Title ix legislation analysis

ARGUMENT

I. Deference should not extend to an opined unpublished agency letter because it does not carry the force of law.[WS1]

The United States Department of Education's Office for Civil Rights (" OCR") letter presented here should not be awarded deference because the regulation letter argues that the interpretation the language of Title IX is ambiguous. Title IX provides that, " no 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 that receives Federal financial assistance." 20 U. S. C. § 1681(a); accord 34 C. F. R. §106. 1 (emphasis added). OCR issued their letter challenging the interpretation of language " on the basis of sex" under Title IX, challenging it on the basis that it is not clear as it relates to gender identity.

In support of OCR's letter, respondent proffers the legal standard accorded under *Auer v. Robbins* . There, the Court afforded controlling deference to an agency letter in form of a legal brief by the Secretary of Labor interpreting the language of regulations with regard to overtime pay under Federal legislation. *Auer v. Robbins* , 519 U. S. 452, 463 (1997). While Auer accords agencies the highest level of deference when interpreting their own regulations, such deference is only warranted in situations where regulatory language is ambiguous, unless the language is " plainly erroneous" or " inconsistent with regulation." *Id* ; *see Chevron, U. S. A., Inc. v. Nat. Resources Def. Council, Inc.,* 467 U. S. 837, 843 (1984); *Mission Group Kansas, Inc. v. Riley* , 146 F. 3d 775 (10th Cir. 1998; *Stinson v. United States,*

508 U. S. 36, 45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U. S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)).

Here, the same level of deference to OCR would be inappropriate because OCR interprets language found under Title IX. Title IX is not an agency regulation, but rather federal law, and " deference to an agency's interpretation of *its* regulation is warranted under *Auer v. Robbins* only when the regulation's language is ambiguous," and that is not the case here. *Christensen v. Harris County* , 529 U. S. 576, 588 (2000) (emphasis added). As such, giving deference to an agency's interpretation of federal law is unwarranted.

II. Language under Title IX is unambiguous and clear in its definition of sex.

Title IX is clear as to its language, prohibiting discrimination of the basis of " sex." When turning to past precedent, many courts have defined the term " sex" as the " biological sex assigned to the person at birth." *Johnston v. Univ. of Pittsburgh of Com. System* , 97 F. Supp. 3d 657, 670 (W. D. Pa. 2015); *Frontiero v. Richardson,* 411 U. S. 677, 686, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

Here, Title IX is clear in its plain language that sex means to be construed as a person's biological sex rather than the gender they identify with. In fact, Title IX makes no mention at all of gender identity anywhere within its language as to be construed as anything but biological sex. We hold a narrow view of the statutory term " sex" due to its construction under legislative history. *Johnston* , 97 F. Supp. 3d at 677.

Because of prior precedent that holds a narrow meaning to the language under Title IX as it relates to " sex," and the lack of reference to a person's perceived gender identity, we have to continue to construe " on the basis of sex" as meaning a person's biological sex and not gender identity.

III. Respondent is not likely not to succeed on the merits because Petitioner's restroom policy does not violate Title IX.

The District Court did not abuse its discretion denying Petitioner's preliminary injunction, because Petitioner had a discretionary right under Title IX to implement its bathroom policy. Schools are allowed to " provide separate toilet, locker room, and shower facilities *on the basis of sex* ." 34 C. F. R. §106. 33 (emphasis added). They may do this so long as " such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." *Id* .

After adopting the restroom policy in dispute, Petitioner installed three single-stall restrooms throughout Gloucester High School. R. 21. They also raised doors and walls around the bathroom stalls, and installed partitions between urinals, in an effort to minimize the exposure individuals may experience in restroom facilities. *Id* . While these new policy measures were put in place, it by no means restricted the very nature of using the restroom facilities, but rather imposed an adherence to using separate facilities that correspond with a person's sex at birth.

As such, Respondent was by no means denied the right to use the bathroom, nor was he encouraged or mandated to " hold it in," but rather designated a separate restroom facility for convenience. *Id* . Respondent chose to avoid

using the restroom in its entirety while present at school and as a result developed painful urinary infections and discomfort because of that choice. *Id* .

Petitioner had every right under the scope of Title IX to enact its restroom policy, and in doing so, provided all students with an alternative facility that may be used by anyone and everyone, at any time. Its purpose was designed to accommodate everyone, including those, such as Respondent, who suffer from gender identity issues, and therefore Petitioner did not act in violation of Title IX.

IV. Petitioner's policy does not discriminate because it is within its authority under Title IX.

Petitioner's policy does not discriminate against Respondent because " the plain language of Title IX does not prohibit discrimination on the basis of gender identity." *Johnston v. Univ. of Pittsburgh of Com. System,* 97 F. Supp. 3d 657, 673 (W. D. Pa. 2015).

To establish a prima facie case of discrimination under Title IX, Respondent must allege (1) that he was subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the discrimination was on the basis of sex. *Id* . at 674; accord *Bougher v. Univ. of Pittsburgh,* 713 F. Supp. 139, 143-44 (W. D. Pa. 1989).

Here, Respondent cannot demonstrate that he was discriminated against based on sex. In dissecting the language under Title IX, the phrase " on the basis of sex" is construed to refer to a person's biological and anatomical sex

assigned at birth. Title IX does not prohibit discrimination based on gender identity, nor does it even refer to such language within the legislature. Here, however, there was no discrimination under either light.

With regard to Respondent's gender identity, Petitioner expressed immediate support when Respondent informed officials that he was transgender from the very beginning. R. 11; R. 16. Subsequently, school officials immediately changed Respondent's name in the official school records and began referring to him using only male pronouns. R. 16. Furthermore, Respondent was permitted to use the boy's restroom for almost two months before community concerns became vocal. R. 17. Here, not only was Petitioner sensitive to Respondent's requests and needs, but they were more than accommodating to ensure that Respondent felt comfortable within his educational environment.

Petitioner's restroom policy took into consideration both community and Respondent's concerns. Ultimately, the policy's intent is to increase both safety and privacy of all students so everyone feels as comfortable as possible using the restroom facilities. By providing *all* students with the option of an alternative, private single-stall restroom, the school sought to address *everyone's* concerns of privacy. As such, the policy is, in and of itself, inclusive, not discriminatory, and Respondent cannot state such a claim.

V. The restroom policy is motivated by a substantial interest.

Petitioner's restroom policy is motivated by a substantial interest to increase privacy and safety of all students. Petitioner implemented said restroom

policy with the scope of addressing the entire community's concerns, including Respondent's, and provide an alternative solution to the dispute set forth.

In *Johnston* , a transgender university student brought suit against the University of Pittsburgh-Johnstown for his expulsion on the basis of discrimination, following failure to comply with the university's bathroom policy. *Johnston* , 97 F. Supp. 3d at 664. There, the university argued that the reasoning behind their " policy of segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest.'" *Johnston* , 97 F. Supp. 3d 657 at 669; *accord Glenn v. Brumby,* 663 F. 3d 1312, 1316 (11th Cir. 2011) (quoting *Cleburne v. Cleburne Living Ctr., Inc.,* 473 U. S. 432, 446-47, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). Further, they reasoned that their policy was needed to " ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex," which was widely upheld by courts for this reason. *Johnston* , 97 F. Supp. 3d 657 at 669; *see Etsitty v. Utah Transit Auth.,* 502 F. 3d 1215, 1224 (10th Cir. 2007).

Similarly, here, Petitioner inherently undertakes the administrative duty to protect the safety and privacy interests of all their students as an educational body, particularly here because, the students are minors, rather than adults, as in *Johnston* . *Linnon v. Commonwealth* , 287 Va. 92, 752 S. E. 2d 822, 826 (2014). For this reason, Petitioner has a substantial interest in protecting the safety and privacy of the minor children in its care. Moreover, all students have the right to privacy proscribed under the Constitution, and

collectively, those rights outweigh the interests claimed by Respondent. *Lee v. Downs* , 641 F. 2d 1117, 1119 (4 th Cir. 1981).

[WS1]Insert roadmap here under the first sub-issue and then continue with your argument