



State of West Virginia
Office of the Attorney General

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Honorable George V. Sitrer
Prosecuting Attorney of Mercer County
Mercer County Courthouse Annex
120 Scott Street, Suite 200
Princeton, West Virginia 24740

Dear Prosecutor Sitrer:

You have asked for an Opinion of the Attorney General regarding sex-segregated athletic programs. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

According to your letter, a question has arisen concerning student participation in the softball team at Pikeview High School. You explain that the Mercer County Schools sponsor several sex-segregated sports programs. Football and baseball have “[t]raditionally” been “male sports,” whereas “[s]oftball has always been treated as a females-only sport.” The letter states that “[a] male student, who exhibits some nontraditional gender-identity traits (makeup, skirts, etc.)[,], has signed up and announced his intention to try out for” the softball team.

Your letter raises the following legal question:

May a school prohibit a male student with nontraditional gender-identity traits from participating in a traditional girls-only sports program and still comply with Title IX?

Title IX of the Education Amendments of 1972 “marked a momentous shift for women’s equality in classrooms, on playing fields, and in communities throughout our nation.”¹ The

¹ *Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics*, White House, Office of the Press Sec’y (June 20, 2012), available at <https://obamawhitehouse>.

federal law 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 any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). And in a 1975 regulation implementing Title IX, the federal government interpreted the law to prohibit discrimination “on the basis of sex” in athletic programs. 34 C.F.R. § 106.41(b).²

Under Title IX regulations, a federally funded school may provide “separate teams for members of each sex,” provided that certain conditions are satisfied. *Id.* The federal regulation applying Title IX to athletic programs specifically permits “separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” *Id.* There is an exception for the circumstance “where a [funding] recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited.” *Id.* In that case, “members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.” *Id.* Contact sports are defined to include “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.” *Id.* More generally, a funding recipient must provide “equal athletic opportunity for members of both sexes”—a mandate evaluated by many factors, such as the provision of equipment and supplies, the scheduling of games and practice time, and the assignment and compensation of coaches. *Id.* § 106.41(b).³

Applying these principles, we believe that under appropriate circumstances, a school could restrict participation in softball to females only without running afoul of Title IX. As stated in the U.S. Department of Education’s 1979 Policy Interpretation, “where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.” 44 Fed. Reg. at 71,418. The answer to that question turns on facts beyond those presented in your letter. For example, whether softball is a contact sport as defined by 34 C.F.R. § 106.41(b)—*i.e.*, a sport “the purpose or major activity of which involves bodily contact.”⁴ If not, have “athletic opportunities for members of th[e] [excluded] sex . . . previously been

archives.gov/the-press-office/2012/06/20/obama-administration-commemorates-40-years-increasing-equality-and-oppor.

² The relevant provision states: “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.” 34 C.F.R. § 106.41(a).

³ In interpreting these regulations, the U.S. Department of Education follows a Policy Interpretation promulgated in 1979. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979). The Policy Interpretation has been clarified and reaffirmed on numerous instances over the years. *See, e.g.*, Letter from Margaret Spellings, U.S. Secretary of Education, to Steven Geoffrey Gieseler, Pacific Legal Foundation (Mar. 27, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>.

⁴ In one case, the U.S. Court of Appeals for the Sixth Circuit appears to have assumed that softball and baseball are non-contact sports. *See Horner v. Kentucky High School Athletic Ass’n*, 43 F.3d 265, 274 (6th Cir. 1994).

limited”? This is a fact-intensive question that most courts appear to evaluate on a school-wide (as opposed to a sport-specific) basis.⁵ And finally, does the school satisfy its overarching requirement to provide “equal athletic opportunity for members of both sexes”?

We also believe that Title IX’s use of the word “sex” permits a school to refuse to consider a student’s professed gender identity when determining which students may join an otherwise permissible single-sex sports team. The word “sex,” which is also the operative term in the relevant regulations, was understood in the mid-1970s to include physical differences between males and females. *See Carciari v. Salazar*, 555 U.S. 379, 388 (2009) (“We begin with the ordinary meaning of the word ‘now,’ as understood when the IRA was enacted”). Dictionaries from that time consistently include definitions of the word “sex” that refer to physiological distinctions between males and females, particularly with respect to their reproductive functions.⁶ Moreover, there is no contemporaneous evidence of the word “sex” being understood to refer to an individual’s professed gender identity in a way that disregards (or supersedes) an individual’s biology and physiology. In fact, Robert Stoller, the UCLA psychoanalyst who first used the term “gender identity,”⁷ wrote in 1968 that gender had “psychological or culture rather than biological connotations.” Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968). To him, “sex was biological but gender was social.” Haig, *supra*, at 93.

This understanding of the word “sex” in Title IX is bolstered by more recent acts (and omissions) by Congress. Congress has specifically chosen to extend protection for “gender identity” in the federal hate crimes law, *see* 18 U.S.C. § 249 (listing both “gender” and “gender identity”), and the Violence Against Women Act, *see* 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination on the basis of both “sex” and “gender identity”). But it has never amended Title IX.

Any remaining doubt should be dispelled by the fact that Title IX is a Spending Clause statute and thus must be construed strictly. As the U.S. Supreme Court has explained, Congress

⁵ *See Williams v. School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 174 (3d Cir. 1993) (rejecting the argument that a school district with a girls-only field hockey team would violate Title IX where “opportunities for boys in the sport of field hockey have previously been limited”); *Mercer v. Duke University*, 190 F.3d 643, 646 (4th Cir. 1999) (noting in a case concerning Duke’s male-only football program that “appellees do not dispute that athletic opportunities for women at Duke have previously been limited, and thus we assume that the second condition has been met”).

⁶ *See* American Heritage Dictionary 1187 (1976) (“The property or quality by which organisms are classified according to their reproductive functions”); Webster’s Third New International Dictionary 2081 (1971) (“the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change”); 9 Oxford English Dictionary 578 (1961) (“The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these”).

⁷ *See* David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, Archives of Sexual Behavior, Apr. 2004, at 93 (noting that Stoller and a colleague “introduced the term *gender identity* at the 23rd International Psycho-Analytical Congress in Stockholm (July–August 1963)”).

has power under the Spending Clause to enact laws that place conditions on the distribution and use of federal funds. Such laws are “much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But this puts an important limit on Congress’s power. To ensure that a State “voluntarily and knowingly accepts the terms of the ‘contract,’” the Supreme Court has required that grant conditions in Spending Clause statutes be unequivocally clear in the statutory language. *Id.* “[I]nsisting that Congress speak with a clear voice,” the Supreme Court has explained, “enable[s] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” *Id.*

There is no plausible argument that Title IX *clearly* requires a school to consider a student’s professed gender identity when determining which students may join a single-sex sports team. As discussed above, the evidence overwhelmingly shows that the word “sex” was understood in the mid-1970s to refer to physiological distinctions between males and females, particularly with respect to their reproductive functions. Even if it could be argued that *some* evidence supports understanding the word “sex” to refer to an individual’s professed gender identity, that could not satisfy the Supreme Court’s “clear-statement” requirement for conditions imposed in a Spending Clause statute like Title IX.

Against all this, we have not located any controlling federal court decision holding that a school subject to Title IX must allow a student’s professed gender identity to determine whether the student may join a single-sex sports team. As you may know, there has recently been significant litigation across the country over whether Title IX requires a school to allow students access to bathrooms based on their gender identity. But these cases have not presented the question of gender identity and single-sex sports teams.

Moreover, even on the question of access to bathrooms and other intimate spaces, those cases do not provide controlling guidance. In a closely watched case in Texas, a federal district court concluded that a regulation permitting sex-segregated bathrooms is not ambiguous and rejected an attempt to read “gender identity” into the meaning of the word “sex.” “It cannot be disputed,” the court wrote, “that the plain meaning of the term sex as used in § 106.33 when it was enacted . . . following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth.” *Texas v. United States*, ___ F. Supp. 3d ___, 2016 WL 4426495, at *15 (N.D. Tex. Aug. 21, 2016).⁸

In contrast, the U.S. Court of Appeals for the Fourth Circuit has concluded that a school must provide a student access to a bathroom based on the student’s gender identity, but that decision has been stayed by the U.S. Supreme Court and its legal underpinnings have been overtaken by events. In *G.G. v. Gloucester County School Board*, the Fourth Circuit concluded that the Title IX regulation permitting sex-segregated bathrooms is ambiguous as applied to

⁸ The State of West Virginia, represented by this Office, was a party to the *Texas* litigation together with several other States. The district court decision, which granted a preliminary injunction in favor of the States, was appealed to the U.S. Court of Appeals for the Fifth Circuit. Following a change in position by the United States (described further below), both the appeal and the underlying litigation were dismissed in early March 2017.

transgender students, and deferred to an informal letter from the U.S. Department of Education (“DOE”) under the Obama Administration that interpreted the regulation to require schools to treat transgender students consistent with their gender identity. 822 F.3d 709, 718-24 (4th Cir. 2016). But the U.S. Supreme Court stayed that decision on August 3, 2016, and granted certiorari on October 28, 2016, to review the matter is currently reviewing the matter. Then, on February 22, 2017, the Trump Administration withdrew and rescinded the letter to which the Fourth Circuit deferred, and on which the Fourth Circuit entirely based in its decision. The Fourth Circuit did not indicate in its decision how it would have ruled in the absence of the DOE letter, nor did it address the implications of the Supreme Court’s requirement that Spending Clause statutes, like Title IX, be unequivocally clear. Following the federal government’s change in position, the U.S. Supreme Court vacated the Fourth Circuit’s decision and remanded the matter to the lower court for further proceedings.⁹

In light of all of the foregoing, it is the opinion of this Office that a school could prohibit a male student with nontraditional gender-identity traits from participating in a traditional girls-only sports program and still comply with Title IX.

We note that, consistent with our view that Title IX leaves the consideration of gender identity to the discretion of state and local school authorities, state high school athletic associations across the country have taken varied approaches to this issue. In Texas, the Constitution of the University Interscholastic League states: “Gender shall be determined based on a student’s birth certificate. In cases where a student’s birth certificate is unavailable, other similar government documents used for the purpose of identification may be substituted.”¹⁰ But in California, the California Interscholastic Foundation policy is that “[a]ll students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records.”¹¹ Some states, like West Virginia, have no statewide policy.¹²

This Opinion does not, of course, bind the federal government or any court that might consider this question in the future. Both the federal government and private parties have the ability to enforce Title IX. The federal government has an express right to do so under the statute, 20 U.S.C. § 1682, and the U.S. Supreme Court has determined that private parties have an implied private right of action, *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1999). In a private action against a local school board, the Supreme Court found that damages may be awarded. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

⁹ The State of West Virginia, represented by this Office, has filed several briefs in this matter as *amici curiae* on behalf of itself, other States, and several state officials in support of the school district.

¹⁰ University Interscholastic League, Constitution, Subchapter J, Section 360(h), <https://www.uiltexas.org/policy/constitution/general/nondiscrimination> (last visited Mar. 14, 2017).

¹¹ California Interscholastic Foundation, Guidelines for Gender Identity Participation, http://static.psb.in.com/l/1/nb7pxnkt82uwn/Guidelines_for_Gender_Identity_Participation.pdf.

¹² The following website purports to track these policies across the country: <https://www.transathlete.com/k-12> (last visited Mar. 14, 2017).

Currently, there is no threat of federal action against schools that decline to consider a student's gender identity in determining whether the student can participate in a single-sex sports team. Under President Obama, the federal government issued a guidance letter on May 13, 2016, stating that it would "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."¹³ As to sports teams, the letter stated that "Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams," but declared that "[a] school may not . . . adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students." While we do not believe the Obama-era guidance required schools to allow students to participate in sports consistent with their professed gender identity, that question is now irrelevant. In addition to withdrawing the DOE letter at issue in *G.G. v. Gloucester County School Board*, President Trump has withdrawn and rescinded the May 13, 2016, guidance letter, and stated that the federal government "will not rely on the views expressed" therein.¹⁴ The Trump letter explains that the previous guidance did not "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX," and states that the federal government intends "to further and more completely consider the legal issues involved." Consistent with the analysis in this Opinion letter, the Trump letter reaffirms that "there must be due regard for the primary role of the States and local school districts in establishing educational policy."

Future administrative action by the federal government and future court decisions could impact the conclusions and analysis in this Opinion.

Sincerely,



Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

¹³ The Obama letter is available here: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹⁴ The Trump letter is available here: <https://www.justice.gov/opa/press-release/file/941551/download>.