

Law Related Education

The newsletter of the Illinois State Bar Association's Committee on Law Related Education

What Is Sex Discrimination?

BY MADONNA T. LECHNER

State of Kansas, et al., Plaintiffs, v. United States Department of Education, et al., Defendants. Case No. 24-4041-JWB.

ON MAY 14, 2024, THE STATES of Kansas, Alaska, Utah, and Wyoming filed the above complaint against the U. S. Department of Education (DOE) in Federal District Court (District of Kansas). The four States were joined by plaintiffs K.R. (a child), Moms for Liberty, Young America's Foundation, and Female Athletes United. The complaint alleged that the revised regulation implementing Title IX of the Education Amendments of 1972 (Title IX) is contrary to law. The Plaintiffs sought to enjoin DOE from enforcing

the regulation. The regulation, as revised, ultimately went into effect August 1, 2024.

At its enactment in 1972, Title IX prohibited discrimination on the basis of biological sex. Title IX did not initially prohibit discrimination on the basis of gender identity. The original purpose of the statute was to overcome discrimination against biological female students in Federally funded schools. The legislative history reveals that Congress, in 1972, was concerned about unequal treatment of biological female students in admissions, scholarships, and sports.

The revised Title IX regulation now

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Voting Rights for Individuals in Long-Term Care Facilities

BY KAREN ALICE KLOPPE

VOTING IS A FUNDAMENTAL RIGHT. However, individuals who are in long-term care facilities¹ (including those who need special care and support due to age, chronic conditions, dementias, and/or disabilities) may face various barriers during election cycles. Making voting easier is important for civil engagement by this population given the policy decision focus on health aging in the nation.

Common Voting Barriers

Ageist and Ableist Attitudes

Both types of attitudes are common. Some think that individuals who are in long-term care facilities no longer have any interest in voting. Statistics prove otherwise since Americans aged 65 to 70 years represent the largest number of registered voters followed by those over 75 years. (See <https://www.statista.com/statistics/999919/share-people-registered-vote-age>.) As to

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requires that all students in Federally funded schools be guaranteed an educational environment free from discrimination on the bases of biological sex, gender identity, sex stereotypes, sexual orientation, and sex characteristics.

The four Plaintiff States asserted that the revised regulation conflicts with laws passed in their states, such as laws requiring separate lockers and restrooms for each biological sex and laws prohibiting biologically male students from competing against biologically female students in sports.

The States have various laws pertaining to students' privacy and separation of students by their biological sex. Among these, Kansas requires that overnight accommodations for students participating in extracurricular activities be separated by biological sex of the students. Alaska requires that schools provide separate showers, toilets, and training-room facilities for each biological sex. Utah requires that restrooms and changing rooms correspond to each student's biological sex. Wyoming separates athletic activities by biological sex. The States hold that the revised regulation interferes with their sovereign right to create and enforce their own laws, imposes undue administrative burdens, and imposes undue costs to redesign or reconfigure physical facilities.

The Plaintiff K.R. attends a public middle school in Oklahoma. K.R. stated that she encountered biological males using the girls' restroom in her school. She was uncomfortable using the restroom with a biological male and did not feel safe. Because she didn't feel safe, she refused to use the restroom at school. Oklahoma subsequently passed a law that prohibits students from using a bathroom that does not align with their biological sex. After the passage of this law, K.R. resumed using the school bathroom. She fears, however, that the revised Title IX regulation will allow biological males to use the girls' bathroom.

Moms for Liberty is a national

organization of parents whose children attend Federally funded schools in Virginia, Pennsylvania, New York, and California. They believe that their children should use bathrooms that align with their biological sex. The organization's members fear that the revised Title IX regulation will place their children in uncomfortable and unsafe positions in private places, such as locker rooms and restrooms.

Young America's Foundation is a national organization with chapters of postsecondary students in Kansas, Utah, and Wyoming. Its members are concerned that the revised Title IX regulation will subject them to investigatory or disciplinary proceedings when they organize events and express their views in conflict with the revised regulation.

Female Athletes United (FAU) is an organization that promotes equal opportunity, fairness, and safety for biologically female students who participate in sports sponsored by Federally funded schools. The students who are members of FAU attend schools in Kansas, Wyoming, and Utah. These students currently do not compete against biological males because of current state laws. They are concerned about sharing locker rooms and restrooms with biological males. They state that sharing facilities with biological male students makes them feel uncomfortable and unsafe.

In its response to the complaint, DOE emphasized that Title IX does not prohibit certain sex-separation or sex-specific benefits, provided that one biological sex is not treated as inferior to the other. For example, the revised regulation does not prohibit separation of athletic teams, restrooms and shower facilities on the basis of biological sex. Further, DOE pointed out that the revised regulation does not prohibit separation of certain classes or portions of classes on the basis of biological sex, such as physical education. Nevertheless, DOE asserted it fully considered and addressed privacy concerns and determined that there was a

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lack of evidence that transgender students pose a risk to non-transgender students in a single-sex space and asserted that such generalized concerns have been unsubstantiated.

With respect to the concern that the term gender identity is impermissibly vague, DOE disagreed. DOE stated that the term can be subjectively defined by each individual based upon their internal sense of self.

In its July 2, 2024 decision, the Court found that the revised Title IX regulation is arbitrary and capricious, among other deficiencies. According to the Court, DOE lacks the authority to expand sex to mean gender identity. The Court found DOE at fault for failing to define gender identity. It charged DOE with subordinating the fears, concerns, and privacy interests

of biological females to the desires of transgender students. The Court contended that, in its revised regulation, DOE unilaterally decided major questions involving whether to force schools, students, and teachers to accept a student's subjective gender identity regardless of biological sex. Further, per the Court, DOE unilaterally determined that biological males who identify as females are allowed in biological female bathrooms and locker rooms. And, finally, the Court criticized DOE for failing to require medical documentation or other documents to determine whether a student's beliefs as to gender identity are sincere. Similarly, according to the Court, DOE set no limits as to how many times a student could change their gender identity.

The Court characterized DOE's

re-interpretation of sex discrimination as contrary to Title IX and its historical context. The Court stated that Congress did not authorize DOE to rewrite the Title IX statute or render its provisions meaningless. Consequently, the Court granted the Plaintiffs preliminary injunctive relief. The Court set aside DOE enforcement of the regulation in the Plaintiff States. Moreover, the Court enjoined implementation of the regulation: at K.R.'s school; at any school attended by children of members of Moms for Liberty; and at any school attended by members of Young America's Foundation or Female Athletes United. ■

Compiled by Madonna T. Lechner, former Investigator and Team Leader at the U. S. Department of Education, Office for Civil Rights, Chicago.

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Voting Rights

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ableist attitudes, others question whether participation in elections through absentee and mail-in ballots by individuals with disabilities increases the risk of voter fraud. Extensive research reveals that fraud rarely mars elections although there are instances of problems within the election administration system. See <https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud>.

A Lack of Timely Assistance

Individuals who are in long-term care facilities often require additional assistance to exercise their right to vote. The issues run a gamut – gathering election-related information about processes, candidates, and ballot measures; dealing with cognition, dexterity, mobility, and/or vision disabilities which make it more challenging to register to vote, access a polling place, understand the ballot, and physically cast their vote; and addressing matters relating to communication, including, illiteracy and language access needs.

Logistical Issues

Seemingly simple logistical issues to reach election officials and polling places by mail, telephone, email, or in-person visits are often difficult for individuals who live in long-term care facilities. They may not have ready access to affordable and reliable technology or transportation but must instead schedule matters in advance as other residents may have higher priority needs for such services. Arranging for privacy given a shared residence is still another matter for consideration.

Laws Protecting Voting Rights

Advocacy efforts over time have led to the enactment of various laws to help protect voting rights in our nation (see <https://www.usa.gov/voting-rights>), including those of individuals who are in long-term care facilities. For example:

- Voting Rights Act of 1965 (52 U.S.C. § 10508)
- Establishes that individuals with disabilities have a right to receive assistance from a person of their choice in voting.

- Section 504 of the Rehabilitation Act of 1973 (Section 504) 29 U.S.C. § 794 and regulations at 28 C.F.R. § 41.51
- States programs or activities receiving federal financial assistance must ensure accessibility for individuals with disabilities and prohibit discrimination in denial of benefits or participation in such opportunities.
- Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA) (52 U.S.C. § 20101 *et seq.*)
- Requires that States provide accessible registration facilities and polling places.
- Federal Nursing Home Reform Act (in the Omnibus Budget Reconciliation Act of 1987 (OBRA '87)) (42 U.S. Code § 1395i-3) Prescribes extensive requirements for issues about administration, quality care, and surveying process in skilled nursing facilities, including specific listing of resident rights and enforcement measures.²
- Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§12101 *et seq.*)
- Provides that mandate of the nation is the elimination of discrimination against individuals with disabilities to assure equality of opportunity, full participation, independent living, and economic self-sufficiency.
- National Voter Registration Act of 1993 (NVRA) (52 U.S.C. § 20501 *et seq.*)
- Directs that various State agencies offer various registration options and assistance to individuals with disabilities in effort to increase voter participation in elections.
- Help America Vote Act of 2002 (HAVA) (52 U.S.C. § 21081) Specifies that voting systems afford individuals with disabilities the same opportunity for access and participation as other voters.

Long-term Care Facility Responsibilities

Under the preceding laws, it becomes clear that support must be provided to residents who wish to vote by long-term care facilities that accept Medicaid or Medicare funds. (See 42 C.F.R. § 483.10.) Such support includes obtaining information about voting, helping fill out and mailing any applications, satisfying requirements to qualify for available alternatives to in-person voting, getting to the polls, assisting with reading and marking ballots, and ensuring that ballots are submitted in compliance with state laws. Clarification about responsibilities owed by nursing facilities regarding resident voting rights is also set forth in Memorandums sent to State Survey Agency Directors by the Center for Clinical Standards and Quality at the Centers for Medicare & Medicaid Services. See <https://www.cms.gov/files/document/qso-21-02-nh.pdf> and [QSO-24-21-NH \(cms.gov\)](https://www.cms.gov/files/document/qso-24-21-nh.pdf).

Resources:

Here are some useful links to help individuals who are in long-term care facilities exercise their right to vote:

- to check on voter registration status: <https://ova.elections.il.gov/RegistrationLookup.aspx>.
- to register to vote or to update voter registration information: <https://ova.elections.il.gov/>.
- to request a ballot by mail: <https://www.elections.il.gov/ElectionOperations/VotingByMail.aspx>.
- to explore alternative options to in-person voting (*i.e.*, absentee voting, early voting, military and overseas voting, provisional voting, voting by mail, and permanent voting by mail): <https://www.elections.il.gov/InformationForVoters.aspx?MID=I0cuvBFuZRw%3d>.
- to learn about candidates: <https://illinoisvoterguide.org/>.
- to find a polling place: <https://ova.elections.il.gov/>.

elections.il.gov/PollingPlaceLookup.aspx?Name=Jj8LeKA7il5RZOL11%2fRsf%2brWDzEE5awHIVA%2f04u5OOffbunYO7x4nRtY2XrA4JAermwTGIPt%2bk%3d&T=637166797092771287.

- to report complaints of possible violations of the federal voting rights laws: www.justice.gov/crt/about/vot/misc/contact.php.

For more information:

- <https://www.elections.il.gov/>
- <https://www.aclu.org/know-your-rights/voting-rights>
- <https://capitolnewsillinois.com/elections/election-guide/>

- <https://theconsumervoive.org/issues/other-issues-and-resources/voting-rights>
- <https://disabilityvoteil.org/>
- <https://nursinghome411.org/wp-content/uploads/2024/04/Fact-Sheet-Right-to-Vote.pdf>
- <https://thearc.org/vote/>
- <https://www.usvotefoundation.org/disabled-voter-guide/illinois>

Conclusion

Our democracy works best when all eligible voters can participate and have their voices heard. ■

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This message has been written by the author in her personal capacity for informational purposes only. It is not an official document of the Illinois Department on Aging or the State of Illinois.

1. Long-term care facilities include Skilled Nursing Care Facilities, Intermediate Care Facilities, Intermediate Care Facilities for the Developmentally Disabled, State Operated Developmental Centers, Illinois Veterans' Homes, Life Care Facilities/Continuing Care Retirement Communities, Assisted Living and Shared Housing Establishments, Supportive Living Facilities, Sheltered Care Facilities, Specialized Mental Health Rehabilitation Facilities, Community Integrated Living Arrangement, and Medically Complex Facilities for the Developmentally Disabled. Independent Living Facilities are not licensed in Illinois.

2. The related state law is the Nursing Home Care Act (210 ILCS 45 *et seq.* at the following link: <https://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=1225&ChapterID=21>.



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