TRANSGENDER

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TRANSGENDER ISSUES

EMPLOYEES	STUDENTS
• Hiring Decisions	
• Bathrooms, Locker Rooms, Showers	• Bathrooms, Locker Rooms, Showers
• Pronouns, Names	• Pronouns, Names
• Dress Codes	• Dress Codes
	• Overnight Accommodations
	• Athletics

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EMPLOYEES

- June 15, 2020, U.S. Supreme Court
- Bostock v. Clayton County
- Title VII – Civil Rights Act of 1964
- Sex discrimination includes discrimination against an individual on the basis of sexual orientation and transgender status.

"Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"

Bostock v. Clayton County, Georgia,
140 S. Ct. 1731, 590 U.S., 207 L. Ed. 2d 218 (2020)

EEOC: TITLE VII SEX DISCRIMINATION

Employment decisions made on the basis of sexual orientation, transgender status, failure to conform to gender norms or stereotypes

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EMPLOYMENT DECISIONS

- Hiring
- Firing, furloughs, or reductions in force
- Promotion
- Demotions
- Discipline
- Training
- Work assignments
- Pay, overtime, or other compensation
- Fringe benefits
- Other terms, conditions, and privileges of employment.
- Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity

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BATHROOMS, LOCKER ROOMS, SHOWERS

The EEOC has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

PRONOUNS AND NAMES

According to the EEOC, unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the EEOC explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity | U.S. Equal Employment Opportunity Commission (eeoc.gov)

STUDENTS

- January 21, 2021, President Biden
- Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- *Bostock's* reasoning will apply to other discrimination laws, including Title IX
- 100-day review by each federal agency

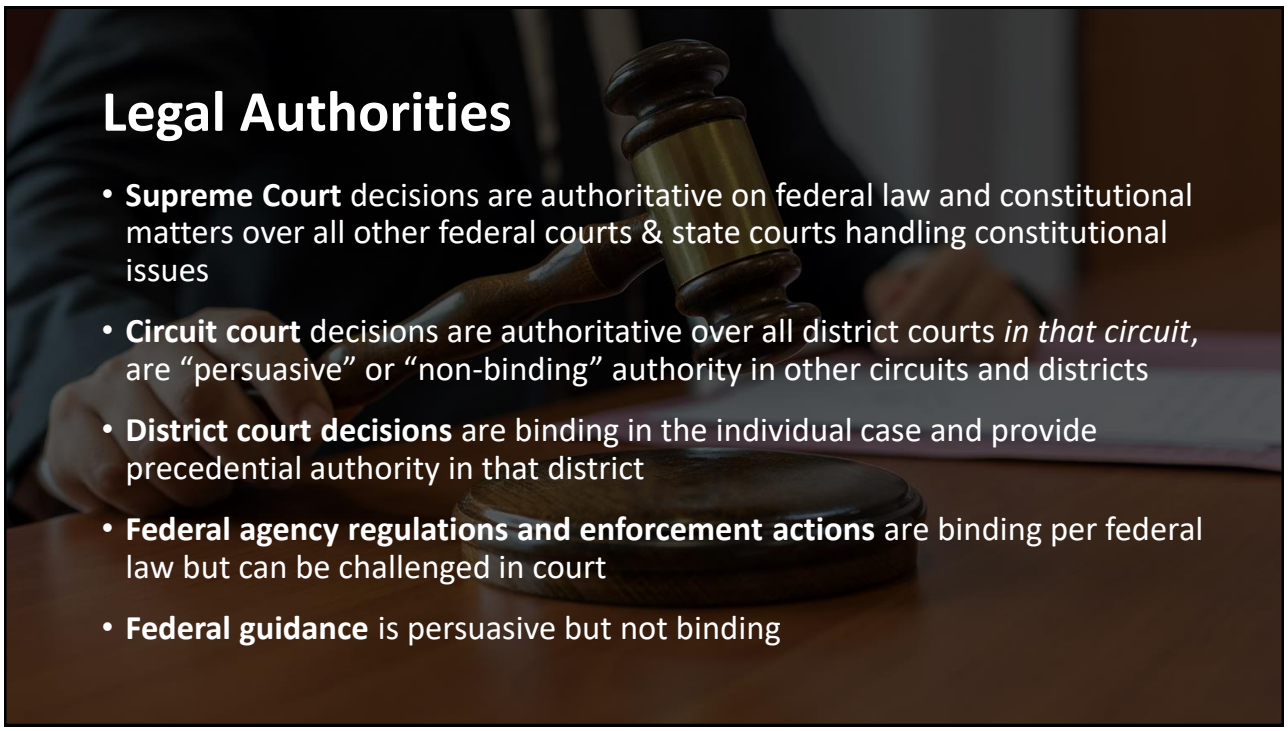
TITLE IX – SEX DISCRIMINATION

June 16, 2021, OCR - USDOE

- Notice of Interpretation explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.
- OCR's interpretation stems from the Supreme Court decision in *Bostock*, "in which the Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex."

- Title IX protects students from harassment who deviate from stereotypical gender norms.
- It does not matter whether or not a harasser is the same or opposite sex.
- A school district may be liable under Title IX for employee or student harassment of transgender students when there is notice of harassment, followed by deliberate indifference and a failure to respond appropriately.

- Transgender and gender-nonconforming students face a heightened risk of bullying, violence, and discrimination.
- Bullying of a student because of the student's nonconformity with gender norms is a form of harassment based on sex in violation of federal law.



Legal Authorities

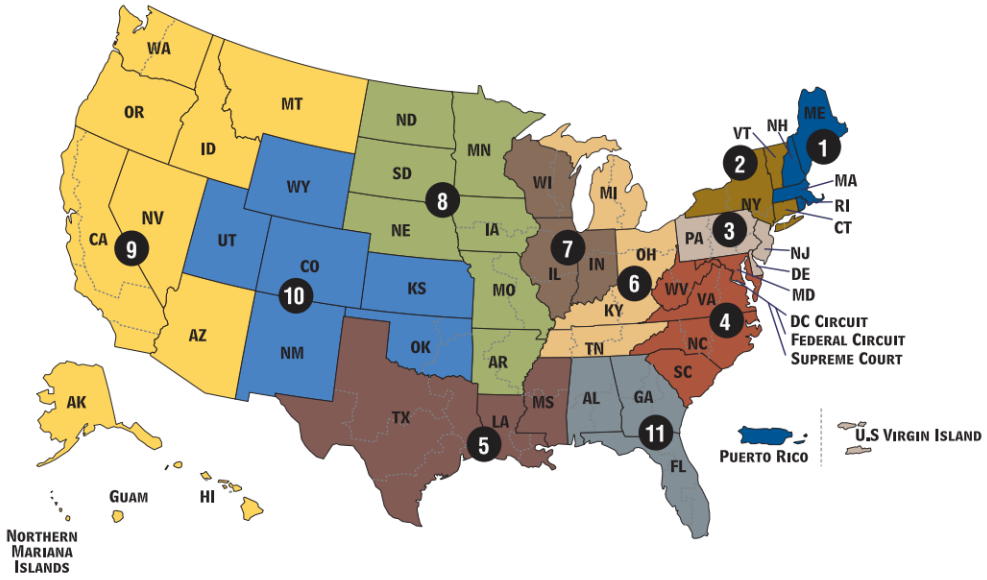
- **Supreme Court** decisions are authoritative on federal law and constitutional matters over all other federal courts & state courts handling constitutional issues
- **Circuit court** decisions are authoritative over all district courts *in that circuit*, are "persuasive" or "non-binding" authority in other circuits and districts
- **District court decisions** are binding in the individual case and provide precedential authority in that district
- **Federal agency regulations and enforcement actions** are binding per federal law but can be challenged in court
- **Federal guidance** is persuasive but not binding

Circuit Courts: Bathroom Cases

- Third, Fourth, Sixth, Seventh, Ninth, Eleventh Circuits have all ruled in favor of transgender students.
- Fifth Circuit has not yet ruled on this issue.

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



Texas v. United States, 201 F.Supp.3d 810 (N.D. Texas, 2016)

Background: Various states, state agencies, and school districts brought action against DOE, DOL< DOJ, challenging defendants' assertion that Title VII and Title IX require that all persons must be afforded opportunity to have access to restrooms, locker rooms, and showers that match their gender identity rather than their biological sex. Plaintiffs moved for a preliminary injunction.

Holdings: federal guidelines were final agency action subject to judicial review; guidelines were subject to notice and comment; and deference was not owed to agency interpretation of a Title IX implementing regulation.

Texas v. United States, 201 F.Supp.3d 810 (N.D. Texas, 2016)

- 2016 - Nationwide preliminary injunction granted.
- 2017 U.S. voluntarily dismissed the case

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Grimm v. Gloucester County Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), as amended (Aug. 28, 2020).

- Nov. 11, 2014 - Gavin Grimm, then 15, addressed his local school board to explain why he was not a danger to other students when using the boys' restroom.
- He had used the boys' bathroom in public places throughout Gloucester County and had never had a confrontation. He told the board it was humiliating to be segregated from the general population.
- He had hoped that his heartfelt explanation would help those in a position of power in his community understand what that he was not a predator, but a boy, despite the fact that he did not conform to some people's idea about who or what a boy is supposed to be.

Grimm v. Gloucester County Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), as amended (Aug. 28, 2020).

- Board responded by adopting a policy that access to changing rooms and bathrooms "shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility"
- When he refused to use the girls' bathroom, Grimm was offered the use of some broom closets that had been retrofitted into unisex bathrooms. Grimm refused to use those as well, opting to use a bathroom in the school nurse's office.

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Grimm v. Gloucester County Sch. Bd.

- Grimm began hormone therapy that altered his bond and muscle structure, deepened his voice, and caused him to grow facial hair.
- Obtained a Virginia state ID card listing sex as male
- Chest reconstruction surgery
- Obtained a court order legally changing his sex to male under VA law
- Obtained a new birth certificate reflecting his sex as male

Grimm v. Gloucester County Sch. Bd.

- Represented by the ACLU, Grimm sued the school district for discriminating against him in violation of the Equal Protection Clause and Title IX.
- Grimm claimed that the district's policy was degrading and stigmatizing and that it singled Grimm out as "unfit to use the same restrooms as every other students."
- Grimm also claimed it was discriminatory to not change his official records to reflect male status.

Grimm v. Gloucester County Sch. Bd.

- Initially, the Fourth Circuit (April 2016) ruled in favor of Grimm based on Obama administration policy related to Title IX protections.
- Then the Trump administration changed the underlying policy (Feb. 2017), forcing a pending hearing before the Supreme Court to be vacated and the case retried at the lower courts.

Grimm v. Gloucester County Sch. Bd.

- Due to recent case law, including the Supreme Court decision in Bostock v. Clayton County, the Fourth Circuit ruled again in favor of the student (Aug. 2020); the Supreme Court refused to hear the case (July 2021), allowing the Fourth Circuit's judgment to stand.
- The District settled with Grimm: $1.3 million in legal fees.

John M. Kluge v. Brownsburg Community School Corp.,
__F.Supp.3d. __, 2021 WL 2915023 (S.D. IN. July 12, 2021).

Kluge v. Brownsburg Community School Corp.

- John Kluge was a teacher for BCSC
- Forced to resign after refusing to refer to transgender students by their preferred names due to his religious objections to affirming transgenderism.
- Pursuant to Title VII, Kluge asserted two claims against BCSC related to the end of his employment: (1) discrimination based on failure to accommodate his religious beliefs; and (2) retaliation.
- Mr. Kluge filed a Motion for Partial Summary Judgment, seeking judgment in his favor on his failure to accommodate claim. BCSC filed a Cross-Motion for Summary Judgment, seeking judgment in its favor on both claims.

FACTUAL BACKGROUND - Teacher

- Hired by BCSC in August 2014 to serve as a Music and Orchestra Teacher at BHS.
- Employed in that capacity until the end of the 2017-2018 academic year.
- Kluge taught beginning, intermediate, and advanced orchestra, beginning music theory, and advanced placement music theory, and was the only teacher who taught any sections of those classes during his time at BHS, which is the only high school in BCSC. Mr. Kluge also assisted the middle school orchestra teacher in teaching classes at the middle school.

FACTUAL BACKGROUND – Christian/Church Elder

- Kluge identifies as a Christian and is a member of Clearnote Church, which is part of the Evangel Presbytery.
- Church elder, meaning he is a member of the board of elders, which "exercise[s] spiritual oversight over the church" and is "part of the government of [the] church."
- Serves as head of the youth group ministries, head of the Owana Program (a discipleship program for children), and a worship group leader.
- Religious beliefs "are drawn from the Bible," and his "Christian faith governs the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues." "

FACTUAL BACKGROUND – Religious Beliefs

"Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." He also believes that "he cannot affirm as true ideas and concepts that he deems untrue and sinful." As a result of these principles, Mr. Kluge believes that "it is sinful to promote gender dysphoria." In addition, according to Mr. Kluge, transgenderism "is a boringly old sin that has been repented for thousands of years," and because being transgender is a sin, it is sinful for him to "encourage[] students in transgenderism."

FACTUAL BACKGROUND – Faculty Mtg/Request

- 2016-17 school year, BHS staff members approached the H.S. Principal seeking direction about how to address transgender students.
- January 2017, faculty members gave a presentation to teachers on what it means to be transgender and how teachers can encourage and support transgender students.
- May 2017, Mr. Kluge and three other teachers requested meeting with the Principal, during which they presented a signed letter expressing their religious objections to transgenderism and other information supporting their position that BHS should not "promote transgenderism."
- The letter specifically asked that BCSC staff not be required to refer to transgender students using their preferred pronouns and that transgender students not be permitted to use the restrooms and locker rooms of their choice.

FACTUAL BACKGROUND – Name Policy

- In response to competing concerns, BCSC implemented a policy ("the Name Policy"), which took effect in May 2017 and required all staff to address students by the name that appears in PowerSchool, a database that BCSC uses to record and store student information, including grades, attendance, and discipline.
- Transgender students could change their first names in PowerSchool if they presented a letter from a parent and a letter from a healthcare professional regarding the need for a name change.
- Through the same process, students could also change their gender marker and the pronouns used to refer to them.

FACTUAL BACKGROUND – Restrooms, Dress Codes

- In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, including wearing school-related uniforms associated with the gender with which they identified.
- The three other teachers who initially expressed objections to "promot[ing] transgenderism" accepted the Name Policy, while Mr. Kluge did not.
- BCSC's practices regarding transgender students were based on BCSC's administrators' ultimate conclusion that "transgender students face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying" and that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being."

FACTUAL BACKGROUND – Three Options

In July 2017, Mr. Kluge informed the Principal that he could not follow the Name Policy because he had a religious objection to referring to students using names and pronouns corresponding to the gender with which they identify, rather than the biological sex that they were assigned at birth. The Principal called a meeting with Mr. Kluge and the Superintendent to discuss the situation. At the meeting, the Principal gave Mr. Kluge three options: (1) comply with the Name Policy; (2) resign; or (3) be suspended pending termination. Mr. Kluge refused to either follow the Name Policy or resign, so he was suspended.

FACTUAL BACKGROUND – Last Names Only Accom.

The following week, on July 31, 2017, another meeting was held between the Superintendent, Director of Human Resources, and Mr. Kluge. Mr. Kluge proposed that he be permitted to address all students by their last names only, similar to a sports coach ("the last names only accommodation"), and the administrators agreed.

FACTUAL BACKGROUND – Last Names Only Accom.

Mr. Kluge signed a document that stated the following, including a handwritten notation initialed by the Director of HR:

You are directed to recognize and treat students in a manner using the identity indicated in PowerSchool. This directive is based on the status of a current court decision applicable to Indiana. We agree that John may use last name only to address students. You are also directed not to attempt to counsel or advise students on his/her lifestyle choices.

FACTUAL BACKGROUND – Equity Alliance Club

- After Mr. Kluge began referring to students by last names, some students and faculty members complained that this was dehumanizing.
- Mr. Kluge became a frequent topic of the student Equality Alliance Club.
- At least one student claimed that sometimes, Mr. Kluge would use honorifics like "Mr." or "Miss" when referring to cisgender students.

FACTUAL BACKGROUND – Ending the Accommodation

- January 2018, the Principal asked Kluge to resign effective at the end of the year, because he was continuing to receive complaints from students and did not like the tense situation.
- February, Kluge was informed that after the 2017-18 school year, he would no longer be allowed the "last names only accommodation." The Director of HR stated that this accommodation was not reasonable.
- March, Mr. Kluge was told her could either comply with the Name Policy, resign, or be terminated.

FACTUAL BACKGROUND – Kluge Resigns

April 2018

I'm writing you to formally resign from my position as a teacher, effective at the end of the 2017-2018 school year when my contract is finished, i.e., early August 2018. I'm resigning my position because [BCSC] has directed its employees to call transgender students by a name and sex not matching their legal name and sex. BCSC has directed employees to call these students by a name that encourages the destructive lifestyle and psychological disorder known as gender dysphoria. BCSC has allowed me the accommodation of referring to students by last name only starting in August 2017 so I could maintain a "neutral" position on the issue. Per our conversation on 3/15/18, [BCSC] is no longer allowing this accommodation. BCSC will require me to refer to transgender students by their "preferred" name as well as by their "preferred" pronoun that does not match their legal name and sex. BCSC will require this beginning in the 2018-2019 school year. Because my Christian conscience does not allow me to call transgender students by their "preferred" name and pronoun, you have said I am required to send you a resignation letter by May 1, 2018 or I will be terminated at that time…

LEGAL ISSUES – Title VII – Religious Accoms

1. **Whether District was required to offer other accommodations**
2. **Whether Kluge's religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet**
3. **Whether the last-names-only accommodation was an undue hardship**

LEGAL ISSUES – Religious Accoms

1. **Whether District was required to offer other accommodations**

Court: The court ruled that BCSC's failure to propose an alternative accommodation, or to engage in further discussions regarding a potential accommodation, did not violate Title VII.

"Title VII merely requires an employer to 'show, as a matter of law, that any and all accommodations would have imposed an undue hardship.'"

LEGAL ISSUES – Sincerely Held

2. Whether Kluge's religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet

Court: Perfection is not required. "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?"

The court also noted that the sincerity of an individual's religious belief is a question of fact that is generally not appropriate for a court to determine at summary judgment. The court assumed without deciding that Mr. Kluge's religious beliefs against referring to transgender students by their preferred names and pronouns were sincerely held.

LEGAL ISSUES – Undue Hardship

3. Whether the last-names-only accommodation was an undue hardship

Court: Kluge established a prima facie case of discrimination based on failure to accommodate, so the burden shifted to BCSC to demonstrate that it could not provide a reasonable accommodation "without undue hardship on the conduct of [its] business."

In the Seventh Circuit, requiring an employer "to bear more than a *de minimis* cost" or incur more than a "slight burden" constitutes an undue hardship. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

"The relevant costs may include not only monetary costs but also the employer's burden in conducting its business." *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001).

LEGAL ISSUES – Undue Hardship

3. Whether the last-names-only accommodation was an undue hardship

Court: BCBS argued that Kluge's failure to address transgender students by the names and pronouns reflected in PowerSchool created undue hardship related to interference with its mission to educate students. BCSC argued that the last names only arrangement created an undue hardship **by placing it on "the razor's edge of liability" by exposing it to potential lawsuits by transgender students** alleging discrimination. The court ruled that the undisputed evidence in this case demonstrated that the last names only accommodation resulted in undue hardship to BCSC as that term is defined by relevant authority in the Seventh Circuit.

LEGAL ISSUES – Heckler's Veto

3. Whether the last-names-only accommodation was an undue hardship

Court: The court pointed to the declarations of two transgender students to show that Mr. Kluge's use of last names only made them feel targeted and uncomfortable. One student dreaded going to orchestra class and did not feel comfortable speaking to Kluge directly. Other students and teachers complained that Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable. One student quit orchestra entirely. "Certainly, this evidence shows that Mr. Kluge's use of the last names only accommodation burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students. BCSC was not required to allow an accommodation that unduly burdened its "business" in this manner."

LEGAL ISSUES – Most Students Excelled

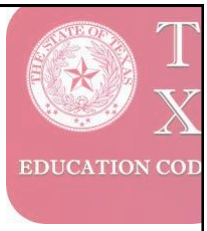
3. Whether the last-names-only accommodation was an undue hardship

Court: In an attempt to show that his interference with BCSC's business did not rise above the *de minimis* level, Kluge repeatedly emphasized that many of his orchestra students were successful during the 2017-2018 school year in that they participated in extracurricular activities and won awards for their musical performances. He also submitted declarations from students and another teacher stating that they did not perceive any problems in his classes resulting from the use of last names only. The court noted that these facts may well be true, and were accepted as such, but they were deemed neither dispositive of nor relevant to the undue hardship question.

HOLDING

"BCSC is a public-school corporation and as such has an obligation to meet the needs of all of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only." BCSC presented evidence that two specific students were affected by Kluge's conduct and that other students and teachers complained.

Texas Education Code § 26.008. Right to Full Information Concerning Student



(a) A parent is entitled to full information regarding the school activities of a parent's child except as provided by Section 38.004.

(b) An attempt by any school district employee to encourage or coerce a child to withhold information from the child's parent is grounds for discipline under Section 21.104, 21.156, or 21.211, as applicable.

CHANGING STUDENT RECORDS

7. Should a district change school records to reflect a transgender student's preferred name and gender?

At least one federal circuit court has found that a school district's refusal to change a transgender student's records to reflect his male gender identity violated Title IX and the Equal Protection Clause.[12] While the Fourth Circuit case is not binding legal authority in Texas, it reflects a legal trend that may be persuasive in a Texas court. Texas law does not definitively resolve this issue, but a district does have some flexibility with regard to requests to change a student's name and gender.

- Legal Issues Related to Transgender Students July 2021 (tasb.org)

CHANGING STUDENT RECORDS

Texas Education Code section 25.0021 requires that a student be identified by his or her legal surname, or last name, as that name appears (1) on the student's birth certificate or other document suitable as proof for the student's identity, or (2) in a court order changing the student's name. However, Section 25.0021 does not address students' first names or genders.

CHANGING STUDENT RECORDS

In general, a student's legal name is used on permanent records, especially when required by state or federal laws and regulations. For example, Texas school districts are required to complete and maintain permanently the academic achievement record, or "AAR" of high school students (often referred to as a "transcript"), including full legal name and gender.[13] Following guidelines developed by the Texas commissioner of education, the AAR must have the complete name from the student's birth certificate or other legal document, without use of nicknames or abbreviations.[14] The student's legal name, the name submitted to Public Education Information Management System (PEIMS) at the Texas Education Agency (TEA), and the name recorded on the AAR must be identical.[15] Any changes in the AAR must be dated, explained and kept as part of the student's permanent file.[16] TEA has informally stated that it will accept the student gender that a district reports through PEIMS, including a report that changes the student's gender following a student and/or parent request to alter the record.

CHANGING STUDENT RECORDS

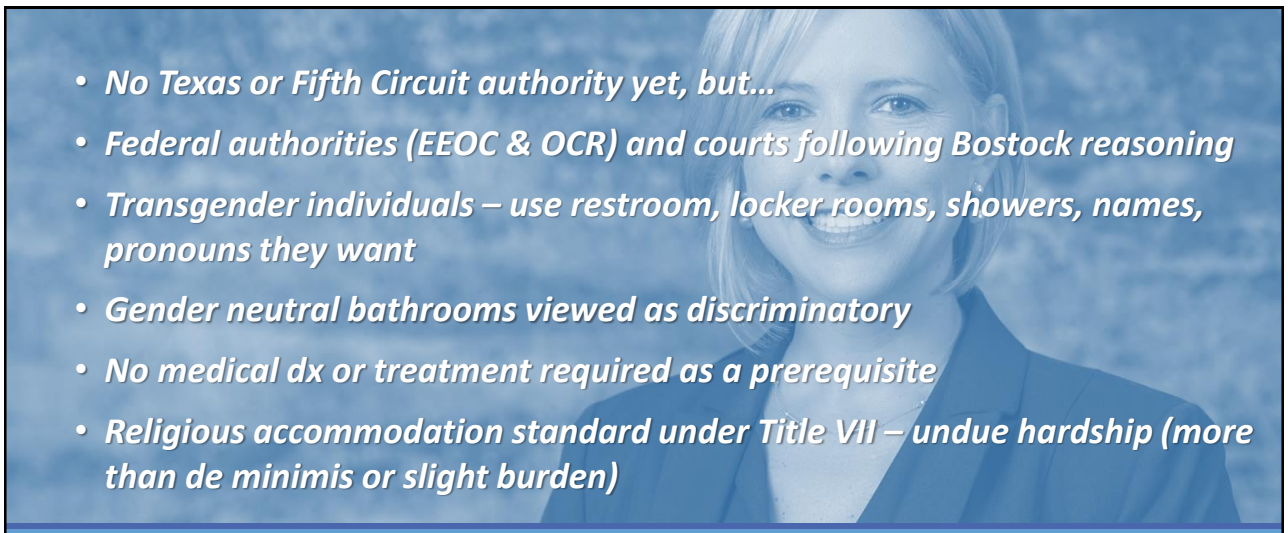
In contrast to permanent school records, however, teachers and other school district employees often informally address students by, and have non-permanent school records that reflect, preferred names or nicknames that are not a student's legal first name. A school district should apply this practice equally with transgender students. For example, the transgender student's preferred first name and gender should be used in speaking with the student and for class rosters, identification badges, awards, and any other similar purpose. OCR and DOJ's 2021 guidance cites a failure to address a transgender student by the student's chosen name and pronouns as an example of sex-based discrimination within the agencies' enforcement authority under Title IX.[17]

ATHLETICS

- **Fairness in Women's Sports Acts**
- **Labelled anti-trans legislation**

States that passed legislation in 2021

- Alabama (11th Circuit)
- Arkansas (8th Circuit)
- Florida (11th Circuit)
- Kansas (Vetoed) (10th Circuit)
- Louisiana (5th Circuit)
- Mississippi (5th Circuit)
- Montana (9th Circuit)
- North Dakota (Vetoed; Overridden) (8th Circuit)
- South Dakota (Vetoed) (8th Circuit)
- Tennessee (6th Circuit)
- West Virginia (4th Circuit)



- ***No Texas or Fifth Circuit authority yet, but…***
- ***Federal authorities (EEOC & OCR) and courts following Bostock reasoning***
- ***Transgender individuals – use restroom, locker rooms, showers, names, pronouns they want***
- ***Gender neutral bathrooms viewed as discriminatory***
- ***No medical dx or treatment required as a prerequisite***
- ***Religious accommodation standard under Title VII – undue hardship (more than de minimis or slight burden)***

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Transgender Issues

By Holly Boyd Wardell, Shareholder
October 20, 2021

EMPLOYEES

On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*, which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status. 140 S. Ct. 1731 (2020).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) issued guidance declaring the following employment decisions to be in violation of Title VII if made on the basis of an individual's sexual orientation, transgender status, failure to conform with gender norms or stereotypes:

- Hiring
- Firing, furloughs, or reductions in force
- Promotion
- Demotion
- Discipline
- Training
- Work assignments
- Pay, overtime, or other compensation
- Fringe benefits
- Other terms, conditions, and privileges of employment.
- Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity

Bathrooms, Locker Rooms, Showers: The EEOC has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. *See Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that

Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity). In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

Pronouns and Names: According to the EEOC, unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the EEOC explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity | U.S. Equal Employment Opportunity Commission (eeoc.gov)

STUDENTS

BIDEN EXECUTIVE ORDER – JANUARY 20, 2021

President Joseph Biden released "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" on January 20, 2021. In this executive order, the Biden administration pronounced that *Bostock v. Clayton County* would also apply to other discrimination laws. The order states: "Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

The order mandated that, "[w]ithin 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified pursuant to" the executive order. *Id.*

U.S. DEPT. OF EDUCATION – OFFICE FOR CIVIL RIGHTS – JUNE 16, 2021

On June 16, 2021, the Office for Civil Rights at the U.S. Department of Education issued a Notice of Interpretation explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity. OCR's explained that its interpretation stems from the landmark U.S. Supreme Court decision in *Bostock v. Clayton County*, "in which the Supreme Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex." U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity | U.S. Department of Education. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (Jun. 21, 2021) (to be codified at 34 C.F.R. chapter undef.).

"The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination – and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination," said U.S. Secretary of Education Miguel Cardona. "Today, the Department makes clear that all students—including LGBTQ+ students—deserve the opportunity to learn and thrive in schools that are free from discrimination." *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, U.S. DEP'T. OF ED., (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity.

OCR further explicated that the Notice of Interpretation "continues OCR's sustained effort to promote safe and inclusive schools for all students, including LGBTQ+ students. This action is part of the Biden-Harris Administration's commitment to advance the rights of the LGBTQ+ community, set out in President Biden's *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity* and the *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*." *Id.*

The Department of Education's Notice of Interpretation is available here.

Third Circuit (PA, NJ, DE, Virgin Islands)

The Third Circuit upheld a school district's policy that transgender students may use the bathroom consistent with their gender identity. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018). Cisgender high school students, by and through their parents and guardians, brought an action against the school district and school officials

alleging that the district's policy of allowing transgender students to access bathrooms and locker rooms consistent with their gender identity violated their constitutional rights of bodily privacy, as well as Title IX and state tort law. According to the Third Circuit, the District Court correctly concluded that the appellants' attempt to enjoin that policy based on an alleged violation of their privacy rights and their rights under Title IX and Pennsylvania tort law is not likely to succeed on the merits. The Third Circuit also agreed with the District Court that an injunction was not merited, because the appellants would not be irreparably harmed.

Fourth Circuit (MD, NC, SC, VA, WV)

The Fourth Circuit ruled that a school district's policy requiring students to use bathrooms based on their biological sex, or birth-assigned sex, and its refusal to amend a transgender student's school records to reflect his gender identity violated Equal Protection Clause and constituted discrimination on the basis of sex in violation of Title IX. *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020).

> The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. Compare *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), and *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), with *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015). How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.
>
> *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 620 (4th Cir. 2020), as amended (Aug. 28, 2020).

On June 28, 2021, the Supreme Court denied the school board's petition for a writ of certiorari.

Fifth Circuit (TX, LA, MS)

The Fifth Circuit has no caselaw that addresses transgender students. However, the Fifth Circuit has ruled that it will not adjust court documents to match the preferred name or pronouns of a transgender litigant after the case is decided. "If a court orders one litigant referred to as "her" (instead of "him"), then the court can hardly refuse when the next litigant moves to be referred to as "xemself" (instead of "himself"). Deploying such neologisms could hinder communication among the parties and the court." *United States v. Varner*, 948 F.3d 250, 257–58 (5th Cir. 2020). The Court has often changed pronouns at the beginning of cases

to match the preferred designation by a litigant, but the court admitted this to be an uneven practice it does not intend to adjust.

Sixth Circuit (KY, MN, OH, TN)

The Sixth Circuit upheld an injunction against a school district that denied a transgender girl the ability to use the female restroom. The court stated: "However, the record establishes that Doe, a vulnerable eleven-year-old with special needs, will suffer irreparable harm if prohibited from using the girls' restroom. Highland's exclusion of Doe from the girls' restrooms has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old child." *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016). This case was ultimately settled but not before the court noted that, "public interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe's constitutional and civil rights, a purpose that is always in the public interest." *Dodds*, F.3d 217, 222.

In 2021, the Sixth Circuit held that under the First Amendment a college professor may refuse to use a student's preferred pronouns for religious reasons. The court stated: "The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (citations omitted). The court continued: "The panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the government always has a compelling interest in regulating employees' speech on matters of public concern. . .it would allow universities to discipline professors, students, and staff any time their speech might cause offense. That is not the law." *Id* at 510.

Seventh Circuit (IL, IN, WI)

The Seventh Circuit ruled that transgender students may bring claims of sex discrimination under Title IX, that these students are likely to succeed in their cases if brought under a theory of sex stereotyping, and that heightened scrutiny instead of rational basis applied to these sorts of cases. *See Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017). "The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act." *Id.*

***John M. Kluge v. Brownsburg Community School Corp.*, __**F.Supp.3d. __, 2021 WL 2915023 (S.D. IN. July 12, 2021). John Kluge was a teacher for the Brownsburg Community School Corporation ("BCSC"); he was forced to resign after refusing to refer to transgender students

by the names selected by the students, their parents, and their healthcare providers due to his religious objections to affirming transgenderism. Pursuant to Title VII, Mr. Kluge asserted two claims against BCSC related to the end of his employment: (1) discrimination based on failure to accommodate his religious beliefs; and (2) retaliation. Mr. Kluge filed a Motion for Partial Summary Judgment, seeking judgment in his favor on his failure to accommodate claim. BCSC filed a Cross-Motion for Summary Judgment, seeking judgment in its favor on both claims. In addition, a group of medical, mental health, and transgender youth support organizations filed a Motion for Leave to File Brief of Amici Curiae in support of BCSC's summary judgment motion.

FACTS: Mr. Kluge was hired by BCSC in August 2014 to serve as a Music and Orchestra Teacher at BHS. He was employed in that capacity until the end of the 2017-2018 academic year. Mr. Kluge taught beginning, intermediate, and advanced orchestra, beginning music theory, and advanced placement music theory, and was the only teacher who taught any sections of those classes during his time at BHS, which is the only high school in BCSC. Mr. Kluge also assisted the middle school orchestra teacher in teaching classes at the middle school.

Mr. Kluge identifies as a Christian and is a member of Clearnote Church, which is part of the Evangel Presbytery. He serves as a church elder, meaning he is a member of the board of elders, which "exercise[s] spiritual oversight over the church" and is "part of the government of [the] church." In addition, Mr. Kluge serves as head of the youth group ministries, head of the Owana Program (a discipleship program for children), and a worship group leader. Mr. Kluge's religious beliefs "are drawn from the Bible," and his "Christian faith governs the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues." "Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." He also believes that "he cannot affirm as true ideas and concepts that he deems untrue and sinful." As a result of these principles, Mr. Kluge believes that "it is sinful to promote gender dysphoria." In addition, according to Mr. Kluge, transgenderism "is a boringly old sin that has been repented for thousands of years," and because being transgender is a sin, it is sinful for him to "encourage[] students in transgenderism."

During the 2016-17 school year, BHS faculty and staff members approached the High School Principal seeking direction about how to address transgender students. In January 2017, faculty members gave a presentation to teachers on what it means to be transgender and how teachers can encourage and support transgender students. In May 2017, Mr. Kluge and three other teachers called a meeting with the Principal, during which they presented a

signed letter expressing their religious objections to transgenderism and other information supporting their position that BHS should not "promote transgenderism." The letter specifically asked that BCSC faculty and staff not be required to refer to transgender students using their preferred pronouns and that transgender students not be permitted to use the restrooms and locker rooms of their choice. In response to these various competing concerns, BCSC implemented a policy ("the Name Policy"), which took effect in May 2017 and required all staff to address students by the name that appears in PowerSchool, a database that BCSC uses to record and store student information, including grades, attendance, and discipline. Transgender students could change their first names in PowerSchool if they presented a letter from a parent and a letter from a healthcare professional regarding the need for a name change. Through the same process, students could also change their gender marker and the pronouns used to refer to them. In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, including wearing school-related uniforms associated with the gender with which they identified. The three other teachers who initially expressed objections to "promot[ing] transgenderism" accepted the Name Policy, while Mr. Kluge did not. BCSC's practices regarding transgender students were based on BCSC's administrators' ultimate conclusion that "transgender students face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying" and that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being."

In July 2017, Mr. Kluge informed the Principal that he could not follow the Name Policy because he had a religious objection to referring to students using names and pronouns corresponding to the gender with which they identify, rather than the biological sex that they were assigned at birth. The Principal called a meeting with Mr. Kluge and the Superintendent to discuss the situation. At the meeting, the Principal gave Mr. Kluge three options: (1) comply with the Name Policy; (2) resign; or (3) be suspended pending termination. Mr. Kluge refused to either follow the Name Policy or resign, so he was suspended.

The following week, on July 31, 2017, another meeting was held between the Superintendent, Director of Human Resources, and Mr. Kluge. Mr. Kluge proposed that he be permitted to address all students by their last names only, similar to a sports coach ("the last names only accommodation"), and the administrators agreed. Mr. Kluge signed a document that stated the following, including a handwritten notation initialed by the Director of HR:

> You are directed to recognize and treat students in a manner using the identity indicated in PowerSchool. This directive is based on the status of a current court decision applicable to Indiana. We agree that John may use last name

> only to address students. You are also directed not to attempt to counsel or advise students on his/her lifestyle choices.

Another handwritten note, also initialed by the Director of HR, further stated: "In addition, Angie Boyer will be responsible for distributing uniforms to students." Mr. Kluge understood the last names only accommodation to mean that he would refer to all students—not just transgender students—by their last names only, not use any honorifics such as "Mr." or "Ms." to refer to any student, and if any student were to directly ask why he used last names only, he would respond that he views the orchestra class like a sports team and was trying to foster a sense of community. He also understood that he would not be required to distribute gender-specific orchestra uniforms to students.

After Mr. Kluge began referring to students by last names, some students and faculty members complained that this was dehumanizing. Mr. Kluge became a frequent topic of the student Equality Alliance Club. At least one student claimed that sometimes, Mr. Kluge would use honorifics like “Mr.” or “Miss” when referring to cisgender students. In January 2018, the Principal asked Mr. Kluge to resign effective at the end of the year, because he was continuing to receive complaints from students and did not like the tense situation.

In February 2018, Mr. Kluge was informed that after the 2017-18 school year, he would no longer be allowed the “last names only accommodation.” The Director of HR stated that this accommodation was not reasonable. In March, Mr. Kluge was told her could either comply with the Name Policy, resign, or be terminated.

On April 30, 2018, Mr. Kluge sent an email to the Director of HR, which stated:

> I'm writing you to formally resign from my position as a teacher, effective at the end of the 2017-2018 school year when my contract is finished, i.e., early August 2018. I'm resigning my position because [BCSC] has directed its employees to call transgender students by a name and sex not matching their legal name and sex. BCSC has directed employees to call these students by a name that encourages the destructive lifestyle and psychological disorder known as gender dysphoria. BCSC has allowed me the accommodation of referring to students by last name only starting in August 2017 so I could maintain a "neutral" position on the issue. Per our conversation on 3/15/18, [BCSC] is no longer allowing this accommodation. BCSC will require me to refer to transgender students by their "preferred" name as well as by their "preferred" pronoun that does not match their legal name and sex. BCSC will require this beginning in the 2018-2019 school year. Because my Christian conscience does not allow me to call transgender

students by their "preferred" name and pronoun, you have said I am required to send you a resignation letter by May 1, 2018 or I will be terminated at that time.

***

LEGAL ISSUES: Mr. Kluge argued that BCSC discriminated against him by refusing to accommodate his sincerely held religious beliefs. Specifically, he asserted that his belief against promoting transgenderism by using a transgender student's preferred name and pronouns is religious in nature, is sincerely held, and was clearly communicated to BCSC. He further argued that BCSC discriminated against him based on that belief in three ways: (1) withdrawing the last-name only accommodation despite a lack of undue hardship; (2) refusing to offer or discuss any other accommodation; and (3) coercing his resignation letter through misrepresentation."

Failure to offer other accommodations: Mr. Kluge contended that BCSC failed to offer any accommodation after it withdrew the last names only accommodation, and even if the last names only accommodation was the only possible accommodation, BCSC could not show that use of that accommodation would cause undue hardship. He argues that students' "emotional discomfort" does not constitute undue hardship, and "[t]he fact that BCSC and [Mr.] Kluge agreed to an accommodation and used it successfully for a full semester establishes last-names only as a 'reasonable accommodation' for [Mr.] Kluge's religious beliefs, and also that there was no 'undue hardship' associated with that accommodation." The court ruled that BCSC's failure to propose an alternative accommodation, or to engage in further discussions regarding a potential accommodation, did not violate Title VII. "Title VII merely requires an employer to 'show, as a matter of law, that any and all accommodations would have imposed an undue hardship.'"

Perfection not required: Regarding Mr. Kluge's occasional use of honorifics (Mr. or Miss) with cisgender students, the court held that "Title VII and courts . . . do not require perfect consistency in observance, practice, and interpretation when determining if a belief system qualifies as a religion or whether a person's belief is sincere, citing *Grayson v. Schuler*, 666 F.3d 450, 454-55 (7th Cir. 2012) ("[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?"). The court also noted that the sincerity of an individual's religious belief is a question of fact that is generally not appropriate for a court to determine at summary judgment. The court assumed without deciding that Mr. Kluge's religious beliefs against referring to transgender students by their preferred names and pronouns were sincerely held.

Undue Hardship: Because Mr. Kluge established a prima facie case of discrimination based on failure to accommodate, the burden shifted to BCSC to demonstrate that it could not provide a reasonable accommodation "without undue hardship on the conduct of [its] business." 42 U.S.C. § 2000e(j). In the Seventh Circuit, requiring an employer "to bear more than a *de minimis* cost" or incur more than a "slight burden" constitutes an undue hardship. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)). "The relevant costs may include not only monetary costs but also the employer's burden in conducting its business." *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001).

BCBS argued that Mr. Kluge's failure to address transgender students by the names and pronouns reflected in PowerSchool created undue hardship related to interference with its mission to educate students. BCSC argued that the last names only arrangement created an undue hardship by placing it on "the razor's edge of liability" by exposing it to potential lawsuits by transgender students alleging discrimination. The court ruled that the undisputed evidence in this case demonstrated that the last names only accommodation resulted in undue hardship to BCSC as that term is defined by relevant authority in the Seventh Circuit. The court pointed to the declarations of two transgender students to show that Mr. Kluge's use of last names only made them feel targeted and uncomfortable. One student dreaded going to orchestra class and did not feel comfortable speaking to Mr. Kluge directly. Other students and teachers complained that Mr. Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable. One student quit orchestra entirely. “Certainly, this evidence shows that Mr. Kluge's use of the last names only accommodation burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students. BCSC was not required to allow an accommodation that unduly burdened its "business" in this manner.”

In an attempt to show that his interference with BCSC's business did not rise above the *de minimis* level, Mr. Kluge repeatedly emphasized that many of his orchestra students were successful during the 2017-2018 school year in that they participated in extracurricular activities and won awards for their musical performances. He also submitted declarations from students and another teacher stating that they did not perceive any problems in Mr. Kluge's classes resulting from the use of last names only. The court noted that these facts may well be true, and were accepted as such, but they were deemed neither dispositive of nor relevant to the undue hardship question. “BCSC is a public-school corporation and as such has an obligation to meet the needs of all of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only.” BCSC presented evidence that two specific students were affected by Mr. Kluge's

conduct and that other students and teachers complained. "[G]given that Mr. Kluge does not dispute that refusing to affirm transgender students in their identity can cause emotional harm, this harm is likely to be repeated each time a new transgender student joins Mr. Kluge's class (or, as the case may be, chooses not to enroll in music or orchestra classes solely because of Mr. Kluge's behavior). As a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of all of its students, it is incurring a more than *de minimis* cost to its mission to provide adequate public education that is equally open to all Title VII does not require employers to provide accommodations that would place them "on the 'razor's edge' of liability."

Ninth Circuit (AK, AZ, CA, HI, Guam)

The Ninth Circuit upheld a school district's policy to allow transgender students to use the bathroom, locker room, and showers of their gender identity. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1217–18 (9th Cir. 2020), cert. denied, 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020). The Ninth Circuit ruled:

> "There is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth. We also hold that a policy that treats all students equally does not discriminate based on sex in violation of Title IX, and that the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender. We hold further that the Fourteenth Amendment does not provide a fundamental parental right to determine the bathroom policies of the public schools to which parents may send their children, either independent of the parental right to direct the upbringing and education of their children or encompassed by it. Finally, we hold that the school district's policy is rationally related to a legitimate state purpose, and does not infringe Plaintiffs' First Amendment free exercise rights because it does not target religious conduct."
>
> *Id.*

Eleventh Circuit (AL, FL, GA)

The Eleventh Circuit held that a school district's policy of requiring students to use the bathroom of the sex assigned at the time of their enrollment violated a transgender student's equal protection rights and Title IX. *See Adams by & through Kasper v. Sch. Bd. of St. Johns County*, 3 F.4th 1299 (11th Cir. 2021), rehearing *en banc* granted Aug. 23, 2021.

The gender stated at enrollment determined the bathroom the student could use. This meant that the policy not only treated transgender students differently from cis-gendered students,

it treated transgender students differently if they transitioned before versus after enrolling in school. According to the court, this further perpetuated gender stereotypes. The court noted, "[T]his policy presumes every person deemed "male" at birth would act and identify as a "boy" and every person deemed "female" would act and identify as a "girl." Based on these stereotypes, the School Board labeled Mr. Adams as a "girl" for purposes of his bathroom use, based solely on his sex assigned at birth." *Id*.

This opinion was recently vacated pending a rehearing *en banc* before the 11th Circuit. *Adams v. School Board of St. Johns County, Florida*, 9 F.4th 1369, 11th Cir.(FL.), Aug. 23, 2021. The rehearing will likely focus on the student's equal protection claim, specifically whether an individual's transgender status confers protection under the equal protection clause as a suspect class. The Circuit courts are divided on this issue.

- Fourth Circuit held that transgender status was at least a quasi-suspect class entitled to heightened scrutiny. *Grimm v. Gloucester County School Bd.*, 972 F.3d 586 (4th Cir. 2020).
- Seventh Circuit declined to decide whether transgender status was protected, instead falling back on "sex-based" classifications. *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

If transgender status is defined as its own protected class, it could have the same protections as sex-based classifications. "Intermediate scrutiny typically is used to review laws that employ quasi-suspect classifications…such as gender…or legitimacy…. On occasion intermediate scrutiny has been applied to review a law that affects 'an important though not constitutional right.'" *Ramos v. Town of Vernon*, 331 F. 3d 315, 321 (2d. Cir. 2003).

EQUAL PROTECTION CLAUSE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Const. amend. XIV, §1

Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation's anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.). In Bostock v. Clayton County, 590 U.S. ___ (2020), the Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.

It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.

Sec. 2. Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation. (a) The head of each agency shall, as soon as practicable and in consultation with the Attorney General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") that:

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 et seq.), consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.

(c) The head of each agency shall, as soon as practicable, also consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy set forth in section 1 of this order. If an agency takes an action described in this subsection or subsection (b) of this section, it shall seek to ensure that it is accounting for, and taking

appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability.

(d) Within 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified pursuant to subsections (b) and (c) of this section, as appropriate and consistent with applicable law.

Sec. 3. Definition. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
January 20, 2021.

AN ACT

relating to requiring public school students to compete in interscholastic athletic competitions based on biological sex.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The legislature finds that:

(1) historically, boys participate in interscholastic athletics at a higher rate than girls, and a noticeable disparity continues between the athletic participation rates of students who are girls and students who are boys in University Interscholastic League member schools;

(2) courts have recognized a legitimate and important governmental interest in redressing past discrimination against girls in athletics on the basis of sex and promoting equality of athletic opportunity between the sexes under Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681 et seq.), a federal civil rights statute; and

(3) courts have recognized that classification by sex is the only feasible classification to promote the governmental interest of providing for interscholastic athletic opportunities for girls.

SECTION 2. The purpose of this Act is to further the governmental interest of ensuring that sufficient interscholastic athletic opportunities remain available for girls to remedy past discrimination on the basis of sex.

SECTION 3. Subchapter D, Chapter 33, Education Code, is amended by adding Section 33.0834 to read as follows:

Sec. 33.0834. INTERSCHOLASTIC ATHLETIC COMPETITION BASED ON BIOLOGICAL SEX. (a) Except as provided by Subsection (b), an interscholastic athletic team sponsored or authorized by a school district or open-enrollment charter school may not allow a student to compete in an interscholastic athletic competition sponsored or authorized by the district or school that is designated for the biological sex opposite to the student's biological sex as correctly stated on:

(1) the student's official birth certificate, as described by Subsection (c); or

(2) if the student's official birth certificate described by Subdivision (1) is unobtainable, another government record.

(b) An interscholastic athletic team described by Subsection (a) may allow a female student to compete in an interscholastic athletic competition that is designated for male students if a corresponding interscholastic athletic competition designated for female students is not offered or available.

(c) For purposes of this section, a statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex only if the statement was:

(1) entered at or near the time of the student's birth; or

(2) modified to correct any type of scrivener or clerical error in the student's biological sex.

(d) The University Interscholastic League shall adopt rules to implement this section, provided that the rules must be approved by the commissioner in accordance with Section 33.083(b). The rules must ensure compliance with state and federal law regarding the confidentiality of student medical information, including Chapter 181, Health and Safety Code, and the Health Insurance

Portability and Accountability Act of 1996 (42 U.S.C. Section 1320d et seq.).

SECTION 4. This Act applies to any interscholastic athletic competition sponsored or authorized by a school district or open-enrollment charter school that occurs on or after the effective date of this Act.

SECTION 5. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect on the 91st day after the last day of the legislative session.

_____ _____

President of the Senate Speaker of the House

I certify that H.B. No. 25 was passed by the House on October 14, 2021, by the following vote: Yeas 76, Nays 54, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 25 on October 17, 2021, by the following vote: Yeas 76, Nays 61, 1 present, not voting.

_____

Chief Clerk of the House

I certify that H.B. No. 25 was passed by the Senate, with amendments, on October 15, 2021, by the following vote: Yeas 19, Nays 12.

_____

Secretary of the Senate

APPROVED: _____

Date

_____

Governor