



THE FISCAL IMPACT OF TENNESSEE HOUSE BILL 2414

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EXECUTIVE SUMMARY

An estimated 1.7% of youth (aged 13-19) and 0.3% of adults in the United States identify as transgender.¹ Applying these percentages to the number of youth and adults living in Tennessee indicates that the state is home to approximately 10,000 transgender youth aged 13-19, and 14,700 adults aged 20 and older.²

House Bill 2414³ requires public educational institutions to restrict students' use of restrooms according to the sex assigned on their birth certificates.⁴ This policy is in conflict with several federal laws, and, if enacted, could lead to loss of federal funding, administrative enforcement proceedings, and litigation, which could result in costs and lost revenue to the State of Tennessee.

The potential fiscal impact of the bill includes:

- Loss of federal educational funding of up to \$1.2 billion annually as a result of Title IX violations;
- Loss of federal contracts to educational institutions of up to \$3 million to \$9 million annually as a result of Executive Order 13672 violations;
- Costs incurred as a result of litigation and federal administrative enforcement.

¹ JODY L. HERMAN, CHRISTY MALLORY & BIANCA D.M. WILSON, THE WILLIAMS INSTITUTE, ESTIMATES OF TRANSGENDER POPULATIONS IN STATES WITH LEGISLATION IMPACTING TRANSGENDER PEOPLE 1 (2016), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Estimates-of-Transgender-Populations.pdf>.

² Id. at 8.

³ H.B. 2414, 109th Gen. Assem., 2nd Sess. (Tenn. 2016).

⁴ H.B. 2414, 109th Gen. Assem., 2nd Sess. (Tenn. 2016).

I. LOSS OF FEDERAL EDUCATIONAL FUNDING UNDER TITLE IX

Title IX & Gender Identity Discrimination

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in all federally funded education programs and activities.⁵ Title IX applies broadly to educational institutions, prohibiting discrimination in all operations by state, local, and private schools that receive federal funding, with a few limited exceptions.⁶

The U.S. Department of Education has interpreted Title IX to prohibit discrimination based on gender identity.⁷ Consistent with this interpretation, the U.S. Department of Education's Office of Civil Rights has resolved complaints of gender identity discrimination in favor of transgender students.⁸ These resolutions have required school districts to allow transgender students to access restrooms and other facilities that correspond to their gender identity.⁹ The Office of Civil Rights has explicitly determined that permitting a transgender student to use a separate, gender-neutral facility (such as a single-stall faculty restroom) does not absolve a school district of Title IX liability.¹⁰ Rather, the Office for Civil Rights has interpreted Title IX to require that schools allow students to access shared restrooms and facilities that correspond to their gender identity.¹¹

Fiscal Impact of Title IX Violations

Tennessee's public educational institutions are at risk of losing federal funding under House Bill 2414 because the bill requires public schools to restrict student's use of restrooms based on the

⁵ 20 U.S.C. § 1681 (2015).

⁶ Id. § 1681(c); U.S. Dep't of Justice, Title IX Legal Manual at C.1, <https://www.justice.gov/crt/title-ix#B.%C2%A0%20Recipient> (last visited Mar. 30, 2016).

⁷ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁸ Finding Letter from Timothy C.J. Blanchard, Office for Civil Rights, U.S. Dep't of Educ., to Stephen M. Tomlinson, Superintendent, Broadalbin-Perth Central School Dist., Re: Case No. 02-13-1220 (Dec. 22, 2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02131220-a.pdf> (finding that school district violated Title IX when it refused to allow transgender student to access restroom consistent with the student's gender identity, even when it provided a single-stall, gender-neutral facility for the student's use); Finding Letter from Adele Rapport, Office for Civil Rights, U.S. Dep't of Educ., to Daniel E. Cates, Superintendent, Township High School District 211, Re: OCR Case No. 05-14-1055 (Dec. 3, 2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05141055-a.pdf> (finding that school district violated Title IX when it prohibited a transgender student from accessing a shared locker room consistent with her gender identity); Finding Letter from Kay Bhagat, Office for Civil Rights, U.S. Dep't of Educ., to Tony Zeiss, President, Central Piedmont Community College, Re: OCR Complaint No. 11-14-2265 (Aug. 14, 2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142265-a.pdf> (finding that college violated Title IX when it refused to allow transgender student to access restroom consistent with her gender identity).

⁹ Id.

¹⁰ Id.

¹¹ Id.

sex stated on their original birth certificate. This policy is in conflict with the Department of Education's interpretation of Title IX to require public schools to allow transgender students to access restrooms and other facilities consistent with their gender identity. The Department of Education may revoke or withhold funding from educational institutions that violate Title IX and refuse to correct the violation.¹²

Tennessee's fiscal year 2016 budget includes \$1,233,138,700 in federal funding for public educational institutions.¹³ Of this total, \$1,014,040,800 is allocated to K-12 schools and \$219,097,900 is allocated to institutions of higher education.¹⁴ Federal funding to educational institutions in Tennessee represents 12.6% of the state's budget for public education; and 3.6% of the state's total annual budget.¹⁵ House Bill 2414 would put this funding at risk of being revoked or withheld by the Department of Education.

II. LOSS OF FEDERAL CONTRACTS UNDER EXECUTIVE ORDER 13672

Executive Order 13672 & Gender Identity Discrimination

Executive Order 13672, which amends Executive Order 11246, prohibits federal contractors that receive more than \$10,000 in federal contracts annually from discriminating against their employees and job applicants based on gender identity.¹⁶ The U.S. Department of Labor's

¹² OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 18, 28 (2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/ocrepm.pdf>. To date, the Office for Civil Rights has been able to reach resolution agreements with educational institutions in all but one case of gender identity discrimination. Resolution Agreement, Broadalbin-Perth Central School District, OCR Case No. 02-13-1220, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02131220-b.pdf> (last visited Mar. 30, 2016); Agreement to Resolve, Between Township High School District 211 and the U.S. Dep't of Educ., Office for Civil Rights, OCR Case No. 05-14-1055, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05141055-b.pdf> (last visited Mar. 30, 2016); Voluntary Resolution Agreement, Central Piedmont Community College, OCR Complaint No. 11-14-2265, <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142265-b.pdf> (last visited Mar. 30, 2016). In all of these resolution agreements, educational institutions have voluntarily agreed to provide transgender students access to shared restrooms and facilities that correspond with their gender identity. *Id.* In the final case, where a resolution has not been reached, the Office for Civil Rights' investigation is ongoing, and the student's mother filed a case in federal court on behalf of the student. *G.G. v. Gloucester County School*, ACLU.org, Nov. 23, 2015, <https://www.aclu.org/cases/gg-v-gloucester-county-school-board>; Complaint, *G.G. v. Gloucester County Sch. Bd.*, No. 5:15cv54 (E.D. Va. June 11, 2015). In that case, a Virginia district court found in favor of the school district, and the case has been appealed to the Fourth Circuit. *G.G. v. Gloucester County Sch. Bd.*, No. 4:15cv54 (E.D. Va. Sept. 17, 2015).

¹³ STATE OF TENN., THE BUDGET: FISCAL YEAR 2015-2016 B-76 <https://www.tn.gov/assets/entities/finance/budget/attachments/2016BudgetDocumentVoll.pdf> (last visited Mar. 30, 2016).

¹⁴ *Id.* at B-77.

¹⁵ *Id.* at A-8.

¹⁶ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014); 41 C.F.R. § 60-1.5 (2015).

Office of Federal Contracts Compliance Programs has made clear that Executive Order 13672 applies to student employees consistent with the principles established under Title VII.¹⁷

The Office of Federal Contract Compliance Programs has issued guidance stating that “contractors must allow employees and applicants to use restrooms consistent with their gender identity,” and defines gender identity as “one’s internal sense of one’s own gender. It may or may not correspond to the sex assigned to a person at birth, and may or may not be made visible to others.”¹⁸

Fiscal Impact of Title IX Violations

House Bill 2414 would put educational institutions that hire student employees at risk of losing federal contracts and being banned from bidding on future opportunities because the bill requires schools to discriminate against student employees in violation of Executive Order 13672.¹⁹

Over the past few fiscal year periods, public institutions of higher education in Tennessee have received between \$3.4 million and \$8.2 million in federal contracting dollars.

- In fiscal year 2015, public institutions of higher education in Tennessee received a total of \$8.2 million in federal contracting dollars.²⁰ Contracts were awarded to the University of Tennessee, East Tennessee State University, Middle Tennessee State University, Nashville State Technical Community College, Southwest Tennessee Community

¹⁷ Id.

¹⁸ See Office of Federal Contract Compliance Programs, *Frequently Asked Questions EO 13672 Final Rule*, U.S. DEP’T OF LABOR, http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html (last visited Mar. 28, 2016).

¹⁹ The executive order and its implementing regulations provide for several enforcement mechanisms. A contractor that has violated EO 13672 may have its name published for failing to comply; may have its contracts canceled, terminated, or suspended; and may be prohibited from receiving future contracts for a period of at least six months. Office of Fed. Contractor Compliance Programs, *OFCCP Debarred Companies*, U.S. DEP’T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/preaward/debarlst.htm> (last visited Mar. 30, 2016). Debarred entities are available at System for Award Management, <https://www.sam.gov/portal/SAM/##11> (search Classification: All, State/Province: All, Country: All, Agency: United States Department of Labor, Exclusion Status: Active, Exclusion Program: Procurement).

According to the federal government’s System for Award Management database, 29 entities are currently barred from bidding on federal procurement contracts because they violated contracting laws enforced by the Department of Labor. Office of Fed. Contractor Compliance Programs, *OFCCP Debarred Companies*, U.S. DEP’T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/preaward/debarlst.htm> (last visited Mar. 30, 2016). Debarred entities are available at System for Award Management, <https://www.sam.gov/portal/SAM/##11> (search Classification: All, State/Province: All, Country: All, Agency: United States Department of Labor, Exclusion Status: Active, Exclusion Program: Procurement).

²⁰ Advanced Data Search, usaspending.gov, <https://www.usaspending.gov/Pages/AdvancedSearch.aspx> (last visited Mar. 30, 2016) (select Fiscal Year: FY-2015, select Recipient State: Tennessee, select Place of Performance State: Tennessee, select Contractor Type: Educational Institution). The data that resulted from this search were downloaded and contracts to private institutions were removed. The remaining contract amounts were summed.

College, Tennessee State University, Tennessee Technological University, and the University of Memphis.²¹

- In fiscal year 2014, public institutions of higher education in Tennessee received a total of \$4.5 million in federal contracting dollars.²² Contracts were awarded to the University of Tennessee, East Tennessee State University, Nashville State Technical Community College, Southwest Tennessee Community College, and the University of Memphis.²³
- In fiscal year 2013, public institutions of higher education in Tennessee received a total of \$3.8 million in federal contracting dollars.²⁴ Contracts were awarded to the University of Tennessee, East Tennessee State University, Nashville State Technical Community College, Southwest Tennessee Community College, Tennessee Technological University, and the University of Memphis.²⁵

As a result of House Bill 2414, Tennessee's educational institutions could be at risk of losing an estimated \$3 million to \$9 million in federal contracts annually and may be debarred from receiving future contracts, assuming that educational institutions in Tennessee continue to receive federal contracting dollars in amounts similar to that received over the past several years. This analysis considers only the impact of loss of federal contracts to public institutions of higher education because K-12 schools generally do not hire student employees.

III. LITIGATION AND ENFORCEMENT ACTIONS

Tennessee's educational institutions will incur the costs of individual lawsuits and administrative enforcement actions under Title IX and Executive Order 13672 as a result of the law.

Individuals can file administrative complaints of discrimination under Title IX and Executive Order 13672.²⁶ Under Title IX, any individual is permitted to file a complaint alleging that a school policy violates the law; the person need not have experienced discrimination under the

²¹ Id.

²² Advanced Data Search, usaspending.gov, <https://www.usaspending.gov/Pages/AdvancedSearch.aspx> (last visited Mar. 30, 2016) (select Fiscal Year: FY-2014, select Recipient State: Tennessee, select Place of Performance State: Tennessee, select Contractor Type: Educational Institution). The data that resulted from this search were downloaded and contracts to private institutions were removed. The remaining contract amounts were summed.

²³ Id.

²⁴ Advanced Data Search, usaspending.gov, <https://www.usaspending.gov/Pages/AdvancedSearch.aspx> (last visited Mar. 30, 2016) (select Fiscal Year: FY-2014, select Recipient State: Tennessee, select Place of Performance State: Tennessee, select Contractor Type: Educational Institution). The data that resulted from this search were downloaded and contracts to private institutions were removed. The remaining contract amounts were summed.

²⁵ Id.

²⁶ Office for Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited Mar. 31, 2016); Office of Federal Contract Compliance Programs, *Executive Order 11246*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ofcpcp/regs/compliance/fs11246.htm> (last visited Mar. 31, 2016).

policy.²⁷ Complaints filed under Title IX or Executive Order 13672 trigger administrative enforcement procedures, such as investigations and compliance reviews.²⁸ These procedures may be burdensome to schools, particularly those that are under-resourced and understaffed. Both Title IX and Executive Order 13672 also allow the Department of Justice to bring suit against entities that fail to comply with the laws.²⁹

In addition, Title IX provides a private right of action, allowing individuals who have been discriminated against to file lawsuits alleging discrimination directly in court.³⁰ Public schools are not immune from these suits, as Congress has abrogated states' Eleventh Amendment immunity under Title IX by statute.³¹ A case recently filed in Virginia demonstrates that parents and legal organizations are willing to take schools to court for not allowing transgender students to use the restroom consistent with their gender identity.³² With thousands of transgender youth and college students in Tennessee, the cost of these suits could be significant.

CONCLUSION

House Bill 2414 conflicts with the gender identity non-discrimination requirements of federal laws including Title IX and Executive Order 13672 by restricting restroom access students based on the sex on their birth certificates. As a result, state and local government entities in Tennessee are at risk of losing an estimated \$1.2 billion in federal funding for education and \$3 million to \$9 million federal contracts. In addition, the legislation would likely give rise to litigation and administrative enforcement proceedings that impose burdens and costs on the state.

²⁷ Office for Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited Mar. 31, 2016).

²⁸ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 17-28 (2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>; OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, FEDERAL CONTRACT COMPLIANCE MANUAL (2014), available at http://www.dol.gov/ofcpcp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.

²⁹ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 28 (2015), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>; Exec. Order. No. 11,246, § 209(2)-(4), 3 C.F.R. 339 (1964-1965) (as amended).

³⁰ *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

³¹ 42 U.S.C. § 2000d-7.

³² See *supra* note 12.