Trump Administration Revokes Administrative Guidance Regarding Transgender Student Rights in Schools

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Last night the Trump administration revoked the joint guidance issued by the Department of Justice and Department of Education regarding transgender student rights in schools. The guidance, published in May 2016, directed public schools to allow students to use the restroom matching their gender identity. The joint guidance stated that requiring transgender students to use the restrooms and locker rooms based on their sex at birth violates Title IX of the Education Amendments of 1972, the federal law that prohibits discrimination based on sex in educational programs or activities. The guidance also provided that publicly disclosing a transgender student's birth name or biological sex violates the Family Educational Rights and Privacy Act of 1974 (FERPA), and that schools must change a student's gender on school records when asked by a parent, without requiring production of medical records or a birth certificate.

By revoking this guidance, the Department of Justice and Department of Education are essentially rescinding their prior interpretation of Title IX regarding transgender student rights. Revoking this guidance may have a substantial impact on the current case before the United States Supreme Court regarding transgender students, *Grimm v. Gloucester County School Board*. In *Gloucester*, the Supreme Court granted certiorari to determine whether the court should defer to an Agency's letter that does not carry the force of law, and whether the Department of Education's interpretation of Title IX should be given effect by courts. Because the underlying guidance was revoked, the Supreme Court may determine that the issue is now moot and dismiss the case.

If the Supreme Court dismisses the case, schools should look to local binding precedent for direction on these difficult issues. The Sixth Circuit (which binds Ohio) recently ruled in favor of a

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transgender student in a preliminary injunction ruling regarding the student's right to use a bathroom based on their gender identity in *Highland Local School District*. In that ruling, the Sixth Circuit stated that sex stereotyping based on gender nonconformity—which includes transgender status—is impermissible discrimination. However, this was merely a preliminary injunction ruling, and the Sixth Circuit has not yet ruled on the merits of the case. The Sixth Circuit was awaiting the Supreme Court's decision in *Gloucester* to provide binding guidance to resolve *Highland*, but if the Supreme Court does not issue a decision in *Gloucester*, the Sixth Circuit will have to rule on the merits of the *Highland* case. Until we receive further clarity, schools are advised to consult their attorneys regarding transgender student issues.

For more information, please contact Don Crain, Alex Ewing, Jack Hemenway or Joe Scholler in Frost Brown Todd's Government Services Practice Group.

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