

# FEDERALISM IN Action

## Transgender Bathrooms

The battle of the bathrooms first came to Texas in 2015 in the 84th legislative session when four different bills were introduced that would regulate which restrooms transgender students could use. None of those bills, including one that attached a \$2,000 fine for using the wrong restroom, made it out of committee. Far from dying, the issue is gaining traction in Texas, particularly as Lieutenant Governor Dan Patrick has called it a “come and take it” moment. The question is whether or not to allow people to use restrooms based on their gender identity. Who gets to decide—the local government, the state government, or the national government—is a question of federalism.

Until recently, local governments have been deciding this question in Texas. Several school districts across the state, including Waco, Houston, Dallas, and Austin, had already quietly adopted policies to accommodate gender identity. However, when the Fort Worth superintendent announced in late April 2016 new guidelines calling for its district to allow students to use the bathroom consistent with their gender identity, state officials objected. Patrick criticized the new policy and immediately called for the superin-

tendent’s resignation. He also indicated greater state involvement, calling for transgender bathrooms to be a priority in the next legislative session. Ironically, the new policy was merely formalizing what the Fort Worth Independent School District (ISD) had been doing for the past sixteen years.<sup>i</sup> In practice, transgender students in Fort Worth would be allowed to use single stall restrooms, access private restrooms (in the nurses office), or access restrooms when other students are not around. Fort Worth mayor Betsy Price supports the Fort Worth ISD policy, stating, “While I respect the passion on this particular issue and drastically differing opinions, I strongly believe this is a local issue that needs to be focused on the safety, inclusion and education of all 86,000 FWISD students.”<sup>ii</sup>

As the fight between the state government and local school boards heated up, the national government joined the fray. In early May 2016, the U.S. Departments of Justice and Education issued a joint release outlining new guidelines for schools across America. According to the new guideline, gender identity should be treated as a student’s sex for the purpose of Title IX Educational Amendments of 1972 adherence, which prohibits discrimination based on sex for programs receiving federal funds. This is an example of fiscal federalism, in Texas amounting to approximately \$6 billion a year, and provoked predictable opposition from state officials.<sup>iii</sup> Attorney General Ken Paxton announced that Texas will join other states to sue the national government over the new directive. Meanwhile, Lieutenant Governor Patrick sent a letter to all school districts in the state, calling on them to defy the new national guidelines, declaring “Now that’s a violation of local control—when the president of the United States of

America decides to get into every school-house in the United States of America.”<sup>iv</sup> The issue also illustrates the ambiguity created by the plural executive, as the lieutenant governor is making this issue his rallying cry even as the attorney general is charged with legally representing the state. The result of this push and pull is local school boards who have long been dealing with the practical issues once again find themselves at the mercy of a looming battle between the state officials and the national government.

- Should transgender bathrooms be a key issue in the next legislative session?
- Does tying federal financial assistance to compliance with the Title IX Educational Amendment amount to federal overreach?
- Which level of government should get to create transgender policies for schools?

i Marjorie Owens and Jim Douglas, “Former Fort Worth Council Member Calls Lt. Gov. Patrick a ‘bully’” *WFAA.com*, May 10, 2016, <http://www.wfaa.com/news/politics/fw-council-member-calls-lt-patrick-a-bully/184693217> (accessed June 30, 2016).

ii Frank Heinz, “Billions in School Funding at Risk,” *nbcdfw.com*, May 11, 2016, <http://www.nbcdfw.com/news/local/Texas-Fort-Worth-ISD-Transgender-Bathroom-Debate-Could-Put-Billions-in-School-Funding-at-Risk-378892281.html> (accessed June 29, 2016).

iii Ibid.

iv Patrick Svitek, “Patrick Suggests Legislature Might Step In on Bathroom Guidelines,” *Texas Tribune*, May 31, 2016, <https://www.texastribune.org/2016/05/31/patrick-escalates-battle-against-transgender-guide> (accessed June 29, 2016).