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## **OCR Issues Internal Guidance Narrowing Scope of Complaints & Investigations (Including Complaints Involving Transgender Students)**

As part of its endeavor to shift power from federal government to state and local governments and communities, the Trump Administration has been reviewing the role of the Department of Education and the Office for Civil Rights (OCR). On April 26, 2017, President Trump signed an Executive Order which directs Education Secretary Betsy DeVos to conduct a review of the Department of Education's regulations and guidance documents and determine whether the Department has overreached its authority on education issues in K-12 schools. The Executive Order authorizes Secretary DeVos to rescind or revise any regulations or guidance documents that are inconsistent with federal statutes. As the scope of the Department's authority is reconsidered, the OCR recently issued two memorandums to Regional Directors regarding the scope of and procedures for investigating OCR complaints, including complaints involving transgender students.

### OCR Instructions to the Field re Scope of Complaints

On June 8, 2017, the Acting Assistant Secretary for Civil Rights sent instructions to Regional Directors regarding the scope of complaints and protocols for investigating such complaints. The guidance is effective immediately and applies to all pending and new complaints. The instructions include the following:

- “Effective immediately, there is no mandate that any one type of complaint is automatically treated differently than any other type of complaint with respect to the scope of the investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters.”
- “In particular, OCR will no longer follow the existing investigative rule of obtaining three (3) years of past complaint data/files in order to assess a recipient's compliance . . .”
- “There is no longer a ‘one size fits all’ approach to the investigation of any category of complaints.”
- “OCR will only apply a ‘systemic’ or ‘class-action’ approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant.”

The memorandum closed by emphasizing OCR's neutral and impartial role in investigating complaints, and the intent to “empower investigative staff to clear case backlogs and resolve

complaints within a reasonable time-frame, thus providing effective resolution and justice to complaints and recipients.”

### OCR Instructions to the Field re Complaints Involving Transgender Students

On June 6, 2017, the Acting Assistant Secretary for Civil Rights sent instructions to Regional Directors regarding the acceptance and review of complaints involving transgender students. The memorandum instructs OCR investigative staff to “rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender.”

The memorandum instructs investigative staff that “OCR may assert subject matter jurisdiction over and open for investigation the following allegations:

- Failure to promptly and equitably resolve a transgender student’s complaint of sex discrimination
- Failure to assess whether sexual harassment (e., unwelcome conduct of a sexual nature) or gender-based harassment (i.e., based on sex stereotyping, such as acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes) of a transgender student created a hostile environment;
- Failure to take steps reasonably calculated to address sexual or gender-based harassment that creates a hostile environment;
- Retaliation against a transgender student after concerns about possible sex discrimination were brought to the recipient’s attention; and
- Different treatment based on sex stereotyping” (internal statutory citations omitted).

Denying a transgender student access to the bathroom or locker room that corresponds with his or her gender identity is not on the list of specific allegations over which OCR may assert subject matter jurisdiction and open an investigation. While some media outlets are interpreting this to mean that complaints involving a transgender student’s bathroom or locker room access would likely be dismissed, it should be noted that in *Whitaker v. Kenosha Unified School District et al.*, the Seventh Circuit Court of Appeals issued an injunction permitting a transgender student to use the bathroom corresponding to their gender identity. The Court found that the student was likely to succeed on his Title IX claim, concluding that a policy that prohibits individuals from using the bathroom that corresponds with their gender identity punishes those individuals for their gender nonconformity and for not conforming to the sex stereotypes associated with their sex assigned at birth.

Because the OCR internal memorandum directs investigative staff to rely on federal court interpretation of Title IX, which would include the Seventh Circuit’s interpretation in *Whitaker*, it is unclear at this point whether OCR will assert subject matter jurisdiction over allegations concerning restroom access even though such allegations are not explicitly listed in the internal memorandum.

If you have any questions about this Legal Update or the effect of the recent guidance on pending or potential OCR investigations in your school district, please contact Alana Leffler at [aleffler@buelowvetter.com](mailto:aleffler@buelowvetter.com) or 262-364-0267, Gary Ruesch at [gruesch@buelowvetter.com](mailto:gruesch@buelowvetter.com) or 262-364-0263 or your Buelow Vetter attorney.