



Trump Administration Rolls Back Transgender Student Protections

Insights

2.23.17

Late yesterday, the Trump administration revoked Obama-era federal guidelines that had instructed public schools to permit transgender students to use bathrooms that match their gender identity. This action comes less than two weeks after the Department of Justice withdrew its objection to a federal court injunction barring the implementation of that previous policy. Yesterday's Dear Colleague letter not only reverses course from the Obama administration's position, but establishes that transgender bathroom policies are determinations to be made by states and local school districts.

How Did We Get Here?

In May 2016, the Department of Education (DOE) and the Department of Justice (DOJ) jointly issued a Dear Colleague letter directing schools receiving federal education funding to allow transgender students to use bathrooms and changing facilities corresponding with their gender identity. The federal agencies concluded Title IX's sex discrimination ban included discrimination on the basis of gender identity, justifying the position.

However, before the 2016-2017 school year had begun for most students, a federal court in Texas blocked the Obama administration from enforcing its directive on a national basis, granting a preliminary injunction request brought by a number of states. After the injunction took effect, the Obama DOJ filed an appeal with the 5th Circuit Court of Appeals. It argued the injunction violated Title IX and requested the court limit the injunction to only apply to states that were parties to the suit.

But everything changed when President Trump took office in January. On February 10, a day after Jeff Sessions took office as Attorney General, the DOJ withdrew its appeal. This led many to believe that the Trump administration had no interest in defending or enforcing the 2016 Dear Colleague letter. That suspicion was confirmed yesterday with the issuance of the Trump administration's own letter.

The Trump Administration's Dear Colleague Letter

On the evening of February 22, the DOJ and DOE jointly released their own Dear Colleague letter expressly eliminating the federal requirement that transgender students have access to bathrooms and changing facilities that match their gender identities. Unlike Obama's guidance, the 2017 version lacks a new view or policy; instead, it focuses on revoking the May 2016 letter and establishing the

position that the individual states and local school districts have the right to create their own policies.

The Letter begins by rescinding the Obama administration's 2016 Dear Colleague letter and the January 2015 letter to Emily Prince written by the DOE's former-Acting Deputy Assistant Secretary for Civil Rights. The 2017 letter indicates this reversal is necessary "in order to further and more completely consider the legal issues involved."

The letter criticizes the Obama administration's now-revoked guidance documents by stating they failed to "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal process." It goes on to note that courts have disagreed when interpreting the guidance.

Yesterday's letter indicates that the Trump administration will treat transgender bathroom policies as an issue for the individual states to decide, saying, "there must be due regard for the primary role of the states and local school districts in establishing educational policy." Notably, the letter specifically categorizes the transgender bathroom issue as purely an "educational" matter better left to local jurisdictions, rather than a civil rights matter to be handled by the federal government. Therefore, states and local school districts may adopt their own transgender bathroom policies.

At the same time, the letter attempts to reassure those concerned about this issue by saying the withdrawal of the 2016 guidance documents has no effect on the right of all students to be protected from discrimination, bullying, and harassment. It stresses that all students must be able to learn and thrive in a safe environment.

It concludes by explicitly stating it adds no requirements to existing, applicable law. Thus, the established federal law – in which Title IX sex discrimination does not include barring discrimination on the basis of gender identity – still stands.

Is This The Last Word In The Bathroom Battle?

Yesterday's policy switch has no immediate impact on public schools, as the federal court's injunction to Obama administration's policy is still in effect. However, because the bathroom battle has been such a hotly contested issue, this is unlikely the last we will hear from the administration on this matter. Moreover, the Supreme Court and individual states may, and most likely will, weigh in to further shape the issue.

The February 22 letter could, however, affect current litigation. On March 28, the U.S. Supreme Court is scheduled to hear oral arguments in a case involving a transgender student who was denied choice of bathroom in Virginia (*G.G. v. Gloucester County School Board*). Yesterday, the DOJ notified the Supreme Court of its withdrawal of the 2016 guidance documents and its subsequent change in policy. Now that the Obama administration's guidance has been reversed, and a new DOJ/DOE Dear Colleague letter in effect, the Supreme Court may decide to drop the case and direct the lower courts to sort out the issue.

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As for whether Title IX sex discrimination includes discrimination on the basis of gender identity, that issue depends on how the courts, especially the Supreme Court, interpret the matter. The February 22 letter established the president's view that the matter is best left to state and local governments, but the courts may have the last word on that question.

While 13 states provide protection to transgender students who wish to use the bathroom and changing rooms of the gender with which they identify, 12 other states are currently considering legislation that would restrict access to bathrooms and changing facilities to sex assigned at the student's birth (Alabama, Illinois, Kansas, Kentucky, Minnesota, Missouri, New York, South Carolina, Tennessee, Texas, Washington and Wyoming). No doubt this is a fluid situation that will take several twists and turns in the not-too-distant future, requiring public school administrators to remain up-to-speed with the latest developments.