



February 19, 2014

TRANSGENDER ISSUES UPDATE

In late January, the top appellate court in Maine ruled that a local school district had violated the rights of a transgender female by refusing to permit her to use the communal girls restrooms. Similar to California's recently adopted AB 1266, the laws in Maine prohibit discrimination on the basis of gender identity in the use of facilities.

The female was a biological male who started identifying as a female in the third grade, appearing exclusively as a female by the fourth grade. She was diagnosed with "gender dysphoria," what doctors call psychological distress from having a gender identity different from the sex assigned at birth. The district accepted this diagnosis and a 504 plan included the future use of the girls' communal restrooms, the school counselor indicating that would be the best practice, the school principal indicating it would not have been safe for her to use the boys' restrooms, and the minutes of the 504 Meeting indicating it was important to the girl's psychological health that she live socially as a female, including use of the girls' communal restroom.

The court's opinion noted that the school had determined the student was a female, based on input from the family, therapists, and experts, and subsequently changed its position, not on any change in the student's status, but solely on complaints made by others "about the school's well-considered opinion."

The case is unusual in that, for years, the school district had permitted use of facilities based on the student's gender identity, including use of single-stall and communal restrooms. It was only after an on-campus event created significant media attention that the district changed its mind and directed her to only use staff restrooms. The media coverage was triggered by a boy twice following the female into the girls restroom at the direction of the boy's grandfather.

After noting that the carefully developed program and educational plan had been operating for years, the court went on to clarify that its ruling did not open the restroom doors to everyone by saying:

"Thus, we do not suggest that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion without the plans developed in cooperation with the school and the accepted and respected diagnosis that are present in this case. Our opinion must not be read to require schools to permit students casual access to any bathroom of their choice. Decisions about how to address students' legitimate gender identity issues are not to be taken lightly. Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination"

The dissent in the opinion argued that if it is "sexual orientation" discrimination to deny a transgender female use of the girls' bathroom, it would also be "sex" discrimination to deny the boy the right to use the girls' bathroom, as both are protected categories under the same statute. The majority did not support that argument.

California's own AB 1266, the bill permitting use of facilities (including bathrooms) on the basis of gender identity, is under challenge by conservative groups which formed the organization called "Privacy For All Students" and submitted a petition for a referendum seeking to put before the voters the question of whether the new transgender law should be repealed. Required to submit 505,000 valid voter signatures to get on the ballot, a sampling of the 620,000 signatures submitted resulted in only around 480,000 signatures estimated as valid. The sampling result was less than the amount needed to be immediately placed on the November ballot but more than enough to trigger the need for a full check of all signatures, which is supposed to be completed by February 24, 2014.

Until the signature count is verified and sufficient to place the referendum on the ballot, AB 1266 remains operative but will not be enforced by the Attorney General. Districts are reminded that as noted in the Arcadia Settlement Agreement, federal law requires transgender accommodation. Most districts are handling requests for transgender accommodation on a case-by-case basis.

If you have any questions concerning this or related issues, or need support in this area, do not hesitate to contact our office.

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