

Memo

Date: January 13, 2016

To: Amy Sneirson, Executive Director

From: Barbara Archer Hirsch, Commission Counsel

Re: Interpretation of the Education Provisions of the MHRA

The Commission's Education Rule, which is a joint rule enacted with the Department of Education, has not been updated in any significant way in the past 15 years. Even the most recent amendment, enacted in 2000, did not amend the rule to include all of the then-protected classes which had been added to the MHRA: while race, national origin, and disability had been added to the education provisions in the late 1980s, those classes are not mentioned in our current rule.

Ten years ago, the education provisions of the MHRA were amended to make discrimination on the basis of sexual orientation (which includes gender identity and gender expression) unlawful. Soon thereafter, the Commission applied the sexual orientation protections in a claim by a transgender student's right to use the bathroom corresponding with her gender identity. The case became the subject of long-running litigation around the application of the MHRA's sexual orientation provisions in education. Because of the litigation, the Commission held off on rulemaking. The litigation was finally concluded about two years ago. *See Doe v. RSU 26*, 2014 ME 11. In the wake of *Doe*, we received a number of inquiries about the rights of students under the MHRA, specifically with regard to sexual orientation issues.

While we would like to propose changes to the current Education Rule, that avenue is unavailable at the moment. The public is in need of guidance as to the application of the education provisions of the MHRA generally, and how the Commission interprets the Act with regard to sexual orientation discrimination in particular. Those issues are addressed below.

Introduction:

As an initial matter, while the text of the Education Rule addresses sex discrimination only, its provisions are also applicable to unlawful education discrimination on the basis of race, national origin, physical or mental disability, and sexual orientation. The rules, like the MHRA itself, are meant to be interpreted broadly. In particular, with regard to discrimination on the basis of sex and sexual orientation, including gender identity and gender expression, the Commission's rules are intended to be liberally construed to facilitate inclusion and educational opportunity for transgender individuals. **Whenever educational or extra-curricular opportunities offered by a covered educational institution are offered separately to students based on sex and/or gender, students shall be allowed to participate in accordance with their gender identity.**

Definitions:

“Sexual orientation” is defined in the MHRA to mean a person’s actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression. The terms heterosexuality, bisexuality, and homosexuality should not be considered exclusive, however, and the statute should be interpreted to cover all orientations (including, for example, those who identify as asexual).

“Gender identity” means an individual’s sincerely held core belief regarding their gender, whether that individual identifies as male, female, a blend of both, neither, or in some other way (such as, for example, students who identify as “queer”, “genderqueer”, “bi-gender”, “intersex” or “gender fluid”).

“Gender expression” means an individual’s external expression of their gender identity, through such means as clothing, hair styling, jewelry, voice, and behavior.

“Transgender” is used as an umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex/gender they were assigned at birth. Being transgender does not imply any specific sexual orientation.

Determination of a Student’s Gender Identity:

In general, an educational institution should accept a student’s assertion of their gender identity when there is consistent and uniform assertion of the gender identity, or any other evidence that the student’s gender identity is sincerely held as part of their core identity. If the educational institution has a credible, objective reason to believe that a student’s gender identity is being asserted for an improper purpose, it may request additional evidence supporting the student’s stated gender identity.

- (a) Satisfactory additional evidence may include, but shall not be limited to, the following:
 - i. A written statement from a physician, physician’s assistant, nurse practitioner, or nurse who has been involved with the student’s health care;
 - ii. A written statement from a psychologist, psychiatrist, or social worker who has met with the student;
 - iii. Passports or other formal documents showing the student’s gender identity;
 - iv. Familial documents, such as family photographs or statements from the student’s parent(s), guardian(s), or other adult relative(s);
 - v. A statement from an adult who is close to the student and can speak to the student’s core gender identity.

- (b) An educational institution may not require medical records as proof of a student’s gender identity.

Athletics:

Students should be allowed to compete on single-sex/gender teams based upon their gender identity.

In general, if a student’s gender identity changes in concert with athletic seasons, the educational institution may request additional information supporting the student’s stated gender identity, unless

the school is already aware that the asserted gender identity, which may be fluid, is the student's sincerely held core belief as to their gender.

If the participation of a transgender student on the single-sex/gender team that most closely matches the student's gender identity poses a significant risk of substantial physical harm to the student or to other participants, the educational institution and the student shall enter into interactive discussions to minimize or eliminate the threat of substantial harm, while also providing mutually-acceptable athletic opportunity for the student. The assessment that there is a significant risk of substantial physical harm cannot be based on generalizations or on assumptions about transgender athletes, or about sex/gender differences generally. Rather, the educational institution should engage in an individualized assessment of the individual student's participation on the particular team at issue.

Comparable Facilities:

Students must be permitted to use the toilet, locker room, and shower facilities corresponding to their gender identity. Facilities such as a curtained changing area or unisex facilities may be provided and made available to all students, but should not be used to isolate or segregate students based on their sexual orientation, gender expression, or gender identity. Students shall not be required to use facilities corresponding to their assigned birth sex/gender, where their assigned birth sex/gender and their gender identity are different.

If the educational institution offers housing in which students are separated or assigned by gender, students should be permitted to reside in the housing facilities corresponding to their gender identity.

Harassment/Hostile Educational Environment:

Educational institutions are subject to potential claims under the MHRA for harassment/hostile educational environment based on a student's sexual orientation. In the school context, the Commission has interpreted a hostile educational environment as involving harassment that a reasonable student of the same age and maturity as the student being harassed would consider severe or pervasive enough to create an intimidating, hostile, or offensive school environment. An educational institution may be held liable for the alleged hostile environment if it knew or should have known of the harassment and failed to take prompt, appropriate action.

Student Names/Appearance:

A student's official record shall bear their legal name, which may be changed only upon proof that the student's legal name has been changed pursuant to a court order. At the written request of a student, however, and consistent with the student's gender identity, the educational institution shall use the student's preferred name and pronouns consistent with their gender identity on all other documents.

If a student so chooses, the educational institution's employees should be required to address the student by the student's chosen name and use pronouns consistent with the student's gender identity. The educational institution should also, at the request of any student, instruct its students to address the student by the student's chosen name and use pronouns consistent with the student's gender identity. Inadvertent slips and honest mistakes will not be considered a violation of the Act, but a pattern of

refusal to acknowledge a student's gender identity by using their chosen name and pronouns may be considered to constitute such a violation.

Students should be permitted to dress in a manner consistent with the student's gender identity, subject to any dress code adopted by the educational institution. The dress code should be applied to the student consistent with their gender identity.

In the event that the student and their parent/legal guardian do not agree with regard to the student's sexual orientation, gender identity, or gender expression, the educational institution should, whenever possible, abide by the wishes of the student with regard their gender identity and expression while at school.