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HB 1084: Protect Students First Act

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EDUCATION

General Provisions: Amend Title 20 of the Official Code of Georgia Annotated, Relating to Education, so as to Prevent the Use of and Reliance upon Curricula or Training Programs which Advocate for Certain Concepts, with Exceptions; Provide for Such Exceptions; Require Local Boards of Education, Local School Superintendents, and the Governing Bodies of Charter Schools to Prohibit Discrimination on the Basis of Race; Require that Curricula and Training Programs Shall Encourage Such Employees Not to Judge Others Based on Race; Provide for Statutory Construction; Provide for Complaint Resolution Policies and Procedures; Provide for Promulgation of a Model Policy by the State Board of Education; Provide for Guidance to Schools and Local School Systems by the Department of Education; Provide for a Process by which Certain Individuals Shall Have Access to Certain Records; Provide for Penalties; Prohibit Certain Waivers; Prohibit Basing Certification and Classification of Certain Professional Personnel upon Completion of Training Programs which Advocate for Certain Concepts; Prohibit Certain Performance Standards and the Code of Ethics for Educators to Require Completion of Training Programs which Advocate for Certain Concepts; Provide for Definitions; Provide for a Short Title; Provide for Construction; Provide that No High School that Receives QBE Funds Shall Participate in, Sponsor, or Provide Coaching Staff for Interscholastic Sports Events which are Conducted Under the Authority of, Conducted Under the Rules of, or Scheduled by any Athletic Association unless Such Athletic Association Provides for an Executive Oversight Committee; Provide for the Appointment, Membership, Selection of Officers, Meetings, Duties, and Authorities of Such Executive Oversight Committee; Provide for Reimbursement for Such Executive Oversight Committee; Provide for Noncompliant High Schools to Forfeit QBE Funding; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 20-1-11 (new), 20-2-200 (amended), 20-2-316 (amended),

20-2-739 (amended), 20-2-984
(amended), 20-2-984.1 (amended)
BILL NUMBER: HB 1084
ACT NUMBER: 719
GEORGIA LAWS: 2022 Ga. Laws 136
EFFECTIVE DATE: July 1, 2022
SUMMARY: The Act prohibits local school systems, charter schools, and their employees from teaching or advocating for divisive concepts as defined in the Act. Training programs for teacher certification by the Professional Standards Commission may not advocate for such divisive concepts. The Act also implements a complaint resolution policy for aggrieved parent(s), students, or school employees that allows them to appeal decisions to the State Board of Education, which can ultimately require local school systems to adopt a corrective action plan upon a finding of a violation of the Act. Local school systems that fail to adopt the corrective action plan are subject to suspension of one or more waivers. Finally, the Act requires all high schools receiving Quality Basic Education (QBE) funding for interscholastic sports events to appoint an executive oversight committee. Among the authority and duties of the committee is the power to prohibit transgender females from participating in sports events designated for female students. Violators of this provision are subject to forfeiture of QBE funding.

*History**Divisive Concepts*

The terms “critical race theory” and “divisive concepts” are often used interchangeably, but they are distinct theories. Critical race theory is a social theory that originated in the 1980s that studies how race has created various structural social hierarchies.¹ Divisive concepts are the generalizations that simplify the hierarchies into broad statements.² These terms achieved modern notoriety in September 2020 when then President Donald Trump signed Executive Order 13950 (the Order), which prohibited the use of divisive concepts by federal agencies, contractors, and grant recipients.³ The Order defined divisive concepts as follows:

- (1) [O]ne race or sex is inherently superior to another race or sex;
- (2) the United States is fundamentally racist or sexist;
- (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (6) an individual’s moral character is necessarily determined by his or her race or sex;
- (7) an

1. Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html> [https://perma.cc/V57G-GQJJ]. Critical race theory encompasses the idea that “U.S. social institutions (e.g., the criminal justice system, education system, labor market, housing market, and healthcare system) are laced with racism embedded in laws, regulations, rules, and procedures that lead to differential outcomes by race.” Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [https://perma.cc/7RDS-9ZKC].

2. Ty Tagami & Maya T. Prabhu, *Georgia Lawmakers Approve Divisive Concepts, Transgender Sports Bill*, ATLANTA J.-CONST., <https://www.ajc.com/education/georgia-lawmakers-approve-divisive-concepts-transgender-sports-bills/B3VRB7VXMBGAFBLDFM6JLYSULE/> [https://perma.cc/F4FT-Y973] (Apr. 5, 2022).

3. Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020); Sarah Schwartz, *Who’s Really Driving Critical Race Theory Legislation? An Investigation*, EDUCATIONWEEK (July 19, 2021), <https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07> [https://perma.cc/6CTP-HD9L].

individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term . . . also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.⁴

The Order defined “race or sex stereotyping” as “ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.”⁵ Finally, the Order defined “race or sex scapegoating” as “assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex,” and includes “any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.”⁶

Five days before issuing the Order, then President Trump gave a speech at the White House Conference on American History denouncing critical race theory as “toxic propaganda” and “ideological poison” that would “destroy our country.”⁷ Within months of the Order, twenty states introduced similar bills, and as of September 2022, forty-two states had adopted or introduced similar legislation or policies, despite President Joe Biden’s revocation of the Order on January 20, 2021.⁸

4. Exec. Order No. 13,950, 85 Fed. Reg. at 60685.

5. *Id.*

6. *Id.*

7. Remarks at White House Conference on American History, 2020 DAILY COMP. PRES. DOC. 2 (Sept. 17, 2020), <https://www.govinfo.gov/content/pkg/DCPD-202000691/pdf/DCPD-202000691.pdf> [<https://perma.cc/2FZ8-RUP3>].

8. Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Schwartz, *supra* note 3; Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/NK72-PFUE>] (Sept. 28, 2022).

Proponents of these bills point to the rise in classroom discussions surrounding race and police brutality after George Floyd’s murder in Minneapolis on May 25, 2020, and the resulting nationwide protests.⁹ Classroom discussions about divisive concepts, such as race, sparked a pushback from Conservatives, arguing that asking White students “to reflect on their privilege [was] racist and divisive.”¹⁰

Idaho was one of the first states to pass a bill to prohibit teaching divisive concepts.¹¹ The Idaho law is broader than the Order in that it prohibits discrimination on the basis of “sex, race, ethnicity, religion, color, [or] national origin.”¹² Its delineation of prohibited acts, however, is narrower, only including provisions on inherent superiority, adverse treatment, and individual responsibility for past acts.¹³ Shortly after Idaho passed its bill, several states across the country, including Florida, Iowa, Kentucky, and Mississippi, followed suit.¹⁴ Similar bills were passed by the legislatures in Kansas, North Carolina, and Wisconsin but were vetoed by the respective states’ Governors.¹⁵ Finally, some states have adopted laws pursuant to state executive orders (South Dakota and Virginia) or attorney general opinions (Montana).¹⁶ Regardless, Georgia was one state of many to successfully pass an act prohibiting educators from “espousing personal political beliefs” regarding specified “divisive concepts.”¹⁷

9. Schwartz, *supra* note 3.

10. *Id.*

11. *Id.*

12. IDAHO CODE § 33-138 (2022).

13. *Id.*

14. Kiara Alfonseca, *Map: Where Anti-Critical Race Theory Efforts Have Reached*, ABC NEWS (Mar. 24, 2022, 6:03 AM), <https://abcnews.go.com/Politics/map-anti-critical-race-theory-efforts-reached/story?id=83619715> [<https://perma.cc/HF3Z-WJFE>].

15. *Governor Laura Kelly Signs Redistricting Maps for State House, Senate, Board of Education*, KAN. OFF. GOVERNOR (Apr. 15, 2022), <https://governor.kansas.gov/governor-laura-kelly-signs-redistricting-maps-for-state-house-senate-board-of-education/> [<https://perma.cc/VUQ4-SSMN>]; Press Release, North Carolina Office of the Governor, *Governor Cooper Signs Nine Bills into Law, Vetoes Two Bills* (Sept. 10, 2021), <https://governor.nc.gov/news/press-releases/2021/09/10/governor-cooper-signs-nine-bills-law-vetoes-two-bills> [<https://perma.cc/JD2G-2U27>]; Dee Pettack, *Evers Vetoes AB 411, So-Called CRT Bill*, SCH. ADM’RS ALL. (Feb. 4, 2022), <https://www.wsaa.org/?p=18517> [<https://perma.cc/WM94-NKLH>].

16. *Critical Race Theory: Legislation Tracker*, HERITAGE FOUND., <https://datavisualizations.heritage.org/education/critical-race-theory-legislation-tracker/> [<https://perma.cc/R333-JXQW>] (May 23, 2022).

17. 2022 Ga. Laws 136, § 1-2, at 137–42 (codified at O.C.G.A. § 20-1-11 (2022)).

In Georgia, House Bill (HB) 1084 was authored by Representative Will Wade (R-9th), who repeatedly cited a desire to “keep the children of this state at the center of this conversation.”¹⁸ The bill’s driving force was to protect students from “far, radical ideologies that the media promulgates from . . . the loudest and sometimes the most unthoughtful sides of our parties.”¹⁹ Though Senator Bo Hatchett (R-50th) authored and introduced a similar bill—Senate Bill (SB) 377—that passed in the Senate one week after HB 1084 passed in the House, the authors of both bills decided to move forward with only HB 1084.²⁰

Transgender Athlete Bans

In 2019, only two states had prohibited transgender women from competing in women’s sports.²¹ In 2021, “[o]ver 75 anti-trans laws were introduced.”²² As of October 2022, eighteen states have banned transgender athletes from competing in women’s sports.²³ Most states that have passed such legislation have instituted outright bans, naming the respective Acts some variation of “Fairness in Women’s Sports.”²⁴ Although the Governors of Kentucky, Indiana, and Utah vetoed the bills that reached their desks, the legislatures in all three states overrode the vetoes.²⁵

18. Video Recording of House Proceedings at 1 hr., 23 min., 23 sec. (Mar. 4, 2022, PM) [hereinafter Mar. 4 House Video PM] (remarks by Rep. Will Wade (R-9th)), <https://youtu.be/60iCQ1KE1sQ> [<https://perma.cc/5NDZ-BGRJ>].

19. *Id.* at 1 hr., 25 min., 24 sec.

20. Telephone Interview with Sen. Bo Hatchett (R-50th) (May 26, 2022) [hereinafter Hatchett Interview] (on file with the Georgia State University Law Review).

21. Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NPR (Mar. 18, 2021, 5:17 PM), <https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s> [<https://perma.cc/GAZ9-XJ7H>].

22. *B.P.J. v. West Virginia State Board of Education*, ACLU, <https://www.aclu.org/cases/bpj-v-west-virginia-state-board-education> [<https://perma.cc/KE5N-PS9F>] (Oct. 13, 2022).

23. See Jo Yurcaba, *Louisiana Becomes 18th State to Enact a Transgender Athlete Ban*, NBC NEWS (June 7, 2022, 3:27 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/louisiana-becomes-18th-state-enact-transgender-athlete-ban-rcna32328> [<https://perma.cc/D5SG-VGRU>]; *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans [<https://perma.cc/P5TA-G3HV>] (Oct. 25, 2022).

24. See, e.g., Press Release, Executive Office of Governor Ron DeSantis, Governor Ron DeSantis Signs Fairness in Women’s Sports Act (June 1, 2021), <https://www.flgov.com/2021/06/01/governor-ron-desantis-signs-fairness-in-womens-sports-act/> [<https://perma.cc/UNC2-JZEF>].

25. Zachary Evans, *Georgia School Athletics Group Bars Male Students from Girls’ Sports*, NAT’L

Unlike other states' legislatures, the Georgia General Assembly did not institute an outright ban on transgender athletes participating in interscholastic sports.²⁶ Although Senator Marty Harbin (R-16th) introduced SB 435 earlier in the legislative session, which would have done just that, the bill failed in the House after passing the Senate.²⁷ With a last minute amendment introduced by Representative Wade, however, HB 1084 created an executive oversight committee to monitor high school athletic associations.²⁸ The amendment was never debated on the floor, and many lawmakers "didn't have copies of the text and didn't know what they were voting on."²⁹ Senator Hatchett explained that including the trans-athlete provision in HB 1084 allowed athletic associations, including the Georgia High School Association (GHSA), to make determinations about transgender athletes' eligibility rather than legislators.³⁰ Senator Hatchett further explained the provision is intended to "protect girls' sports and the integrity of girls' sports" and keep the discretion in the hands of "the [appropriate] governing body of Georgia high school athletics."³¹

REV. (May 5, 2022, 3:21 PM), <https://www.nationalreview.com/news/georgia-school-athletics-group-bars-male-students-from-girls-sports/> [<https://perma.cc/L7AP-8697>]; Press Release, Delphine Luneau, Human Rights Campaign, Indiana Lawmakers Override Republic Governor's Veto, Pursuing Their Fixation on Discriminating Against Transgender Schoolchildren (May 24, 2022), <https://www.hrc.org/press-releases/indiana-lawmakers-override-republican-governors-veto-pursuing-their-fixation-on-discriminating-against-transgender-schoolchildren> [<https://perma.cc/32P3-TEY6>].

26. Hatchett Interview, *supra* note 20.

27. *Id.*; Georgia General Assembly, SB 435, Bill Tracking, <https://www.legis.ga.gov/legislation/61642> [<https://perma.cc/3NWX-HPLU>].

28. House Floor Amendment to HB 1084, introduced by Rep. Will Wade (R-9th), April 4, 2022.

29. Jeff Amy, *Georgia High School Athletic Group Bans Transgender Athletes*, ASSOCIATED PRESS (May 4, 2022), <https://apnews.com/article/sports-education-georgia-atlanta-gender-identity-d0432fa7530b9bd6e4e1d7380114e6c2> [<https://perma.cc/MNF5-ZKEP>]; Video Recording of Senate Proceedings at 2 hr., 3 min., 34 sec. (Apr. 4, 2022, Part 4) [hereinafter Apr. 4 Senate Video Part 4] (remarks by Sen. Sally Harrell (D-40th)), <https://vimeo.com/showcase/9076378?video=695937413> [<https://perma.cc/67RP-JY8A>]; Video Recording of House Proceedings at 4 hr., 9 min., 28 sec. (Apr. 4, 2022, PM 2) [hereinafter Apr. 4 House Video PM 2] (remarks by Rep. Will Wade (R-9th)), <https://www.youtube.com/watch?v=16aZudGZD5Y&t=2045s> [<https://perma.cc/TCM6-29E7>].

30. Hatchett Interview, *supra* note 20.

31. *Id.*

*Bill Tracking of HB 1084**Passage by the House*

HB 1084 was sponsored by Representatives Will Wade (R-9th), Jan Jones (R-47th), Matt Dubnik (R-29th), Steven Meeks (R-178th), Brad Thomas (R-21st), Bruce Williamson (R-115th), and Senator Butch Miller (R-49th).³² The bill was placed in the House hopper on January 27, 2022, and first read by the House on February 1, 2022.³³ The second reading took place on February 2, 2022, after which it was assigned to the House Committee on Education.³⁴ On February 24, 2022, the Committee favorably reported the bill by substitute.³⁵ The substitute clarified and reworded certain definitions of divisive concepts and incorporated a definition for “espousing personal political beliefs.”³⁶ Additionally, the substitute clarified the penalties for local school systems that fail to implement the State Board of Education’s corrective action plan, which include suspension of waivers provided pursuant to Code sections 20-2-244 and 20-2-2065.³⁷

The House read the bill a third time on March 4, 2022, and the Committee passed the substitute by a vote of 92 to 63, with votes split along party lines.³⁸ Representative Wade immediately moved to transmit HB 1084 to the Senate, but this motion was withdrawn amid outcries from several representatives.³⁹ Representative Park Cannon

32. Georgia General Assembly, HB 1084, Bill Tracking [hereinafter HB 1084, Bill Tracking], <https://www.legis.ga.gov/legislation/61477> [<https://perma.cc/74P8-ZC4Z>].

33. *Id.*; State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022.

34. State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022; HB 1084, Bill Tracking, *supra* note 32.

35. State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022.

36. Video Recording of House Education Committee Meeting at 21 min., 21 sec. (Feb. 23, 2022) [hereinafter Feb. 23 Education Committee Meeting] (remarks by Rep. Will Wade (R-9th)), [<https://perma.cc/4KN9-5EM5>]. Compare HB 1084, as introduced, § 1, pp. 2–3, ll. 28–46, 2022 Ga. Gen. Assemb., with HB 1084 (HCS), § 2, pp. 2–3, ll. 31–47, 2022 Ga. Gen. Assemb.

37. Feb. 23 Education Committee Meeting, *supra* note 36, at 23 min., 2 sec. Compare HB 1084, as introduced, § 1, p. 6, ll. 123–26, 2022 Ga. Gen. Assemb., with HB 1084 (HCS), § 2, p. 7, ll. 155–63, 2022 Ga. Gen. Assemb. See O.C.G.A. § 20-2-244 (2022) (allowing the State Board of Education “to waive specifically identified state rules, regulations, policies, and procedures, or provisions [of Title 20 Chapter 2]” for improving student performance in public schools); O.C.G.A. § 20-2-2065 (2022) (allowing the same in charter schools).

38. State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022; Georgia House of Representatives Voting Record, HB 1084, #618 (Mar. 4, 2022).

39. Mar. 4 House Video PM, *supra* note 18, at 2 hr., 31 min., 55 sec.

(D-58th) then rose to serve notice of intent to ask for reconsideration.⁴⁰ The motion for reconsideration was taken up on March 8, 2022, but failed by a vote of 71 to 92.⁴¹

Passage by the Senate

The bill was read and referred to the Senate Education and Youth Committee on March 9, 2022.⁴² On March 30, 2022, the Committee favorably reported the bill by substitute, and it was read for the second time in the Senate.⁴³ The substitute, a result of meetings between Representative Wade and Senator Bo Hatchett (R-50th), made several minor changes to the House substitute.⁴⁴ The Senate substitute specified that divisive concepts include the idea that an individual bears responsibility or should feel guilt or anguish “solely by virtue of his or her race.”⁴⁵ Additionally, the substitute expanded the definition of prohibited divisive concepts to include teaching that performance-based advancements “have been advocated for by individuals of a particular race to oppress individuals of another race.”⁴⁶ Finally, the substitute replaced the phrase “adopt[] or promote” with “advocate for” in the definition of “espousing personal political beliefs.”⁴⁷ The Senate read the bill for the third time and passed the Committee substitute on April 1, 2022, by a vote of 32 to 21.⁴⁸

40. *Id.* at 2 hr., 32 min., 23 sec. (remarks by Rep. Park Cannon (D-58th)); State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022.

41. Georgia House of Representatives Voting Record, HB 1084, #622 (Mar. 8, 2022).

42. State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022; HB 1084, Bill Tracking, *supra* note 32.

43. State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022.

44. Video Recording of Senate Education and Youth Committee Meeting at 35 min., 56 sec. (Mar. 28, 2022) (remarks by Rep. Will Wade (R-9th)), <https://vimeo.com/showcase/8821658/video/693233719> [<https://perma.cc/G9EB-FXX5>].

45. *Compare* HB 1084 (HCS), § 2, p. 2, ll. 36–39, 2022 Ga. Gen. Assemb., *with* HB 1084 (SCS), § 2, p. 2, ll. 35–38, 2022 Ga. Gen. Assemb.

46. *Compare* HB 1084 (HCS), § 2, p. 2, l. 40, 2022 Ga. Gen. Assemb., *with* HB 1084 (SCS), § 2, p. 2, ll. 39–41, 2022 Ga. Gen. Assemb.

47. *Compare* HB 1084 (HCS), § 2, p. 3, ll. 46–47, 2022 Ga. Gen. Assemb., *with* HB 1084 (SCS), § 2, p. 2, ll. 46–47, 2022 Ga. Gen. Assemb.

48. State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022; Georgia Senate Voting Record, HB 1084, #786 (Apr. 1, 2022).

House Amendment to Senate Substitute

On April 4, 2022, Representative Wade moved for the House to agree to the Senate substitute as amended by the House.⁴⁹ The House amendment restructured the existing sections of the bill and added a section requiring high schools receiving Quality Basic Education (QBE) funding and participating in interscholastic events to implement an executive oversight committee for their athletic associations.⁵⁰ The section lays out the procedure for appointment to the committee as well as the authority and duties of the committee, including conducting annual reviews of the athletic association and the authority to prohibit “students whose gender is male from participating in athletic events that are designated for students whose gender is female.”⁵¹ The House voted to adopt the amendment by a vote of 99 to 69, then immediately voted to adopt the Senate substitute by a vote of 98 to 71.⁵² Representative Cannon’s motion to reconsider failed by a vote of 70 to 99.⁵³

In the Senate, Senator Miller moved to agree to the House amendment.⁵⁴ Senator Gloria Butler (D-55th)’s motion to print the bill failed by a vote of 21 to 32.⁵⁵ The Senate agreed to the House amendment by a vote of 32 to 21.⁵⁶ On April 8, 2022, the House transmitted the bill to Governor Brian Kemp (R).⁵⁷ Governor Kemp signed HB 1084 into law as Act 719 on April 28, 2022, with an effective date of July 1, 2022.⁵⁸

49. State of Georgia Final Composite Status Sheet, HB 1084, May 19, 2022; Apr. 4 House Video PM 2, *supra* note 29, at 4 hr., 8 min., 38 sec.

50. See House Floor Amendment to HB 1084, introduced by Rep. Will Wade (R-9th), April 4, 2022.

51. *Id.* § 2-1, pp. 2-4, ll. 28-74.

52. Georgia House of Representatives Voting Record, HB 1084, #907 (Apr. 4, 2022); Georgia House of Representatives Voting Record, HB 1084, #908 (Apr. 4, 2022).

53. Georgia House of Representatives Voting Record, HB 1084, #909 (Apr. 4, 2022).

54. Apr. 4 Senate Video Part 4, *supra* note 29, at 1 hr., 59 min., 17 sec. (remarks by Sen. Butch Miller (R-50th)).

55. *Id.* at 1 hr., 59 min., 40 sec. (remarks by Sen. Gloria Butler (D-55th)); Georgia Senate Voting Record, HB 1084, #875 (Apr. 4, 2022).

56. State of Georgia Final Composite Sheet, HB 1084, May 19, 2022; Georgia Senate Voting Record, HB 1084, #877 (Apr. 5, 2022).

57. State of Georgia Final Composite Sheet, HB 1084, May 19, 2022.

58. *Id.*; HB 1084, Bill Tracking, *supra* note 32.

*The Act**Section 1-1*

Section 1-1 of HB 1084 names the Act the Protect Students First Act.⁵⁹

Section 1-2

Section 1-2 creates Code section 20-1-11, subsection (a) of which defines four terms used throughout the Act: “divisive concepts,” “espousing personal political beliefs,” “race scapegoating,” and “race stereotyping.”⁶⁰ “Divisive concepts” includes any of the following views:

(A) One race is inherently superior to another race; (B) The United States of America is fundamentally racist; (C) An individual, by virtue of his or her race, is inherently or consciously racist or oppressive toward individuals of other races; (D) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race; (E) An individual’s moral character is inherently determined by his or her race; (F) An individual, solely by virtue of his or her race, bears individual responsibility for actions committed in the past by other individuals of the same race; (G) An individual, solely by virtue of his or her race, should feel anguish, guilt, or any other form of psychological distress; (H) Performance-based advancement or the recognition and appreciation of character traits such as hard work ethic are racist . . . ; or (I) Any other form of race scapegoating or race stereotyping.⁶¹

“Espousing personal political beliefs” encompasses any individual who, “while performing official duties as part of his or her

59. 2022 Ga. Laws 136, § 1-1, at 136.

60. 2022 Ga. Laws 136, § 1-2, at 137 (codified at O.C.G.A. § 20-1-11(a) (2022)).

61. § 20-1-11(a)(1).

employment or engagement with a school . . . [is] intentionally encouraging or attempting to persuade or indoctrinate a student, school community member, or other school personnel to agree with or advocate for such individual's personal beliefs concerning divisive concepts.”⁶²

“Race scapegoating” is defined as “assigning fault or blame to a race, or to an individual of a particular race because of his or her race,” including claims insinuating that an individual “is inherently racist or is inherently inclined to oppress individuals of other races.”⁶³ Similarly, “race stereotyping” is defined as “ascribing character traits, values, moral or ethical codes, status, or beliefs to an individual because of his or her race.”⁶⁴

Subsection (b) of the Code section places a broad prohibition on school employees “discriminating against students and other employees based on race.”⁶⁵

Subsection (c) requires curricula and employee training that encourages “employees and students to practice tolerance and mutual respect and to refrain from judging others based on race.”⁶⁶ The required curricula and employee training, however, cannot advocate for any of the listed divisive concepts.⁶⁷

Subsection (d) provides exceptions to the Act.⁶⁸ As Representative Will Wade (R-9th) stated, this section delineates “what this [Act] does not do.”⁶⁹ This subsection notes that the Code section is specifically not intended to “undermine intellectual freedom and free expression” or “[i]nfringe upon the intellectual vitality of students” or school employees.⁷⁰ Further, it is not purported to keep schools from teaching “tolerance, mutual respect, cultural sensitivity, or cultural competency” or to stop school employees “from responding in a professionally and academically appropriate manner and without

62. § 20-1-11(a)(2).

63. § 20-1-11(a)(3).

64. § 20-1-11(a)(4).

65. § 20-1-11(b).

66. § 20-1-11(c)(1).

67. § 20-1-11(c)(2).

68. § 20-1-11(d).

69. 2022 Ga. Laws 136, § 1-2, at 138 (codified at § 20-1-11(d)); Mar. 4 House Video PM, *supra* note 18, at 1 hr., 23 min., 9 sec.

70. § 20-1-11(d)(1)–(2).

espousing personal political beliefs to questions regarding specific divisive concepts raised by students, school community members, or participants in a training program.”⁷¹ It does not prohibit discussions of divisive concepts if the discussion is part of the larger course of instruction, is discussed in an academically appropriate manner, and does not espouse personal political beliefs.⁷²

The Act does not prohibit teaching topics such as “slavery, racial oppression, racial segregation, or racial discrimination, including . . . laws resulting in racial oppression, segregation, and discrimination.”⁷³ It neither “[c]reate[s] any right or benefit, substantive or procedural, enforceable at law or in equity” against a school, nor does it prohibit state or federally ordered training in divisive concepts when there are findings of discrimination.⁷⁴

Subsection (e) requires “each local board of education and the governing body of each charter school” to plan and execute a complaint resolution policy and procedure for potential allegations.⁷⁵ Complaints can be made by a parent of a student enrolled at the school in which the alleged incident occurred, a lawfully emancipated student, a student who has reached the age of eighteen (the age of majority in Georgia), or an employee of the school.⁷⁶ Such complaints must be submitted in writing to the school’s principal, who must “take reasonable steps to investigate the allegations” within five school days of receiving the complaint.⁷⁷ Unless the principal and the complainant mutually agree on a different schedule, “[w]ithin ten school days of [the principal] receiving the complaint,” the principal must conduct a conference with the complainant to discuss the alleged violations and any remedial steps.⁷⁸ If requested by the complainant, the principal must provide, within three school days of the request, “a written summary of the findings of the investigation and a statement of remedial measures” to be taken.⁷⁹

71. § 20-1-11(d)(3)–(4).

72. § 20-1-11(d)(5).

73. 2022 Ga. Laws 136, § 1-2, at 138 (codified at § 20-1-11(d)(7)).

74. § 20-1-11(d)(8)–(9).

75. § 20-1-11(e)(1).

76. § 20-1-11(e)(1)(A).

77. §§ 20-1-11(e)(1)(B), -11(e)(1)(D)(i).

78. § 20-1-11(e)(1)(D)(ii).

79. § 20-1-11(e)(1)(D)(iii).

The complainant may submit a request for review through multiple levels of the school system, from the governing body of a state charter school or the local school superintendent, to the local board of education, and finally to the State Board of Education.⁸⁰ If appealed to the State Board of Education, the board must hear the appeal and make written determinations of whether a violation occurred.⁸¹ Upon a finding that a violation occurred, the State Board of Education must direct the Georgia Department of Education to develop a corrective action plan and provide it to the school within ten days.⁸² The local school system then has thirty days to implement the plan.⁸³ Throughout the process, confidential student and personnel matters may not be disclosed and are not subject to review.⁸⁴

If the local school system fails to implement the plan, the State Board of Education has the authority to order a “suspension of one or more waivers included in the local school system’s contract with the State Board of Education.”⁸⁵ Such waivers will remain suspended for at least twelve months from the order, “and, if the remainder of the current term of such local school system’s contract with the State Board of Education providing for waivers is greater than [twelve] months, then no longer than such remainder.”⁸⁶ If the local school system has not been granted any waivers, the State Board of Education must refer the matter to the state school superintendent, who has discretion to “exercise his or her suspension authority as provided in Code [s]ection 20-2-34.”⁸⁷

Next, the Act directs the State Board of Education to, by July 1, 2022, “promulgate a model policy to assist schools and local school systems with establishing a complaint resolution process” and directs the department of education to develop guidelines for determining whether a violation occurred.⁸⁸ Finally, paragraph (5) of subsection (e)

80. §§ 20-1-11(e)(1)(E)–(e)(2).

81. § 20-1-11(e)(3).

82. *Id.*

83. *Id.*

84. § 20-1-11(e)(1)(E).

85. § 20-1-11(e)(3)(A)(i).

86. § 20-1-11(e)(3)(A)(iii).

87. § 20-1-11(e)(3)(B). The State School Superintendent has “the authority to suspend a county school superintendent for incompetency, willful neglect of duty, misconduct, immorality, or the commission of any crime involving moral turpitude.” § 20-2-34.

88. 2022 Ga. Laws 136, § 1-2, at 141 (codified at § 20-1-11(e)(4)).

provides that an aggrieved party is not prohibited from bringing a cause of action at law or in equity.⁸⁹

Subsection (f) allows an individual eligible to file a written request for any non-confidential records he or she believes may substantiate the complaint.⁹⁰ This request can be made “at any time, including prior to filing a complaint.”⁹¹ The local school superintendent or school principal must then produce the records “within a reasonable amount of time not to exceed three business days of receipt of [the] request.”⁹² If the requested records are unavailable within that time frame, the school official must provide a description of the records and a timeline for when they will be available.⁹³ The official must then provide access to the records “as soon as practicable,” but the request must be completed within thirty days.⁹⁴ If the superintendent or principal denies the request for records or fails to provide responsive records within thirty days, the complainant may appeal to the local board of education or charter school governing board.⁹⁵ This appeal must be heard at the next available public meeting.⁹⁶ An aggrieved party is not prohibited from also bringing a cause of action at law or in equity.⁹⁷

Subsection (g) provides that Code section 20-1-11 is not subject to waivers.⁹⁸

Sections 1-3 through 1-6

The final sections of Part I, Sections 1-3, 1-4, 1-5, and 1-6, amend each implicated Code section to prohibit classifications, certifications, or training completions from being contingent on any material that advocates for divisive concepts.⁹⁹

89. § 20-1-11(e)(5).

90. § 20-1-11(f)(1).

91. § 20-1-11(f)(1).

92. *Id.*

93. *Id.*

94. *Id.*

95. § 20-1-11(f)(2).

96. *Id.*

97. § 20-1-11(f)(3).

98. § 20-1-11(g).

99. 2022 Ga. Laws 136, § 1-3, at 142 (codified at § 20-2-200(a)–(b)(1)) (certifications by the Professional Standards Commission relating to certifying professional personnel in elementary and secondary education); 2022 Ga. Laws 136, § 1-4, at 143 (codified at § 20-2-739) (trainings and standards by the Department of Education “relating to conflict management and resolution and cultural diversity

Section 2-1

Section 2-1 of the Act amends Code section 20-2-316 to create subsection (c), which requires all high schools who participate in interscholastic sports events under the authority of an athletic association to implement an “executive oversight committee” to govern high school athletic associations.¹⁰⁰ Members are to be appointed by the Governor, Lieutenant Governor, speaker of the House of Representatives, Georgia School Superintendents Association, Georgia School Boards Association, and various members of the GHSA.¹⁰¹ Each member serves a term of three years at staggered expirations and is eligible for reappointment once.¹⁰²

The committee’s responsibilities include meeting at least twice per school year, conducting audits of classifications and travel-related issues, conducting an annual evaluation of “participating schools,” and reporting findings to the Georgia General Assembly’s High School Athletics Overview Committee.¹⁰³ Athletic associations are given broad discretionary power, allowing them to “prohibit students whose gender is male from participating in athletic events that are designated for students whose gender is female” if they deem it “necessary and appropriate.”¹⁰⁴

Finally, any violator of this Code section forfeits its allotted QBE funding provided for in Article 6 of Chapter 2 of Title 20.¹⁰⁵

training programs”); 2022 Ga. Laws 136, § 1-5, at 143 (codified at § 20-2-984(a)) (standards and procedures issued by the Professional Standards Commission for teaching certifications and continuation of teaching certificates); 2022 Ga. Laws 136, § 1-6, at 143–44 (codified at § 20-2-984.1(a)) (“standards of performance and a code of ethics” issued by the Professional Standards Commission for educators).

100. 2022 Ga. Laws 136, § 2-1, at 144–45 (codified at § 20-2-316(c)(1)).

101. § 20-2-316(c)(1)(A).

102. § 20-2-316(c)(1)(D).

103. § 20-2-316(c)(1)(E).

104. § 20-2-316(c)(1)(E)(v).

105. § 20-2-316(c)(2).

*Analysis**Divisive Concepts*

It has long been accepted that “students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁰⁶ In *Keyishian v. Board of Regents of University of State of New York*, the Supreme Court held unconstitutional a New York plan that made university professors’ employments contingent on disclosure of their personal involvement in “subversive activities.”¹⁰⁷ Justice Brennan, writing for the majority, held that the First Amendment cannot “tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁰⁸ The classroom, as an especially important “marketplace of ideas,” acts as a nursery for tomorrow’s leaders to be “trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”¹⁰⁹

The New York policy in *Keyishian* differs from HB 1084’s policy in that the Georgia General Assembly does not require educators to disclose their political beliefs concerning divisive concepts; however, the spirit of the Court in *Keyishian* is important to note. The Court was adamant that a robust education was only possible without “authoritative selection” of ideas.¹¹⁰ Additionally, the complicated regulatory scheme in *Keyishian* created confusion in what educators could and could not say.¹¹¹ This ambiguity would have had such a “chilling effect” on the First Amendment to render the policy

106. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (referencing two 1923 Supreme Court cases that recognized the “unmistakable holding” that constitutional rights are not shed at the schoolhouse gate); *id.* at 508 (holding that students had the first amendment protected right to don black armbands at school in a political yet “silent, passive expression” that was “unaccompanied by any disorder or disturbance”).

107. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 602, 604 (1967). This case involved a New York plan (codified partly via statute and partly via administrative regulations) requiring educators to sign contracts certifying that they were currently not Communists and if they ever had been, that they disclose so to the university President. *Id.* at 595–96. The Court found this to be unconstitutional both in terms of the plan’s vagueness and in terms of the importance of a “robust” education system. *Id.* at 603–04.

108. *Id.* at 603.

109. *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

110. *Id.*

111. *Id.* at 604.

unconstitutional.¹¹² If HB 1084 produced a similarly concerning “chilling effect”—that is, if educators were prohibited from directly asking tough questions regarding divisive concepts to challenge their students, for example—there could be a potential First Amendment issue.¹¹³

Though no official complaint regarding Georgia’s divisive concepts law has been brought in a Georgia court, groups and individuals throughout Georgia have raised Fourteenth Amendment concerns.¹¹⁴ Specifically, Andrea Young, executive director of the American Civil Liberties Union (ACLU) of Georgia, stated:

[HB 1084] is potentially unconstitutionally vague, violating the Due Process Clause of the Fourteenth Amendment, because it’s too vague for any educator to fully understand whether or not they will be punished for teaching or saying something about race or racism that . . . can be considered by someone to be a divisive concept.¹¹⁵

However, Representative Will Wade (R-9th), seemingly in anticipation of a due process claim, repeatedly spoke of the “process” for complaint resolution during the committee and floor debates.¹¹⁶ During committee discussions, Representative Wade stated that the bill would not “prevent First Amendment rights” and that nothing in the bill would prohibit discussing topics like modern-day slavery or

112. *Id.* Notably, Representative Bee Nguyen (D-89th) used this same language to describe the effects HB 1084 would have on Georgia classrooms. Mar. 4 House Video PM, *supra* note 18, at 2 hr., 18 min., 9 sec. (remarks by Rep. Bee Nguyen (D-89th)) (“Essential to America is academic freedom. And this bill infringes on that crucial tenet by censoring what happens inside our public school systems. [HB 1084] will create, whether or not it intends to, a chilling effect for both teachers and students.”).

113. Mar. 4 House Video PM, *supra* note 18, at 1 hr., 46 min., 10 sec. (remarks by Rep. Becky Evans (D-83rd)).

114. *See, e.g.*, Video Recording of House Education Academic Innovation Subcommittee Meeting at 1 hr., 44 min., 40 sec. (Feb. 9, 2022) [hereinafter Feb. 9 Subcommittee Meeting] (remarks by Andrea Young, Executive Director, ACLU of Georgia), https://youtu.be/SMUXc_vmzR0 [<https://perma.cc/2HUN-4M32>].

115. *Id.*

116. *Id.* at 45 min., 34 sec. (remarks by Rep. Will Wade (R-9th)); Video Recording of House Education Committee Meeting at 45 min., 46 sec. (Feb. 9, 2022) (remarks by Rep. Will Wade (R-9th)), <https://youtu.be/eMbWTES8tPQ>; Mar. 4 House Video PM, *supra* note 18, at 1 hr., 28 min., 58 sec. (“This bill will ensure that a process happens locally.”).

“the fact that critical race theory is in the news” when these discussions are “academically appropriate.”¹¹⁷

Despite their efforts to avoid First Amendment claims, the Act’s authors may have pigeonholed themselves into a battle of ambiguity. For example, the Act requires a disciplinary system for educators who discuss divisive concepts in class, yet the Act also explicitly allows the discussion of divisive concepts *sometimes*.¹¹⁸

The question remains: If an educator is asked by a student about one of the listed divisive concepts, what answer would be sufficiently “academically appropriate” to avoid penalty? Additionally, does the mere existence of this ambiguity have a sufficiently chilling effect on the free exercise of an educator’s First Amendment rights so as to render the policy unconstitutional?

Opponents were “especially concerned about how this bill could affect crucial conversations between students and teachers about our recent history and current events” including, for example, what many people consider crucial details of how “the justice system failed Ahmaud Arbery.”¹¹⁹ In a telephone interview, Senator Bo Hatchett (R-50th) specifically iterated: “We encourage the teaching of history. We encourage the teaching of civil rights. Those are core lessons.”¹²⁰ He emphasized that “learning about our nation[’s] stains,” however, should not be an avenue for teachers to “attack or make a certain individual feel guilty because of the color of their skin, their race, their ethnicity, [or] their background.”¹²¹

Even though proponents are adamant that this Act would not hinder teaching about historical race-relation issues, opponents question the Act’s effects on teaching current race-relation concepts.¹²²

Curiously, the same legislative session that passed HB 1084 also passed unanimously and adopted House Resolution (HR) 881—a resolution that encourages schools to teach about the Civil Rights

117. Feb. 9 Subcommittee Meeting, *supra* note 116, at 54 min., 51 sec. (remarks by Rep. Will Wade (R-9th)).

118. See O.C.G.A. § 20-1-11(c)(2), -11(d)(5), -11(e)(1) (2022).

119. Mar. 4 House Video PM, *supra* note 18, at 1 hr., 46 min., 26 sec. (remarks by Rep. Becky Evans (D-83rd)); *id.* at 1 hr., 39 min., 30 sec. (remarks by Rep. Erica Thomas (D-39th)).

120. Hatchett Interview, *supra* note 20.

121. *Id.*

122. Mar. 4 House Video PM, *supra* note 18, at 1 hr., 48 min., 18 sec. (remarks by Rep. Becky Evans (D-83rd)).

Era.¹²³ HR 881 emphasizes the need for students to learn both Dr. Martin Luther King Jr.'s "tactics and strategies of nonviolent resistance" and the idea that "hatred on the basis of immutable characteristics such as race . . . can overtake any nation or society and lead to profound injustice."¹²⁴ Representative Wade, a vocal supporter of HR 881, recognized that teaching yesterday's racial relations is "imperative" and that schools must "prioritize this part of our history as a part of the educational outcomes of our students."¹²⁵ HB 1084, in conjunction with HR 881, highlights the legislature's potentially counterintuitive view that teaching the Civil Rights Movement of the 1960s is important, but teaching current divisive concepts is prohibited.

Representative Park Cannon (D-58th), also an educator, called this bill "a vehicle for student inquiry to be considered divisive."¹²⁶ Opponents feared the bill would cool racial discussions in the classroom and adversely affect students' critical thinking skills and curiosity.¹²⁷ Representative Matthew Wilson (D-80th), a former educator, described the classroom as "[a] safe space for our students, where our trained educators can also teach them the skills to discuss, consider, question, and even reject ideas, but to do so in a healthy and respectful manner," which gives students the opportunity to develop communication skills that ultimately enable students "to thrive in our modern global economy."¹²⁸

Further, opponents argued that "psychological distress" as a response to humanitarian violations is not a symptom to be fixed but a lesson in empathy.¹²⁹ Limiting students' opportunities to feel empathy for the plight of other humans, past, present, or future, "will rob young people of an inclusive education."¹³⁰

123. HR 881, p. 2, ll. 28–32, as passed, 2022 Ga. Gen. Assemb.; Georgia House of Representatives Voting Record, HR 881, #885 (Apr. 4, 2022).

124. *Id.* p. 2, ll. 19–27.

125. Video Recording of House Education Committee Meeting at 1 hr., 38 min., 25 sec. (Mar. 23, 2022, PM) (remarks by Rep. Will Wade (R-9th)), <https://youtu.be/FoKf7PQrhE> [<https://perma.cc/J5ZW-B2LF>].

126. Mar. 4 House Video PM, *supra* note 18, at 1 hr., 51 min., 20 sec. (remarks by Rep. Park Cannon (D-58th)).

127. *Id.* at 1 hr., 46 min., 45 sec. (remarks by Rep. Becky Evans (D-83rd)).

128. *Id.* at 2 hr., 1 min., 55 sec. (remarks by Rep. Matthew Wilson (D-80th)).

129. *Id.* at 1 hr., 45 min., 56 sec. (remarks by Rep. Becky Evans (D-83rd)).

130. *Id.*

Representative Doreen Carter (D-93rd) highlighted that HB 1084 does not provide “a system . . . to support the teacher. And then what happens to our children who have hard questions? This teacher is not going to answer those questions because they don’t want to violate this Code.”¹³¹

Advocacy groups in other states have posed similar questions. In June 2021, the Arizona Legislature passed House Bill 2898, a purported budget reconciliation bill which included a section pertaining to divisive concepts.¹³² The divisive concepts portion was struck down as unconstitutional by the Arizona Supreme Court, not because of any substantive constitutional failings, but because it failed to comply with a procedural titling requirement of the Arizona Constitution.¹³³

Arizona was not alone: The New Hampshire General Court passed state budget House Bill 2 in 2021.¹³⁴ Similar to the Arizona Act, New Hampshire’s law passed through the Finance Committee and relates to “state fees, funds, revenues, and expenditures.”¹³⁵ “[A] major teachers[’] union, three individual teachers[,] and two parents” challenged the constitutionality of this Act in the New Hampshire District Court.¹³⁶ The complaint alleges, in part, that the Act is unconstitutionally vague, violates the Due Process Clause of the Fourteenth Amendment and “chills teacher speech.”¹³⁷

131. *Id.* at 1 hr., 59 min., 39 sec. (remarks by Rep. Doreen Carter (D-93rd)).

132. *See* Ariz. Sess. Laws Ch. 404, § 21 (2021).

133. *Ariz. Sch. Bds. Ass’n, Inc. v. Arizona*, 501 P.3d 731, 738–39 (Ariz. 2022). The school board association challenged the Act under the “title requirement” of the Arizona State Constitution, which requires that the “title must be worded so that it puts people on notice as to the contents of the act.” *Id.* at 738 (quoting *State v. Sutton*, 565 P.2d 1278, 1280 (Ariz. 1977)). Because HB 2898’s title stated, “Kindergarten through Grade Twelve,” and only with reference to “Budget Reconciliation,” the Court held that the titles did not provide sufficient notice of the substantive measures contained within the Act. *Id.* at 738–39.

134. 2021 N.H. Laws Ch. 91; *ACLU, Largest Teachers’ Union NEA-NH, Leading Disability and LGBTQ+ Advocacy Groups, File Federal Lawsuit Challenging New Hampshire Classroom Censorship Law*, ACLU (Dec. 20, 2021), <https://www.aclu.org/press-releases/aclu-largest-teachers-union-nea-nh-leading-disability-and-lgbtq-advocacy-groups-file> [<https://perma.cc/7YSA-L8WC>].

135. 2021 N.H. Laws Ch. 91, http://gencourt.state.nh.us/bill_status/legacy/bs2016/billText.aspx?sy=2021&id=1080&txtFormat=pdf&v=current [<https://perma.cc/DSE8-Y3H6>].

136. John DiStaso & Scott Cook, *Lawsuit Challenges Constitutionality of ‘Divisive Concepts’ Law Passed by GOP Legislative Majority*, WMUR9, <https://www.wmur.com/article/lawsuit-challenges-constitutionality-of-divisive-concepts-law/38505123> [<https://perma.cc/HD4P-V4KX>] (Dec. 13, 2021, 2:43 PM).

137. Complaint at 2, 43, *Local 8027 v. Edelblut*, No. 1:21-cv-1077 (D.N.H. Dec. 13, 2021).

The Executive Oversight Committee and the Transgender Athlete Ban

Georgia's last-minute amendment to HB 1084, creating the executive oversight committee and expanding athletic associations' power to include regulating sports and gender identity, did not occur in isolation.¹³⁸ As of October 2022, eighteen states have banned transgender girls and women from participating in publicly funded sports.¹³⁹ States in which similar laws have failed, like New Hampshire, leaves discretion with individual schools or their sports associations.¹⁴⁰ Georgia is unique in creating the executive oversight committee that has express authority to, through athletic associations, place bans on transgender athletes upon a determination that it is "necessary and appropriate."¹⁴¹

The GHSA governs the "majority of high school sports in Georgia," with over "465 voluntary members . . . both from public and private high schools."¹⁴² Patrick Johnson, the athletic director of Midtown High School in Atlanta, compared the GHSA to the National Collegiate Athletic Association.¹⁴³ Since 2016, the GHSA has respected determinations made by individual schools regarding the participation by transgender athletes in interscholastic sporting events.¹⁴⁴

On May 4, 2022, six days after Governor Brian Kemp (R) signed HB 1084 into law, the GHSA unanimously voted to change its rules to prohibit high school athletes from participating on teams that do not match the sex listed on their birth certificates, reverting to the pre-2016

138. See House Floor Amendment to HB 1084, introduced by Rep. Will Wade (R-9th), April 4, 2022.

139. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans [<https://perma.cc/P5TA-G3HV>] (Oct. 13, 2022).

140. Katie Barnes, *Alabama to Wyoming: State Policies on Transgender Athlete Participation*, ESPN (June 7, 2022), https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation [<https://perma.cc/GG87-CUUI>].

141. O.C.G.A. § 20-2-316(c)(1)(E)(5) (2022).

142. Stella Maximuk, *GHSA Approves Bill Banning Transgender Athletes*, SOUTHERNER ONLINE (May 10, 2022) (quoting Patrick Johnson, Athletic Director, Midtown High School), <https://thesoutherneronline.com/88541/sports/ghsa-approves-bill-banning-transgender-athletes/> [<https://perma.cc/42SG-UC37>].

143. *Id.*

144. Amy, *supra* note 29.

policy.¹⁴⁵ Opponents of the rule change cited HB 1084’s requirement that an executive oversight committee composed of ten members be appointed to investigate the need for such a policy, and argued that the hasty move without study would “ultimately hurt kids throughout Georgia.”¹⁴⁶ However, Robin Hines, the executive director of the GHSA, stated that the rule change had “nothing to do with the law that passed” and merely saw the change as a “competitive balance issue” instead of a transgender issue.¹⁴⁷

The Georgia Constitution states: “The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the other except as herein provided.”¹⁴⁸ In interpreting this constitutional provision, the Georgia Supreme Court has recognized the judicial doctrine of non-delegation, under which the Georgia General Assembly cannot delegate legislative authority to entities outside of the legislative branch.¹⁴⁹ In *Rogers v. Medical Association of Georgia*, the Georgia Supreme Court held unconstitutional the delegation of appointive power to a private organization, reasoning that “[s]uch an organization, no matter how responsible, is not in the public domain and is not accountable to the people as our constitution requires. It represents and is accountable to its membership.”¹⁵⁰

Through HB 1084, the Georgia General Assembly delegated the power to ban transgender athletes from participating in interscholastic sporting events, providing scant guidance except “[i]f the athletic association determines that it is necessary and appropriate.”¹⁵¹ Further, the new law provides for the appointment of members of the executive oversight committee by private parties, including high school athletic

145. *Id.*

146. *Id.* (quoting Jeff Graham, Executive Director of Georgia Equality); see Maximuk, *supra* note 142.

147. Ross Williams, *Georgia High School Association OKs Bans of Transgender Athletes*, GA. RECORDER (May 5, 2022, 1:00 AM), <https://georgiarecorder.com/2022/05/05/georgia-high-school-association-oks-bans-of-transgender-athletes/> [<https://perma.cc/T42F-BNDD>].

148. GA. CONST. art. 1, § 2, para. III.

149. Premier Health Care Invs., LLC v. UHS of Anchor, L.P., 310 Ga. 32, 49–50, 849 S.E.2d 441, 456–57 (2020).

150. *Rogers v. Med. Ass’n of Ga.*, 244 Ga. 151, 153, 259 S.E.2d 85, 87 (1979); see *Atlanta J. v. Hill*, 257 Ga. 398, 401, 359 S.E.2d 913, 915 (1987) (“These constitutional provisions mandate that public affairs shall be managed by public officials who are accountable to the people.”).

151. O.C.G.A. § 20-2-316(c)(1)(E)(v) (2022).

coaches, officials, and referees.¹⁵² Thus, if a court were to find that the GHSA is not a state actor, delegating the power to ban transgender-athletes, an arguably “public affair,” may violate the non-delegation doctrine by infringing on the separation of powers.¹⁵³ If, on the other hand, the Georgia Supreme Court were to find that the GHSA was indeed a state actor, there “might not be a non-delegation problem” with the GHSA’s rule change.¹⁵⁴ However, under case precedent, the Georgia General Assembly’s grant of appointment power to non-public officials may still violate the non-delegation doctrine.¹⁵⁵

Individual Georgia public schools and boards of education could face lawsuits alleging violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁶ Several such lawsuits have been filed in district courts across the country, backed in large part by the ACLU.¹⁵⁷ In a pending lawsuit in the Southern District of West Virginia, the court granted the plaintiff’s motion for preliminary injunction against the West Virginia Board of Education.¹⁵⁸ An injunction order was issued in a similar case backed by the ACLU in the District of Idaho.¹⁵⁹

In June 2021, the Department of Justice (DOJ) submitted a statement of interest in *B.P.J. v. West Virginia State Board of Education*, arguing that the West Virginia transgender athlete ban is

152. § 20-2-316(c)(1)(A).

153. *Atlanta J.*, 257 Ga. at 401, 359 S.E.2d at 915; see Interview with Anthony Kreis, Assistant Professor, Georgia State University College of Law (Aug. 15, 2022) [hereinafter Kreis Interview] (on file with the Georgia State University Law Review) (“[I]f they’re not a state actor, and it’s clearly a private entity, which I think it mostly is, there’s a weird mixing of private-public interests that doesn’t seem to jive with the non-delegation matter.”).

154. Kreis Interview, *supra* note 153.

155. See *Rogers*, 244 Ga. at 153, 259 S.E.2d at 87.

156. Kreis Interview, *supra* note 153.

157. See Rebecca Boone, *Lawsuit Over Idaho Transgender Ban Likely to Proceed*, KTVB7, <https://www.ktvb.com/article/news/local/capitol-watch/lawsuit-over-idaho-transgender-athlete-ban-to-proceed/277-57f2f2fb-787c-4710-82fb-9916aba56a69> [<https://perma.cc/5R6W-AKVX>] (Apr. 14, 2022, 4:28 PM).

158. *Id.*; *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 358 (S.D.W. Va. 2021) (“A fear of the unknown and discomfort with the unfamiliar have motivated many of the most malignant harms committed by our country’s governments on their own citizens. Out of fear of those less like them, the powerful have made laws that restricted who could attend what schools, who could work certain jobs, who could marry whom, and even how people can practice their religions. Recognizing that classifying human beings in ways that officially sanction harm is antithetical to democracy, the states ratified the Fourteenth Amendment.”).

159. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), *appeals docketed*, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020).

unconstitutional under the Fourteenth Amendment and violates Title IX.¹⁶⁰ In the statement of interest, the DOJ stated that “[n]either the facts nor the law supports [the] assertion” that a transgender athlete ban will “protect athletic opportunities for girls,” and that transgender girls make up “approximately one half of one percent of the United States’ population.”¹⁶¹ Indeed, opponents of the bill, including the Governors of Kentucky, Utah, and Indiana, argue that the laws are irrelevant because there are “few-to-no instances of transgender student athletes” in the states where these bills are being passed.¹⁶² Similar statements have been made regarding HB 1084.¹⁶³ Further, opponents cite the disproportionate incidences of suicide and self-harm among transgender youth.¹⁶⁴

Similar to the statement made by Robin Hines on behalf of the GHSA, proponents of transgender athlete bans argue that allowing transgender females to compete against cisgender females is inherently detrimental to cisgender students.¹⁶⁵ However, “[f]ederal courts have rejected claims that treating students consistent with their gender identity harms cisgender students in violation of Title IX, and have specifically addressed and dismissed unsubstantiated concerns about privacy and safety associated with treating people consistent with their gender identity.”¹⁶⁶

Finally, in 2022, the Department of Education proposed an amendment to Title IX of the Education Amendments of 1972.¹⁶⁷ If adopted, the new rules would, in part, clarify its prohibition of sex discrimination to include discrimination based on sexual orientation and gender identity.¹⁶⁸ Interestingly, the Supreme Court held in

160. John Raby, *DOJ: 2 States' Transgender Restrictions Unconstitutional*, ASSOCIATED PRESS (June 17, 2021), <https://apnews.com/article/college-sports-west-virginia-laws-sports-education-a3e8852ced2bf0c3bd8ce546bfe70d2b> [<https://perma.cc/XXA8-Z6AP>].

161. Statement of Interest of the United States at 2, *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D.W. Va. June 17, 2021) (No. 2:21-cv-00316) (internal quotation marks omitted).

162. Evans, *supra* note 25.

163. Amy, *supra* note 29.

164. *Id.*

165. Ermyas & Wakeam, *supra* note 21.

166. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41535 (July 12, 2022) (to be codified at 40 C.F.R. pt. 106) (citing various cases addressing Title IX claims regarding gender identity).

167. *Id.* at 41390.

168. *Id.*; Laura Meckler, *New Title IX Rules Set to Assert Rights of Transgender Students*, WASH. POST (Mar. 30, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/03/30/transgender->

Bostock v. Clayton County that, under Title VII of the Civil Rights Act of 1964, sexual orientation and gender identity were included in the definition of “on the basis of sex.”¹⁶⁹ Though this case did not specifically address Title IX, “courts often look to Title VII cases for guidance on Title IX issues.”¹⁷⁰ However, the proposed rules would not amend schools’ responsibilities as to sports programs.¹⁷¹ Instead, the Department of Education plans to issue a separate notice of proposed rulemaking to address “what criteria, if any, [schools] should be permitted to use to establish students’ eligibility to participate on a particular male or female athletics team.”¹⁷² Amending Title IX to include these groups would buttress arguments made by opponents of these bans across the country.

Conclusion

The contents of HB 1084 are not novel. Both portions encompassed in HB 1084—the prohibition on divisive concepts and the transgender athlete ban—have been constitutionally challenged across the nation. Although *Bostock v. Clayton County* was recently decided by the Supreme Court, the outcome in an educational context is unclear. The makeup of the current Supreme Court combined with this Act’s history of Conservative support would point to a ruling in favor of upholding the constitutionality of the Act. Ultimately, when it comes to Supreme Court Justices, “they can do whatever they want, and they will do whatever they want.”¹⁷³

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discrimination-title-ix-rule-students/ [https://perma.cc/R4LQ-WK47].

169. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

170. Janica Pierce Tucker & Shawna Sorrel, *US Department of Education Issues Proposed Amendments to Title IX*, TAFT L. BULLS. (Aug. 9, 2022), <https://1npdf11.onenorth.com/pdfrenderer.svc/v1/abcpdf11/GetRenderedPdfByUrl/us-department-of-education-issues-proposed-amendments-to-title-ix.pdf?url=https%3A%2F%2Fwww.taftlaw.com%2Fpdf%2Fnews-events%2Fflaw-bulletins%2Fus-department-of-education-issues-proposed-amendments-to-title-ix> [https://perma.cc/262H-K4S7].

171. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41537.

172. *Id.*

173. Kreis Interview, *supra* note 153.