Transgender Issues Highlight Tensions Between Students' Rights To Liberty And Privacy

Insights
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In the wake of controversy over school vouchers, fights over appropriate curriculum, and the endless battles to decide whether school funding is adequate, the nation's public and private schools certainly have their share of problems to overcome. It is no wonder that issues pertaining to transgender students haven't received much press before now. But, with more openness in today's society regarding gender identity, sexual orientation, same-sex marriage, and the like, public and private schools are going to see more of these issues in both the employee and student arenas.

Last summer, the Colorado Civil Rights Division (CCRD) found that a public school district near Colorado Springs discriminated against six-year old Coy Mathis, a transgender student, when it refused to allow the child, a biological male, to use the girls' restroom at the elementary school. Even more recently, the State of California brought those issues to national headlines when it became the first state to enact a law that state legislators say will guarantee equal treatment and basic rights to transgender students.

With a court in Maine considering transgender-student rights and federal agencies such as the EEOC beginning to turn their focus to transgender issues in employment, the clear message seems to be that the time to address these coming issues is now.

The California Approach

California already had a law prohibiting discrimination against students based on sex, including gender identity and sexual orientation; however, advocates claimed that transgender students fell through the cracks. For instance, if a transgender student wanted to use school facilities or participate in gender-specific extra-curricular activities (such as sports), they could only do so based upon their biological gender, not the gender with which they identified.

A law effective January 1, 2014, amended the California Education Code to permit transgendered students to use facilities and participate in activities consistent with identified rather than biological gender. While the law was not extensive, and does not provide explicit guidance as to its implementation, the practical implications could be far reaching. Of course, the law is not without controversy.

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controversy.

For instance, privacy groups argue that the law (and similar efforts to address transgender issues) infringes upon the privacy rights of students who may be uncomfortable with sharing bathrooms with, or competing against, students who are biologically the opposite sex. Recently, an effort to put the new law to a public referendum failed by only a few thousand signatures. For now, the law stays on the books, and other states may soon follow.

In the wake of these events in California, public and private schools around the country may be forced to confront these issues in the coming months and years. Taking a proactive approach to examine the issues *before* they become legislative mandates may serve the interests of students, faculty, employees, and administration by permitting schools and their governing organizations to directly confront the issues and address them according to their own preferences rather than having a publicly-elected body that may or may not represent the school's best interests make the decision for them.

A Colorado Case Study

Addressing transgender student issues is not an easy undertaking; it places school administrators in the unenviable position of having to weigh the competing privacy rights of their students and parents. On the one hand, all students, including transgender students, have basic liberty rights that cannot be ignored, such as the right to feel safe in their educational environment. Yet the lines between those rights often get blurred, particularly when those rights are diametrically opposed.

For instance, in Florence, Colorado last fall, less than four months after the CCRD's ruling in the Coy Mathis case, three female high-school students complained that a transgender student permitted to use the girl's bathroom at Florence High School had begun sexually harassing them. While the details of the allegations are not generally known, the alleged victims have hired attorneys and appear to be pressing claims centered on privacy concerns. Whether they are ultimately proven true or not, the takeaway for schools and school districts around the country is clear: the issue is divided and there are no easy solutions.

Practical First Steps

Regardless of how a school or school district chooses to approach transgender student issues (if at all), some common sense considerations are key:

· *Consult counsel with relevant experience.*

The legal considerations inherent in a policy of this type can be exceptionally complex,

particularly for public schools and universities. Knowledge of privacy issues and constitutional law is key and experienced counsel will be instrumental in drafting policies that can be well-defended, as well as advising administrators on potential risks.

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· *Discuss the issues with the school's board (or other relevant decisionmakers).*

Having a clear understanding of the administration's position on transgender student issues and achieving buy-in from those decisionmakers on the course of action is imperative to providing a unified institutional position, regardless of what that position may be.

· *Provide training for students, staff, faculty, and parents.*

If the institution's decision is to create a policy that would be a significant departure from its current stance on transgender-student issues, there must be training on the key elements of the policy and the expectations each of these groups will have under the policy.

· *Plan for fallout.*

There will be segments of the community that are unhappy about the policy, regardless of what it is. Negative public-relations campaigns, increases in student harassment and bullying, and vocal objection at school board meetings are just a few examples. Any plan to address transgender issues must include a plan for addressing these types of occurrences.

Conclusion

Transgender student issues may not be the largest problem area faced by most educational institutions; but recent developments in California, Colorado, Washington, and Maine, coupled with the changing views in America on sexual preference, same-sex marriage, and other such formerly-taboo subjects has signaled a coming change. The issue is forcing its way into mainstream media outlets and more governmental units are beginning to legislate changes that may or may not sit well with the educative goals of a particular educational institution.

As California and Colorado have demonstrated, it may be time for educational institutions to face these issues head-on rather than waiting for the states to issue legislative mandates. Regardless of how a particular institution chooses to address these issues, schools should be informed, armed, and ready to defend their positions. A clear, concise, and well-developed policy may be essential to weathering the coming storm.

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