Transgender Students, Title IX, and District Policies

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Law

An understanding of the present state of affairs involving transgender student rights and a school districts responsibilities as it relates to those rights requires an understanding of:

- Title IX
- State Law (or lack thereof)
- Judicial Precedent
- “Dear Colleague” Letters
- The U.S. Dep’t. of Ed. Office of Civil Rights (OCR)
Title IX:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”

Does not specifically mention discrimination based upon sexual orientation or gender identity.
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State Law:
The state of Michigan has no laws on the books which specifically address discrimination against transgender or gender non-conforming citizens.

There is talk of introducing legislation which would require transgender individuals to use the restroom of their birth gender, but this is not the law at present.
Law

Judicial Precedent:
The Courts have come to inapposite conclusions with respect to transgender civil rights matters:

DOE v. REGIONAL SCHOOL UNIT 26
(Maine Supreme Court, 2014)
• Upheld transgender girl’s right to use the bathroom of the gender she identifies as.
Law

Judicial Precedent:
The Courts have come to inapposite conclusions with respect to transgender civil rights matters:

JOHNSTON v. UNIVERSITY OF PITTSBURGH
(Federal District Court, PA., 2015)
• Dismissed case of transgender male who sued to allow use of male locker rooms, indicating that transgender status is not a protected class and Title IX language does not prohibit discrimination based upon gender identity.
• The university ultimately settled with the student and adopted more progressive transgender policies.
Judicial Precedent:
The Courts have come to inapposite conclusions with respect to transgender civil rights matters:

G.G. v. GLOUCESTER COUNTY SCHOOL BOARD
(4th Circuit, 2015)

• Transgender male’s claim of discrimination (restroom issue) is dismissed by District Court. Title IX does not protect against transgender discrimination.

• 4th Circuit Court of Appeals reverses and states that Title IX does provide such protections.
Law

Judicial Precedent:

In Michigan there is a pending case in federal court regarding transgender rights, but it has not been resolved.

At present, there is no legal precedent that dictates how these matters must be handled.

However, the case law that does exist provides some direction on how federal courts are responding... and the “trend” currently favors OCR interpretation of Title IX.
“Dear Colleague” Letters:

On May 13, 2016 the DOJ and US Dept. of Ed, via their respective Offices of Civil Rights, released a “Dear Colleague” Letter.
May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.¹ This prohibition encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status. This letter summarizes a school’s Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school’s compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is significant guidance.² This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ccr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED’s Office of Elementary and Secondary Education, Examples of Policies and Emerging Practices for Supporting Transgender Students. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX’s requirements.³

Terminology

- Gender identity refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth.

- Sex assigned at birth refers to the sex designation recorded on an infant’s birth certificate should such a record be provided at birth.

- Transgender describes those individuals whose gender identity is different from the sex they were assigned at birth. A transgender male is someone who identifies as male but was assigned
Law

“Dear Colleague” Letters:

On May 13, 2016 the DOJ and US Dept. of Ed, via their respective Offices of Civil Rights, released a “Dear Colleague” Letter.

These types of letters are meant to provide clarity and guidance for those interested in understanding precisely how OCR interprets Title IX and what OCR expects of those entities subject to Title IX with respect to transgender issues. Similar letters have been issued previously. Courts do occasionally cite such letters as persuasive or otherwise give them deference, but they are not “binding authority.”
“Dear Colleague” Letters:

These letters do not “create” new laws, nor do they expand the scope of transgender legal rights, or expand the burden placed upon school districts. Rather, they reaffirm the already existing interpretation of Title IX by OCR.

However, they do emphasize and clarify what OCR expects as it relates to Title IX compliance and the treatment of transgender students. These letters could be relied upon by a presiding judge when it comes to evaluating any defense that Title IX requirements are vague, and would be proffered by a plaintiff as “persuasive authority” as to how Title IX should be interpreted and that the district was placed on notice with respect to its Title IX duties.
Enforcement

OCR:

“The Departments interpret Title IX to require that when a student or the student’s parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representation or records, the school will begin treating the student consistent with the student’s gender identity.”
Enforcement

OCR:
“A school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”
Given the amount of attention being paid to this issue, transgender students are more aware than ever of the options available to them when they feel as though their civil rights have been violated.
Once OCR initiates an investigation into alleged Title IX allegations, they are deliberate and thorough.

The investigation process can last anywhere from 18 to 24 months.

OCR investigations are generally very public, and findings are made available for everyone to read.
Enforcement

Districts that have been investigated by OCR regarding a transgender student do not stand out for being particularly ignorant of basic civil rights or necessarily callous towards the welfare of transgender students.

Often times, these districts accommodated the student with respect to most requests, but simply stopped short of equal access as it relates to restrooms, locker rooms, or in other, similar, situations.
Enforcement

Whether districts take an initially cooperative stance or a somewhat more defiant stance with respect to OCR investigations, the outcome is largely the same.

Generally, a resolution agreement is eventually reached which requires that the district do most or all of the following:
Enforcement

• Henceforth the student at issue must be treated in accordance with their gender identity in all respects. This includes name, pronouns, application of dress code, rest room access, extra-curricular activities, overnight accommodations at district sponsored camps and so on.

• Ongoing review and revision of all policies and procedures in order to ensure that all students have equal opportunity, regardless of gender identity or gender non-conforming status.

• Student/parents must be informed of their option to request a Student Success Plan (SSP) which requires the district to collaborate in bringing together a group of professionals to consult and advise with respect to the students ongoing welfare. District will have to develop an SSP implementation guide which specifically addresses gender-based discrimination as part of the overall SSP framework.
Enforcement

- District must engage a third party consultant specializing in adolescent gender identity to support and assist the district with implementing new policies.
- District must revise all complaint procedures to ensure Title IX compliance. This includes reviewing all investigative steps and standards, as well as interim measures, legal standards and potential remedies.
- District must institute mandatory professional development as to gender nonconformance issues and ensure that all staff are trained with regards to all new policies, procedures, intervention techniques, and so on.
Enforcement

• District must contact third party sites where district sponsored events occur and request that their policies accommodate students accordingly. If facility refuses, District must find alternative sites to hold activities that are willing to comply with Title IX.

• District must implement age appropriate instruction into curriculum regarding gender identity, discrimination, prohibited conduct, etc.

• District must report all future gender-based discrimination complaints lodged against it to OCR as well as provide an explanation and documentation as to how each complaint was handled.

• District must conduct periodic school climate assessments to evaluate the effectiveness of its bullying/harassment prevention efforts and gauge inclusiveness.
Enforcement

• OCR reserves the right to return to the district at any time, interview staff and students regarding progress towards goals, request additional documentation, and so forth.

• OCR will continue to monitor the district until it is satisfied that all conditions of the consent agreement have been met.

• District must comply with numerous reporting requirements, many of which are on a very specific timetable. These include reports and updates regarding the third party consultant, policy change implementation, proof that changes have been integrated into policy and procedure guidelines, outcome reports concerning assessments, proof that notices have been posted regarding student rights, and so forth.
Enforcement

OCR INVESTIGATION:
Arcadia Unified School District (California)
INITIATED: October, 2011
RESOLUTION: July, 2013

Downey Unified School District (California)
INITIATED: November, 2011
RESOLUTION: October, 2014

Township High School District 211 “Palatine” (Illinois)
INITIATED: December, 2013
RESOLUTION: November, 2015
What do these investigations tell us?

Even when a district is providing specific, progressive accommodations, OCR will still become involved in situations where the student isn’t being treated in accordance with their declared gender identity in all respects.

RESTROOMS
LOCKER ROOMS
CAMP SITUATIONS
What Your Students Know About their Rights

The transgender rights movement is very high profile at the moment and the “push back” against this movement has, naturally, led to a proliferation of resources for transgender students to access. These resources encourage them to become activists.
The chances that an aggrieved transgender student will not seek out some type of recourse are becoming increasingly unlikely.
Question

So are we breaking the law if we allow a transgender student to use the bathroom of the gender they identify with?

Answer

No.
Question

So are we breaking the law if we allow a transgender student to use the bathroom of the gender they identify with?

No.

As of now, there are no laws in Michigan forbidding schools from adopting such a policy.
Question

So are we breaking the law if we DON’T allow a transgender student to use the bathroom of the gender they identify with?

Answer

Yes. According to OCR interpretation of Title IX.
Question
So what is the potential fallout for failing to comply with OCR’s interpretation of Title IX?

Answer
Loss of federal funding.
Question

So what is the potential fallout for failing to comply with OCR’s interpretation?

Federal funding can account for as much as 15% of some district’s total funding. Other districts may receive virtually no federal funds.
Question
So what is the potential fallout for failing to comply with OCR’s interpretation of Title IX?

Answer
Loss of federal funding. Possible civil lawsuits.
Question
So we don’t have to change our policies to specifically mention transgender students, but should we?

Answer
That is a decision that each district must make after taking into account all of the various factors in play.
Considerations

Every district has its own unique political, social, and religious dynamic...

...and OCR is not initiating investigations against districts simply because they do not have anti-bullying policies which specifically mention transgender students.

If your district is not, at present, dealing with a transgender student accommodation issue, any decision to “stand pat” with your current anti-bullying policies is understandable.
Considerations

However:

If/when that first transgender student makes their presence known, you should already have an understanding of how your district will handle the situation.

But isn’t that exactly what POLICIES are for? To provide a uniform framework on how to deal with particular situations?
Considerations

YES.

Hence the LGBTQ Guidance Document currently being reviewed by the State Board of Education.

Whether your district formally adopts those model policies or not, they do provide a guide as to how to handle transgender situations...

...THAT IS, if your primary concern is avoiding an OCR investigation.
Considerations

Point of Emphasis:

Your district need not have progressive transgender policies in place now, but if a transgender student situation is mishandled, resulting in an OCR investigation, your district WILL have progressive transgender policies in place once an OCR Resolution is implemented.
Considerations

Point of Emphasis:

Avoiding “controversy” is only possible up until the time that your first transgender student is identified and begins requesting accommodations.

Granting these accommodations at the outset may spark community discord.

However, refusing the accommodations will likely bring about OCR involvement, resulting in the same accommodations being granted, with additional arduous requirements, and the same community discord.
Considerations

Bottom Line:

HAVE A PLAN.

This plan need not be adopted as board policy and accompanied by public hearings. The plan can simply be based upon your current anti-bullying and equal rights policies, with an underlying understanding that, at the administrative level, OCR has certain, clear expectations.
Considerations

Bottom Line:

When a transgender student presents with accommodation requests, take those requests seriously and work with them closely.

Seeking some compromise is fine, but understand that if the student is demanding something that you know OCR would give them, you’re risking an OCR investigation if you do not comply.

Best practice would be to offer to collaborate with the student and parents on a support plan that will follow the student until they leave the district.
Records Change

Can a student’s name/gender be changed in their school record based simply upon a request?

This is somewhat unclear under Michigan Law. Changes to student records are allowed per FERPA if the record is “inaccurate, misleading, or in violation of the student’s privacy.”
Records Change

Does a gender transition qualify as an “inaccuracy”? Most districts faced with such an issue do accept this rationale and make the necessary changes. There is a legal basis for refusing such, although it is doubtful that OCR would accept this reasoning.

Regardless, at the very least, ensure that the student is addressed by their preferred names and pronouns at school.
Confidentially

Do districts have an obligation to protect the secrecy of a transgender student’s status?

FERPA protects student information and remains the standard. Most legal professionals would agree that a student’s transgender status would qualify as confidential medical information.

Districts are not obligated to “scrub” an entire academic record to erase all traces of a prior name or gender identifier, but should take reasonable steps to ensure that a student’s transgender status is not unnecessarily revealed (even in situations where the information is not necessarily “a secret”).
Confidentially

Do districts have an obligation to protect the secrecy of a transgender student’s status?

Districts certainly should make sure that they are doing all they reasonably can to protect all aspects of a student’s privacy.

Again, communication is key. The District should be upfront about the steps that are being taken to ensure privacy, as well as what the student’s expectations should be.
Confidentially

What if a student wants the district to make sure their transgender status is known? Are we obligated to “broadcast” it?

Again, discuss the situation with the student and attempt to understand to what extent they would like this information to be known. In the *Downey* matter, the fact that the district refused to honor the student’s request to have an assembly on the issue was mentioned by OCR. To what extent it influenced the outcome is unknown.

Administrators are allowed to have a dialogue with the student and parents, express their own concerns, and attempt to reach a resolution that works for everyone.
Sports

What if a transgender student wants to compete on a single-sex team that corresponds with their gender identity?

Decisions about participation in sports follow the same analysis as all other issues. OCR has yet to investigate such a situation, but based upon the language of their various Resolutions, they expect schools to allow such participation.

The Michigan High School Athletic Association has specific guidance, which essentially states that biological males cannot participate on female athletic teams (in MHSAA sanctioned events) without demonstrating that they’ve taken steps to transition medically (i.e. reassignment surgery, hormone suppression therapy).
Dress Code

Do we have to change our current dress code policies?

Consider it.

Dress code policies should be reviewed and revised to be gender neutral. Policies which read “girls wearing dresses must ensure that...” can be easily changed to “Students wearing dresses must ensure that...”.

Districts still have the ability to regulate what constitutes appropriate attire, but should avoid language which demands students to comport to stereotypical gender appearances. Enforcing such policies would likely be deemed a violation not only of Title IX, but constitutional violations of free speech and equal protection as well as state and federal civil rights laws.
Staff

What do we do with staff who refuse to cooperate as it relates to transgender accommodations?

By accepting employment with a school district, administrators and school staff agree to abide by, uphold, and enforce all of their school board’s policies and procedures. This includes federal and state laws, as well as several non-discrimination laws in general, and Title IX in particular, regardless of “personally held beliefs.”

An Employee’s failure to comply could create a discriminatory environment and possibly lead to liability. Likewise, preventing such is a basic responsibility of all employees.
What about free speech and genuinely held religious convictions?

In a non-school context the Supreme Court has recognized a free exercise exemption to a government mandate which directed behavior that was otherwise contrary to the employee’s sincerely held religious belief. Whether or not such a claim would be successful in federal court, in this context, is not clear. However, in the past the Supreme Court has given employers significant control over employee speech when that speech runs counter to their official job duties.
Overall

Ultimately, a school district’s goal should be to draft and implement policies that protect all students and comply with the law while considering, to the extent possible, the sentiments of the community.
Questions?

MASB
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