



EMPLOYMENT LAW ALERT

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SCHOOL'S IN SESSION AND THE COURTS ARE BUSY

Texas Federal Court Issues Nationwide Temporary Injunction on Enforcement of Department of Justice and Department of Education's Joint Directive on Transgender Facilities Access under Title IX

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Recently, in State of Texas v. United States, a Texas federal judge temporarily enjoined nationwide enforcement of the Department of Justice (the DOJ) and Department of Education's (the DOE) (collectively, the Departments) joint directive issued in May concerning their interpretation of Title IX's protections for transgender students. Under Title IX, "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Under §106.33 of the DOE's related regulations, [a] recipient 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 Departments' directive clarified that they include a student's transgender status within

the definition of "sex" for purposes of enforcing Title IX. As a result, the Departments instructed, "a school must not treat a transgender student differently from the way it treats other students of the same gender identity."

The directive took the form of a "Dear Colleague" letter and explained a school's obligations to transgender students under Title IX and how the Departments intended to evaluate a school's compliance with these obligations. These obligations include allowing transgender students to use bathroom, locker, and shower facilities consistent with their gender identity. The directive instructed that a school may not require a transgender student to use individual-use facilities when other students are not required to do the same.

Fifteen plaintiffs, including thirteen states and agencies represented by state leaders and two school districts, one in Texas and one in Arizona, sought to enjoin enforcement of the directive on the basis that it was final agency action, and as such, required a notice and comment period under the Administrative Procedure Act (the APA). Plaintiffs contended that the Departments' directive was legislative in character, and not merely interpretive as argued by the Departments, because it imposed substantive obligations to change policies and facilities and effectively amended prior Title IX legislation and associated regulations. During the preliminary injunction hearing, the Departments confirmed that Plaintiffs were not in compliance with the guidelines.

The court agreed with Plaintiffs that the directive was legislative and substantive in nature. The court also noted that recent enforcement action taken by the DOJ against the University of North Carolina (UNC) and others in connection with North Carolina's recently enacted law (commonly known as HB 2), requiring individuals to use restrooms consistent with their biological sex ([See our article *You Can't Close the Bathroom Door*](#)), support Plaintiffs' contention that the directive is compulsory. (Just recently, a North Carolina federal court ruled that the part of HB 2 applicable to public entities, including schools such as UNC, violates federal anti-discrimination laws and enjoined UNC from enforcing it. UNC stated earlier that it had no intention of enforcing the bathroom restrictions.) This

all indicated to the Texas court that the Departments had "drawn a line in the sand," requiring Plaintiffs to adhere to the guidelines or risk non-compliance with Title IX. Plaintiffs were legally impacted in a manner they had not been prior to the guidelines, and so the court concluded the guidelines were a legislative act, requiring adherence to the APA's notice and comment period.

Importantly, in ruling to enjoin temporarily the enforcement of the Departments' directive, the court would not give deference to the Departments' interpretation that "sex" includes gender identity or buy into the Departments' argument that the directive was necessary to clarify an ambiguity in §106.33. Here, the court agreed with Plaintiffs that the meaning of "sex," as used in Title IX and Section 106.33 of the DOE's regulations is unambiguous and means biological sex. The court refused to follow the Fourth Circuit in G.G. ex rel Grimm v. Gloucester County School Board, which gave deference to the DOE's interpretation in ruling in favor of allowing a transgender student in Virginia to use school restrooms consistent with his gender identity. There, the Fourth Circuit found "sex," as used in §106.33, to be ambiguous. That ruling was stayed by the U.S. Supreme Court while the school board petitions for certiorari. That petition was filed on August 29. If that petition is granted, it will be the Court's first transgender bathroom case and should provide clarity around the federal government's efforts to provide Title IX

gender discrimination protection to transgender students.

The temporary injunction issued by the Texas federal court is certainly a setback for the federal government's attempts to expand transgender inclusion. However, the injunction does not prevent a state, city, or school district from implementing inclusive restroom laws and policies. In other words,

it does not make those laws and policies illegal.

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