SOUTH DAKOTA
School Law Notes

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Federal Agencies to Schools: No Restrictions on Transgender Restroom Access

On Friday, May 13, 2016, the United States Department of Education and Department of Justice released joint guidance to schools explaining how federal law prohibiting sex discrimination affects schools' obligations toward transgender students.

In a "Dear Colleague" letter to school districts, the Department of Education maintains that requiring transgender students to use same-sex facilities violates Title IX, the 1972 law that prohibits discrimination based on sex.

"Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status," said the "Dear Colleague" letter.

The letter also lists obligations that schools have to transgender students. However, it should be noted that civil rights guidance from the agencies does not carry the force of law, but it serves as a warning of possible enforcement actions, including loss of federal funding, for schools that run afoul of the agencies' interpretation.

Among the directions included in the guidance:

- Educators must respond quickly to harassment, "including harassment based on a student's actual or perceived gender identity, transgender status, or gender transition;"
- Schools should honor students' gender identity, even if it differs from the biological sex listed on their educational records;
- Schools must allow transgender students to

participate in and access sex-segregated activities, facilities, and classes consistent with their gender identity; and

- Educators must keep students' transgender status private unless they chose to disclose it to their peers.

"The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity," the guidance says. "Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity. Because transgender students often are unable to obtain identification documents that reflect their gender identity (e.g., due to restrictions imposed by state or local law in their place of birth or residence), requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity."

Q: Is prayer allowed at public school football or basketball games?

A: No. In Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), the United States Supreme Court held that a policy permitting student-led "invocations" before football games violates the Establishment Clause. The Supreme Court refused to view the expression as "private speech" because the messages were delivered over the school's public address system by a student body member under the supervision of school faculty and under a school policy that encouraged public prayer. Under these circumstances, the Supreme Court considered the prayer to be "school-sponsored."

Supreme Court Decides Heffernan v. City of Paterson

On April 26, the United States Supreme Court decided Heffernan v. City of Paterson, finding that government employees who are demoted because their employer believes they are engaging in constitutionally protected political activity may challenge their employer's action under the First Amendment of the Constitution and 42 U.S.C. § 1983, even if the employer was factually mistaken about the employee's conduct.

In 2005, Jeffrey Heffernan worked as a police officer for the Paterson, New Jersey, Police Department. Paterson's mayor was running a contested reelection campaign. Members of the Police Department saw Heffernan obtain a campaign sign from the headquarters of the mayor's opponent and concluded that he was supporting the opponent. On that basis, Heffernan was demoted. In reality, Heffernan had picked up the sign for his mother.

Heffernan filed a section 1983 claim against the Police Department, arguing that the Police Department's actions violated his constitutional right to free speech. Both the district court and the United States Court of Appeals for the Third Circuit ruled against Heffernan. The Supreme Court reversed.

The Supreme Court recognized that "[w]ith a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate." The Supreme Court presumed that any exceptions to this rule did not apply and the type of conduct the Police Department thought Heffernan had engaged in was constitutionally protected. It then considered whether the Police Department's decision to demote Heffernan was actionable because the Police Department perceived that Heffernan was exercising his constitutional rights when he retrieved the sign, although in fact he was not.

Finding that neither section 1983 nor the Court's precedent clearly answered the precise question, the Supreme Court concluded that "the employer's motive, and in particular the facts as the employer reasonably understood them," are "what counts[.]" Reasoning that the First Amendment restricts Government conduct, it held that "[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983 - even if . . . the employer makes a factual mistake about the employee's behavior."

Q: How can a school district best manage custody conflicts between parents or other caretakers?

A: Unfortunately, the law often does not provide clear guidance to school officials about how to resolve custody conflicts between parents or other caretakers. Therefore, it is important that school officials establish guidelines to deal with these conflicts.

School policies should be designed to minimize custodial conflicts and encourage parents and other caretakers to resolve these disputes away from the school grounds. These guidelines are offered as examples of policies that may assist school officials in managing custodial disputes.

When a child is enrolled the school should:

1. Ask for information about the marital status of the student's parents and, if the parents are not living together, ask about the child custody arrangements;
2. Obtain identifying information about the child's parents if the child is living with someone other than the parents;
3. Ask for copies of the most recent court orders, separation agreements, or other documents affecting the child's custody or legal status;
4. Inform parents or caretakers, in writing, of the school's policies relating to visiting students during schol hours and removing students from school during school hours; and
5. Make it clear that the information is requested to protect parents' rights and safeguard students.


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