
OCR Finds That Title IX Requires Equal Locker Room Access for Transgender Students

NOVEMBER 6, 2015

The US Department of Education, Office for Civil Rights (OCR), recently confirmed that transgender students are protected from sex-based discrimination under Title IX and found that a public school district violated Title IX by denying a transgender student equal locker room access. OCR's action highlights the need for educational institutions at all levels to proactively develop policies and training programs designed to provide equal opportunities and access for transgender students.

The OCR Letter and Related Authority

On November 2, 2015, OCR informed the superintendent of an Illinois school district (the District) that it was violating Title IX by denying a transgender student (Student A) who identifies as female full access to a high school girls' locker room. OCR found that it was not sufficient to offer Student A alternative changing locations or to permit her to use the girls' locker room on the condition that she utilize recently installed privacy curtains. In OCR's view, only unconditional and equal access would satisfy Title IX.

OCR concluded that the locker room policy violated Title IX even though the District had otherwise honored Student A's request to be treated as female. That was so, OCR concluded, because the separate changing facilities offered by the District were not equivalent and left Student A feeling "set apart." OCR explained that requiring Student A, a student athlete, to avail herself of separate facilities forced her to miss opportunities for bonding with her teammates, contributing to disparaging treatment on social media by teammates and exclusion from social activities. OCR further observed that physical education instructors and coaching staff had reprimanded Student A on the few occasions that she did enter the girls' locker rooms.

OCR rejected the District's position that its policy "appropriately serves the dignity and privacy" of all students by balancing Student A's needs with the privacy concerns of other female students. In this respect, the letter mirrors positions taken by the US Department of Justice in a [recently filed amicus brief](#) in a Fourth Circuit case regarding bathroom access for a transgender student. In that brief, the Justice Department argued that "generalized assertions of safety and privacy cannot override Title IX's guarantee of an equal educational opportunity." Both in the brief and the OCR letter, the government stated that privacy concerns were appropriately addressed by measures that enhanced

the ability of any student to protect the student's privacy—rather than by imposing a burden on the transgender student alone.

Notably, OCR's position on the issues of access and privacy is consistent with that set forth by the NCAA in its [2011 policy resource on the inclusion of transgender students](#) in intercollegiate athletics. The NCAA recommended:

Transgender student-athletes should be able to use the locker room, shower, and toilet facilities in accordance with the student's gender identity. Every locker room should have some private, enclosed changing areas, showers, and toilets for use by any athlete who desires them. When requested by a transgender student-athlete, schools should provide private, separate changing, showering, and toilet facilities for the student's use, but transgender students should not be required to use separate facilities.

Recent federal decisions support OCR's view that federal statutory prohibitions on sex discrimination encompass discrimination against transgender persons. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (an employment discrimination case holding that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"). And on the specific issue of facility access, the Equal Employment Opportunity Commission recently held that the Army violated Title VII by denying a transgender woman access to the women's restroom. *See Lusardi v. Department of the Army*, No. 0120133395, 2015 WL 1607756, at *7 (EEOC Apr. 1, 2015). There are, however, federal decisions holding that prohibitions on sex discrimination do not bar discrimination based on transgender status. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-1222 (10th Cir. 2007).

How Should Educational Institutions Respond?

As the number of transgender students seeking equal access rises, educational institutions should develop and implement policies to ensure equal educational opportunities and like treatment, including specifically appropriate training of staff and students. In light of recent developments, including resolution agreements reached by OCR in [2013](#) and [2014](#) concerning restroom access for transgender students, educational institutions should consider the following steps:

- draft policies specifically stating that discrimination on the basis of gender identity is a form of sex discrimination and should be treated as such;
- develop implementation guidelines for faculty and staff—including athletics and gym or fitness center personnel—addressing nondiscrimination policies and provide training regarding the obligation to prevent and address discrimination on the basis of gender identity;
- draft policies permitting access to sex-specific locker room and restroom facilities consistent with a student's gender identity and permitting access to additional private facilities if requested;
- review key campus locker room and restroom facilities to assess whether modifications should be made to enhance the ability of any student to protect his or her privacy;

- work to develop intercollegiate agreements that provide equal access to sex-specific locker room and other athletic facilities consistent with a student's gender identity at all intercollegiate athletic events;
- incorporate gender identity-based discrimination into bullying prevention and sexual harassment training programs for students; and
- establish "support teams" for transgender students to help ensure equal access and opportunity and notify transgender students and their families of the availability of such support teams.

WilmerHale has substantial experience counseling educational institutions on policies and procedures relating to sex discrimination, as well as anticipating and addressing federal oversight.

Our diverse team includes:

- a former General Counsel of two leading research universities, public and private;
- a former Chief Litigator for the NAACP Legal Defense and Educational Fund; and
- two former Deputy Attorneys General of the United States.

We would be pleased to speak with you about evaluating and enhancing your school's policies and training programs to provide equal access for transgender students.

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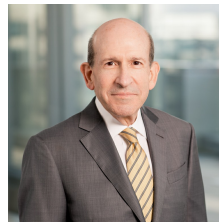
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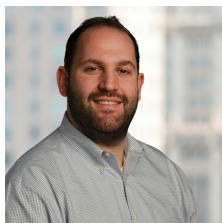
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