



MEMORANDUM

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TO School District Clients and Friends

FROM Maree Sneed
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DATE April 3, 2014

SUBJECT ***Do your policies consider the rights of transgender students? – Maine’s Highest Court Upholds Transgender Student’s Right to Use a Communal Restroom Consistent With Her Gender Identity***

There is a growing recognition of the rights of transgender students by:

- *Interscholastic sports organizations*: By unanimous vote this year, the Virginia High School League officially permitted transgender athletes to participate in sports.
- *School districts*: Tucson Unified School District held a gender-identity workshop at one of its schools, and plans to revise its nondiscrimination policy to protect transgender students.
- *Courts*: On January 30, 2014, the State of Maine’s highest court held that a public school violated a transgender student’s rights under the Maine Human Rights Act (“MHRA”)¹ when it denied her access to the school’s communal bathrooms, consistent with her gender identity.²

The court opined that “the sole purpose of the public-accommodations and educational-opportunities provisions of the MHRA is to ensure equal enjoyment of and access to educational opportunities and public accommodations and facilities. The public-accommodations and educational-opportunities provisions were amended [by the Maine legislature] in 2005 to prohibit discrimination against transgender students in schools.”³ The court stressed that its “opinion must not be read to require schools to permit students casual access to any bathroom of their choice”; in this case, the school had “acknowledged and accepted” the student’s female gender identity.⁴

¹ 5 M.R.S. § 4592(1) (2013) (declaring it a violation of the Maine Human Rights Act to deny access to a public accommodation on the basis of sexual orientation); *id.* at § 4602(4) (declaring it a violation of the Maine Human Rights Act to engage in “education discrimination” on the basis of sexual orientation).

² John Doe et al. v. Regional Sch. Unit 26 (“RSU 26”), ___ A.3d ___, 2014 WL 325906 (Me. Jan. 30, 2014).

³ *Id.* at *4 (citation omitted).

⁴ *Id.* at *5.

This memorandum (1) briefly places this court decision in context based on federal and state efforts to protect the rights of transgender and gender non-conforming students and (2) discusses the Maine court's rationale.

1. Placing the Maine Court's Decision in Context

a. State Protection for Transgendered Students

According to the Gay & Lesbian Advocates & Defenders, which represented the plaintiff in this case, the Maine high court was the first state high court to specifically address the rights of transgender and gender non-conforming students to access restroom facilities corresponding to their gender identity. A few states, like Maine, have passed laws to protect transgender and gender non-conforming citizens. Notably, a California law protecting transgender and gender non-conforming students went into effect in January 2014.⁵ As explained in the legislative counsel's digest that accompanied the bill before it became a law, existing California law already prohibited public schools from discriminating against students on the basis of their gender identity and gender expression; the new law focuses on sex-segregated activities and facilities, requiring that each "pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."⁶

b. Federal Protection for Transgender Students

While some states protect the rights of transgender and gender non-conforming citizens explicitly under their statutes, there is no federal law that prohibits discrimination on the basis of transgender or gender non-conforming status. However, the U.S. Department of Education's Office for Civil Rights ("OCR") interprets Title IX of the Education Amendments of 1972 to prohibit gender-based discrimination. See OCR, Dear Colleague Letter, Harassment and Bullying 7-8 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. As a result, during the past several years, OCR has exercised its authority to prohibit discrimination against transgender students by, for example, negotiating a consent decree with a school district and entering into a resolution agreement with another school district (in collaboration with the U.S. Department of Justice). In both matters, OCR required the school districts involved to revise their policies and procedures to prohibit gender-based harassment. Anoka-Hennepin School District, Consent Decree (March 5, 2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901.html>; Resolution Agreement with Tehachapi Unified School District (July 2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031.html>.

2. The Maine Court's Ruling

RSU 26 was the first case requiring the Maine Supreme Judicial Court to interpret the 2005 amendments to the MHRA, which prohibit "discrimination based on sexual orientation in public accommodations, educational opportunities, employment, housing, and other areas."⁷ The case arose after Regional School Unit 26 denied a transgender student the right to use the restroom that corresponded with her female gender identity. The student, Susan, born male, began to express her

⁵ Cal. Educ. Code § 221.5 (2014).

⁶ See California Legislative Information, "AB-1266 Pupil rights: sex-segregated school programs and activities" (2013-2014), available at <http://leginfo.ca.gov/faces/billStatusClient.xhtml>.

⁷ RSU 26, 2014 WL 325906, at *2 (citation omitted).

female gender identity as early as age two; school officials collaborated with her parents to develop a plan to support her development, including determining initially that it was a “best practice” (and safer) for her to use the girls’ restroom.⁸ After beginning the fifth grade in September 2007, another student followed Susan into the girls’ restroom twice; acting on the instructions of his grandfather, the student claimed “that he, too, was entitled to use the girls’ bathroom.”⁹ Regional School Unit 26 responded by requiring Susan to use a “single-stall, unisex staff bathroom”; no other students were required to do so.¹⁰

On April 10, 2008, Susan’s parents filed a complaint with the Maine Human Rights Commission. The commission concluded, unanimously, that there were reasonable grounds to believe discrimination had occurred. On September 23, 2009, Susan’s parents (on Susan’s behalf) and the Maine Human Rights Commission brought suit against Regional School Unit 26, alleging discrimination under the MHRA.

Although the Maine Supreme Judicial Court acknowledged several times that Regional School Unit 26 faced a challenging issue,¹¹ it ruled in favor of Susan. The court held that the MHRA prohibits discrimination on account of sexual orientation, which includes “a person’s actual or perceived gender identity or expression.”¹² Despite the fact that Maine’s statutes require school buildings to contain separate bathrooms for each sex, the court held that the statute requiring separate bathrooms for each sex “does not—and school officials cannot—dictate the use of the bathrooms in a way that discriminates against students in violation of the MHRA.”¹³

The court made schools responsible for establishing policies that do not violate students’ rights. “[E]ach school,” held the court, “is left with the responsibility of creating its own policies concerning how these public accommodations are to be used. Those policies must comply with the MHRA.”¹⁴ The court stressed, however, that no one should be able to “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 Susan’s case – such decisions, said the court, “are not to be taken lightly.”¹⁵

We hope this information is useful to you. If you have questions about the Maine court decision or transgender or gender non-conforming student policies more generally, please contact Maree Sneed (202-637-6416 or maree.sneed@hoganlovells.com) or Esther Haley Walker (202-637-5764 or esther.walker@hoganlovells.com).

⁸ Id. at *1.

⁹ Id. at *2.

¹⁰ Id.

¹¹ See id. (“Particularly where young children are involved, it can be challenging for a school to strike the appropriate balance between maintaining order and ensuring that a transgender student’s individual rights are respected and protected. Many of the school officials involved in Susan’s education exhibited tremendous sensitivity and insight over several years.”); id. (“We appreciate the difficulty of the situation in which the school found itself; nevertheless, we must assess schools’ obligations pursuant to the Legislature’s amendments to the MHRA without regard to the public’s potential discomfort with the result.”).

¹² Id. at *4 (citation omitted).

¹³ Id.

¹⁴ Id. at *5.

¹⁵ Id.