

What to Do While You Wait: Watching the Courts on the Department of Education's Controversial Title IX Transgender Guidance

Transgender rights have become the latest battleground for many public and private elementary and secondary schools, colleges and universities. In recent months, several court decisions-ranging from lower federal courts to the U.S. Supreme Court-have left educational institutions unsure of their legal responsibilities. Gammon & Grange, P.C. is closely monitoring the issue. Here, we outline the most important cases and provide some tips on what to do while we await the next ruling.

Department of Education Dear Colleague Letter. On May 13, 2016, the U.S. Department of Education ("Department") released a guidance on transgender issues for schools that receive federal funding. Called a "[Dear Colleague Letter](#)", the Department's guidance interprets existing Title IX regulations and advises that schools that receive federal funding may not discriminate on the basis of sex against transgender students. This requires that transgender students be permitted to use bathroom and locker room facilities consistent with their gender identity, as opposed to their biological sex, and that they may not be required to use individual-use facilities when other students are not required to do so.

The critical [regulation](#) the Department interprets states that a recipient of funding "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." The Department maintains that the definition of "sex" is ambiguous in the context of transgendered individuals and should be interpreted to prohibit discrimination on the basis of gender identity. If a school fails to follow the Department's guidance, it risks losing federal funding.

Texas District Court Order. In late August, a Texas federal district court issued an [order](#) against the Department which put a nationwide halt to the enforcement of the Dear Colleague Letter. The Texas court ruled that the guidance was contrary to Title IX's text, regulations, and legislative history. In particular, the court held that the definition of "sex" in the regulations was not ambiguous. The court explained that the plain meaning of "sex" as used in the regulation means the biological and anatomical differences between male and female students as determined at their birth-not gender identity.

The Texas court held that its order applies *nationwide* (with certain state law limitations). It prohibited the Department of Education and other defendants from initiating, continuing, or concluding any investigation based on the Dear Colleague Letter, and from using the guidance in any future litigation. Now the case is before the Fifth Circuit on appeal (which covers Texas, Louisiana, and Mississippi).

Virginia Case before the U.S. Supreme Court. In the meantime, the U.S. Supreme Court has taken up the case of [G.G. v. Gloucester County School Board](#). In *Gloucester*, a biologically female student who identifies as a male challenges a school district's restroom policy that provides access to restrooms based upon a student's

biological sex. The policy also provides a limited number of single-stall, unisex restrooms for all students. The student took his case to the Fourth Circuit Court of Appeals and won. (The Fourth Circuit covers the states of Maryland, North and South Carolina, Virginia, and West Virginia.) The Fourth Circuit-which ruled opposite of the Texas court-ordered the school board to permit the female plaintiff to use the men's restroom.

The case is now before the U.S. Supreme Court and was originally scheduled to be heard in early 2017. However, last week the Court announced a new briefing schedule-this means that the case won't be argued any time before March, 2017. There is [speculation](#) that the High Court is making room for the new administration to file a brief in the matter. It is even possible that the new administration could rescind the Department's guidance and the case could be returned to the lower courts for reconsideration.

So, what's a school to do? With all this uncertainty on the issue pending before the courts, what does this mean for your school?

The *first* question to ask is: does your school receive federal financial assistance? If not, Title IX and the Department of Education's guidance do not apply to you. On the other hand, if your school does receive any federal financial assistance, the Department's guidance most likely applies and you will have to await the Courts' rulings.

Second, certain religious schools and institutions have the option of claiming an exemption from Title IX if implementing the guidance would conflict with the practice or tenets of their religious beliefs.

Third, a school might decide to keep its restroom and locker facilities "as-is" while it waits on the court decisions-i.e., based on biological sex, as opposed to gender identity. Depending on where a school is located, a school may reasonably argue that the plain language of the regulation does not *require* it to allow restroom access based on gender identity, but only recommends that it do so.

Finally, as a matter of policy and prudence, a school might decide just to provide one or more gender-neutral, single-person restrooms with locking doors. It could install single-use changing stalls and showers with locking doors in the locker rooms. These practical steps could potentially side-step the issue for the time being.

It is paramount that schools consult with an attorney when addressing these issues. The pending court decisions, and even [state](#) or local laws, will dictate the available options for your institution.

This Alert is a joint publication of Kent D. Talbert, PLLC. and Gammon & Grange, P.C. Our attorneys are available for consultation on the best option for your school and we will continue to update you as major events unfold. Attorney Kent Talbert, of Kent D. Talbert, PLLC., has 25 years of experience in education law, policy, and strategy and can advise your institution on Title IX and other compliance issues. Gammon & Grange attorneys Scott J. Ward, and Christine Lambrou Johnson specialize in advising private and religious institutions in education, employment, and First Amendment law.



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