

Briefing on Issues Relative to Transgender Students in Public Schools

Federal Guidance

As many school district administrators and board members review the guidance from the U.S. Departments of Education and Justice for transgender students, so are staff at MSBA.

The guidance interprets sex nondiscrimination to mean that transgender students are entitled to be treated by school districts in a way consistent with their gender identity. If schools provide sex-segregated activities and facilities, transgender students would be allowed to use the facilities that align with their gender identity. The guidance also pushes school districts to comply by reminding them of their obligations of sex nondiscrimination as a condition of receiving federal funds. Essentially, the agencies are indicating the possibility of withholding all federal aid from school districts that don't comply. The guidance does not carry the force of law, but it does clarify how these agencies will be evaluating school district compliance with federal law and regulations.

Federal Case Law and Rulings

Case law has yet to establish protocol for handling the details of transgender discrimination. On March 31, 2015, a federal judge in the United States District Court for Western Pennsylvania (in the Third Circuit), dismissed the [civil action](#) of a transgender man for discrimination, including a Title IX claim, over the access to bathrooms and locker rooms. Judge Gibson states in the finding that neither the U.S. Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause. The University of Pittsburgh prevailed in their actions and the University explained that "its policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by the courts." Judge Gibson acknowledged that society's views of these issues are evolving, but legal principles are well settled at this point. An appeal was filed in the Third Circuit Court of Appeals, but it was dismissed on March 30, 2016.

Conversely, the United States Department of Education Office for Civil Rights (OCR) has reached a [resolution agreement](#) with the Arcadia Unified School District in California in which a student's gender identity, gender expression, gender transition, transgender status, or gender non-conformity are to be

included in the definition of gender discrimination as it relates to Title IX of the Education Amendments of 1972 (Title IX). The OCR is the federal agency with the responsibility for enforcing Title IX.

Additionally, a three-judge panel of the Fourth Circuit Court of Appeals [ruled](#) that a lower court should have given deference to the Department of Education's interpretation of its regulations, which outlined that Title IX should be applied to transgender students. This ruling lends support to guidance issued by the agencies. A petition for rehearing before all 15 judges of the Fourth Circuit Court of Appeals has been filed. The decision by the three-judge panel has been stayed pending this hearing.

Of these three examples, case law carries more legal weight as opposed to an OCR investigation and action. While the opinions in Third Circuit and the Fourth Circuit are instructive, they are not binding in Minnesota because Minnesota is under the jurisdiction of the Eighth Circuit Court of Appeals.

Current Protections

Minnesota school districts have existing policies which address nondiscrimination on the basis of sex, including gender identity. The Equal Educational Opportunity Policy - 102, Harassment and Violence Policy - 413, and the Bullying Prohibition Policy - 514 protect all students including transgender students. In addition, the Minnesota Human Rights Act (M.S. 363A), includes protections on the basis of gender. However, the Human Rights Act has exemptions for separate restrooms and locker rooms (M.S. 363A.24).

Budget Considerations

A number of additional issues must also be considered, such as costs related to the physical renovation or designs of bathroom and locker room facilities. These challenges vary greatly from school district to school district and from building to building, making a one-size-fits-all policy or response difficult to administer.

Moving Forward

Given the points above, the federal agencies' guidance doesn't change the recommendations we offer to school districts. MSBA's main suggestion is this: If your school district has a student who has self-identified as transgender or the student's parent(s) have identified their child as transgender, make a concerted effort to sit down and talk with that student and his/her parent(s) to see what they are asking of the school district. Many parents and their children may not want full access to the gender identified facility showers or bathrooms. Instead, they may prefer a private unisex bathroom and a separate shower. MSBA has long stood by local control, and we still want

school districts to find a solution that works best for them and their transgender students and provides a safe and welcoming environment for all.

School districts must also consider the possibility that some students or their parents may object to the use of a sex-specific facility by a transgender student. In this event, the school district may need to explore solutions for the objecting students which provide privacy for all students and address the interests of all students. If the requests of any student or their parents are not granted, the school district will need to be prepared to demonstrate all the options considered and to state the reasonable, non-discriminatory rationale for denying any requests.

Many resources regarding transgender students are available to school districts for further research and discussion. MSBA encourages school districts to search out additional information, starting with the National School Boards Association's (NSBA's) comprehensive guide entitled "[Transgender Students in Schools](#)." This guide addresses many other areas that this MSBA briefing does not, such as definitions, official records, curriculum, school staff, and community engagement, to mention a few.

Finally

Individual school boards have the authority to adopt a policy they believe is necessary for the administration of their school district, but, at this juncture, MSBA believes its current policies offer protection for transgender students. A separate model policy dealing with bathroom and locker room protections for transgender students, without clear legal decisions from the courts or Congress, is premature. MSBA will continue to work with its legal counsel and monitor court cases as they proceed through the judicial system to assess if additional language may be needed in the nondiscrimination policies, or if a separate transgender policy is needed.