

POLITICO

Obama's transgender student directive inflames culture wars

Caitlin Emma

May 13, 2016

The Obama administration's historic directive on bathroom access for transgender students takes one of the most socially divisive fronts in America's culture wars and intensifies it across the full spectrum of a well established battleground: public schools and school districts.

Gone are the days when school districts could avoid, sidestep or otherwise delay decisions on the issue, since the administration's decree was sent to every public school district in the land. Amid rancorous debate in the political arena on the subject — and a legal standoff between the federal government and North Carolina over a state law blocking legal protections for gay and transgender individuals — schools, districts and superintendents across the country were already grappling with the thorny legal question of how to treat transgender students.

Now the Obama administration, through Friday's letter from the Education and Justice Departments, has reinforced and specified its interpretation that transgender students are afforded sweeping civil rights protections under Title IX, the federal law prohibiting sex-based discrimination in educational programs and activities. That includes allowing transgender students access to bathrooms, locker rooms and other school facilities that align with their gender identity.

“With this guidance, the Education and Justice Departments are making it crystal clear what schools' obligations to transgender students are under federal law,” said James Esseks, director of the American Civil Liberties Union's Lesbian Gay Bisexual Transgender & HIV Project. “It's about time schools understand that transgender students are fully protected.”

As it has done in North Carolina, the administration threatened Friday to withhold federal education dollars from schools, districts or states that fail to heed the order.

But since the administration's directive amounts to guidance and not a legal requirement, the debate is far from settled. In fact, the real fight has only truly begun, and both sides are digging in for what promises to be a long, nasty and emotional struggle of politics, policy and law — one that appears poised to ultimately land before the Supreme Court.

"I believe it is the biggest issue facing families and schools in America since prayer was taken out of public schools," Texas Lt. Gov. Dan Patrick declared Friday, mere hours after the Obama administration's letter was released.

In Patrick's view, the Obama administration's transgender rights stance will divide the country along a "family-values" fault line and sow discord within school districts. He sees the threat of withholding federal resources for noncompliance as nothing short of "blackmail," and vowed that the Lone Star State won't be bullied by Washington.

"Well, in Texas, he can keep his 30 pieces of silver," Patrick said. "We will not yield to blackmail from the president of the United States."

The White House did not let that zinger go without a response. "Well, I think this does underscore the risk of electing a right-wing radio host to elected statewide office," press secretary Josh Earnest told reporters at the daily briefing Friday, digging at Patrick's prowess on the Texas airwaves.

But Texas Gov. Greg Abbott had Patrick's back, vowing to lead a fight against the federal government, tweeting: "Obama can't rewrite the Civil Rights Act. He's not a King."

So if tens of thousands of schools, school districts and superintendents weren't already wrestling with the issue — not to mention elected officials and campaigning politicians — they're certainly forced to think about it now.

The administration's non-binding guidance — which is meant to clarify the Obama administration's interpretation of the law in the absence of specific mention of transgender rights and to provide best practices for school districts — also gives a degree of political cover to superintendents and district officials, said Fordham Institute President Michael Petrilli.

"I think thousands of superintendents are breathing a sigh of relief today," he said. "Many of them probably don't want to take a position. ... Thousands of school superintendents can now say they don't want to put their federal funding at risk."

But critics say the administration has issued a directive that's going to use up tons of school resources and take time away from teaching students.

"Saying that students are allowed to use the locker room that aligns with their gender identity changes the way schools do business," said Jeanne Allen, founder of the Center for Education Reform. "Schools have to spend time, money, resources and people working on something that has absolutely nothing to do with the purpose of school."

A number of lawsuits have already cropped up in districts across the country, influenced in part by transgender students feeling more comfortable coming out earlier, and with the transgender community receiving more exposure in mainstream media, advocates say.

For example, the Christian nonprofit Alliance Defending Freedom is suing the Obama administration and an Illinois school district over an agreement to let a transgender student who identifies as female use a private changing area in the girl's locker room. And a Virginia school

district is challenging an appellate court's decision to allow a transgender student who identifies as male to use the boy's bathroom at his high school.

In Texas, Fort Bend Independent School District officials started receiving phone calls from concerned parents after the administration pushed their message Friday morning, the Houston Chronicle reports.

"We know how polarizing this is in our nation," said Nancy Porter, spokeswoman for the Houston area's third-largest district. "That's why we're trying to handle this with sensitivity for the best interest of all students."

And on Thursday, the ACLU of Florida filed a complaint with the Education Department's Office for Civil Rights against the Marion County School District for barring transgender students from using bathrooms that are consistent with their gender identity.

Allen said she expects more lawsuits to come out of school districts across the country. "Is this a proper use of government in an educational venue?" she said of the Obama administration's guidance. "Parents will rebel."

Allen and Neal McCluskey, of the Cato Institute, both proponents of school choice, said the issue might spur parents to push for more schooling options independent of the public systems and the micromanagement of the federal government.

The swift Republican pushback against the Obama administration's robust civil rights message included strong words from a leading lawmaker on Capitol Hill: Senate HELP Chairman Lamar Alexander, a Tennessee Republican who has previously accused the Education Department of circumventing Congress and regulating through Title IX guidance on sexual harassment and assault policies, causing colleges and universities to make changes.

Alexander stressed Friday that the administration's guidance is merely that — guidance.

"This is the kind of issue that parents, schools boards, communities, students and teachers should be allowed to work out in a practical way with a maximum amount of respect for the individual rights of all students," he argued. "Insofar as the federal government goes, it's up to Congress to write the law, not the executive departments. And guidance issued by the departments does not amount to federal law, and should not be treated as such."

But the Education and Justice Departments, leaning on its greatest advantage in this struggle, made clear that if schools and districts are discriminating against transgender students, forcing them to use a bathroom based on their gender at birth or marginalizing them in any way, federal funding would immediately be at risk. That threat sparked dueling lawsuits in North Carolina earlier this week, with Republican Gov. Pat McCrory suing the Justice Department, and Justice suing right back, over the state's so-called House Bill 2, which requires transgender students to use a bathroom that aligns with the gender on their birth certificate. Attorney General Loretta Lynch said the law violates multiple civil rights laws, including Title IX.

McCrary responded Friday, saying that the administration's policy "changes generations of gender etiquette and privacy norms which parents, children and employees have expected in the most personal and private settings of their everyday lives."

"Most Americans, including this governor, believe that government is searching for a solution to a problem that has yet to be defined," he added.

Republican House Education and the Workforce Chairman John Kline also chimed in, saying the administration's warning is "another unilateral decree imposed on our nation's schools, colleges, and universities by a lawless administration."

"This latest edict disregards the will and concerns of millions of students, parents, teachers, school administrators, and religious leaders," he said, directing his anger over the move toward Education Secretary John B. King Jr. "The secretary has the audacity to say this will promote an environment free of fear and discrimination, but what about the students, parents, and families who don't share the president's personal views?"

"The secretary has no business — and certainly no legal authority — denying low-income students the financial support they deserve because their school or institution doesn't bend to the president's personal agenda," he added.

To date, the Obama administration has not withheld funding from any school under Title IX in relation to discrimination against transgender students.

Advocates and scholars say the issue of transgender civil rights as a whole could go all the way to the Supreme Court — just like the issue of gay marriage. And if there's no judicial relief, Congress might have to offer some clarity.

Social conservatives took a hit when SCOTUS upheld gay marriage last year, so the issue of transgender rights has taken on greater importance for social conservatives on the right. It's an area where they see the potential for victory because they say that Title IX doesn't specifically address transgender individuals.

But Petrilli said the Obama administration and many on the left also see this issue as a "political winner."

"This is a classic wedge issue and they probably suspect that the American people are going to be on their side more than the Republicans," he said.

Advocates suspect that Hillary Clinton, if elected president, will continue the administration's civil rights and equity agenda. But Donald Trump is a wild card. Trump didn't blast the administration's move in an interview with George Stephanopoulos of ABC's "Good Morning America" on Friday morning, merely saying it should be left to the states.

"I think the state should make the decision. I think they're more than capable of making the decision; I felt that from the beginning," said Trump, whose position is somewhat muddled because he said previously that the issue does not present any problems and people should be free to use any bathroom they want.

Some superintendents and major school districts were quick to celebrate the Obama administration's aggressive play, however. Los Angeles Unified School District, the second largest school district in the country, said the White House and district officials share a commitment to "providing a school climate in which students feel welcome and comfortable."

The Education and Justice Departments cited LAUSD when it comes to best practices for identifying when a student is transgender, for example. The district has a policy that says: "There is no medical or mental health diagnosis or treatment threshold that students must meet in order to have their gender identity recognized and respected."

Minnesota Education Commissioner Brenda Cassellius said the Education and Justice Departments are clarifying "what we've believed all along — that gender identity is protected under Title IX, and that all students have a right to attend a school that is safe and discrimination-free."

But Oklahoma Superintendent Joy Hofmeister called the Obama administration's move an "outrageous overreach," borrowing a phrase that McCrory has used often against the president.

"It nearly defies belief that the Obama Administration now wants to direct how Oklahoma schools and districts operate our bathrooms," she said. "Furthermore, I find it disturbing that this 'joint guidance' carries an implicit threat of loss of federal funds. In the midst of a historic funding crisis for public education, schools should not be burdened with this sort of overreach yet again."

Large urban districts, like LAUSD and Chicago Public Schools — the nation's third largest school district — have adopted inclusive policies. But many other districts, often smaller, conservative or more rural, are looking to pass restrictive policies. For example, a fight in Fannin County, Ga., has recently exploded, drawing angry parents to school board meetings.

Democrats and LGBT advocates also celebrated Friday's news as an historic moment for transgender individuals and students across the country. Education Secretary King said in releasing the guidance that no student should ever feel unwelcome at school.

"Our guidance sends a clear message to transgender students across the country: Here in America, you are safe, you are protected and you belong — just as you are," added Vanita Gupta, head of the Justice Department's Civil Rights Division.

Democratic Rep. Bobby Scott said: "The timing of this guidance can help to quell the unfounded fears that have been spurred by damaging bills in some states. This guidance can also help schools to familiarize themselves with the expectations of the law, so that they may intelligently protect the rights and dignity of transgender students and, indeed, all students."

Gavin Grimm, a transgender student fighting in federal court to use the boy's bathroom at his Virginia high school, said the Obama administration has given transgender students a new means of ensuring they're treated fairly and with dignity while at school.

"This guidance would have made a big difference in my life, and I'm happy that kids will be free to use the bathroom that reflects who they are," he said.

Grimm's case against his local school board was recently upheld in federal appellate court — a major legal victory for him and for transgender rights advocates across the country. But his legal battle isn't over: The school board has filed a petition for a rehearing in the case.