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Procedural Barriers to the Use of Title IX as a Defense for Transgender Students in State Juvenile Justice Proceedings

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State courts must follow valid federal constitutional and statutory law. This is a basic constitutional principle grounded in the Supremacy Clause.[1] For transgender children in places such as Tennessee, situated in the Sixth Circuit Court of Appeals, this should be excellent news. Since 2016, the Sixth Circuit has followed the majority of lower federal courts in interpreting "sex discrimination" in Title IX of the Education Amendments of 1972[2] to prohibit discrimination and harassment in schools on the basis of transgender status.[3] Even more promising, the United States Supreme Court has recently signaled strong support for the Sixth Circuit's interpretation of Title IX. In *Bostock v. Clayton County*, the Court interpreted Title VII of the Civil Rights Act of 1964 to prohibit discrimination against transgender employees. As the Court held, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."[4]

Following this precedent, public schools in Tennessee should be: allowing students to use the bathrooms corresponding with their gender identity; allowing students to self-identify, including by using their preferred name; and protecting students from harassment due to their transgender status. But the on-the-ground experiences of transgender students and their families show that this is not the reality. Many transgender children in public schools in Tennessee have been forced to use bathrooms that do not align with their identified genders, have not been called their preferred name or gender pronoun, and have been subjected to routine harassment and bullying with little institutional support.[5] Transgender students who experience harassment and bullying based on their LGBTQ+ status are more likely to experience

"academic underachievement, increased truancy, and higher dropout rates"[6] and are therefore more likely to interact with the state juvenile justice system.[7]

This chapter illustrates how federal question jurisdiction and choice of law can impact the enforcement of Title IX, particularly in state truancy proceedings—which are a predictable result of transgender students avoiding school.[8] The experiences of transgender children in Tennessee confirm the complexity of raising federal civil rights claims or defenses in state courts. A student in a truancy proceeding might have a valid Title IX claim based on the discrimination and harassment she experienced in school. However, any lawyer representing such a student in a state truancy proceeding would have to consider a number of potential procedural factors before deciding to raise such a defense. In short, the path from Supreme Court precedent to actually having an effect on a person's life is not always clear.

In order to show how federalism and federal procedure impede enforcement of Title IX, the first section considers a hypothetical case of a transgender student going through the state truancy process after having experienced harassment and discrimination in school; the second section considers the jurisdictional issues raised when considering how to articulate and define a potential federal harassment and discrimination defense in a state court proceeding; and the third section addresses the *Erie*[9] question of what law controls when potential federal civil rights defenses are raised in state truancy proceedings.

The Case

Consider the following hypothetical experience of a student, Tania, in Knoxville, Tennessee. Assume for the moment that Tania's school has referred her to court based on truancy charges for ten days of "unjustified" school absences. Tania is now before a state juvenile justice court defending herself against a charge of "chronic truancy."[10] Tania concedes that she missed school, a violation of Tennessee's compulsory education law, Tenn. Code Ann. § 49-6-3001. However, she says that she missed school to avoid the harassment and discrimination she experienced there due to her transgender status. School administration forced her to either use the male bathroom or conspicuously

request a key for the faculty bathroom (leading to more taunting by her peers). Her teachers and peers continued to call her by her birth name, Matt, a name incongruous with her gender identity and clothing choice. Further, despite complaining to teachers and the principal, other students constantly harassed her, including by calling her derogatory names such as "he/she."

Tania has hired a lawyer, who is considering arguing that, because the harassment and discrimination Tania experienced violates Title IX, her absences are "justified" and she should not be found truant. As the following makes clear, jurisdictional and choice of law problems complicate this decision.

Nature of the Action

The first thing that Tania might consider is to file a Title IX action in federal court. A federal suit could seek relief against the school as well as a declaratory judgment preventing the state district attorney from prosecuting the truancy proceeding against her. Based on the facts of her case, Tania has a viable Title IX case. The kind of conduct that Tania has been experiencing—deadnaming, discriminatory bathroom access, and harassment due to transgender status—is unlawful in Tennessee under the Sixth Circuit's 2016 decision in *Dodds v. US Department of Education*.[11] The court in *Dodds* held that "settled law" prohibits "[s]ex stereotyping based on a person's gender non-conforming behavior" and noted that "[t]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes."[12] The Supreme Court in *Bostock* signaled support for *Dodds* when it held that, under Title VII, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."[13] Lower courts traditionally rely on the Supreme Court's interpretations of Title VII to inform their interpretation of Title IX, especially when determining who is encompassed by the term sex discrimination.[14]

Despite the positive outlook for any case filed in federal court against the school district, the federal suit is unlikely to have any practical effect on Tania's state truancy proceeding. Although federal courts have some powers to stay state proceedings, those powers are quite limited.[15]

Thus, Tania will have to raise the Title IX as a "defense" to the truancy charge. She and her lawyer might think about trying to remove her case to federal court under 28 U.S. Code § 1441. But this tactic, too, is destined to fail. Removal under § 1441 is limited to "civil actions," and truancy proceedings have been characterized as quasicriminal due to their potentially harsh direct and indirect penalties.[16] Even if removal were possible, Tania cannot remove her case to federal court under the well-pleaded complaint rule. The federal issue, Title IX, is raised by a "defense" and therefore could not establish federal court jurisdiction.[17] Instead, Tania must proceed through the state truancy process, ensuring that the harassment/failure to correct defense will be heard by the local state juvenile court judge.

Erie, Reverse-*Erie*, and What Law Controls?

Since Tania's harassment/discrimination defense will be heard by the state juvenile court, the next question is: What law will control her defense? This "choice of law" question invokes two issues central to the viability of Tania's defense. First, in evaluating Tania's harassment defense, does the state juvenile court judge have to apply federal law? Or can she apply some other source of law, such as state harassment law? And second, even if the juvenile court recognizes Tania's Title IX defense, is it bound by the Sixth Circuit's expansive interpretation of "sex discrimination" under Title IX?

First, can the juvenile justice court reject the application of Title IX altogether and instead apply a state-law definition of harassment? You bet. A state judge wishing to do this might characterize Tania's truancy defense as one of state statutory law, not federal law. This sounds contentious, even obstructionist, because a state court is obliged to apply valid federal statutory law—here, Title IX. Furthermore, state courts must apply federal law even when there is seemingly conflicting state law on point.[18]

However, in this case, the state truancy law and Title IX are not conflicting but potentially complementary. In Tennessee, just as in many other states, the state must prove that a students' absences were "without justification" to bring a successful truancy action. As part of that process, the student can raise defenses,[19] including by arguing that bullying and

harassment justified the truancy.[20] There is little precedent in Tennessee on the meaning of "without justification," but certainly the definition of "justified" is a matter of state law.

Thus, a state juvenile court may use its own common law definition of harassment—ungrounded in Title IX principles—to determine whether there was enough "justification" in a particular case to support a student's defense. Should the state court in Tania's case follow this approach, even a direct Supreme Court decision interpreting Title IX would not assist her. This is so *even if* such harassment would be deemed actionable discrimination under Title IX by a district court sitting across the street, or even by the Supreme Court.

But a state court could also reasonably interpret the phrase "without justification" to include violations of Title IX. In that event, the court would incorporate federal law into the state law. That's the ideal approach from Tania's perspective, as the federal precedent is strongly in her favor. But this leads to the second choice of law question: If the juvenile court does follow federal law and recognizes her Title IX defense as a "justification," is the court obligated to follow the Sixth Circuit's expansive interpretation of "sex discrimination" under Title IX?

The answer is no. Because this involves a question of how a court of one sovereign (Tennessee) must apply the law of another (the United States), it raises a choice of law issue under the doctrine of *Erie R. Co. v. Tompkins*.[21] The basic *Erie* principle requires that federal courts defer to state court precedent when applying state substantive law.[22] A related principle, often referred to as "reverse *Erie*," governs the deference state courts must give to federal precedent.[23]

The majority view among state courts—and the view in Tennessee—is that federal trial or appellate court decisions interpreting law are not binding on state courts. Instead, such precedents are merely "persuasive authority."[24] Therefore, our juvenile court judge will not be bound by the Sixth Circuit's interpretation of Title IX. He may consider it persuasive, but then again he may not, choosing instead to rely on common law precedents in Tennessee. The same goes for the Supreme Court's recent decision in *Bostock*; because the Court in that decision was analyzing Title VII, there is nothing formally stopping the state court from coming to a different conclusion about Title IX.[25] Although this potential split between federal and state courts on the meaning of a federal law

may seem odd at first to law students who have studied *Erie*, a number of jurists celebrate it.[26] To quote Justice O'Connor, we should encourage "dialogue among different jurists . . . [t]he benefits of [which] can, for at least a limited time, outweigh the immediate need for uniformity."[27]

Conclusion

State juvenile courts have considerable leeway to recognize—or not recognize—defenses of bullying and harassment of transgender students. Until the United States Supreme Court directly decides the issue, local courts remain unbound by federal precedent on the issue. And even a direct Supreme Court precedent might not be enough: state courts may rely on their own definitions of what is "justified." In short, even if a student's Title IX defense has merit, as a practical matter, choice of law and jurisdictional limitations might impede her ability to enforce her federal statutory civil rights in state courts. The federalist institutional structure of our judicial system empowers local state courts to make idiosyncratic decisions such as these.

This is disturbing. By either failing to recognize the federal law as controlling, or by failing to recognize an issue as implicating federal law, state courts can undermine the enforcement of federal civil rights protections for transgender people and other vulnerable populations. Court decisions such as *Bostock* and *Dodds* are vitally important, but vulnerable populations may spend years attempting, unsuccessfully, to have these rights recognized in hostile state forums—including in state courts and schools. And, although the Supreme Court can theoretically step in to resolve conflicts among the courts, the Court rarely does so. Transgender students do not have the luxury of waiting calmly for "dialogue among different jurists." Every day counts. Wait-and-see is not an option.

NOTES

1 U.S. Const. art. VI § 2. *See* Felder v. Casey, 487 U.S. 131, 151 (1988).
2 20 U.S.C. §§ 1681–1688.
3 Dodds v. United States Dep't of Educ., 845 F.3d 217, 222 (6th Cir. 2016).
4 Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020).
5 For a comprehensive view of the experiences of LGBTQ+ children in American schools, see Human Rights Watch, *Hatred in the Hallways: Violence and*

Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools (2001), www.hrw.org (May 2010); Joseph G. Kosciw, Emily A. Greytak, Adrian D. Zongrone, Caitlin M. Clark & Nhan L. Truong, GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, www.glsen.org (2018); National Center for Transgender Equality, *2015 U.S. Transgender Survey, Tennessee State Report* (2015), www.transequality.org (Oct. 2010).

6 Note, Jason Lee, *Too Cruel for School: LGBT Bullying, Noncognitive Skill Development, and the Educational Rights of Students*, 49 Harv. C.R.-C.L. L. Rev. 261, 288 (2014) (citing Harper ex rel. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007)).

7 Billie Gastic, *School Truancy and the Disciplinary Problems of Bullying Victims*, 60 Educ. Rev. 391, 397 (2008); Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 Temp. L. Rev. 415, 420 (2006). Regarding the difficulty of determine the precise number LGBTQ+ children in the justice system, see Randi Feinstein, Andrea Greenblatt, Lauren Hass, Sally Kohn & Julianna Rana, Urban Justice Center, *Justice for All? A Report on Lesbian, Gay, Bisexual, and Transgendered Youth in the Juvenile Justice System*, at 26–27, https://files.eric.ed.gov (2001).

8 As this chapter is limited in scope, it will not cover other potential procedural barriers to federal civil rights enforcements, such as issue preclusion.

9 Referring to the landmark case Erie R.R. Co. v. Tompkins, discussed in the third section.

10 For further background on the truancy process see Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*, 3 Duke F. for L. & Soc. Change 139 (2011); Ashley Goins, *Justice for Juveniles: The Importance of Immediately Appointing Counsel to Cases Involving Status Offenses and Engaging in Holistic Representation of Juveniles in All Cases*, 2 The Forum: A Tennessee Student Legal Journal 33 (2015).

11 *Dodds*, 845 F.3d at 221.

12 *Id.* (quoting G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), *vacated and remanded*, ___ U.S. ___, 137 S. Ct. 1239, 197 L.Ed.2d 460 (2017)). *See also* EEOC v. v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568 (6th Cir. 2018), *cert. granted in part sub nom.* R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019), and *aff'd sub nom*. Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731 (2020).

13 *Bostock*, 140 S. Ct. at 1747.

14 *See, e.g.*, Preston v. Com. of Va. ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994); *see also* Grimm v. Gloucester Cty. Sch. Bd., No. 19–1953, slip op. at 52 (4th Cir. Aug. 26, 2020).

15 *See, e.g.*, D.T. by and through B.K.T. v. Sumner Cty. Sch., No. 3:18-CV-00388, 2018 WL 4776080, at *2 (M.D. Tenn. Oct. 3, 2018).

16 Goins, *supra* note 10, at 27–28.

17 *See* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1782 (1998).

18 Free v. Bland, 369 U.S. 663, 666 (1962).

19 *See* Goins, *supra* note 10, at 34 (citing Tenn. Code Ann. § 37-1-102(b)(23)(A) (2014)).

20 *See* Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline*, 42 J.L. & Educ. 653, 679 (2013); Rivkin, *supra* note 10, at 12.

21 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

22 *See* Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie As the Worst Decision of All Time*, 39 Pepp. L. Rev. 129, 141 (2011); John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 722–23 (1974).

23 For thorough discussions of the reverse-*Erie* doctrine see Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 Vand. L. Rev. 53, 55 (2015); Kevin M. Clermont, *Reverse-Erie*, 82 Notre Dame L. Rev. 1, 20 (2006); Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 Wm. & Mary L. Rev. 1143, 1177 (1999); Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and Erie State Law Predictions*, 3 Seton Hall Circuit Rev. 1, 16–28 (2006).

24 Frost, *supra* note 23, at 62; State v. Carruthers, 35 S.W. 3d 516, 561 n.45 (Tenn. 2000). For minority state approaches to the reverse-Erie doctrine, see Frost, *supra* note 23, at 63.

25 For a discussion on state court powers to hear federal claims, see Josh Blackman, *State Judicial Sovereignty*, 2016 U. Ill. L. Rev. 2033, 2039 (2016).

26 *See, e.g.*, Sandra Day O'Connor, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. 173, 181–82 (1994); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. Rev. 759, 771 (1979). For a contrary view, see Frost, *supra* note 23.

27 O'Connor, *Proceedings*, *supra* note 26, at 181–82.