Buelow Vetter
Buikema Olson & Vliet, LLC
The Solution Starts Here.

TITLE IX TRAINING

CESA #7

October 7, 2022

Attorney Mary S. Gerbig
Attorney Aleah M. Loll
Attorney Jennifer L. Williams
Buelow Vetter Buikema Olson & Vliet, LLC
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Service centers in Sheboygan,
Appleton and Green Bay
Mgerbig@buelowvetter.com
920-362-5064
aloll@buelowvetter.com
262-409-7313
jwilliams@buelowvetter.com
414-477-0649

TRANSGENDER & GENDER NONCONFORMING STUDENTS

I. Terminology

A. **"Gender identity"** is the internal, deeply held sense or psychological knowledge of one's own gender. One's gender identity may be the same or different than the sex assigned at birth. Most people have a gender identity of male or female, but not everyone's gender identity will fit neatly in one of those two categories.

B. **"Gender expression"** describes the manner in which people manifest or express their gender to others through their name, pronoun, clothing, hairstyle, behavior, and other characteristics.

C. **"Gender nonconforming"** describes a person whose gender expression is different from conventional or stereotypical expectations of masculinity or femininity.

D. **"Transgender"** describes a person whose gender identity and/or gender expression differs from what is typically associated with the sex assigned at birth. Transgender identity is not dependent upon hormone therapy or other medical interventions or procedures.

E. **Other terminology: Non-binary, genderqueer, intersex, gender fluid.** See GLAAD's Media Reference Guide and Glossary of Terms: https://www.glaad.org/reference/lgbtq

II. Federal Law

A. Title IX of Education Amendments of 1972

1. Prohibits discrimination based on sex in any education program that receives federal financial assistance.

2. The Department of Education's Office for Civil Rights and the Department of Justice's Civil Rights Division share enforcement authority over Title IX.

3. Receiving Funding under the National School Lunch Program Triggers Title IX

Under 20 U.S.C. § 1681(a), Title IX prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance." A "program or activity" is broadly defined to encompass an entire institution, and not just the particular program or activity receiving federal support. See 20 U.S.C. § 1687; see also Dep't of Justice Manual (accessed at: http://www.justice.gov/crt/about/cor

/coord/ixlegal.php#C. Covered Education Program or Activity) ("[A] fact-specific inquiry is necessary to determine what constitutes a covered "education program or activity." In other words, Title IX's scope of coverage will depend upon which portions of a covered program or activity are educational in nature.).

4. In Russo v. Diocese of Greensburg, Civil Action No. 09-1169, 2010 WL 3656579 (W.D. Pa. September 15, 2010), the court found that receipt of a subsidy under the NLSP constituted "federal financial assistance" for purposes of Title IX. A Catholic high school and Diocese were sued by a former student under Title IX and the Rehabilitation Act for sexual harassment by a teacher. The plaintiff argued that the school was subject to non-discrimination laws as a result of its receipt of federal financial assistance, including a subsidy under the NSLP. The diocese and school moved for summary judgment and argued that they did not receive federal financial assistance, because another school in the diocese received only subsidies under the NSLP, but not the high school at issue in the case. The court rejected the defendants' arguments and found that receipt of NSLP funds by another school in the diocese triggered anti-discrimination requirements for the district and the high school. See also Valesky v. Aquinas Academy, Civil Action No. 09-800, 2011 WL 4102584 (W.D. Pa. September 14, 2011).

5. Religious Freedom May be Used to Waive Title IX Non-Discrimination Requirements

Religious organizations are exempt from the non-discrimination requirements of 20 U.S.C. § 1681(a) if its application "would not be consistent the religious tenants of such organization." § 1681(a)(3). A religious institution seeking an exemption from § 1681(a) is required to submit to the "Assistant Secretary [of Education] a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization." 34 C.F.R.§ 106.12(b).

III. State Law

A. Wis. Stat. § 118.13 - Pupil Discrimination Prohibited

"No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex . . . . sexual orientation . . . ." There are no court decisions on whether and how the statute applies to transgender status, gender identity, etc.

B. Wis. Admin. Code PI9

"'Discrimination' means any action, policy or practice, including bias, stereotyping and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles or rewards based, in whole or in part, on sex . . . . sexual orientation . . . ."

"'Pupil harassment' means behavior towards pupils based, in whole or in part, on sex . . . . sexual orientation . . . . which interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment."

"'Stereotyping' means attributing behaviors, abilities, interests, values and roles to a person or group of persons on the basis, in whole or in part, of their sex . . . . sexual orientation . . . ."

IV. Case Law

A. *Whitaker v. Kenosha Unified School District et al.,* Case 2:16-cv-00943-PP.

1. A transgender boy high school student and his parents filed a lawsuit against the Kenosha Unified School District, alleging that the school district's practice of not treating the student consistent with his gender identity, including the decision not to permit the student to access the boys' restrooms, violated Title IX. The student requested a preliminary and permanent injunction directing the district to permit the student to use the boys' restrooms at school and otherwise treat the student consistent with his gender identity. The school district filed a motion to dismiss, arguing that Title IX's protections did not apply to transgender students.

2. On September 19, 2016, Judge Pepper denied the school district's motion to dismiss. On September 20, 2016, Judge Pepper granted a preliminary injunction which will temporarily require the school district to permit the student to use the boys' restrooms at school. The district reportedly intends to appeal both decisions.

3. On May 30, 2017, a three-judge panel of the Seventh Circuit Court of Appeals unanimously affirmed the preliminary injunction.

4. The Court's decision hinged heavily on the harm that this particular student would likely suffer if he was denied access to the boys' restroom. The Court noted that the student had been diagnosed with Gender Dysphoria and had begun hormone replacement therapy as part of his transition. The Court found that the school district's bathroom policy negatively impacted the student's mental health and caused him significant psychological distress, including depression and thoughts of

suicide. In addition to the emotional harm identified by the Court, the Court found that the school district's bathroom policy exacerbated the student's medical condition, which rendered the student susceptible to fainting and/or seizures if dehydrated.

5. The Court found that the student demonstrated a likelihood of success on his Title IX claim, concluding that "the School District denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." The Court went on to conclude that providing a transgender student with an alternative single-user/gender neutral bathroom is not sufficient to relieve a school district from liability, due to the increased stigmatization.

6. The Court also concluded that the student was likely to succeed on his Equal Protection Clause claim, finding that the School District treated transgender students, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. The school district had the burden of demonstrating that its justification for its bathroom policy was not only genuine, but also "exceedingly persuasive." The Court found the school district had failed to provide evidence that the district, its students, or the public would be harmed as a result of allowing the student to use the boys' restroom. While the Court recognized that the school district had a legitimate interest in protecting the privacy rights of other students in the restrooms, the Court concluded that a transgender student's presence in the restroom provided no more risk to other students' privacy rights than any other student present in the restroom. In addition, the Court highlighted the fact that the before the school district implemented its bathroom policy, the student had used the boys' restroom for nearly six months without incident or complaint from another student.

B. ***Students and Parents for Privacy, et al. v. United States Department of Education, et al.***

1. A group of students and parents in Palatine, Illinois, filed a civil rights lawsuit against the Administration and the Township High School District, seeking to invalidate the Resolution Agreement reached between the district and OCR.

2. The Plaintiffs claim that the privacy rights of other students in the locker room are not protected by the agreed upon measures, and that the Agreement violates Title IX, the Administrative Procedure Act, the students' fundamental right to privacy, the Illinois and Federal Religious Freedom Restoration Acts, and the First Amendment Free Exercise of Religion Clause.

3. U.S. Magistrate Judge Gilbert's Report and Recommendation "[T]he Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that DOE's interpretation of Title IX is not in accordance with law or entitled to deference. The Court also finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that District 211 or the Federal Defendants are violating their right to privacy under the United States Constitution or that District 211 is violating Title UX because transgender students are permitted to use restrooms consistent with their gender identity… High school students do not have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs. In addition, sharing a restroom or locker room with a transgender student does not create a severe, pervasive, or objectively offensive hostile environment under Title IX given the privacy protections District 211 has put in place in those facilities and the alternative facilities available to students who do not want to share a restroom with a transgender student." (Emphasis added.)

4. On December 29, 2017, United States District Judge Alonso adopted the Magistrate Judge's Report and Recommendation, and overruled the Plaintiffs objections to the same.

5. On April 12th, 2019, the Plaintiffs voluntarily dismissed the case.

C. ***John and Jane Doe 1, et al. v. Madison Metropolitan School District*, Case No. 20-CV-454**

1. The Wisconsin Institute for Law & Liberty (WILL) filed a lawsuit in Dane County Circuit Court on behalf of Madison parents challenging the District's policies implemented to support transgender, Non-binary & gender-expansive students. The policies included the following provisions:

(a) Children of any age can transition to a different gender identity at school, by changing their name and pronouns, without parental notice or consent.

(b) District employees are prohibited from notifying parents, without the child's consent, that their child has or wants to change gender identity at school, or that their child may be dealing with gender dysphoria.

(c) District employees are even instructed to deceive parents by using the child's legal name and pronouns with family, while using the different name and pronouns adopted by the child in the school setting.

2. WILL argued that the District's policies violated parents' rights to make healthcare decisions and pursue treatment options for their children, violated the state requirement that parents must consent to medical treatment for their children, and interfered with parents' ability to provide proper support for their children.

3. On September 28, 2020, the Circuit Court issued an injunction against the District, enjoining it from applying or enforcing its policies "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school, including information about the name and pronouns being used to address their child at school. This injunction does not create an affirmative obligation to disclose information if that obligation does not already exist at law and shall not require or allow District staff to disclose any information that they are otherwise prohibited from disclosing to parents by any state or federal law or regulation."

4. The issue of whether the parents could proceed through the case anonymously was appealed to the Wisconsin Supreme Court. On July 8, 2022, the Wisconsin Supreme Court ruled on that issue, denying the plaintiffs' effort to proceed anonymously. The Wisconsin Supreme Court allowed the school district policy to remain in effect at this time (with the temporary injunction from the circuit court though), noting that the issue had not yet been decided on at the circuit court level.

5. *Pending litigation in Waukesha County for a similar issue in the Kettle Moraine School District.

D. ***Bostock v. Clayton County, GA*, 590 U. S. (2020).**

1. Majority Opinion:

"An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

"[H]omosexuality and transgender status are inextricably bound up with sex."

2. Justice Alito's Dissent:

"What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, infra; e.g., 20 U. S. C. §1681(a) (Title IX); 42 U. S. C. §3631 (Fair Housing Act); 15 U. S. C. 1691(a)(1) (Equal Credit Opportunity Act). The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." Ante, at 31. And it declines to say anything about other statutes whose terms mirror Title VII's."

***

"…transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time. Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance. In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination, and some lower court decisions have agreed. *See Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F. 3d 1034, 1049 (CA7 2017); *G. G. v. Gloucester Cty. School Bd.*, 822 F. 3d 709, 715 (CA4 2016), vacated and remanded, 580 U. S. (2017); *Adams v. School Bd. of St. Johns Cty*., 318 F. Supp. 3d 1293, 1325 (MD Fla. 2018); cf. *Doe v. Boyertown Area School Dist.*, 897 F. 3d 518, 533 (CA3 2018), cert. denied, 587 U. S. (2019).

E. *G.G. v. Gloucester County School Board* (4th Cir. 2020).

"After the Supreme Court's recent decision in Bostock v. Clayton County, 140 S. Ct. 1731 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on

the basis of sex." Although Bostock interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX. See Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007); cf. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citation omitted)). In Bostock, the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex." As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Bostock, 140 S. Ct. at 1741. That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions. See id. at 1741–42. As explained above in the equal protection discussion, the Board could not exclude Grimm from the boys bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys restrooms "on the basis of sex."

F. *Adams by and through Kasper v. School Board of St. Johns County,* 968 F. 3d 1286 (11th Cir. 2020).

"Mr. Adams also prevails on his Title IX claim. Title IX mandates that no person 'shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a).

There is only one dispute about Mr. Adams's Title IX claim: whether excluding Mr. Adams from the boys' bathroom amounts to sex discrimination in violation of the statute. We conclude that this policy of exclusion constitutes discrimination. First, Title IX protects students from discrimination based on their transgender status. And second, the School District treated Mr. Adams differently because he was transgender, and this different treatment caused him harm. Finally, nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy.

Our analysis of Mr. Adams's Title IX claim benefits from the Supreme Court's recent decision in *Bostock v. Clayton County*, 590 U.S. , 140 S. Ct. 1731 (2020). *Bostock* announced that Title VII's prohibition on sex discrimination also forbids discrimination based on transgender status. Id. at 1737. The Court instructed that 'it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.' *Id*. at 1741.

Bostock has great import for Mr. Adams's Title IX claim. Although Title VII and Title IX are separate substantive provisions of the Civil Rights Act of 1964, both titles prohibit discrimination against individuals on the basis of sex. 42 U.S.C. § 2000e-2(a)(1) (Title VII); 20 U.S.C. § 1681(a) (Title IX). Both titles also employ a 'but-for causation standard,' which *Bostock* found critical to its expansive interpretation of sex. discrimination. Given these similarities, it comes as no surprise that the Supreme Court has 'looked to its Title VII interpretations of discrimination in illuminating Title IX' and its antidiscrimination provisions.

The School Board argues that Title IX does not proscribe discrimination against transgender people, because the statute was only 'intended to address discrimination plaguing biological women.' Appellant's Br. at 39. However, Bostock teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the 'starkly broad terms' of the statute require nothing less. 140 S. Ct. at 1753. This reasoning applies with the same force to Title IX's equally broad prohibition on sex discrimination.

Still, the School Board argues that Title IX's ban on sex discrimination is somehow different from Title VII's because 'schools are a wildly different environment than the workplace" and education "is the province of local governmental officials.' Appellant's Br. at 43–44. We are not persuaded. Congress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces. And, as we have explained, the Supreme Court's interpretation of discrimination based on sex applies in both settings. With *Bostock's* guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."

V. Guidance from the U.S. Department of Education: From Obama, to Trump, to Biden

A. Obama Administration

1. *Dear Colleague Letter on Transgender Students*, U.S. Department of Justice & U.S. Department of Education (5/12/2016).

(a) "The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity. Because transgender students often are unable to obtain identification documents that reflect their gender identity (e.g., due to restrictions imposed by

state or local law in their place of birth or residence), requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity."

(b) "Restrooms and Locker Rooms. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy."

B. Trump Administration

1. *Dear Colleague Letter*, U.S. Department of Justice and U.S. Department of Education (2/22/2017).

(a) Withdraws and rescinds May 12, 2016, Dear Colleague Letter and other guidance issued by the Obama Administration that takes the position that Title IX's prohibitions on discrimination on the basis of sex requires access to sex-segregated facilities based on gender identity.

(b) "Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment."

2. Memorandum for Kimberly Richey Acting Assistant Secretary for the Office for Civil Rights Re: *Bostock v. Clayton Cty.* (January 8, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc- memorandum-01082021.pdf

Question 2: Does Bostock affect the meaning of "sex" as that term is used in Title IX?

Answer: No. Bostock does not affect the meaning of "sex" as that term is used in Title IX for at least two reasons. First, as we pointed out in response to Question 1, Bostock does not construe Title IX. However, it is worth noting the Court's assumption that the ordinary public meaning of the term "sex" in Title VII means biological distinctions between male and female. This is consistent with and further supports the Department's

long-standing construction of the term "sex" in Title IX to mean biological sex, male or female.

Second, statutory and regulatory text and structure, contemporaneous Supreme Court authorities, and the Department's historic practice demonstrate that the ordinary public meaning of the term "sex" at the time of Title IX's enactment could only have been, as Justice Gorsuch put it, "biological distinctions between male and female…."

C. Biden Administration

1. Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, January 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/

"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. . . .

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."

***

"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."

2. Memo from Principal Deputy Assistant Attorney General Pamela Karlan, Civil Rights Division Re: Application of Bostock to Title IX (March 26, 2021), available at: https://www.justice.gov/crt/page/file/1383026/download

(a) "After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX's prohibition on discrimination "on the basis of sex" is that it includes discrimination on the basis of gender identity and sexual orientation."

(b) "Before reaching this conclusion, the Division considered whether Title IX "contain[s] sufficient indications" that would merit a

contrary conclusion. The Division carefully considered, among other things, the dissenting opinions in 3 Gloucester and Adams, and the concerns raised in the dissents in Bostock. Like the majority opinions in those cases, however, the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from Bostock's textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly."

(c) "Whether allegations of sex discrimination, including allegations of sexual orientation or gender identity discrimination, constitute a violation of Title IX in any given case will necessarily turn on the specific facts, and therefore this statement does not prescribe any particular outcome with regard to enforcement."

3. On June 23, 2022, the Biden Administration Released Proposed Changes to the Title IX Regulations.

"The goal of the Department's proposed regulations is thus to fully effectuate Title IX by clarifying and specifying the scope and application of Title IX protections and recipients' obligation not to discriminate on the basis of sex. Specifically, this proposed regulatory action focuses on ensuring that recipients prevent and address sex discrimination, including but not limited to sex-based harassment, in their education programs or activities; clarifying the scope of Title IX's protection for students and others who are participating or attempting to participate in a recipient's education program or activity; defining important terms related to a recipient's obligations under Title IX; ensuring the provision of supportive measures, as appropriate to restore or preserve a complainant's or respondent's access to the recipient's education program or activity; clarifying a recipient's responsibilities toward students who are pregnant or experiencing pregnancy-related conditions; and clarifying that Title IX's prohibition on sex discrimination encompasses discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. In addressing confusion about coverage of sex-based harassment in the current regulations, the Department's proposed regulations also set out requirements that enable recipients to meet their obligations in settings that vary in size, student populations, and administrative structure." *Unofficial Version of Proposed Rule,* p. 12.

The proposed regulations would address discrimination based on sexual orientation, gender identity, and sex characteristics by:

(a) Prohibiting recipients from separating or treating any person differently based on sex in a manner that subjects that person to

more than minimal harm (unless otherwise permitted by Title IX). This includes policies and practices that prevent a student from participating in a recipient's education program or activity consistent with their gender identity. This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2)).

(b) The Department will engage in a separate rulemaking to address Title IX's application to the context of athletics and, in particular, what criteria recipients may be permitted to use to establish students' eligibility to participate on a particular male or female athletic team. (See discussion of § 106.41.).

"The Department does not intend that the specific categories of discrimination listed in proposed § 106.10 would be exhaustive, as evidenced by the use of the word "includes." Title IX's broad prohibition on discrimination "on the basis of sex" under a recipient's education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person's sex. The Department therefore proposes to clarify in this section that, consistent with Bostock and other Supreme Court precedent, Title IX bars all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Unofficial Version of Proposed Rule,* 522.

Gender Identity. "Proposed § 106.10 would also clarify that Title IX prohibits discrimination on the basis of an individual's gender identity. The Department has previously described its jurisdiction over gender identity discrimination in guidance documents and in filings in Federal court. See, e.g., 2016 Dear Colleague Letter on Title IX and Transgender Students; 2014 Q&A on Sexual Violence at 5; Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant, Grimm, 822 F.3d 709 (No. 15-2056), https://www.justice.gov/crt/file/788971/download; Statement of Interest of the United States, Tooley v. Van Buren Pub. Schs., No. 2:14-cv-13466-AC -RG (E.D. Mich. Feb. 24, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/02/27/tooleysoi.pdf. Federal courts had likewise recognized that Title IX covers gender identity discrimination. See, e.g., Grimm, 972 F.3d at 616-19; Whitaker, 858 F.3d at 1049-50. However, the Department subsequently rescinded the

2016 Dear Colleague Letter on Title IX and Transgender Students and declined to assert in the 2020 amendments that Title IX prohibits discrimination on the basis of a person's gender identity. See, e.g., 85 FR at 30177-79. Then, following the Supreme Court's decision in Bostock, the Department once again acknowledged that complaints of discrimination on the basis of transgender status "might fall within the scope of Title IX's non-discrimination mandate because they allege sex discrimination." Rubinstein Memo at 4 (citing Bostock, 140 S. Ct. at 1741, 1737). More recently OCR affirmed that discrimination on the basis of sex under Title IX should align with the Supreme Court's reasoning in Bostock. Thus, in its 2021 Bostock Notice of Interpretation, OCR made clear that, consistent with Bostock, it interprets Title IX's prohibition on sex discrimination to cover discrimination on the basis of gender identity. 86 FR at 32637 (citing Bostock's holding that when an employer discriminates against a person for being transgender, "the employer necessarily discriminates against that person for 'traits or actions it would not have questioned in members of a different sex"). The proposed regulations are consistent with OCR's 2021 Bostock Notice of Interpretation and the interpretation of Federal courts that have applied Bostock to Title IX." *Id*. at 525.

Sex stereotypes. Proposed § 106.10 would clarify that discrimination based on sex stereotypes, i.e., fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex, is prohibited under Title IX. The proposed regulations would codify the long-recognized principle that Title IX and other sex discrimination laws prohibit harassment and other forms of discrimination based on a person's conformity or nonconformity to stereotypical notions of masculinity and femininity. As the Supreme Court explained in Price Waterhouse v. Hopkins, the assumption that persons must act and dress in a particular way based on expectations related to a person's sex is a form of discrimination on the basis of sex. *Id*. at 526.

4. What's Next from the Biden Administration Regarding Transgender Students?

"Ensure young LGBTQ+ people are supported and protected in our schools and college campuses by:

Guaranteeing transgender students have access to facilities based on their gender identity. On his first day in office, Biden will reinstate the Obama-Biden guidance revoked by the Trump-Pence Administration, which will restore transgender students' access to sports, bathrooms, and locker rooms in accordance with their gender identity. He will direct his Department of Education to vigorously enforce and investigate violations of transgender students' civil rights." *The Biden Plan to Advance*

LGBTQ+ Equality in America and Around the Word, https://joebiden.com/lgbtq-policy/

VI. Parent Rights

A. *See* the *Madison Metropolitan School District* case on page 5, above.

B. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

1. "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, 'prepare [them] for additional obligations.'"

C. FERPA and Wisconsin Statute s. 118.125

1. Wisconsin Statute s. 118.125

(a) State law (Wis. Stat. s. 118.125) prohibits the disclosure of confidential pupil records, with limited exceptions, absent written consent of the student or in the case of a minor student, the parent/guardian of the minor student.

(b) A pupil, or the parent or guardian of a minor pupil, shall, upon request, be shown and provided with a copy of the pupil's progress records.

(c) An adult pupil or the parent or guardian of a minor pupil shall, upon request, be shown, in the presence of a person qualified to explain and interpret the records, the pupil's behavioral records. Such pupil or parent or guardian shall, upon request, be provided with a copy of the behavioral records.

2. Family Educational Rights and Privacy Act (FERPA)

(a) Under FERPA, school must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days following its receipt of a request. A school is required to provide a parent with copies of education records, or make other arrangements, if a failure to do so would effectively prevent the parent from obtaining access to the records.

(b) Under FERPA, a parent has the right to request that inaccurate or misleading information in his or her child's education records be amended. While a school is not required to amend education records in accordance with a parent's request, the school is required to consider the request. If the school decides not to amend a record in accordance with a parent's request, the school must inform the parent of his or her right to a hearing on the matter. If, as a result of the hearing, the school still decides not to amend the record, the parent has the right to insert a statement in the record setting forth his or her views. That statement must remain with the contested part of the student's record for as long as the record is maintained.

VII. Recommendations

A. Develop procedures or guidelines relating to transgender students which focus on process and do not guarantee a result for particular requests. Such procedures would ensure consistency among the schools. For example, the procedures would address issues such as which District representative students and parents should contact with concerns relating to the student's gender identity and expression at school, what information the District may ask for before making a decision, communication to and involvement of parents, student confidentiality, etc. The procedures would provide that the District would address student needs and concerns on a case-by-case basis, taking into account the privacy rights of all students.

B. We generally recommend that parents and adult students be permitted to determine the name and pronouns that will be used at school and school-sponsored activities. We also recommend considering, on a case-by-case basis, whether to allow minor students of a certain age to determine what name and pronouns will be used at school. Absent very unusual circumstances, we would still recommend soliciting and considering input from the parents, even if the parent input is not determinative. As the Madison Metropolitan School District injunction on pages 5-6 shows, communication with and involvement of the parents is key. If the student is not "out" at home, the District should consider ways to help facilitate a conversation between the student and parents. The District should not "out" the student to their family without the student's permission.

C. Documentation of a legal name change would not be required in order to initiate and honor a request to use a student's preferred name and pronouns at school, since we would assume the District does not require legal documentation from students who ask to be called by a nickname or middle name. Typically, school districts have found ways to note the student's preferred name in the student information system without changing the student's name for the purposes of official records. For example, there may be a nickname field. Certain student information systems have added a preferred name field to address this situation.

This allows the preferred name to appear on attendance rosters etc., but the legal name will still appear on the District's official records, transcripts, testing booklets, etc. We generally recommend that the District require documentation of a legal name change before changing the student's name on official records such as transcripts, testing booklets, or information reported to DPI, for example.

D. Investigate complaints from transgender students of bullying and harassment and take appropriate action, regardless of whether "gender identity" is expressly mentioned in the District's bullying or harassment policy.

E. Appropriately address personnel issues, such as school staff members refusing to follow District guidance or directives relating to transgender students. If an employee asks for an accommodation due to religious beliefs, engage in the interactive process under Title VII. The District does not have to provide the particular accommodation being requested if the District identifies other reasonable accommodations or determines the requested accommodation would create a "more than *de minimis*" undue hardship for the District. According to the DOL, an accommodation may cause an undue hardship if it infringes on the rights of others or decreases workplace efficiency. The Alliance Defending Freedom has represented teachers who filed lawsuits in other states when they were disciplined for refusing to use preferred names or pronouns of transgender students.

F. Although a student's transgender status alone would not be the basis for a referral, students with disabilities may not be denied FAPE or appropriate accommodations due to their transgender status. Child Find requirements apply to transgender students just as they would any other students. 504 Plans or IEPs may, as appropriate, reflect conditions that may be related to a student's transgender status (e.g., anxiety or depression). Gender Plans should not be developed in isolation from any 504 Plan or IEP.

G. For questions regarding participation in athletics, see the WIAA's Transgender Participation Policy, available at https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf.