STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 11, 2016

Opinion No. 16-15

Effect of House Bill 2414, 109th Gen. Assem. (2016), on Title IX Funding

Question 1

Does House Bill 2414, 109th Gen. Assem. (2016), pose a risk of violation of Title IX of the Education amendments of 1972?

Opinion 1

Yes, if only because the U.S. Department of Education, which is charged with enforcing Title IX, interprets Title IX to require that transgender students be given access to restrooms and locker rooms consistent with their "gender identity" instead of their anatomical gender.

Question 2

What is the likely effect of a violation of Title IX on federal funding for public education in Tennessee?

Opinion 2

If H.B. 2414 is enacted, a public school district or institution of higher learning that implements that law will be putting its Title IX funding at risk, because a recipient of federal funding that discriminates in violation of Title IX may lose its federal funding.

ANALYSIS

If enacted, House Bill 2414, 109th Gen. Assem. (2016), would require Tennessee public schools and institutions of higher learning to require their students to use restrooms and locker rooms that are assigned for use by persons of the sex indicated on the respective student's birth certificate.[1] This proposed legislation would have the effect of banning transgender students[2] from using restrooms and locker rooms that are consistent with their gender identity or expression.

Legislation very similar to H.B. 2414 has just been enacted in North Carolina and already faces a legal challenge. *See Carcano v. McCrory,* U.S. Dist. Ct., M.D. N.C., No. 1:16-cv-236, filed 3/28/16. The North Carolina legislation requires local boards of education to ensure that every "multiple occupancy bathroom or changing facility . . . be designated for and used only by students based on their biological sex." It defines "biological sex" as the condition of being male or female as stated on a person's birth certificate. The plaintiffs have challenged that legislation as violative of the federal equal protection clause because it discriminates on the basis of sex by treating transgender people differently from non-transgender people, violative of federal substantive due process rights because it infringes on the privacy rights of transgender people by requiring them to disclose personal information to anyone who sees them using a facility that is inconsistent with their gender expression, and violative of Title IX of the Education Amendments of 1972 because it discriminates on the basis of sex. *Id.*

1. Violation of Title IX

Tennessee's H.B. 2414, if enacted, would be subject to similar legal challenges, including a claim that it violates Title IX. Discrimination on the basis of sex is a violation of Title IX. If H.B. 2414 is found to discriminate on the basis of sex, it would be a violation of Title IX.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

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[1] Section 1 of HB 2414 would add the following subsection to Title 49, Chapter 2, Part 1:

> Public schools shall require that a student use student restroom and locker room facilities that are assigned for use by persons of the same sex as the sex indicated on the student's original birth certificate.

Section 2 of HB 2414 would add the following language to Title 49, Chapter 7, Part 1:

> Public institutions of higher education shall require that a student use the restroom and locker room facilities that are assigned for use by persons of the same sex as the sex indicated on the student's original birth certificate.

[2] A transgender person is one who identifies with a gender other than that person's biological gender. New Oxford American Dictionary, 3rd ed. The U.S. Department of Education defines a "transgender person" as one who "has a gender identity (i.e., one's internal sense of gender) that is different from the individual's assigned sex at birth (i.e., the gender designation listed on one's original birth certificate)." *G.G. v. Gloucester Co. School Bd.,* U.S. Dist. Ct., E. Dist. Of Va., Newport News Div., Civil No. 4:15cv54, Statement of Interest of the United States, p. 1, n. 1 (parenthesis in original) filed 6/29/15.

any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681(a). Title IX applies to institutions that receive federal financial assistance, including state and local educational agencies such as local school districts and postsecondary institutions. To protect against discrimination based on sex in education programs and activities, Title IX requires educational programs and activities that receive federal funds to operate in a nondiscriminatory manner or forfeit their federal funding.

As a general rule, if a state agency such as a public school or institution of higher learning directly or indirectly receives federal financial assistance and conducts an education program or activity that benefits from this assistance, the state agency must comply with Title IX throughout the operations of its entire agency. 20 U.S.C.A. § 1687; *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 465-6 (1999). Title IX generally requires that males and females be treated equally, but educational institutions are allowed to keep "separate living facilities for the different sexes." 20 U.S.C.A. § 1686. And educational institutions may provide separate restroom and locker room facilities for the different sexes as long as the facilities for each sex are "comparable." 34 C.F.R. § 106.33.

"Sex" is not defined in Title IX or its regulations. When a federal statute does not define a word, courts may look to the dictionary definition of the word to determine congressional intent. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (U.S. 2012). The ordinary dictionary meaning of "sex" is "either of two main categories (male and female) into which humans . . . are divided on the basis of their reproductive functions." New Oxford American Dictionary, 3rd ed. Thus, references to "sex" in Title IX may be read as references to male and female as determined by a person's biological, anatomical reproductive organs.

But the U.S. Department of Education ("DOE"), the federal agency charged with enforcing Title IX, has a different interpretation. DOE says that the "plain language [of Title IX] protects all persons, including transgender students, from sex discrimination," and interprets "sex" as being "broad and encompass[ing] gender identity, including transgender status," so that a policy requiring a transgender student to use a restroom inconsistent with the student's gender identity is "based on impermissible sex stereotypes." *G.G. v. Gloucester Co. Sch. Bd.*, U.S. Dist. Ct., E. D. Va., Newport News Div., Civil No. 4:15cv54, Statement of Interest of the United States filed 6/29/15, pp. 5, 6, 13. In other words, DOE takes the position that a policy or law that prohibits a student from using a restroom consistent with his or her gender identity is discrimination based on sex and, therefore, violates Title IX.

In short, according to DOE, "[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX." *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* at 25.[3] And DOE interprets Title IX to require that transgender students be given access to restrooms and locker rooms consistent with their "gender identity" instead of their anatomical gender. *G.G. v. Gloucester Cnty. Sch. Bd.*, *supra*, Statement of Interest of the United States, pp. 7-8.

[3] http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf, last visited March 29, 2016.

DOE has in fact enforced that interpretation of Title IX when called upon to investigate school districts for not allowing transgender students to use restroom or locker room facilities assigned to the sex with which the student identifies. A transgender student who was born male and remained an anatomical male but lived as a female filed a complaint against the Township High School District 211 in Illinois for not allowing the student to use the girls' locker room, although it allowed the student to be treated as female in all other respects.[4] Finding discrimination based on sex, DOE required the school district to allow the transgender student to use the girls' locker room and to install curtains to protect the privacy of any student who wanted privacy. Rather than lose its federal funding, the school district settled the complaint on those terms.[5] A biological female who identified as a male filed a similar complaint against the Arcadia Unified School District in Wisconsin and obtained a similar result. DOE again took the position that the student must be allowed to use the facilities of her gender identity rather than her anatomical gender, and the school district settled on those terms to protect its federal funding.[6] Had these school districts not agreed to allow the transgender students to use the facilities consistent with their "gender identity," they would have jeopardized their federal funding.

When an administrative agency such as DOE is charged with enforcement of a statute, the agency's construction of the statute, while not binding on the courts, is given deference by courts. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Thus, DOE's statements about its interpretation of the law—e.g., its Statement of Interest, its various publications, its Letters and Resolutions—while not controlling law, will be accorded judicial deference.

There well may be valid legal arguments against DOE's interpretation, but there is no settled precedent to provide guidance as to how a court may ultimately rule; this is a new, undeveloped, and evolving area of the law. It is also possible that DOE's interpretation is changed or modified in the future under a different administration. But, as things currently stand, we must, as a practical matter, assume that H.B. 2414 would violate Title IX, because the enforcer of Title IX has clearly interpreted—and enforced—Title IX to prohibit as "discriminatory on the basis of sex" what H.B. 2414 is designed to accomplish.

2. Effect on Federal Funding

It follows that a public school district or institution of higher learning that complied with H.B. 2414 could find its Title IX funding in jeopardy. "Congress enacted Title IX in 1972 with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices." *Gebser*

[4] Letter from the United States Department of Education Office of Civil Rights to Daniel E. Cates, Superintendent of Township High School District 211, OCR Case No. 05-14-1055, November 2, 2015, https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf, last visited March 28, 2016.

[5] Agreement to Resolve Between Township High School District 211 and the U.S. Department of Education, Office for Civil Rights, OCR Case No. 05-14-1055, https://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf, last visited March 28, 2016.

[6] Resolution Between Arcadia Unified School District and the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf, last visited March 28, 2016.

v. Lago Vista Indep. School Dist., 524 U.S. 274, 286 (1998). "The express statutory means of enforcement is administrative: The statute directs federal agencies who distribute education funding to establish requirements to effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law,' including ultimately the termination of federal funding." *Id.* at 280. Title IX is also enforceable through an implied private right of action that may give rise to monetary damages. *Id.*

Title IX operates as a contract with recipients of federal funding for educational programs. *Id*. at 286. The offer of federal funding is conditioned on the promise by the recipient not to discriminate. *Id*. Although Title IX permits agencies who disburse education funding to enforce its non-discrimination mandate through proceedings to suspend or terminate funding, an agency may not initiate enforcement proceedings until it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. § 1682. Thus, if compliance with H.B. 2414 is found to be a violation of Title IX, federal funding would not be immediately suspended or terminated. The alleged offender would be afforded the opportunity voluntarily to come into compliance before funding is suspended or terminated. *Id*.

In sum, if a transgender student is required by a school district in Tennessee to use a restroom or locker room facility that is consistent with his or her anatomical gender rather than his or her gender expression or gender identity, and if that student files a complaint, DOE, applying its current interpretation of Title IX, will almost certainly require the school district to permit the student access to the facility consistent with his or her gender expression, and refusal to do so could very well result in loss of federal funding—at least until DOE's interpretation is overruled by authoritative and binding judicial decision.

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