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Subjects: 1. Whether Senate Bill 150 allows school districts to choose whether to offer curriculum that either (1) prohibits children in grades five and below to receive instruction on human sexuality or sexually transmitted diseases; or (2) prohibits any child regardless of age to receive instruction with the goal of exploring gender identity, gender expression, or sexual orientation.

2. Whether a school district would violate Title IX of the Education Amendments of 1972 by implementing the provisions of Senate Bill 150 concerning preferred pronoun policies and policies concerning the use of facilities including restrooms, locker rooms and shower rooms in public schools.

Written by: Jeremy J. Sylvester, Assistant Attorney General

Syllabus: 1. Senate Bill 150 does not permit school districts to choose one of its two restrictions on curricula content. The law prohibits not only instruction on human sexuality or sexually transmitted diseases for children in grades 5 or below, but also instruction, for any grade level, on gender identity, gender expression, or sexual orientation.

2. Neither existing binding legal precedent nor statutory or regulatory law holds or declares that a school district would violate Title IX by implementing Senate Bill 150's provisions concerning preferred pronoun policies and policies concerning the

use of facilities including restrooms, locker rooms and shower rooms in public schools.

Opinion of the Attorney General

During the 2023 regular session, the Kentucky General Assembly enacted Senate Bill 150, overriding a veto from the Governor. *See* 2023 Ky. Acts, Ch. 132. The law addresses multiple topics governing the operation of public schools, including limiting instruction on gender identity and sexual orientation, establishing parental notification rights, prohibiting required or recommended preferred pronoun usage policies, and restricting a person of one biological sex from using the restrooms, locker rooms, or shower rooms designated for the opposite biological sex.[1] This opinion addresses concerns arising from a guidance document issued by the Kentucky Department of Education (KDE) on April 17, 2023, which the KDE later updated on June 5, 2023. The update to the guidance document offers the KDE's heavily revised interpretation of Section 2 of the law suggesting that school districts have the choice to obey only one of two legislative prohibitions relating to public school curricula for human sexuality or sexually transmitted diseases. The guidance document also suggests that school districts risk violating Title IX if they implement the provisions of the law addressing restrooms, locker rooms, showers rooms, and preferred pronoun usage.

Both versions of the KDE guidance document discussed Section 2 of Senate Bill 150. Section 2 amended KRS §158.1415 to place restrictions on public-school instruction regarding human sexuality or sexually transmitted diseases. At issue here is the following statutory text:

> (1) If a school council, or, if none exists, the principal adopts a curriculum for human sexuality or sexually transmitted diseases, instruction shall include but not be limited to the following content: [. . .]
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> (d) A policy to respect parental rights by ensuring that:
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> 1. Children in grade five (5) and below do not receive any instruction through curriculum or program on human sexuality or sexually transmitted diseases; or
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> 2. Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation; and

[1] The bill also prohibited puberty blockers, cross-sex hormones, and surgeries for the treatment of gender dysphoria in minors.

> (e) A policy to notify a parent in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases authorized in this section.

KRS §158.1415(1).

The April 2023 KDE guidance document only briefly discusses Section 2 of Senate Bill 150 but refers the reader to another document entitled "Senate Bill 150 (2023) Section Two Supplemental Guidance."[2] This supplement delineated the bill's requirements for Kindergarten through Grade 5 compared to Grades 6 through 12. This supplement clearly stated that no children in Grades 5 and below should "receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases." Moreover, children in this group (Grades 5 and below) were also prohibited from receiving "any instruction or presentation on gender identity, gender expression or sexual orientation." The supplemental guidance states that the curriculum for Grades 6 through 12 may include instruction on human sexuality and sexually transmitted disease subject to advance parental notice and consent. However, the supplement again emphasized that these students may not "receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression or sexual orientation."

Less than two months after issuing its supplement discussing Section 2 of Senate Bill 150, the KDE inexplicably issued a revised guidance document radically altering its prior guidance to school districts.[3] The KDE claimed that the "or" between KRS 158.1415(1)(d)(1) and (d)(2) allows a school district to choose which one of those two prohibitions apply to its curriculum on human sexuality or sexually transmitted diseases.[4] As an example, the guidance document posits that a school district choosing to prohibit instruction with the goal or purpose of studying gender identity, gender expression, or sexual orientation can still instruct children of any age on other topics of human sexuality and sexually transmitted diseases.[5]

The updated KDE guidance document also suggests that Section 5(b) of Senate Bill 150 would violate Title IX, if implemented. Section 5(b) prohibits the KDE or Kentucky Board of Education from recommending or requiring "policies and procedures for the use of pronouns that do not conform to a student's biological sex." 2023 Ky. Acts, Ch. 132, § 5(b). Similarly, "[a] local school district shall not require

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[2] A copy of this supplemental guidance document is available at: https://perma.cc/WHD8-RBT7.

[3] A copy of this revised guidance documents entitled 2023 Legislative Guidance-Emergency Bills is available at: https://perma.cc/47W5-QH5X.

[4] *Id.*, at pp. 9 – 10.

[5] *Id.*, at p. 10.

school personnel or students to use pronouns for students that do not conform to that particular student's biological sex." *Id.* at § 5(b).

Last, the updated KDE guidance document implies that Section 3 of Senate Bill 150 would violate Title IX, if implemented. Section 3 requires local school and charter school boards to adopt policies that "shall, at a minimum, not allow students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex." *Id.* at § 3. A student who asserts that his or her gender does not conform with his or her biological sex and whose parents or legal guardian provides consent, "shall be provided with the best available accommodation." *Id.* at § 4(a). Acceptable accommodations may include "access to single-stall restrooms or controlled use of faculty bathrooms, lockers rooms, or shower rooms." *Id.* at § 4(a).

Following its summary of Senate Bill 150's provisions governing policies on preferred pronouns, restrooms, locker rooms and shower rooms, the KDE strongly suggested these provisions violated Title IX by stating:

> School districts should remain aware of the legal landscape applicable to transgender students, including current and proposed Title IX regulations. The United States Court of Appeals for the Sixth Circuit previously held: "Under settled law in this Circuit [which includes Kentucky], gender nonconformity as defined in *Smith v. City of Salem*, is an individual's 'fail[ure] to act and/or identify with his or her gender…. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Dodds v. United States Department of Education*, 845 F.3d 217, 221 (2016).

After making this statement, KDE concluded that school districts should consult with board counsel for legal advice for potential liability concerns. The implication of this statement is that school districts risk financial harm, either in the form of legal liability to pay monetary damages in private Title IX actions or in the loss of federal funding, if they comply Senate Bill 150.[6]

I. KDE's most recent interpretation of Section 2 of Senate Bill 150 is incorrect.

The KDE correctly interpreted Section 2 of Senate Bill 150 the first time. The KDE's revised interpretation of Section 2 of Senate Bill 150 is incorrect. First, it fails to account for the use of the disjunctive "or" in the context of prohibitions. And second,

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[6] At least one news reporter drew this conclusion as well. Krista Johnson, *Why Kentucky schools that follow state anti-trans law may run afoul of federal laws*, Courier Journal (Apr. 24, 2023).

the KDE's interpretation would render part of the statute meaningless, creating an absurd result that is clearly contrary to what the legislature intended.

The intent of the legislature is clear from the text of Section 2. *See Chilton v. Gividen*, 246 S.W.2d 133, 135 ("[A] statute will be construed so as to accomplish the purpose for which it was enacted."). When read in proper context, KRS §158.1415(1)(d) seeks to ensure school districts respect parental rights by prohibiting two things: either (1) instruction on human sexuality or sexually transmitted diseases to students in grades 5 or below; or (2) instruction or presentations to students of any age that have the goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation. Because the legislature was stating basic prohibitions, its use of the disjunctive "or" in this section of the statute means that both things connected by the disjunctive are prohibited. Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation Legal Texts, 119 (West 2012). KDE seemed to have applied basic canon of construction in its April guidance documents.

Even if the intent of the legislature in using "or" were not clear[7], "courts have the ultimate responsibility" in matters of statutory construction, not agencies. *Gilbert v. Commonwealth*, 291 S.W.3d 712, 716 (Ky. App. 2008) (citing *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet,* 689 S.W.2d 14, 20 (Ky. 1985)). Kentucky "courts have said '[n]ot the literal language but the true intention or will of the Legislature is the law.'" *Hardwick v. Boyd Cnty. Fiscal Ct.*, 219 S.W.3d 198, 201 (Ky. App. 2007) (quoting *Asher v. Stacy*, 185 S.W.2d 958, 959 (Ky. 1945)); *see also Cosby v.*

[7] Commissioner Glass (or his lawyers) must know the legislative intent behind Section 2, because he stated repeatedly (at least 8 times) during a recent interview on Kentucky Tonight that the "or" was a "mistake." See "SB 150 and LGBTQ Issues", available at https://ket.org/program/kentucky-tonight/sb-150-and-lgbtq-issues/ (last viewed July 5, 2023).

1:39 – "That's the language in the bill, so it wasn't our determination to use the word 'or,' that is the de facto language that is in the statute."

1:53 – "We started hearing from attorneys that represent school districts and they really pointed out that error… We now know it's an error based on the reaction that we are seeing from the Senate GOP and the Kentucky GOP… But it's been brought to us from those attorneys in pointing out that error."

2:45 – "Its clear the legislators made an error here and the right thing for them to do… When I make an error I accept responsibility for it and straighten it out. They have the opportunity to do that in the next session. I'm sure they will correct this error."

3:09 – "It's almost surprising there aren't more errors with the speed and undercover darkness that this moved through."

4:07 – "It doesn't seem like they are owning up to it…. It seems like based on their reaction their intent was for it to be 'and' and the right thing for them to do in the next session is to go ahead and correct the error."

Commonwealth, 147 S.W.3d 56, 59 (Ky. 2004) ("The legislature's intention shall be effectuated, even at the expense of the letter of the law." (citation omitted)); KRS 446.080(1) ("All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . .."). In carrying out their duty to construe statutes, courts may revise "or" to "and" and vice versa, "whenever such conversion is required, inter alia, to effectuate the obvious intention of the Legislature and to accomplish the purpose or object of the statute." *Duncan v. Wiseman Baking Co.*, 357 S.W.2d 694, 698 (Ky. 1961) (observing that the "popular use of the words 'or' and 'and' is loose and frequently inaccurate); *see also*, *Boron Oil Co. v. Cathedral Found., Inc.*, 434 S.W.2d 640, 641 (Ky. 1968) (noting that this practices is permissible when it is "obvious that the intent of the legislature would be thwarted if the change were not made."). In doing so, "an interpretation which will lead to an absurd result will be avoided." *Chilton*, 246 S.W.2d at 135.

Such an interpretative conversion of "or" to "and" would be appropriate here to avoid the absurd interpretation KDE has now proffered. Under the KDE's reckoning, if a school district chooses to forgo instruction on gender identity, gender expression, and sexual orientation, it is free to teach about all other aspects of human sexuality and sexually transmitted diseases to children of any age. Moreover, KDE's flawed interpretation cannot be harmonized with several other provisions of Senate Bill 150. *See Jefferson Cnty. Bd. of Ed. v. Fell*, 391 S.W.3d 713, 719 (Ky. 2012) ("The particular work, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent."); *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) ("The statute must be read as a whole and in context with other parts of the law."). KRS §158.1415(1)(e) provides for advance parental notification and consent before any child in **grade six or above** receives any instruction through curriculum or programs about human sexuality or sexually transmitted diseases.

This provision clearly contemplates that KRS §158.1415(1)(d)(1) prohibits all such instruction to grades 5 and below rather than leaving it to the school districts to decide whether they will do so. If this were not the case, explicit or graphic instruction could be presented to kindergartners as a part of curriculum on prevention of sexually transmitted diseases without prior parental notification or consent, while parental consent would be required to present the same material to high schoolers. That is both perverse and non-sensical. It is also obvious the General Assembly intended to prohibit all instruction that has as its goal or purpose students studying or exploring gender identity, gender expression, or sexual orientation because there is no reference to these topics in other provisions concerning parental notice and consent (*see* KRS §158.1415(1)(e)) or the requirement to offer alternative instruction on human sexuality (*see* KRS §158.1415(3)). This omission is entirely consistent with

the purpose of the Act to completely prohibit instruction on these topics under KRS §158.1415(1)(d)(2).

Based on the foregoing, it is the opinion of the Attorney General that Section 2 of Senate Bill 150 prohibits school districts from offering any instruction to children in grades 5 and below on the topics of human sexuality or sexually transmitted diseases. Moreover, school districts are prohibited from providing instruction exploring gender identity, gender expression, or sexual orientation to students in any grade. School districts are not given the option as to which of these prohibitions they are required to implement.

II. No binding precedent, statutory or regulatory law establishes that implementation of Senate Bill 150 would violate Title IX.

Because the KDE guidance (both the April guidance and the revised June guidance) is overly simplistic and fails to provide any guidance at all, this Office must advise on Title IX's requirements and how they may relate to Senate Bill 150. In the opinion of the Attorney General, a school district's implementation of Senate Bill 150 does not constitute a Title IX violation under any existing, binding legal precedent or statutory or regulatory law.

A. Title IX prohibits discrimination "on the basis of sex."

Title IX was enacted in 1972 to ensure women and girls are provided equal access to educational opportunities. The operative provision of Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). Although "sex" is not defined by statute, the term refers to the biological differences between male and female. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812–814 (11th Cir. 2022); Notice of Final Rule, 85 Fed. Reg. 30026, 30178 (May 19, 2020) ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification."). *See also*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020)(Niemeyer, J. dissenting) (noting that "sex" refers to the "physiological distinctions between males and females").

Not all differential treatment on the basis of sex constitutes prohibited discrimination under Title IX. *Meriwether v. Hartop*, 992 F.3d 492, 510, n.4 (6th Cir. 2021). For example, Congress declared that nothing in Title IX "shall be construed to prohibit [schools] from maintaining separate living facilities for the different sexes." 20 U.S.C §1686. The implementing regulations also state that schools "may provide

separate toilets, locker room, and shower facilities on the basis of sex," so long as the "facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Moreover, schools may "operate or sponsor teams for members of each sex where selection for such teams is based on competitive skill or the activity involved is a contact sport." *Id* at § 106.41(b). Title IX thus underscores that "[p]hysical differences between men and women … are enduring" and the "two sexes are not fungible" but rather have "inherent differences." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsberg, J.) (cleaned up) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

Although not explicitly stated in the statute, Title IX also prohibits sexual harassment and abuse of students. Title IX's implementing regulations require schools to investigate complaints of harassment and abuse and take appropriate steps to prevent it. 34 C.F.R. §§ 106.44, 106.45. A student subject to sex abuse or harassment by an employee or another student at a school may also bring a private cause of action against the school to collect damages. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) (dealing with misconduct by teacher); *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629 (1999) (dealing with student-on-student harassment). To prevail in a suit against the school, a plaintiff must prove that "1) [the plaintiff] was subjected to a quid pro quo sexual harassment or a sexually hostile work environment; [2)] [the plaintiff] provided actual notice of the situation to an 'appropriate person,' who was, at a minimum, an official of the educational entity with authority to take corrective action and to end discrimination; and [3] the institution's response to the harassment amounted to 'deliberate indifference.'" *Klemencic v. Ohio St. Univ.*, 263 F.3d 504, 510 (6th Cir. 2001) (citation omitted). For hostile work environment claims, the plaintiff must also demonstrate the sexual harassment was "so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities and benefits provided by the school." *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing to *Davis*, 119 S. Ct. at 1666–71).

B. No binding precedent holds that unlawful discrimination "on the basis of sex" under Title IX includes disparate treatment of those asserting a gender identity that does not conform with their sex.

In the past decade, courts began tackling the issue of whether discrimination against employees whose gender identity does not conform to their biological sex constitutes unlawful sex discrimination under Title VII, which prohibits adverse employment actions against the employee "because of" the employee's "sex." 42 U.S.C. § 2000e-2(a). Both the United States Supreme Court and the Sixth Circuit Court of Appeals have held that taking adverse employment actions against an employee for not conforming to certain stereotypes associated with the employee's biological sex constitutes unlawful sex discrimination under Title VII. *See e.g.*, *Bostock v. Clayton*

County, 140 S. Ct. 1731 (2020) (holding that Title VII prohibits an employer from firing an employee for being homosexual or gender non-conforming); S*mith v. City of Salem*, 378 F.3d 729 (6th Cir. 2005) (holding that termination of employee based on gender transition constitutes sex-based discrimination); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., 884 F.3d. 560 (6th Cir. 2018) (same). These cases interpreting Title VII are binding in Kentucky.

These Title VII cases, however, have not been extended to the Title IX context. The KDE guidance elides this point. The *Bostock* majority expressly noted that "other federal or state laws that prohibit sex discrimination" were not "before" the Court; and refused to "prejudge" any such question about what those statutes require. *Bostock*, 140 S. Ct. at 1753. Even more specifically, the Court stated, "we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Id*. The Sixth Circuit Court of Appeals issued similar warnings. *See Meriwether*, 992 F.3d at 510, n. 4 ("[I]t does not follow that principles announced in the Title VII context automatically apply in the Title IX context."); *Pelcha v. MW Bancorp, Inc*., 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he rule in *Bostock* extends no further than Title VII.").

There is currently a split of authority among the federal circuit courts regarding whether Title IX prohibits discrimination based on gender nonconformity in all contexts. Ruling *en banc*, the Eleventh Circuit Court of Appeals recently held that the term "sex" in Title IX means biological sex and therefore segregation of restroom facilities based on biological sex is specifically allowed under existing regulations. *Adams*, 57 F.4th at 812–814. The Fourth and Seventh Circuit Courts of Appeal, however, have interpreted Title IX under the same sex-stereotyping framework used in Title VII cases. *See Grimm*, 972 F.3d at 617–18 (finding a violation of Title IX to deny a biological male student who identified as female access to the girl's restroom); [8] *Whitaker v. Kenosha Unified Sch. Dist*., 858 F.3d 1034, 1047–1050 (7th Cir. 2017) (concluding the same regarding a biological male student who had been denied access to the girl's restroom).[9]

The United States Department of Education also recently sought to amend Title IX regulations to address gender incongruent persons. Notice of Proposed Rule

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[8] The first Fourth Circuit Court of Appeals decision in this case gave deference to a Department of Education letter opining that Title IX requires school to allow students to use the sex-segregated bathroom consistent with their asserted gender identity. *Grim v. Gloucester Cnty. Sch. Bd*., 822 F.3d 709 (4th Cir. 2016). The United States Supreme Court then issued of a stay of the injunction entered in favor of the plaintiff based, in part, on this letter, *see Gloucester Cnty. Sch. Bd. v. Grimm*, 136 S. Ct. 2442 (2016), and then vacated judgment and remanded the case back to the Fourth Circuit for further consideration of a Title IX guidance document issued by the Department of Education under a new administration, *see Gloucester*, 137 S. Ct. 1239 (2017). After the Fourth Circuit Court of Appeals found in favor of the plaintiff again, the United States Supreme Court denied writ of certiorari on June 28, 2021. *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021).

[9] The United States Supreme Court dismissed a petition for writ of certiorari upon agreement of the parties. *Whitaker v. Kenosha Unified Sch. Dist*., 138 S. Ct. 1260 (2018).

Making, 87 Fed. Reg. 41390 (July 12, 2022). These proposed regulations reflect a shift in policy and ideology regarding what it means to discriminate "on the basis of sex" in the context of Title IX. However, proposed regulations are not binding law. Moreover, the views on how Title IX's ban on sex discrimination should apply to gender incongruent students change from administration to administration.[10] At the very least, this back-and-forth interpretation of Title IX on the issue of gender identity indicates how unsettled the law is.

C. Neither existing binding legal precedent nor statutory or regulatory law holds or declares that a school district would violate Title IX by implementing Senate Bill 150's provisions concerning the use of facilities including restrooms, locker rooms and shower rooms in public schools.

Students who claim their gender does not conform with their biological sex have mounted legal challenges against policies requiring them to use the sex-segregated restroom aligning with their biological sex. The Fourth and Seventh Circuit Courts of Appeal have held that enforcement of these polices against these individuals violates Title IX's prohibition on sex-based discrimination under the sex-stereotyping theory advanced by *Bostock*. *See Grimm*, 972 F.3d at 616–19; *Whitaker,* 858 F.3d at 1047–1050. But the Eleventh Circuit Court of Appeals has held that restricting restroom use by biological sex rather than the asserted gender identity of a student did not amount to illegal sex discrimination under Title IX. *Adams*, 57 F.4th at 811–14. The United States Supreme Court explicitly stated that it has yet to weigh in on this specific issue. *Bostock*, 140 S. Ct. at 1753.

The Sixth Circuit Court of Appeals has also not issued a definitive ruling suggesting that a school district implementing Senate Bill 150's provisions governing restrooms, locker rooms, and shower rooms would constitute a violation of Title IX. The *Dodds* case, which is cited in the KDE guidance, addressed a school district's motion to stay an injunction entered in a district court in Ohio on behalf of an eleven-year-old special needs student who was suicidal. That injunction allowed the student

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[10] *See e.g.,* February 22, 2017 Dear Colleague Letter (withdrawing Obama administration letters opining that Title IX required access to sex-segregated facilities based on gender identity), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.; Memorandum for Kimberly M. Richey Re: *Bostock v. Clayton Cty*., 140 S. Ct. 1731 (2020) (concluding that Title IX does not prohibit certain practices such as referring to students by pronouns matching their biological sex or restricting access to sex-segregated restrooms based on biological sex), available at https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf; President Biden's Exec. Order No. 13, 988, 86 Fed. Reg. 7,023 (Jan. 20, 2021) ("Under *Bostock's* reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.")

to use the restroom aligning with the student's self-identified gender. *Dodds*, 845 F.3d. at 220–21. A panel of the Sixth Circuit Court of Appeals, after weighing the equities of the case, allowed the injunction to remain in place. Believing that the unique procedural posture and facts of the *Dodds* case did not make it binding precedent, the United Stated District Court for the Middle District of Tennessee ruled that a Tennessee law restricting use of sex-separated restrooms and changing rooms according to biological sex did not violate Title IX. *D.H. v. Williamson Cnty. Bd. of Ed.*, 2022 W.L. 16639994 (M.D. Tenn. Nov. 2, 2022). The Sixth Circuit Court of Appeals has yet to rule on that appeal.

The Office also believes that a challenge to Senate Bill 150's restrictions on the use of locker rooms and shower rooms to students of the same biological sex requires a different analysis than has been employed by cases addressing restrooms only. Some of the cases involving restrooms discounted the privacy interests of students because the restrooms had stalls with doors. *Whitaker*, 858 F.3d at 1052 ("[restroom policy] ignores the practical reality of how [the student] … uses the bathroom: by entering a stall and closing the door"); *Grimm*,972 F.3d at 613–14 (agreeing with *Whitaker* on the issue of privacy). But locker rooms and shower rooms typically involve groups of students gathered in a complete state of undress where the anatomical and physiological differences between the biological sexes is patent. In this Office's opinion, courts within the Sixth Circuit may be hesitant to find that Title IX requires middle and high school girls to undress and shower in the presence the boys they will sit next to in English class later that same day. *See Williamson Cnty. Bd. of Ed.*, 2022 W.L. 16639994 at *9 (acknowledging privacy interests of other students in restroom).

As stated above, the Department of Education has recently proposed Title IX regulation amendments. 87 Fed. Reg. 41390. These proposed amendments include a revision to 34 CFR §106.31(a):

> (2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

87 Fed. Reg. 41571. The Department notes that its regulations have "recognized limited contexts in which recipients are permitted … to separate student on the basis of sex because the Department has determined that in those contexts such treatment

does not generally impose harm on students. *See e.g.*, 34 CFR 106.33 (toilet, locker room, and shower facilities); *id.* at 105.34(a)(3)." 87 Fed. Reg., 41534. But the Department cites to *Grimm*, *Whitaker*, and other restroom cases, and states that "courts have recognized that a [school] subjects students to such harm when it bars them from accessing otherwise permissible sex-separate facilities or activities consistent with their gender identity." *Id.* at 41535. Thus, the Department's proposed regulations reflect its view that facilities separated based on biological sex are generally legal, but that students should be allowed to use the sex-separated facility that aligns with the gender, when the student's sex and gender identity do not align.

Again, it is important to note that these proposed regulations are not final and are not currently binding on recipients of federal funding. Moreover, these proposed regulations addressing gender identity are based on the Department's expansive interpretation of *Bostock*, which it disclosed in a published interpretation entitled, "Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender in Light of *Bostock v. Clayton County*." Interpretation, 86 Fed. Reg. 32,637 (June 22, 2021). That flawed published interpretation is the subject of a legal challenge currently on appeal before the Sixth Circuit Court of Appeals. *See Tenn., et. al. v. Dep. of Ed., et. al*, No. 22-5807.

In sum, Title IX's text and existing implementing regulations allow disparate treatment based on biological sex in some contexts. Moreover, the United States Supreme Court and Sixth Circuit Court of Appeals have warned that Title VII case law concerning gender identity discrimination in the workplace do not apply to Title IX. For these reasons, it is the Attorney General's opinion that a school district's implementation of Senate Bill 150's provision concerning restrooms, locker rooms, and shower rooms would not violate Title IX.

D. A school district does not violate Title IX simply because it does not have a required preferred pronoun usage policy.

KDE's implication that a school district may violate Title IX by not having a preferred pronoun policy wholly lacks merit.[11] In fact, the recent Sixth Circuit Court of Appeal's holding in *Meriwether v. Hartop* suggests just the opposite. *Meriwether*, 992 F.3d at 511. In that case, a professor, Nicholas Meriwether, was disciplined by his employer for failing to comply with the university's policy mandating he refer to the plaintiff by preferred pronouns during class. Meriwether sued stating that the university violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment. The court held that the university's policy forcing Meriwether under the threat of discipline to use a student's preferred pronouns stated a claim for violation of Meriwether's First Amendment rights. *Id.* at 511–12, 517. The court also

[11] *Dodds*, the only Sixth Circuit case cited in KDE's guidance, has nothing to do with preferred pronoun polices.

rejected the university's argument that Title IX compelled a different result. *Id.* at 511. The court noted that the failure of Meriwether to use preferred pronouns, absent more, was not sufficient to support a Title IX hostile-environment claim because Meriwether's actions were not "serious enough to have the systematic effect of denying the victim equal access to an educational program or activity." *Id.* (quoting *Davis*, 526 U.S. at 652).[12]

Senate Bill 150 simply prevents schools from implementing a policy concerning preferred pronouns that teachers and students must follow under the threat of discipline. Senate Bill 150 does not prevent teachers and students from voluntarily referring to students by their preferred pronouns if they choose to do so. By giving students and teachers the freedom to act in accordance with their beliefs, however, Senate Bill 150 preserves the First Amendment rights of students and teachers consistent with the *Meriwether* holding. And in doing so, it alleviates potential liability for school districts for First Amendment claims. For these reasons, it is the Office's opinion that implementation of Senate Bill 150's prohibition on preferred pronoun usage polices does not violate Title IX.

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[12] This is consistent with letter from Assistant Secretary Kenneth Marcus to Representative Mark Green dated March 9, 2020, which is available at https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20200309-title-ix-and-use-of-preferred-pronouns.pdf. That letter states, 'By itself, refusing to use transgender students' preferred pronouns is not a violation of Title IX and would not trigger a loss of funding or other sanctions."