Blurred Lines: Title IX and Gender Identity in Public Schools

In a second extra session of the North Carolina General Assembly on 23 March 2016, when then governor Pat McCrory signed the Public Facilities Privacy and Security Act (HB 2) into law, North Carolina became the first state in the country to enact a bill restricting access to multiuser restrooms, locker rooms, and other facilities segregated by sex as determined by the sex assigned at birth – “biological sex.” This paper will examine what transpired after the legislation was enacted, including federal government involvement, reactions of state officials, and key litigation that followed. Three questions will frame the discussion of the principal issues: (1) Are the federal directives in the Dear Colleague Letter consistent with Title IX, or did the federal government overstep its authority in this case? (2) Does Title IX, and its regulations, require schools to permit transgender students to use restrooms and changing facilities corresponding to their gender identity or must they use the restrooms and changing facilities according to their anatomical/biological sex assigned at birth? (3) Where do we go from here?

House Bill 2 – The Public Facilities Privacy and Security Act. Part I of North Carolina’s House Bill 2 – Public Facilities Privacy and Security Act (the state’s “bathroom” bill) comprises provisions for single-sex multiple occupancy bathroom and changing facilities, and a subdivision (63) was added to § 1.1 G.S. 115C-47 directing local school boards to establish single-sex multiple occupancy bathroom and changing facilities. A new section (§ 115C-521.2) was added to Article 37 corresponding with the directive, including definitions of terms. This

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1 HB2 defines a multiple occupancy bathroom or changing facility as one designed or designated to be used by more than one person at a time where students may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a school restroom, locker room, changing room, or shower room. The law stipulates that for single-sex multiple occupancy bathroom and changing facilities, “local school boards shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.” “Biological sex” is defined in the statute as “the physical condition of being male or female as stated on the birth certificate.”

2 The statement of accommodations permitted stipulates, “Nothing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathroom or changing facilities or controlled use of faculty facilities upon a request due to special circumstances, but in no event shall that accommodation result in the local boards of education allowing a student to use multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the student’s biological sex.”
section of the statute does not apply under specified conditions to people who enter a multiple occupancy bathroom or changing facility that has been designated for use by the opposite sex (emphasis added).  

Driven by the perception that North Carolina’s “bathroom bill” was designed to prevent “local governments from extending civil rights protections to gay and transgender people” (Washington Post, 4 May 2016), the passage of the “bathroom” legislation quickly ignited national controversy, elevating concerns of the public, business groups and major corporations. Opponents of the bill described it as “literally the most anti-LGBT legislation in this country” (Gibbs, 13 July 2016). Several companies, including PayPal and Deutsche Bank withdrew plans for expanding their businesses in North Carolina, costing the state $3.76 billion, $8 million in cancelled conventions, and hundreds of jobs that companies had planned to bring to the state’s local economies (Washington Post, 4 May 2016).

A few days after the legislation passed, the U.S. Department of Justice challenged North Carolina’s controversial bill charging that it violated the 1964 federal Civil Rights Act by discriminating against people who are transgender by limiting access to restrooms based on gender [sex]. The civil rights attorney for the Justice Department gave Pat McCrory, the governor at that time, five days in which to rescind the new law. The ultimatum “escalated a contentious national debate” (Lichtblau, E., 2016), initiating a standoff between North Carolina and the federal government. The Justice Department asked that North Carolina either abandon

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3 The section does not apply for individuals who enter the multiple occupancy bathroom or changing facility designated for use by the opposite sex: (1) for custodial purposes; (2) for maintenance or inspection purposes; (3) to render medical assistance; (4) to accompany a student needing assistance when the assisting individual is an employee or authorized volunteer of the local board of education or the student’s parent or authorized caregiver; (5) to receive assistance in using the facility; (6) to accompany a person other than a student needing assistance; (7) that has been temporarily designated for use by that person’s biological sex. To provide additional specifications, a new Article (Article 81 § 143-760) was also added. HB 2 includes a statement of accommodations permitted stipulating “Nothing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathroom or changing facilities or controlled use of faculty facilities upon a request due to special circumstances, but in no event shall that accommodation result in the local boards of education allowing a student to use multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the student’s biological sex.”
the new law or fix it. Opponents of the bill aligned themselves with the Justice Department for confirming their belief that the bill was discriminatory and in violation of civil rights law.

Prior to this controversy, transgender status had not been included as a basis for claims of discrimination under federal civil rights law. However, as a result of it, Eric H. Holder, Jr., the attorney general at that time changed the Department of Justice policy to include transgender status, affirming in a memo that discrimination in the workplace violates Title VII of the Civil Rights Act of 1964. The Equal Opportunity Commission also weighed in affirming that “equal access to restrooms is a significant, basic condition of employment,” which constitutes discrimination when withheld from those who are transgender. Conversely, parents and students in Illinois filed a lawsuit seeking to prevent the school district from requiring that middle school and high school aged girls use the same locker rooms and restrooms as students who are the biologically opposite gender (Zapotosky, M. & Berman, M., 2016).

On 9 May, the U.S. Justice Department initiated legal action against North Carolina, and former governor Pat McCrory reciprocated in kind against the Department of Justice. On 13 May 2016, the U.S. Justice Department and U.S. Department of Education on behalf of the Obama administration issued a formal directive 4 to clarify how schools and school districts can comply with the requirements of Title IX of the Education Amendments of 1972 and its implementing regulations to prohibit “sex discrimination in educational programs and activities operated by recipients of Federal financial assistance” (20 U.S.C. §§ 1681-1688; 34 C.F.R. Pt. 54Z). This encompasses any federally funded education program or activity, including elementary and secondary schools and colleges and universities. It also applies to any education or training program operated by a recipient of federal assistance. A primary obligation specified in the letter is to provide transgender students access to gender-segregated activities and facilities consistent with their gender identity, therefore, making it clear that the prohibitions also apply to “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.” Key terms relative to the subject of the letter are included for clarification. The letter also contains information about how to comply with the requirements of

4 The Dear Colleague letter addressing transgender students may be accessed at the following link: https://www.natlawreview.com/article/state-texas-v-united-states-america-battle-over-bathrooms-and-gender-identity
Title IX, including specific guidance for providing a safe and nondiscriminatory environment; identification documents, names and pronouns; and activities and facilities where students are segregated by gender. These facilities and activities include, restrooms and locker rooms, single-gender classes and schools, social fraternities and sororities, housing and overnight accommodations, and other gender-specific activities and rules. The last section of the letter provides information concerning privacy and education records, including specific directives designed to safeguard students’ privacy.

Opponents of the federal guidance challenged it as constituting significant federal overreach and a violation of state sovereignty. Some conservative opponents filed bills challenging the federal guidance, and others calling for President Obama’s impeachment. Supporters of the federal guidance point out that the opposition is reminiscent of the era of racial segregation that nearly destroyed the country during the civil rights era. Some of the supporters, including parents of transgender students praised the federal guidance, while for others the general guidelines remained unclear (Kentworthy, 2016).

This sparked a progression of lawsuits between federal government and state officials, and between the general public and school districts as the public began asserting their rights (on both sides of the issue). On 25 May 2016, Texas filed suit against the federal government to enjoin it from enforcing the interpretation of Title IX described in the “Dear Colleague” letter. Alabama, the Arizona Department of Education, Georgia, Louisiana, Maine Governor Paul LePage, Oklahoma, Tennessee, Utah, West Virginia, Wisconsin, and two school districts joined Texas in the suit. On 6 June 2016, Mississippi and Kentucky also joined the suit, and the plaintiffs in the Texas-initiated lawsuit requested an injunction suspending the federal regulations, arguing that they unfairly burden states and jeopardize safety (Kralik, J., 2017).

Additionally, other states began considering the creation of similar bills. By July 2017, 16 states – Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming – had begun considering legislation that would restrict access to multiuser restrooms, locker

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rooms, and other gender-segregated facilities based on biological gender or sex, as assigned at birth. Six states – Missouri, Montana, North Carolina, South Carolina, Texas, and Virginia – considered legislation to prohibit local government entities from passing anti-discrimination laws (Kralik, J. & Palmer, J., 2017). North Carolina is currently the only state to pass (HB 2) and repeal (HB 142)6 legislation that restricts access to multiuser restrooms, locker rooms, and other gender-segregated facilities based on biological gender, as assigned at birth.

In the midst of the controversy surrounding the bathroom legislation, a high school student whose assigned biological sex is female, but who is a transgender male, brought legal action through his parent against a Virginia school board seeking to be allowed to use the boys’ restroom.7 Relying on the guidelines set forth in the Dear Colleague letter, the Fourth Circuit Court of Appeals ruled in favor of the teen, who was then allowed to use the boys’ restroom. However, that soon ended, and he was no longer allowed to use the restrooms designated for male students. Following his election, President Trump issued a letter withdrawing the Title IX guidance letter of the Obama administration. Both the Virginia school district and G.G. have sought the involvement of the Supreme Court in hopes of settling the matter once and for all.

Are the federal directives in the Dear Colleague Letter consistent with Title IX, or did the federal government overstep its authority in this case? If Title IX is to be taken literally, the directives are not consistent with that law, although the goal of equal treatment of all is laudable. The authors of the bill were thinking in terms of binary gender – female and male – with nothing such as gender identity in between. Further, opponents believe the law is unambiguous and that it is a local decision that does not require intervention of the federal government. Supporters welcome the interpretation.

Does Title IX, and its regulations, require schools to permit transgender students to use restrooms corresponding to their gender identity, or must they use the restrooms and changing facilities according to their anatomical/biological sex assigned at birth? Is it solely a local decision? For now, using a strict interpretation of Title IX does not appear to permit deviation and, in some cases, will prove challenging to implement, particularly in schools.

6 For a review of the legislation that repealed HB 2, go to the following link: https://www.washingtonpost.com/politics/justice-dept-to-north-carolina-law-limiting-protections-for-lgbt-people-violates-federal-law/2016/05/04/c11fa75a-1237-11e6-81b4-581a5c4c42df_story.html?utm_term=.46c5209aba94
7 G.G. v. Gloucester
Where do we go from here? The “biological sex” of an individual appears to be simple, binary. One is either female or male as determined by the chromosomes. One is born, and the doctors take a look at the genitalia and assign the “biological sex” based on their observations, completing the birth certificate to reflect the sex assigned (Wise, N., 2017).

“Deep-seated religious beliefs, cultural constructs, the regulation of sports (such as the rules confronted by Texas high-school wrestler Mack Beggs) and recent laws are premised on the bedrock belief that each of us is either a man or a woman. Yet the reality is that today in the United States alone there are approximately one million people who – from the moment of birth – cannot clearly be defined as either male or female” (Wise, N., 2017, p. 1)

Given this new scientific knowledge, it is now known that many people are born with “sex chromosome, endocrine or hormonal irregularities” rendering their birth certificates unreliable indicators of anatomical sex. This reality will make it virtually impossible for judges and others to determine whether behavior or action is permissible based on a binary construct of whether an individual is female or male.

North Carolina passed the Public Facilities Privacy and Security Act (House Bill 2) that requires that individuals use restrooms and changing facilities based on their “biological sex” assigned at birth and recorded on their birth certificate. The Obama administration rejected HB 2 and provided guidance to assist states in maintaining compliance with Title IX, stipulating that transgender students must be allowed to use the restrooms based on their gender identity. President Trump withdrew the Obama administration guidance, asserting that the decision as to which bathroom or changing facility an individual chooses is a local, and ultimately their personal decision. However, he ultimately agreed with others holding that “the term ‘sex’ unambiguously refers to ‘biological sex,’” which science now informs us is variable thus rendering the current approach, with regard to individuals who do not fit the expected paradigm, inadequate. Additionally, many of the “bathroom” laws that followed HB 2 also base the compliance decision on birth-assigned “biological sex.” How difficult can that be? After all, regardless of one’s preferred identity, sex is binary, right? How can the administrators in our
schools be expected to make accurate decisions when administering school policies based on the premise that sex and gender are binary? School officials, as well as court judges will need to examine the facts in each case through a lens that is unfettered by prevailing paradigms.

If modern science recognizes that sex has countless natural permutations, and if birth certificates, physical observation and even chromosomal testing cannot reliably categorize every individual as either male or female, then our judiciary cannot be required to make gender findings antithetical to that reality. When legislators blur the lines of church and state and enact laws that permit or prohibit conduct based on biologic gender as only male or female – whether it is for the purpose of authorizing marriage or designating the use of public bathrooms – they place an impossible burden on our judiciary, and ultimately on our country and all of its people. (Wise, N. 2017).

Selected References and Resources


Letter from U.S. Dep’t of Justice & Dep’t of Educ., Dear Colleague Letter on Transgender Students 3-4 (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf:


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