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LEGAL NOTE

UPDATE ON TRANSGENDER STUDENTS' RIGHTS

I. INTRODUCTION

The issue of the rights of transgender individuals, especially with respect to bathrooms and locker rooms, recently has garnered significant attention in the national discourse. Against the backdrop of those discussions, on May 13, 2016, the United States Department of Justice (“DOJ”) and United States Department of Education (“DOE”) published a “Dear Colleague” letter (“Guidance Letter”) providing “significant guidance”¹ on how those Departments will implement Title IX with respect to transgender students.² In that letter the DOJ and DOE are

¹ The Guidance Letter does not add or change the law, but rather provides additional information to inform schools how the DOJ and DOE will evaluate whether they are complying with Title IX.

² The Guidance Letter is consistent with the DOJ’s and DOE’s application of Title IX to transgender students in a number of recent documents, as well as a recent court case decided in the Fourth Circuit Court of Appeals. For example, a December 1, 2014 DOE “Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities” states in response to how to apply DOE requirements for single-sex classes to transgender students:

All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.

Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.

Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1, 2014), available at: <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

Likewise, DOE’s Office for Civil Rights (“OCR”) concluded in a November 2, 2015 letter that an Illinois school district discriminated against a transgender female student on the basis of sex, in violation of Title IX, by declining to permit her to access the girls’ locker room. A copy of that November 2, 2015 letter from OCR is available at: <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>.

explicit that they will “treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.” Dear Colleague Letter: Transgender Students (May 13, 2016) at 2, available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. The Guidance Letter explains: “This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.” *Id.*

The Guidance Letter proceeds to address how Title IX will be applied to transgender students in a variety of aspects, including bathrooms, athletics, and educational records. Generally speaking, Title IX provides protections to transgender students and imposes obligations on schools similar, if not identical, to the Massachusetts transgender rights law, which has been in effect since July 2012.³ This is especially evident when the Guidance Letter is compared to the Massachusetts Department of Elementary and Secondary Education’s (“DESE”) “Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment/Nondiscrimination on the Basis of Gender Identity,”⁴ (“DESE Guidance”) which outlines how the Massachusetts Law applies to schools. Because of the similarities between the application of Title IX and the Massachusetts law to transgender students, there should be little practical effect on schools that already have been complying with the Massachusetts Law, though the Guidance Letter does provide additional support in the face of any community backlash. For schools that are not in compliance with the Massachusetts Law, the Guidance Letter should serve as additional motivation to become compliant with non-discrimination laws concerning transgender students.

II. COMPARISON OF DESE GUIDANCE AND FEDERAL TITLE IX GUIDANCE LETTER

Below is a comparison of DOJ/DOE’s and DESE’s positions with respect to the issues discussed in their guidances. As noted above, their respective positions are consistent with each other and, in some cases, virtually identical.

More recently, the DOJ filed an amicus brief in support of a transgender student’s Title IX claim in defense of the government’s interpretation that Title IX requires schools to provide students access to the restrooms that correspond with their gender identities. *G.G. v. Gloucester County Sch. Bd.*, No. 15-2056 (4th Cir. Apr. 19, 2016) at 12. In that case, the Fourth Circuit upheld the government’s interpretation of Title IX, as set forth in a January 7, 2015 OCR opinion letter, stating as follows: “When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity.” *Id.* at 15 (quoting January 7, 2015 letter).

³ “An Act Relative to Gender Identity,” Chapter 199 of the Acts of 2011 (“Massachusetts Law”).

⁴ The DESE Guidance is available at: <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>.

Identification of Transgender Students

Both DESE and DOJ/DOE generally require schools to accept a student's stated gender identity. No medical diagnosis, surgery, or specific course of treatment is required under either state or federal law.

The DOJ/DOE Guidance Letter simply states that once a student or, where appropriate, his or her parent, notifies the school administration that the student will assert a gender identity different from that previously noted on records, the school should begin treating the student consistent with that gender identity. Because obtaining identification documents with the student's gender identity may be difficult, requiring such proof may have the practical effect of limiting or denying transgender students equal access to an educational program or activity, in violation of Title IX.

DESE also generally requires schools to accept a student's stated gender identity, where there is "consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity." DESE Guidance at 4, quoting G.L. c. 4, § 7, which outlines ways in which a person may prove gender identity. Of note, gender identity need not be proven by uniform assertion (e.g., a student may not be "out" as transgender at home) as long as there is other evidence that the gender identity is sincerely held as part of the person's core identity. Once a student meets this standard, schools should not question the student's gender identity absent a credible basis for believing the gender identity is being asserted for an improper purpose. Like the federal standard, medical proof is not required, though it may be used to show gender identity. Likewise, students need not present any formal documentation reflecting a name change.

Practice Tip: Both guidances require a rather low threshold for a student to show gender identity. The DOJ/DOE Guidance Letter is more explicit, however, that for the most part, a student's asserted gender identity should be taken at face value. We have routinely advised that schools generally should not question a student's stated gender identity absent a credible basis to do so. The Guidance Letter ups the ante by suggesting that requiring too much proof of gender identity may rise to level of a Title IX violation. Thus, we again urge extreme caution when questioning the sincerity of a student's stated gender identity in most cases.

Bathrooms and Locker Rooms

Both the DOJ/DOE Guidance Letter and DESE Guidance are explicit that schools must permit transgender students to access the restrooms, locker rooms, and other such facilities consistent with their gender identities. Schools may not require transgender students to use single-stall facilities but they may make them available to all students to use. Both guidances also state that others' discomfort does not justify excluding transgender students from the facilities corresponding with their gender identities.

Practice Tip: Bathrooms and locker rooms seem to be the most controversial issue in communities but there is little room for discussion here. As noted above and as we have advised numerous times in the past, schools must allow transgender students to use the facilities that correspond with their gender identities, even if it makes other uncomfortable. Where feasible, we recommend providing single-stall or other private areas in restrooms and locker rooms that may be accessed by all students, including those uncomfortable with being in the same facility as a transgender student. Again, transgender students may not be forced to use such facilities, though nothing precludes transgender (or any other) students from accessing them.

Names and Pronouns and Student Records

Both guidances advise schools to use the names and gender pronouns consistent with the student's gender identity, even if those names/pronouns differ from the student records. They also both address the confidential treatment of student records. Generally, under both state and federal student privacy provisions, information about a student's transgender status, name change (including the student's birth name), assigned sex at birth, and medical information should be kept confidential and transmitted to only those personnel who must have access to that information for official purposes. Failure to do so may be a violation of the Massachusetts student records regulations, FERPA, and Title IX.

Whereas the DESE Guidance discusses schools obligations under the Massachusetts student record regulations (603 CMR 23), the DOJ/DOE Guidance Letter addresses how the federal student records law, FERPA, applies to information concerning transgender students. Like the Massachusetts student records regulations, FERPA allows disclosure of personally identifiable information to school personnel with a legitimate interest in the information. The Guidance Letter makes clear, however, that disclosing information about a student's birth name

or sex to certain personnel under that exception does not permit schools to disclose that information to personnel who do not have a legitimate interest in the information. Improperly disclosing that information may violate both FERPA and Title IX.

Another exception to FERPA's general prohibition on disclosing student record information is that schools may disclose so-called "directory information," such as a student's name, address, and dates of attendance if such disclosure would not be harmful or an invasion of privacy. The DOJ/DOE Guidance Letter states that: "[s]chool officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy." Guidance Letter at 5. The Guidance Letter also reminds schools that they must provide students and parents an appropriate amount of time to request that the school not disclose their directory information.

With respect to amending student record information, the Guidance Letter instructs that schools must follow the FERPA protocol and respond to a request to amend information related to a student's gender identity or transgender status consistent with its general practice for handling requests for student record amendments. If a student or parent complains about how the school handled that request, the school must resolve the complaint under the school's Title IX grievance procedures.

Practice Tip: As noted above, the Massachusetts and federal obligations with respect to student record privacy are generally consistent. One area where they differ, however, is the age at which the privacy rights transfer to the student from the parent. The rights under FERPA do not transfer to the student until he or she turns 18 or enters a post-secondary program. 34 CFR 99.3. In contrast, rights under the Massachusetts student records regulations transfer to students at the age of 14 or when they enter ninth grade. Between the ages of 14 and 17, the student and the parent may both exercise the rights and after the student turns 18, both the student and the parent may exercise the rights unless the student limits the parent's rights. 603 CMR 23.01. Thus, a school may accept a parent's permission or refusal with respect to disclosure or other student record rights under both federal and state law until a student turns 18 or attends a post-secondary program. Schools should exercise caution acting on a 14-17 year old student's decisions with respect to student records, however, as such actions may be permitted under Massachusetts law but not FERPA.

It is also noteworthy that neither guidance addresses how schools should proceed when parents and students disagree about whether student records should be changed or whether a student should be identified by his or her chosen name and gender identity or those assigned at birth. For students' safety, schools should confer with students before engaging the parents since the parents may not be supportive of a student's transition. Where possible, schools should also try to find compromises (such as calling a student by his or her chosen name but not changing official records) and see if they can work together with the parents and student. We recommend conferring with local counsel and possibly DESE in such situations.

Practice Tip: Before using gender markers or segregating students by sex, consider whether doing so has a clear, legitimate purpose. Removing such markers and limiting segregation of the sexes will minimize forms to be changed and possible areas for missteps that may lead to violations of state and federal law.

Athletics

The DESE Guidance appears to provide more access to transgender students to the single-sex athletic programs consistent with their gender identities than the DOJ/DOE guidance.

Pursuant to the DESE Guidance, when P.E. and intramural and interscholastic athletics are segregated by sex, students must be permitted to participate in a manner consistent with their gender identities. The DESE Guidance also explains that the MIAA will not make its own determinations about gender identity, but instead will comply with the district's determination.

With respect to the application of Title IX to transgender students participating in sports, the DOJ/DOE Guidance Letter states that schools may "operate or sponsor sex-segregated athletic teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport." Guidance Letter at 3. The Guidance Letter further explains: "Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport." *Id.* A school may not adopt or adhere to requirements rooted in broad generalizations or stereotypes about transgender students or based on others' discomfort with transgender students.

Practice Tip: The DESE Guidance is more straight-forward than the DOJ/DOE Guidance Letter. Since the DESE Guidance requires schools to permit students to participate on teams corresponding with their gender identities and the DOJ/DOE Guidance does not appear to

prohibit that result, the safest approach may be to permit students to participate on teams corresponding with their gender identities, if they so request. We advise that you consult with local counsel, however, with respect to any specific questions on this topic.

Safe Environment

Both DESE and DOJ/DOE address the need to create a safe and non-discriminatory environment for transgender students. The DESE Guidance focuses on education and encourages schools to include training about transgender students in their anti-bullying curriculum. It also instructs school administrators to update policies and handbooks to include “gender identity” in portions prohibiting discrimination and encourages them to convey those updates to the community.

The DOJ/DOE Guidance Letter focuses more on enforcement. That Guidance Letter makes plain that schools have an obligation to provide a safe, non-discriminatory environment for all students, including transgender students and that schools have an obligation to take prompt, effective steps to end sex-based harassment of transgender students, prevent its recurrence, and remedy its effects. The Guidance Letter also is clear that “[a] schools’ failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX.” Guidance Letter at 2.

The DOJ/DOE Guidance Letter also instructs that schools may not discipline students for behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity. The examples used were with respect to appearance in yearbook photos, school dances, or graduations.

Practice Tip: At this point, all Massachusetts schools should have updated their policies to reflect their obligations for creating a safe and nondiscriminatory environment for transgender students. Schools should confirm that their anti-bullying and non-discrimination policies include language protecting students on the basis of gender identity. Title IX coordinators should be instructed on the DOJ/DOE Guidance Letter.

III. RESPONDING TO COMMUNITY CONCERNS

We have heard reports of some instances where community member have expressed concern about transgender students in schools, usually with respect to restrooms and locker rooms. While we urge Superintendents to consult local counsel with respect to specific issues, the answer generally remains the same – school districts must comply with state and federal law,

both of which prohibit discrimination against transgender students. Both the DOJ/DOE Guidance Letter and the DESE Guidance are explicit that transgender students must be permitted to use facilities that correspond with their gender identities even if it makes others uncomfortable.

When DESE issued its Guidance, it suggested that schools may wish to notify the school community of the then-new 2012 Massachusetts anti-discrimination law and reaffirm their commitment and legal obligation to provide equal opportunities for all students. As noted above, the DOJ/DOE Guidance Letter does not change existing law and those federal standards are consistent with the DESE Guidance on the Massachusetts law. For schools that have not previously sent a letter to the community setting forth their commitment to treating all students equally, now may be the time to do so, citing the DOJ/DOE Guidance Letter. For schools that previously sent that letter, administrators may wish to reaffirm that position with a follow-up letter included with end-of-the-year or beginning-of the-year materials this summer.