

# At Issue

A RISK MANAGEMENT NEWSLETTER FOR  
ELEMENTARY AND SECONDARY SCHOOLS



## Changing Transgender Laws and the Effects on Educational Institutions

By: **Peter T. Shapiro** and **Stephen D. Hoffman**, partners with Lewis Brisbois Bisgaard & Smith LLP

Issues involving transgender persons have been inescapable in the media, the political sphere, the courts, and increasingly, in myriad everyday situations. Schools appear to have become a particularly charged battleground for such issues, focused largely on the issue of access to restrooms and locker rooms designated by gender for persons who identify as a gender other than their birth gender. The legal landscape changed dramatically on August 21, 2016, when United States District Judge Reed O'Connor in the United District Court for the Northern District of Texas issued an order granting a preliminary injunction preventing enforcement of a federal policy that required public schools to permit transgender students to use bathroom facilities that did not match their gender identities. The order applies to all public schools nationwide, which means that unless and until the injunction is lifted on appeal (or vacated by Judge O'Connor, which seems unlikely),

elementary, middle and secondary schools and colleges in every state and the District of Columbia are barred from enforcing the increasingly widespread policies and practices under which transgender students are permitted to use their preferred bathrooms. Several states filed this suit including Texas, Wisconsin, Arizona, West Virginia and Tennessee to avoid having to comply with the determination of the federal Justice Department and Department of Education that Title IX of the Civil Rights Act of 1964 (which prohibits discrimination on the basis of sex in schools that receive federal funding) requires schools to permit transgender students to use the facilities of their choice. That determination was communicated via a DOJ/DOE guidance letter to schools across the country directing that students be allowed immediate access to bathrooms, showers and locker rooms of the student's choosing or risk losing Title IX-linked funding.

### IN THIS ISSUE

P.1	Changing Transgender Laws
P.4	School Safety
P.5	Making Left Turns
P.6	Zika Virus
P.7	News & Views

Judge O'Connor concluded that the case presented the need to balance protection of students' rights against what he saw as the students' personal privacy rights in bathrooms and locker rooms. However, he concluded that he would not be the one to determine the proper balance of those interests. Instead, he ruled on the grounds that this new government interpretation of the statute and the regulation in question (34 C.F.R. 106.33) was contrary to the legislative intent and the previously adopted implementing regulations. Judge O'Connor ruled that the plaintiffs had shown irreparable harm from enforcement of the new federal policy based on the conflict between that policy and the plaintiffs' own contrary policies, and that the balance of the equities favored plaintiffs. Because the regulation in question is permissive, the injunction does not bar the policies of states that define sex to include gender identity for purposes of providing separate facilities. It applies only to those states whose laws direct separation.

Also importantly for schools as employers, the judge signaled his view that the federal government was wrong in arguing that transgendered employees are protected under Title VII's prohibition of employment discrimination on the basis of sex. The DOJ views the relevant provisions of Title VII and Title IX prohibiting discrimination on the basis

of sex as identical, and argues that both prohibit discrimination against the transgendered. At least one federal appeals court has rejected the view that Title VII's prohibition on discrimination on the basis of sex does not encompass protection for homosexuals, rejecting the position taken by the Equal Employment Opportunity Commission.

It is important to note that this is only a preliminary ruling pending adjudication on the merits of the states' contention that Title IX applies only to biological gender identity such that the federal rules lack sufficient statutory foundation. It is unclear at present how the lawsuit in question will ultimately be determined, and the final resolution may well be years away and may be determined by a Supreme Court composed of at least one justice yet to be appointed. However, unless and until the injunction is overturned, school districts may not enforce the federal guidelines. They remain free, however, to utilize state and local guidelines, which can be expected to vary widely from state to state. Additionally, schools remain able to establish gender neutral facilities, and it is anticipated that many will do so in order to overcome anticipated student and parental objections and future litigation. To the extent possible, given the uncertainties as to the ultimate state of the law, it would appear to be a best practice at present to utilize such facilities if available.

At the same time as the federal government has been expanding the rights of the transgendered, other jurisdictions have acted in contrary fashion. Most prominently, North Carolina passed a law that requires education boards and public agencies to limit the use of sex-segregated bathrooms to people of the corresponding biological sex. The DOJ has filed suit challenging the legality of that law, and on August 26, 2016, a federal judge ruled that the University of North Carolina system cannot enforce the part of the law that restricts which restrooms transgender people can use. Meanwhile, North Carolina is reeling from adverse public reaction and boycotts, including the NBA's decision to move its 2017 All Star game out of Charlotte and the University of Vermont's decision to cancel a scheduled women's basketball game against the University of North Carolina that was to be played in Chapel Hill. If North Carolina's law is upheld, it remains to be determined whether other states or local governments will adopt similar laws or whether the pressures being brought to bear will cause a loss of will to move forward with such laws, as recently occurred in Indiana.

While it is hotly disputed whether either Title VII or Title IX's prohibitions on discrimination on the basis of sex protects transgendered persons, other protections may be available. Some courts have held that discriminating against a transgender individual violates Title VII based on his or her failure to conform to socially-constructed norms regarding gender roles. Schools should be aware that they may risk liability under this theory if





they take adverse action against a transgender student or employee based on his or her gender identification. In this context, educating all staffers to be sensitive to such issues is critical.

It is hardly news that students who do not conform to societal norms are vulnerable to bullying. This is of course a major concern as to transgendered students given how quickly young people will sometimes ostracize peers based on their own fears. Lawsuits giving rise to large verdicts in favor of bullied students are becoming more frequent. Given this environment, schools should be vigilant to adopt and apply rigorous policies prohibiting bullying and encouraging people to speak up when they are victimized or witness bullying conduct. While there is increasing recognition that sexual harassment education and training has limited effectiveness in reducing the frequency of sexual harassment, the same may not be true of education and training concerning bullying with respect to the treatment of gay and transgendered individuals. Such education may actually help avoid bullying before it happens as well as providing schools with a defense to possible claims of failure to protect a bullied student. As with employment training, schools are advised to keep records to show who received such training on a regular basis, including by having attendees sign off confirming their participation. The use of interactive websites for training sessions is ideal, if not necessarily within the means of all school systems.

It would clearly be most desirable for federal legislative clarification of the bathroom access issue as well as the also hotly debated issue of whether transgender persons are otherwise protected in the educational and employment contexts. However, given the Congressional impasse of the recent polarized past, which hardly seems likely to be solved via the current

elections, prospects for legislative action appear to be dim. This controversy will also continue to spill over into other educational contexts, particularly school sports. One can anticipate objections being raised — and the inevitable lawsuits being filed — in response to developments such as a transgendered student who identifies as female signing up for the girls' basketball team. While many Americans may not know anyone who is transgender, and these issues may be foreign to many at present, it is hardly surprising that in our polarized society this has become a hot button issue. Given the surprising speed with which the majority of the American public came to favor gay marriage, followed closely by the Supreme Court's 2015 recognition of the constitutional right of gay people to marry, we may well see a continued groundswell of support for the rights of transgendered persons that may culminate in the Supreme Court confirming that protection of the rights of transgendered students, employees and others can be found in the Civil Rights Laws and potentially the United States Constitution. Meanwhile, school administrators, parents, teachers, coaches and perhaps most importantly students can expect to be embroiled in these controversies for the immediate future, presumably to the detriment of the desired focus on the ostensible pedagogic and citizen-molding goals of the educational system. Vigilance in anticipating and seeking to prevent claims in this context is a major challenge, but one that only the foolhardy would ignore.

Peter T. Shapiro is a partner with Lewis Brisbois Bisgaard & Smith LLP in its New York and New Jersey offices and is Northeast Regional Vice-Chair of the firm's employment group. Stephen D. Hoffman is also a partner with Lewis Brisbois Bisgaard & Smith LLP in its Phoenix and Albuquerque offices and is a member of the firm's employment law group.



# Start School Safely!

By: **Robert Bambino**, CPCU, ARM Wright Specialty Insurance

School is open in most areas of the country with fall sports underway. Community use of fields and other facilities will soon increase as we move further into the school year.

As expected, there are more accidents when school is in session. Not surprisingly, many of these accidents (and resulting claims) are a result of slips and falls, and from the use of equipment. To help our K-12 school clients evaluate the equipment and facilities that are often used by the public, Wright Specialty created a checklist with safety and loss control metrics. It is available at <http://www.wrmamerica.com/producers/resourcecenter/rmrc.htm>. Sign in with your password to our Risk Management Resource Center (under Policyholder tab) and scroll down to Starting School Safety Checklist.

## COMMUNITY USE OF POOLS AND FITNESS ROOMS

The start of school is a good time to check signage in pools and fitness areas. Signs can communicate prohibited activities, provide instruction and warn of inherent dangers. The value of a sign is determined by how well it



is understood and if it influences the reader's behavior. Standardized signage, using universal pictorial symbols, lettering and design, is helpful. In many communities, more than one language is needed. Here are examples of different signs to use in pools and fitness rooms:

POOLS	FITNESS ROOMS
<p><b>General Signage</b></p> <ul style="list-style-type: none"> <li>• Hours of operation</li> <li>• Minimum age</li> <li>• Adults or responsible adult supervisors must accompany children or non-swimmers</li> <li>• No glass, smoking, food or drink in pool area</li> <li>• No cellphones in pool area</li> <li>• No animals – except for service animals</li> <li>• No running, pushing or horseplay</li> <li>• Maximum capacity</li> <li>• Proper attire</li> <li>• Patrons must shower before entering the pool</li> <li>• Use pictorial signs</li> <li>• Report broken equipment to staff</li> <li>• Secure valuables – School is not responsible for lost or stolen property</li> </ul> <p><b>Specific Signage</b></p> <ul style="list-style-type: none"> <li>• Diving: either “No Diving Allowed” or “Dive in Designated Areas Only”</li> <li>• Pool depth markings</li> <li>• Supervision: If pool is not supervised: “Use Pool at Your Own Risk. No Lifeguard on Duty.” If there is supervision: “Do Not Use Pool Without Lifeguard on Duty”</li> <li>• Closures and opening: Locking the pool area with a “Pool Open” or “Pool Closed” sign</li> <li>• Post emergency contact information</li> </ul>	<p><b>General Signage</b></p> <ul style="list-style-type: none"> <li>• Hours of operation</li> <li>• Minimum age</li> <li>• Proper attire (such as athletic shoes and workout clothing)</li> <li>• No cellphone use</li> <li>• No food, smoking, gum or glass containers</li> <li>• Report broken equipment to staff</li> <li>• Use pictorial signs</li> <li>• Use at Your Own Risk</li> <li>• Know Your Own Limitations</li> <li>• Secure valuables – School is not responsible for lost or stolen property</li> <li>• Wipe off equipment after use</li> <li>• Time limits per station (if applicable)</li> </ul> <p><b>Specific Signage</b></p> <ul style="list-style-type: none"> <li>• Weights or Weight Room: “Use a Spotter,” “Rack Weights After Use,” “No Jewelry,” “Use Collars with Free Weights”</li> <li>• Machines must have manufacturers' warning signs attached</li> <li>• Closures and opening: Locking the fitness area with a “Fitness Room Open” or “Fitness Room Closed” sign</li> <li>• Post emergency contact information</li> </ul>

## ASSUMPTION OF RISK, WAIVER AND RELEASE LANGUAGE

A waiver is a voluntary surrender of a participant's right to sue for injury or damage. A release is a voluntary release of the school from liability for injuries that may occur. The effectiveness of waivers and releases varies by state. Make sure to speak to your legal counsel before drafting or using these documents.

Waiver and release forms usually include assumption of risk language – language outlining the risks particular to the activity or program. This is a good way of letting participants

know the risks of physical injury that exist when participating. These forms often contain a statement regarding medical conditions, in effect an affirmation from the participant acknowledging that they are medically and physically able to swim or use the equipment. Parents and guardians should also sign if the participant is a minor.

Although the effectiveness of waivers and release forms are debatable, they should be obtained from participants. Waiver and release forms have the greatest likelihood of passing legal muster if they are specific and related to the events and activities at hand.



# The "Art" of Making a Left Turn

Left-turn accidents are a leading cause of loss for all insurance programs, and Wright Specialty is no exception. Left-turn accidents result in a substantial number of claims and lawsuits against Wright Specialty policyholders. Left turns are also a significant driving issue for older drivers, according to the National Highway Traffic Safety Administration (NHTSA). In states with comparative negligence laws — a mechanism where damages are allocated between negligent parties based on their proportionate degree of fault — the bulk of the liability is usually assessed against the left-turning vehicle.

Vehicle and traffic laws differ from state-to-state, but generally, the driver approaching an intersection has to give way to traffic that is in the intersection, and drivers who want to make a left turn must wait for approaching traffic to pass through the intersection before making the turn. Here are several suggestions taken from different state Department of Motor Vehicle (e.g., California, Georgia, Illinois, Missouri and New York) manuals, to make a left turn safely. We suggest you share this article with your drivers and use it as training material.

### One: Approaching the Intersection

- Make full stops for traffic signals and stop signs.
- Begin signaling about 100' before entering the intersection.
- Reduce your speed.
- Look for traffic in the intersection and around your vehicle.
- You may enter the intersection on a green light to prepare for the turn with no other vehicle(s) ahead of you.
- Keep the front wheels straight while waiting.
- Rear wheels will be inside the path of front wheels and nearer to traffic heading toward you.

- When traffic is clear, begin the turn.
- Do not cut the corner.

### Two: Making the Turn

#### From One-Way to One-Way Road

- Enter from the left lane, or to the left side of a single lane road.
- If the road has more than one lane, turn into the left lane.



#### From One-Way to Two-Way Road

- Enter from the left lane, or to the left side of a single lane road.
- Enter the two-lane road as close as possible to the right on the center line.
- Watch for other traffic in the intersection.





**From Two-Way Road to Two-Way Road**

- Approach with your wheels as close as possible to the center line.
- Try to use the left side of the intersection — reduces interference with approaching traffic that wants to turn left.
- Be alert for traffic heading toward you from the left and from the lane you are going to cross.



**From a Two-Way Road to a One-Way Road**

- Approach with your wheels as close as possible to the center line.
- Make the turn before reaching the center of the intersection and turn into the left lane of the road you will enter.



**From a Two-Way Road to a Four-Lane Highway**

- Approach with your wheels as close as possible to the center line.
- Enter the left lane, to the right of the center line.



When planning bus routes, minimize routes with a large number of left turns or difficult left turns, if possible. This applies not only to busy intersections, but intersections with temporary conditions, such as construction, road repairs, snow banks that obstruct visibility, or unrepaired roadways.

Images from the NYS Department of Motor Vehicles Driver's Manual, Chapter 5: Intersection and Turns.

# Zika Virus for Educational Institutions

In July, the Centers for Disease Control and Prevention (CDC) issued an interim guidance document for school administrators. The document can be found at the CDC website at: <http://www.cdc.gov/zika/schools.html>

The document contains information about the implementation of mosquito control measures, response procedures for a Zika virus infection, OSHA safety recommendations for staff working outdoors and planning for school activities. It also addresses the need to work and coordinate with local public health departments.

The mosquito season is linked to temperature. Generally, mosquitos start swarming when the temperature reaches 50° F. Schools in the south and southwest experience a longer season; in some areas, the mosquito season continues throughout the entire year.

Different state departments of health have also issued guidance documents on the Zika virus. Here are links to several departments:



STATE	LINKS
Arizona	<a href="http://www.azdhs.gov/preparedness/epidemiology-disease-control/mosquito-borne/index.php#zika-home">http://www.azdhs.gov/preparedness/epidemiology-disease-control/mosquito-borne/index.php#zika-home</a>
California	<a href="http://www.cdph.ca.gov/HealthInfo/discond/Pages/Zika.aspx">http://www.cdph.ca.gov/HealthInfo/discond/Pages/Zika.aspx</a>
Colorado	<a href="https://www.colorado.gov/pacific/cdphe/zika">https://www.colorado.gov/pacific/cdphe/zika</a>
Delaware	<a href="http://dhss.delaware.gov/dhss/dph/zika.html">http://dhss.delaware.gov/dhss/dph/zika.html</a>
Georgia	<a href="http://dph.georgia.gov/zika-virus-faq">http://dph.georgia.gov/zika-virus-faq</a>
Indiana	<a href="http://in.gov/isdh/26910.htm">http://in.gov/isdh/26910.htm</a>
Illinois	<a href="http://www.dph.illinois.gov/">http://www.dph.illinois.gov/</a>
Kansas	<a href="http://www.kdheks.gov/zika/index.htm">http://www.kdheks.gov/zika/index.htm</a>
Minnesota	<a href="http://www.health.state.mn.us/divs/idepc/diseases/zika/index.html">http://www.health.state.mn.us/divs/idepc/diseases/zika/index.html</a>
New York	<a href="https://www.health.ny.gov/diseases/zika_virus/additional_information.htm">https://www.health.ny.gov/diseases/zika_virus/additional_information.htm</a>
Ohio	<a href="http://www.odh.ohio.gov/odhprograms/bid/zdp/diseases/zika.aspx">http://www.odh.ohio.gov/odhprograms/bid/zdp/diseases/zika.aspx</a>

The CDC issued a travel advisory for persons traveling to foreign countries and U.S. territories. It can be found at: <http://wwwnc.cdc.gov/travel/page/zika-information>

# News&Views

**Stronger Hurricane Season?** The Tropical Meteorology team at Colorado State University predicted 13 named storms in their April forecast, but has now updated it to 15 storms in their latest July revision. Six of those storms will become hurricanes and two could be major ones. Higher sea surface temperatures in the Atlantic Ocean are to blame. (Source: The Weather Network. August 12, 2016)

## Louisiana Flooding

With over 40,000 homes damaged, the economic cost of the flooding in Louisiana could be \$1.5 billion according to a preliminary report issued by Aon Benfield. (Source: Yahoo! Finance. August 19, 2016)



## EEOC Guidance

The U.S. Equal Opportunity Commission (EEOC) issued its final Enforcement Guidance on Retaliation and Related Issues on August 29, 2016. Retaliation is asserted in almost 45% of all charges made to the EEOC, and it is the most frequently alleged basis of discrimination, according to the EEOC. The document can be accessed on the EEOC website at: <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.

## Student Alcohol Use

Binge alcohol use is down among full-time college students, with 44% of students reporting use during the past month in 2002 to 39% in 2011, according to the National Institute on Alcohol Abuse and Alcoholism, Alcohol Research: Current Reviews, Volume 35, Issue Number 2. It's also down for male high school seniors (36% in 1992 to 27% in 2012), but the same (20%) for females.

# ResourceCenter

**Training or information about today's risk management-related subjects can be found in the Wright Specialty E-Learning or Title IX Learning Centers online.**

Wright Specialty is host to a number of online risk management resources. Take advantage of the free safety education courses available on Wright's 24/7 web-based training center. Visit our Title IX Resource Center to keep up with changing developments or browse our seasonal Risk Alerts to stay up-to-date on school-based risk management and safety issues. With years of experience insuring school risks, Wright Specialty Insurance provides valuable guidance for school administrators to help reduce injuries to students, staff and visitors, and to prevent damage to property. You can access our national Employment Liability Hotline for help with every day employment-related issues. The Hotline is available Monday - Friday from 8:30 a.m. to 6:00 p.m. eastern time. Call 866-758-6874.

**For easy registration for our e-Training Center and for access to the Resource Center, contact Erica Gotay, your Wright Specialty representative, to receive your access code at: 516-750-3902 or [EGOTAY@wrightinsurance.com](mailto:EGOTAY@wrightinsurance.com)**



*The Right Partnership for You.®*

333 Earle Ovington Blvd., Suite 505, Uniondale, NY 11553-3624  
Toll Free: 1.877.976.2111 | Phone: 516.750.3903 | Fax: 516.227.2352

[www.wrightspecialty.com](http://www.wrightspecialty.com)

Wright Specialty Insurance is a member of The Wright Insurance Group™  
© Copyright 2016 The Wright Insurance Group, LLC. All Rights Reserved.

Wright Specialty Insurance provides general information and material through this document to educational institutions throughout the United States. The information contained in At Issue is not intended as a substitute for professional consultation or legal advice with respect to any issue identified or discussed. Wright Specialty Insurance makes no representations about the suitability of this information and material for any purpose other than discussion and disclaims any liability for damages of any kind arising out of the use of the information provided. Consult with your insurance representative, risk manager and legal counsel if you have legal, procedural or safety-related questions.