

Ohio Judge Upholds Federal Guidelines for Transgender Students

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The landscape of transgender law impacting students is quickly evolving, in large part due to the increasing national debate over restroom access for transgender students.

By way of background, under Title IX, schools receiving federal money may not discriminate based on a student's sex. Both the U.S. Department of Justice ("DOJ") and the U.S. Department of Education's Office of Civil Rights, the agency charged with enforcement of Title IX ("OCR"), consider a student's gender identity, defined as one's concept of self as male or female or both or neither, as the student's "sex" for purposes of enforcing Title IX. In OCR's opinion, students must be permitted to access facilities, such as bathrooms and locker rooms, consistent with their gender identity and not be required to use facilities inconsistent with their gender identity.

Interestingly, many states have filed federal lawsuits against the Obama administration, arguing that the federal government (including OCR and DOJ) does not have the power to tell states that transgender individuals must be allowed to use bathrooms that conform with their gender identity.

There is also a disparity of opinion among federal courts on the viability of a Title IX claim based on a student's transgender identity. This issue was most recently addressed in a case involving a local school district in Morrow County, Ohio. Jane Doe, who was born male but identifies as a female attends elementary school in the Highland Local School District (the "School District"). The School District has consistently denied Jane Doe's request to use the girls' bathroom arguing that its policies require it to treat students based on the gender recorded at birth.

The School District filed a lawsuit against the U.S. Department of Education challenging President Obama's directive, among others, concerning transgender bathrooms. On September 26, 2016, a federal judge in Ohio rejected the School District's challenge and ordered the School District to allow the student to utilize the girls' bathroom at her elementary school.

Judge Algenon Marbley stated that the school district failed to offer a persuasive argument that allowing the 11-year-old student access to the girls' restrooms would jeopardize other students' privacy or safety. While the School District argued that it had provided facilities for the student in the school's office, the judge agreed with the student's parents that using a separate bathroom took an unfair "toll on her mental health." The judge refused to grant the School District's preliminary injunction against the Department of Education. Judge Marbley further ordered that the Ohio School District use the student's preferred female name and to use female pronouns when referring to the transgender student. In his decision, Judge Marbley wrote that "school districts

that have encountered these very issues have been able to integrate transgender students fully into the academic and social community without disruption, and certainly without the doomsday scenarios Highland predicts, such as sexual predators entering an elementary-school restroom.” The judge also noted the recent decision by a federal court in Texas wherein it issued a sweeping injunction against enforcement of the federal government’s regulations (regarding transgender access). However, Judge Marbley emphasized that Ohio was not one of the states involved in that lawsuit and that the Texas decision did not apply to the case at hand.

If the Ohio School District fails to comply with the federal government’s directive regarding transgender students use of restroom facilities, it stands to lose significant federal funding. The state of the law regarding “sex” discrimination under Title IX as it applies to transgender students remains the center of an immense amount of legal debate. Schools and administrators must inform themselves of changes in the law and must ensure that their policies remain current to avoid litigation and potential loss of federal funding. Lastly, it is imperative that schools create and maintain policies that apply to transgender students, as well as transparent processes for addressing the requests and needs of transgender students.

If you or your institution has any questions or concerns regarding education or employment related issues, please contact Hayley B. Dryer at hdryer@cullenanddykman.com or at 516-357-3745.

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