleague Letter withdrawing and rescinding the Obama Administration’s prior guidance letters which instructed schools that Title IX requires students access to sex-segregated facilities based on a student’s gender identity. The February 22, 2017 guidance notes that the Departments made their decision “in order to further and more completely consider the legal issues involved” and that the Departments “will not rely on the views expressed within them.”*

On February 22, 2017, the Trump Administration expressly withdrew the Obama Administration’s interpretation of Title IX as to protections afforded to transgender students at educational institutions receiving federal funds.

Since 2014, the U.S. Department of Education (“DOE”) and other federal agencies, including the U.S. Department of Housing and Urban Development, Occupational Safety and Health Administration, U.S. Office of Personnel Management, and Equal Employment Opportunity Commission, have interpreted and enforced their respective statutes and regulations prohibiting sex discrimination to include a ban on gender identity discrimination.

In a January 7, 2015 [opinion letter](#), the DOE stated that “[w]hen 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” and cited its prior statements in a December 2014 [policy document](#) to similar effect. More recently, in May 2016, the DOE issued a [Dear Colleague Letter](#) reiterating its position that, when a school is notified by a parent or guardian that their child will assert a gender identity different from previous representations or records, the school must begin treating the student consistent with that gender identity and that Title IX imposes no medical diagnosis or treatment requirement as a prerequisite.

On October 28, 2016, the U.S. Supreme Court [agreed to hear](#) an appeal in the matter of *Gloucester County School Board v. G.G.*, which asks the Court to weigh in on the issue of restroom access for transgender students. The case appeals the [decision](#) of the U.S. Court of Appeals for the Fourth Circuit, which concluded that a Virginia school board violated Title IX when it decided not to allow a transgender male student to use the boys’ restroom. The Fourth Circuit’s ruling was based on deference to the Obama Administration’s position that the term “sex” as used in Title IX incorporates gender identity. The school board [petitioned](#) the Supreme Court to hear the case arguing that the Fourth Circuit erred because the Obama Administration’s interpretation actually altered the meaning of Title IX.

On February 22, the Trump Administration issued its own [Dear Colleague Letter](#) expressly withdrawing and rescinding the DOE’s prior interpretation, which served as the basis for the Fourth Circuit’s deference in *G.G.* That letter states that the DOE’s January 2015 and May 2016 letters “have given rise to significant litigation” and that the DOE believes that “in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.” The letter further criticizes the Obama Administration’s guidance, noting that they did 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.” Accordingly, the DOE has “decided to withdraw and rescind [the prior] guidance documents in order to further and more completely consider the legal issues involved.”

Despite this change in position, the February 22 Dear Colleague Letter reminds schools of their continuing obligations to protect students from discrimination, bullying, and harassment, including LGBT students. The letters states that:

“[A]ll schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all student and to encourage civility in our classrooms.”

As a practical matter, the withdrawal of the DOE’s policy statements could render the case-or-controversy in *G.G.* moot or otherwise prompt the Supreme Court to remand the decision to the lower courts for reconsideration. Assuming the case moves forward, the ruling will likely have a broader impact beyond education and could also have application to cases interpreting prohibitions on sex discrimination contained in other federal statutes, including Title VII of the Civil Rights Act of 1964. As it stands, oral argument for the case is scheduled for March 28, 2017. Any decision is expected to be sharply divided amongst the Justices and, with Neil Gorsuch’s nomination hearings only scheduled to start eight days before oral argument, it is unknown how his nomination may impact the ruling, if any.

If the case is not decided by the Supreme Court, schools operating in States without State gender identity protections will need to grapple with what the February 22 letter means. Absent legal mandates to the contrary, schools can continue to offer protections to their transgender students consistent with their beliefs as to what is in the best interest of students. Schools that seek to limit bathroom access to the sex-at-birth assigned to their students will need to grapple with how they can enact and implement such a rule while still complying with the present DOE guidance which provides that LGBT students cannot be subjected to discrimination. What is certain is that this issue is far from settled, and that absent a ruling in *G.G.*, litigation will continue in both federal and State courts as to the scope of permissible gender identity policy in schools.

If you would like further information, please contact your Seyfarth attorney, [Abigail Cahak](mailto:acahak@seyfarth.com) at acahak@seyfarth.com, [Sam Schwartz-Fenwick](mailto:sschwartz-fenwick@seyfarth.com) at sschwartz-fenwick@seyfarth.com or [Mary Kay Klimesh](mailto:mklimesh@seyfarth.com) at mklimesh@seyfarth.com.

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