Senate Bill 1499 / House Bill 1274

School Protection Act

Talking Points

PURPOSE OF BILL: To protect a Local Education Agency and/or its employees from lawsuits arising out of an LEA's policy or practice designed to protect students from exposure to the opposite sex when in states of undress by designating locker rooms and shower facilities or bathrooms on the basis of biological sex.

WHAT THE BILL DOES:

- **Authorizes but does not require** the Attorney General to represent LEAs and/or its employees in any legal matter arising out of the adoption of a policy or practice to protect students from exposure to others of opposite biological sex in school locker rooms and restrooms.
- Provides that if the Attorney General deems it in the best interest of the state not to represent an LEA and/or its employees, perhaps because of potential conflicts of interest, the LEA/its employees will be entitled to obtain outside counsel and be reimbursed for "reasonable" attorney fees *if* the Attorney General approves of the lawyer and the fee arrangement in accordance with T.C.A. §§ 8-42-103 and -108.
- Specifically provides that the duty to defend the LEA/employee **does not apply** where there is "willful, malicious, or criminal acts or omissions or for acts or omission done for personal gain."

SPECIFIC TALKING POINTS:

- The bill does not require any school to have any particular policy.
- Biological differences are real and objective, and it is not wrongful discrimination to recognize this reality when it comes to personal situations involving various states of undress.
- It is within the state's prerogative to keep schools that recognize these real and objective differences from being bullied by well-funded legal interest groups.
- Without the protection provided in this bill, an LEA, facing potentially significant legal expenses and a desire to be fiscally prudent with limited funds, may opt not to protect the privacy of its students or to settle a lawsuit in a way that alters a policy that it had already deemed to be in the best interest of all students.
- Providing LEAs protection will provide an incentive for schools to make it a priority to enact a policy and/or make protection of privacy, safety, and dignity of all student.

TALKING POINTS RELATIVE TO THE COURTS:

- President Trump's withdrawal of the "guidance letter" in February 2017 previously issued by the Obama administration stating that discrimination on the basis of "sex" as prohibited by Title IX of the Education Amendments of 1972 includes "gender identity" does *not* resolve the issue.
- Withdrawal of the guidance letter only relates to the Executive Branch's interpretation of the federal law and does not affect or bind the judiciary.
    - In fact, on May 22, 2018, a judge in the U.S. District Court for the Eastern District of Virginia held that a biology-based bathroom/locker room policy violates both Title IX and the equal protection clause of the Constitution (*Grimm v. Gloucester Board of Education).*
    - The U.S. Court of Appeals for the 6th Circuit (which includes Tennessee) recently ruled that the prohibition of workplace discrimination under Title VII of the Civil Rights Act of 1964 on the basis of "sex" (the same term used in Title IX), includes gender identity.
        - It is not a stretch to think that the 6th Circuit could also apply that same analysis to the term "sex" in Title IX.
- Nor will it restrain lawyers from continuing to file lawsuits under both Title IX and the equal protection clause of the Constitution.
    - The ACLU in Indiana filed such a suit in February 2018 on behalf of a "transgender male" seeking access to the male restroom and locker room under both Title IX and the Constitution's equal protection clause.

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