

With Supreme Court Review Looming, Feds Issue Immediate Withdrawal of Previous Title IX Guidance

PUBLISHED ON

February 24, 2017

Following the recent confirmations of Secretary of Education Elizabeth Devos and Attorney General Jeff Sessions, the new Trump administration has moved quickly to withdraw prior guidance concerning discrimination of transgender students in schools. This action comes just a month before the Supreme Court is set to weigh in on the scope of protections afforded under Title IX of the Education Amendments Act of 1972.

The February 23 joint "[Dear Colleague](#)" letter indicates the Obama administration's guidance on this issue failed to afford "due regard for the primary role of the states and local school districts in establishing educational policy." The new guidance withdraws the prior statements of policy and guidance reflected in two previous federal letters addressing the prohibition of sex discrimination against transgender students under [Title IX](#) and providing schools with recommendations on addressing transgender students' rights, including its position that prohibiting transgender students from using facilities that align with their gender identity violates federal anti-discrimination laws.

Oral arguments before the U. S. Supreme Court are scheduled for March 28 in [Gloucester County School Board v. G.G.](#), but the Department of Education (ED), in conjunction with the Department of Justice's (DOJ) Office of Civil Rights, released the latest Dear Colleague letter Wednesday. [Barley Snyder](#) attorneys will continue to track the case.

The U.S. solicitor general's office informed the Supreme Court on Wednesday of the change in guidance. Earlier today, the Supreme Court asked the parties to submit briefs addressing their views on the possible impact of the switch in policy on those rights by the Trump Administration by 2 p.m. next Wednesday.

The new guidance references the numerous legal questions that followed the issuance of the Obama administration's guidance as well as the nationwide injunction barring ED from enforcing a portion of its application. The [DOJ issued a statement](#) indicating that the prior guidance "did not contain sufficient legal analysis or explain how the interpretation was consistent with the language of Title IX." Attorney General Sessions noted that the DOJ "remains committed to the proper interpretation and enforcement of Title IX and to its protections for all students, including LGBTQ students from discrimination, bullying, and harassment." A [separate accompanying statement](#) issued by the Department of Education emphasized that the responsibility to protect every student in our public schools is "not merely a federal mandate, but a moral obligation no individual, school, district, or state can abdicate."

While this new guidance from ED and the DOJ significantly rolls back the legal foundation for the prior

guidance, it notes the obligation of schools to provide a safe learning environment for all students, including transgender students.

In addition to the areas of focus in the new guidance, issues involving transgender students may implicate protections outside of Title IX under both federal and state law. We anticipate additional developments surrounding this issue in the coming months as the focus shifts to state and local responses to the new guidance and additional action in the courts. Fifteen states currently have explicit protections for transgender students.

We will continue to monitor developments on this issue and provide additional updates as appropriate. This update is provided in follow-up to alerts issued by Barley Snyder from last year on [April 22](#), [May 13](#), and [August 5](#).

If you have any questions or concerns regarding this new guidance, or if we can provide any additional assistance as you review your existing policies and procedures, please do not hesitate to contact [Barley Snyder's Education Group](#).