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Transgender Rights under Title IX

By Taylor Williams

The passage of North Carolina's controversial "House Bill 2" in March brought transgender rights to the forefront of America's continuous discussion of civil rights. House Bill 2 requires local boards of education to restrict restroom usage in schools to students' biological sex. Public backlash against the legislation was immediate, particularly from LGBT advocates who claim that the North Carolina law discriminates against transgender students whose gender identity does not conform to their birth sex. The question of whether the statute is constitutional has garnered national attention in recent weeks.

The crux of this controversy stems from the scope of the term "sex" as used in Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. 20 U.S.C.A. § 1681(a). In response to the North Carolina legislation, the U.S. Justice Department, along with the Department of Education, issued a "letter of significant guidance" to all 50 states which instructs schools to regard a student's gender identity "as the student's sex for purposes of Title IX and its implementing regulations." The letter proceeds to mandate, among other things, that transgender students be allowed to use the restroom that comports with their gender identity. But the significance of the Justice Department's letter is broader than the debated transgender bathroom issue. Though not codified law, it recognizes gender identity as a protected classification under Title IX, and threatens revocation of federal funding from institutions that discriminate against transgender students by failing to comply with these guidelines. Prior to this directive, many federal courts had not addressed the status of transgender student identity under Title IX, or had ruled against recognizing gender identity as sexual identity.

In particular, the Justice Department's guidelines will have a significant impact in the Eighth Circuit, which has refused to allow transgender individuals to bring Title IX claims on the basis of gender identity discrimination. Like many other jurisdictions, the Eighth Circuit applies Title VII standards, which prohibit discrimination on the basis of sex in the employment context, to examine claims alleging discriminatory treatment under Title IX. *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996). In 1982, a transgender female brought a Title VII claim against her employer for sex-based discrimination. *Sommers v. Budget Marketing, Inc.*, 667

F.2d 748 (8th Cir. 1982). The employer alleged that the plaintiff was terminated from her position because she misrepresented herself as an anatomical female when she applied for the job. *Id.* The Eighth Circuit held that "for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise," and that the statute does not encompass discrimination based on transsexualism. *Id.* at 750. Thus, the Eighth Circuit currently limits Title VII discrimination claims, and by extension Title IX claims, to those alleging discrimination based on one's birth sex. This precedent directly conflicts with the recent guidelines from the Justice Department and the Department of Education, which extend the scope of Title IX to encompass transsexual gender identity. In light of these recent developments, continuing to follow the ruling in *Sommers* will likely result in the loss of federal funding for educational institutions in states bound by this precedent.

While the Justice Department's guidelines have contributed greatly to the current national interest in bolstering transgender rights, many federal courts have shown a willingness in recent years to expand certain protections to transgender persons. In 2011, the Eleventh Circuit ruled that transgender persons are protected from discrimination under the Equal Protection Clause of the Fourteenth Amendment, noting that "discrimination against a transgender individual because of her gender non-conformity is sex discrimination" under the Equal Protection Clause. *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011). The court in that case also referenced similar cases from the First, Sixth, and Ninth Circuits holding that discrimination on the basis of gender identity is prohibited under the Equal Protection Clause. *Id.* at 1317.

Additionally, many federal district courts have ruled that Title VII prohibits discrimination on the basis of gender identity in the work environment. In March, the District Court of Connecticut explicitly denounced the Eighth Circuit holding in *Sommers*, recognizing that "though [*Sommers*] held that Title VII does not protect gender identity, the weight of authority has begun to shift the other way." *Fabian v. Hosp. of C. Conn.*, 3:12-CV-1154 (SRU), 2016 WL 1089178, at 6 (D. Conn. Mar. 18, 2016). The court concluded that "employment discrimination on the basis of transgender identity is employment discrimination 'because of sex' and constitutes a violation of Title VII of the Civil Rights Act." *Id.* at 14. Even more significant is the fact that twenty states and the District of Columbia have passed employment non-discrimination laws that cover sexual orientation and gender identity. Finally, other district courts have expressly extended Title IX coverage to transgender students, without relying on Title VII standards.

See Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997) (holding that Title IX was enacted to protect students like the transgender female plaintiff from harassment). These decisions illustrate that the Justice Department's expansion of Title IX to cover gender identity did not occur in a vacuum, nor was it simply a response to the North Carolina legislation. Rather, it is the product of larger trend to expand the rights and protections of transgender persons by preventing unlawful discrimination based on their gender identity.

The Justice Department's guidelines will undoubtedly have a great impact on federal courts in the near future. The implications of this controversial federal instruction are made even more interesting by the fact that Eighth Circuit precedent rejects the notion that gender identity falls within the scope of "sex" as used in the Title IX statute. The guidelines are not law, but the Justice Department and the Department of Education make it clear that the consequences for non-compliance will be revocation of federal funding. The potential repercussions, coupled with the fact that many federal courts already consider gender identity to be within the scope of Title IX, will likely necessitate the abandonment of the *Sommers* precedent, as well as North Carolina's "House Bill 2" statute.

Arkansas state courts have not yet addressed the issue of whether the gender identity of transgender students is protected from discriminatory treatment under Title IX. If the opportunity arises in the future, the Justice Department's guidelines will certainly have an effect on the court's ruling. In order to avoid a fate similar to the North Carolina legislature, which is still in an ongoing legal battle with the federal government over its anti-transgender law, courts will have to afford Title IX protection to transgender students, at least by allowing them to bring claims under the statute. Of course, the guidelines will also have a significant effect on Arkansas public schools bound by Title IX. To avoid losing federal funds, schools will have to take measures to treat students in a manner consistent with their gender identity. This may include offering gender neutral restrooms, changing athletic and housing policies, etc. While the Department of Education has yet to revoke funding from an institution accused of transgender discrimination, it has made no illusions that it will do so if Title IX violations are present. As the transgender debate continues to develop, it will be interesting to see how both courts and educational institutions respond.

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