Volume 1, Issue 3

December 4, 2015

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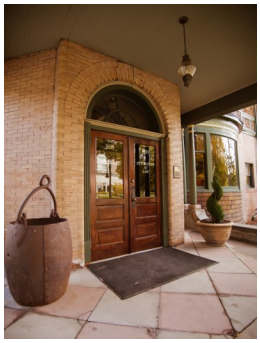
Education Law Newsletter

HAPPY HOLIDAYS



Inside this issue:

TRANSGENDER STUDENTS: WHERE ARE THE COURTS, WHERE IS OCR, AND WHAT DO WE DO HERE IN UTAH? (Cont. on p. 2)

Public schools today are facing a growing number of questions about accommodating transgender students. Issues include use of restroom facilities, locker rooms, overnight trips, team participation, and dress code to name a few. Providing guidance to schools on these issues is a difficult task. There are currently no state or federal laws that expressly prohibit discrimination on the basis of a student's transgender status. In recent years, however, federal agencies have increasingly extended the scope of civil rights laws, particularly Title IX, to transgender students. On the other hand, at least two district courts have ruled on the specific issue of restroom access. They have determined in both cases that requiring a transgender student to use the restroom of the student's **chosen** gender identity rather than **assigned sex at birth** is NOT discrimination under Title IX.

Neither OCR guidance ***nor*** the two district court opinions on this issue are legally binding on Utah schools. This leaves Utah schools with conflicting direction, at best. This article provides a summary and history over recent years of the statements and guidance provided by OCR and the cases heard by the district courts. The intent is to provide some understanding of the different positions and reasoning so that school administrators can more efficiently and manageably navigate these issues when they arise.

OCR/DOJ. In 2013, OCR and the Department of Justice issued a joint letter to Arcadia Unified School District in California. The letter concluded that discrimination against students because of their transgender status violates Title IX. The specific case alleged that the Arcadia California school district prohibited a transgender male student from accessing facilities consistent with his male gender identity, including restrooms and locker rooms at school, as well as sex-specific overnight accommodations at a school-sponsored trip to an off-site academic camp. The District entered into a resolution agreement, with OCR's direction, that required the school to treat the student in a manner consistent with his gender identify.

In October, 2014, OCR issued findings in another California case in which the complainant alleged that the school district discriminated against her by failing to respond adequately to complaints that the student was subjected to verbal harassment by peers. Also, staff at the student's school disciplined her for wearing make-up, discouraged her from speaking about her gender identity with classmates and suggested that she transfer to another school. OCR advised that harassment of students for failing to conform to stereotypical notions of masculinity or femininity constitutes sex discrimination under Title IX.

Most recently, in a January 2015, letter from OCR, the Assistant Deputy Director stated "When a school elects to separate or treat students differently on the basis of sex (such as with sex-segregated restrooms) a school generally must treat transgender students consistent with their gender identity."

According to an article by school law attorney Malina

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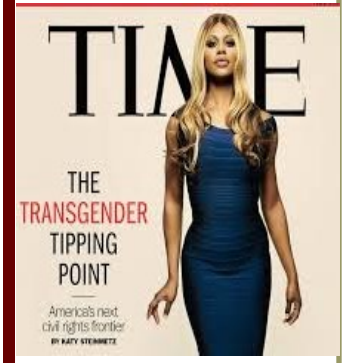
Knowing what may, what must, and what should be shared with the media can go a long way in avoiding a PR nightmare.



Dealing with the Media

Every District has dealt with TV reports and newspapers, and many charters have or will: the 10:00 p.m. phone call from the reporter seeking a comment about the latest crisis facing your district or school. For those schools that do not have a public relations professional on staff, the most appealing answer is probably "No comment." In a presentation paper by Nancy Hungerford, an Oregon school law attorney who was formerly a co-owner and editor of two local newspapers, she explains, "While that response may be a reasonable anti-litigation strategy, it rarely serves as a good communications strategy." She goes on to state, "Knowing how to accomplish both goals requires an understanding of the law governing what can and cannot be disclosed."

• **INFORMATION THAT MUST BE DISCLOSED TO THE PUBLIC.** Obvious examples are school district policies, minutes of board meetings, board meeting agendas, collective bargaining agreements, and the like. Salaries and benefits of public employees are in this category.

• **INFORMATION THAT CAN NEVER BE DISCLOSED TO THE PUBLIC.** Examples include information from "student records" (without parental permission) and, in some districts, depending on the negotiated agreements with local associations, information from official employee personnel files.

• **INFORMATION THAT MAY, BUT IS NOT REQUIRED TO, BE DISCLOSED TO THE PUBLIC.** Examples include school board deliberations on a collective bargaining proposal and investigation reports (sometimes with redactions of "personally identifiable information" (PII)). In addition, "directory information" from student records may be disclosed, unless parents have affirmatively said "No."

Ms. Hungerford provides several practical strategies with specific examples of crises and appropriate responses that both protect the school/district and provide enough information to be responsive to the media. Attached to this email and posted on our website is the paper in full, the most helpful discussion being in the last six pages.

Transgender Title IX Case., (cont. from p. 1)

Piontek, a school law attorney in Wisconsin, "OCR is very active right now and will likely be for the foreseeable future. ... Given its activity in the past couple of years, it is likely that OCR will continue to target its resources on transgender students' claims of discrimination in public schools."

Courts: In two separate federal district court opinions—one in Pennsylvania involving a university student and one in Virginia involving a secondary student—the courts both ruled that segregating restrooms on the basis of sex was not a violation of Title IX. The Virginia court, in September, 2015, concluded that the Title IX claim brought by the complainant for discrimination on the basis of restricted restroom access, is precluded by Department of Education regulations which expressly allow schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable. *See* G.G. *v. Gloucester County School Board*. The court expressly rejected OCR's position, filed in a statement of interest, stating, "[T]he Department of Education's interpretation [that when it comes to the use of sex segregated facilities, a school must treat transgender students consistent with their gender identity] should not be given controlling weight. ...To defer to the Department of Education's newfound interpretation would be nothing less than to allow the Department of Education to "create de facto a new regulation" through the use of a mere letter and guidance document."

What does this mean for Utah schools? While the guidance is conflicting, it is clear that if a transgender student files a complaint with OCR, it will apply its interpretation that discrimination based on transgender status constitutes sex discrimination under Title IX. If that same student files suit in district court, a different interpretation may be applied. Best practice is to work with parents of transgender students early on in the process. Meet with them, talk to them, develop a plan for their child to feel safe and secure at your school. And do what you've always done to ensure that no student is discriminated against for any reason.

Government Immunity and a Win for School Districts...For Now

Last week, Judge John Morris in the Second District Court in Farmington, Utah, dismissed a lawsuit against Davis School District brought by the families of one of Brianne Altice's student victims. [Ms. Altice pleaded guilty in April 2015 to sexual abuse of a minor; her educator license was previously revoked.] According to the news reports, the lawsuit alleged, among other things, that the District was negligent in hiring and retaining Altice. The case was dismissed on the grounds that the District was immune under the Utah Governmental Immunity Act, Utah Code 63G-7, et al.

The general principle in the Governmental Immunity Act is that governmental entities are immune from any injury resulting from the exercise of a governmental function, which includes the operation of a school. There is a waiver of immunity, however, if the alleged act was negligence, rather than intentional. In this case, plaintiff argued that the District was negligent in hiring and supervising a teacher who preyed on students.

The real heart of the case before Judge Morris, however, was whether an exception to the waiver applied, thus retaining immunity for the District. Immunity is retained even when the allegation is one of negligence if the injury in question arose from (among other things) an assault or battery. The District asserted that the injury in question in this case was Ms. Altice's sexual misconduct with the students which was physical battery, and thus the District remained immune. Plaintiff creatively argued that because an essential element of the crime of battery is non-consent, and because the student in this case was a willing participant in the relationship, the conduct cannot be considered battery. Plaintiff also argued that the injury in question was NOT the actual physical sexual conduct, but rather emotional and mental shame and embarrassment.

The District successfully pointed out that a minor cannot legally consent to a sexual relationship of the type at issue here, regardless of whether the victim was willing. Therefore, the court concluded that the element of non-consent was met, the injury arose out of a battery, and the District is therefore immune from suit.

The Plaintiff states she intends to appeal the case. Stay tuned!

Q&A

Q: State law directs that a student who brings a weapon to school or to a school activity "shall be expelled." Are there exceptions to the mandatory expulsion?

A: Yes. Utah Code §53A-11-904 (2)(b) allows for the student and student's parent or legal guardian to meet with the superintendent (or designee) within 45 days. The Superintendent or designee shall provide conditions for the student's return to school and determines if it is in the best interest of the school district and the student to modify the expulsion. This determination must be approved by the local school board or local charter board, giving highest consideration to the safety of all students.

Q: If a school district decides to cut its math tutors for all 6th grade students—and math tutors are part-time employees renewed on a yearly basis—can the school end the employment of the 3 6th grade math tutors without giving the tutors due process hearings and extensive procedures?

A: Unless there is a school district/charter school policy to the contrary, Utah law allows an LEA to terminate the employment of "employees," if necessary, to reduce the number of employees because of "the discontinuance or substantial reduction of a particular service or program." Utah Code 53A-8a-505(1).

Q: The winter holidays are approaching! Does the law allow students to sing religious songs as part of a winter or Christmas program?

A. Yes. The 10th Circuit Court in *Bauchman v. West High School* (1997) concluded: Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs. Moreover, a vocal music instructor would be expected to select any particular piece of sacred choral music, like any particular piece of secular choral music, in part for its unique qualities useful to teach a variety of vocal music skills (i.e., sight reading, intonation, harmonization, expression). Plausible secular reasons also exist for performing school choir concerts in churches and other venues associated with religious institutions. Such venues often are acoustically superior to high school auditoriums or gymnasiums, yet still provide adequate seating capacity. Moreover, by performing in such venues, an instructor can showcase his choir to the general public in an atmosphere conducive to the performance of serious choral music. **To summarize, if a choral instructor determines that religious music teaches legitimate musical skills, those religious songs are appropriate for public school choirs.**

Lawyers who understand and advocate for the needs of public schools

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Carol Lear, Heidi Alder, and Erin Preston are pleased to announce their affiliation as of counsel with Lear & Lear, LLP to provide Education Law services to school districts, charter schools and other public education-related entities. Our services include:

- Prompt and cost effective responses to everyday legal questions and issues
- LEA/school policy and contract review
- School facilities, construction and financing issues
- Hearing officer services
- Employee questions and issues
- Training for educators and for students

What's on the Legislative Docket?

Still two months to go, give or take, and there are no less than 58 education-related bills on the legislative docket. Nine more bills were opened, then abandoned. Of the 58 boxcar bills, three are sponsored by the soon-to-be-former Senator Osmond; his other three were abandoned. It is unclear at this point who—if anyone—will pick up his bills, which deal with student assessment, professional learning scholarships for teachers, and dual enrollment.

Senator Howard Stephenson has 12 boxcar bills. Trailing several bills behind him, Representative Cutler has four and Senator Millner and Representative Anderegg each of have two plus one resolution each.

There are several not-so-surprising bills regarding the election of the State Board of Education (it looks like four bills so far, down one from the five bills introduced last year) and school funding, on which topic there are currently six boxcar bills.

Also not surprising are a few resurrected bills that died last session: another student privacy bill from Representative Anderegg; educator ethics training from Representative Briscoe; and another bill regarding early college high schools from Representative Peterson.

Of course, it's often difficult to determine the substance of a bill from the initial title: "State Office of Education Amendments" from Representative Cutler; "Public Education Appointment and Hiring" sponsored by Senator Stephenson; "Campus Free Expression Act" from Representative Coleman; and "Charter School Testing Options," also from Senator Stephenson.

As always, the 2016 General Legislative Session promises no shortage of education-related bills. For your convenience, and due to high demand after last year's pilot, Lear & Lear will be tracking legislation again this year. Our tracking sheet includes: the sponsor, the bill number, a brief description of the bill and any amendments or substitutes, how the bill affects LEAs, to whom the bill is most applicable (e.g., HR, student services, etc.), and positions from various groups like UEA, USBA, and PTA. (We welcome positions from other groups that would like to be added to our sheet—subject to space available.)

The tracking sheet is a google document that can be found at our website: learneducationlaw.com.