

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUIN CARCAÑO <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
vs.)	CASE NO. 1:16-CV-00236-TDS-JEP
)	
PATRICK MCCRORY, <u>et al.</u> ,)	
)	
Defendants.)	
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)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. 1:16-CV-00425-TDS-JEP
)	
STATE OF NORTH CAROLINA <u>et al.</u> ,)	
)	
Defendants.)	

**MEMORANDUM OF LAW OF THE STATE OF NORTH CAROLINA,
GOVERNOR PATRICK L. MCCRORY, THE NORTH CAROLINA
DEPARTMENT OF PUBLIC SAFETY, PRESIDENT PRO TEMPORE PHIL
BERGER, AND SPEAKER TIM MOORE REGARDING TITLE IX**

Pursuant to the Court’s order on August 1, 2016, Governor McCrory, the State of North Carolina, the North Carolina Department of Public Safety (“DPS”), Senator Phil Berger, and Representative Tim Moore¹ hereby set forth their position as to whether inclusion of the University of North Carolina and its Board of Governors (“UNC defendants”) is redundant with respect to the Title IX claims in these cases.

¹ These parties have joined together in a single brief, but could not practicably join in a brief with the UNC defendants because of the divergent positions taken by the parties.

I. PLAINTIFFS BRING TITLE IX CHALLENGES ONLY AGAINST THE UNC DEFENDANTS.

The Carcaño plaintiffs have asserted a Title IX claim against only one defendant: the University of North Carolina. First Am. Compl. at ¶¶ 235-43 (D.E. #9 in 1:16-CV-00236). Likewise, the United States has asserted its Title IX claim only against the University and its Board of Governors.² Compl. at ¶ 55 (D.E. #1 in 1:16-CV-00425). Accordingly, the only means by which either the Carcaño plaintiffs or the United States could receive relief under Title IX is through their claims against the relevant UNC defendant. As the pleadings currently stand, then, there is no redundancy in the Title IX claims.

II. SUBSTITUTING THE STATE FOR THE UNC DEFENDANTS WOULD NOT REMEDY ANY FAILURE OF THE CARCAÑO PLAINTIFFS AND THE UNITED STATES TO ASSERT A JUSTICIABLE TITLE IX CLAIM.

Through their motions to dismiss and their most recent supplemental briefing, the UNC defendants have argued that neither the Carcaño plaintiffs nor the United States has a justiciable case or controversy under Title IX. Merely changing the names of the Title IX defendants to the “State of North Carolina” would not remedy that defect. Therefore, it is irrelevant whether a State can be directly sued in its own name under Title IX for the actions of its agencies.

Similarly, even assuming a plaintiff could sue a State under Title IX based on unrelated federally funded programs or activities, there is no plaintiff before the Court

² President Pro Tempore Berger and Speaker Moore, the intervenor-defendants, have asserted a counterclaim under Title IX against the United States, but that counterclaim is not at issue on the pending motions for preliminary injunction.

with standing to challenge any such programs or activities. Trying to adjudicate the subject legislation's validity absent a plaintiff with Article III standing would result in precisely the kind of advisory opinion the federal judiciary lacks jurisdiction to provide. See generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351 (1992). Thus, if the Court were to find that there is no actual case or controversy as to the UNC defendants, they should be dismissed along with the Title IX claims asserted against them.

III. GOVERNOR MCCRORY AND THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY ARE NOT PROPER TITLE IX DEFENDANTS FOR THE CLAIMS BEING ASSERTED AGAINST THE UNC DEFENDANTS.

The claims against the UNC defendants are also not duplicative of any claims that might be brought against Governor McCrory and DPS. Title IX was enacted pursuant to the Spending Clause, see U.S. Const. art. I, § 8, cl. 1, and the text of Title IX limits its scope to the particular funding recipient. See 20 U.S.C. § 1687; Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640, 143 L. Ed. 2d 839 (1999) (“[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress’ authority under the Spending Clause[.]”). While Title IX prohibits “sex” discrimination in any federally funded “education program or activity,” 20 U.S.C. § 1681(a), the phrase “education program or activity” is defined to include (among other categories not relevant here) “all of the operations” of the following:

- “a department, agency, special purpose district, or other instrumentality of a State or of a local government;”
- “the entity of such State or local government that distributes such assistance and each such department or

agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;”

- “a college, university, or other postsecondary institution, or a public system of higher education;” and
- “a local educational agency[,] . . . system of vocational education, or other school system[.]”

20 U.S.C. § 1687(1)-(2). Thus, “program or activity” refers to the specific entity that receives Title IX funding, not the state’s chief executive or any other part of the state that does not receive Title IX funds. When a covered program or activity fails to comply with Title IX, funding may be terminated, “but such termination or refusal [to provide funding] shall be limited to the particular political entity, or part thereof, or other recipient . . . and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.” 20 U.S.C. § 1682. The implied private right of action under Title IX is similarly limited to the actual funding recipient.³

Additionally, under North Carolina law, the Governor does not exercise any direct authority over the University of North Carolina. To the contrary, the University is created by Article IX, Section 8, of the North Carolina Constitution, rather than the article that creates the Office of the Governor and executive branch, and it possesses its

³ See Davis, 526 U.S. at 640-41, 143 L. Ed. 2d 839 (“The Government’s enforcement power [under Title IX] may only be exercised against the funding recipient, see § 1682, and we have not extended damages liability under Title IX to parties outside the scope of this power.”); Jennings v. Univ. of North Carolina at Chapel Hill, 240 F. Supp. 2d 492, 509 (M.D.N.C. 2002) (“Courts have generally held that only the funding recipient can be liable under Title IX.”) (citing several cases); see also Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1019 (7th Cir. 1997) (“Title IX only protects against discrimination under any education program or activity receiving federal financial assistance[.]”).

own board of governors. Compare N.C. Const., art. IX, § 8, with id., art. III; N.C. Gen. Stat. §§ 116-3, -11 (setting forth powers of Board of Governors). The North Carolina General Statutes likewise treat the university system as separate from the Governor. See, e.g., N.C. Gen. Stat. § 116-6 (General Assembly to elect Board of Governors).

Moreover, unlike the University, DPS is a state agency supervised by a secretary appointed by the Governor. Id. §§ 143A-9 & 143B-600. Neither DPS nor its secretary, though, has any role in administering the University. See id. §§ 143B-601, -602. Thus, the specific Title IX funding at issue here that subjects the UNC defendants to the requirements of Title IX does not subject any other agency or department of the State of North Carolina to Title IX.

CONCLUSION

The UNC defendants are the only parties sued under Title IX by either the Carcaño plaintiffs or the United States, and neither Governor McCrory nor the North Carolina Department of Public Safety possesses any relevant role in the administration of the University of North Carolina that would make them proper defendants under Title IX.

Respectfully submitted, this the 5th day of August, 2016.

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83.1(d)

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys, and that I have mailed the document to the following non-CM/ECF participant:

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This the 5th day of August, 2016.

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