Ratwik, Roszak & Maloney, P.A.

444 Cedar Street, Suite 2100
Saint Paul, Minnesota 55101

(612) 339-0060
www.ratwiklaw.com

ACCOMMODATING TRANSGENDER STUDENTS: LEGAL UPDATE AND BEST PRACTICES

Timothy A. Sullivan
tas@ratwiklaw.com

2025 MSBA Leadership Conference
January 17, 2025

I. INTRODUCTION

These materials focus on a school district's legal obligation to accommodate transgender and gender non-conforming students. This issue has received a substantial amount of attention in recent years, both at the state and national level. These materials are intended to help identify and respond to the most frequently arising issues involving the accommodation of gender non-conforming students with the understanding that this is an area of the law that is quickly evolving.

II. TERMINOLOGY

A. Gender Identity. "Gender identity" refers to how a person identifies and sees herself/himself/themself. One's gender identity can be the same or different than the gender assigned at birth. Most people have a gender identity that matches their assigned sex at birth, but some individuals have a gender identity that is different from their assigned gender. An individual may identify as a girl or a boy, as agender, genderqueer, nonbinary, or as a person. Gender Terminology: Discussion Guide, GAY, LESBIAN, AND

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2025 Ratwik, Roszak & Maloney, P.A.

STRAIGHT EDUCATION NETWORK (GLSEN), at 1, https://www.glsen.org/sites/default/files/Gender%20Terminology%20Guide.pdf.E: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

B. Gender Expression. "Gender expression" refers to the variety of ways we express our gender, which includes the way we talk, our mannerisms, how we interact with others, as well as our clothing, accessories, hairstyles, and activities. *Id*.

C. Transgender. "Transgender" is an adjective describing a person whose gender identity or expression is different from that traditionally associated with an assigned sex at birth. *Id.*

1. A transgender male is an individual born female, but who identifies as a male.

2. A transgender female is an individual born male, but who identities as a female.

A 2023 survey of U.S. High School Students conducted by the CDC found that 3.3% of high school students identify as transgender, with another 2.2% identified as questioning.

D. Gender Non-Conforming. "Gender Non-Conforming" describes people whose gender expression differs from social expectations, such as "feminine" boys, "masculine" girls, and whose who are perceived as androgynous. The phrase also includes people who identify outside traditional gender categories.

E. Cisgender. "Cisgender" is a term used for individuals whose gender identity corresponds with the sex assigned to them at birth. *Id.*

F. Gender Attribution. "Gender attribution" refers to how an individual's gender is perceived by others, which can vary depending on the people you are around, the country you are in, or over time. *Id*.

G. **Gender Dysphoria.** "Gender dysphoria" is the feeling of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics. Not every transgender or gender- diverse person experiences gender dysphoria. This term was adopted to replace the term "gender identity disorder," which is no longer used. *See* https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms- causes/syc-20475255.

III. A COUPLE WORDS ABOUT PRONOUNS

A. One area that has gotten a lot of attention in recent years is the use of pronouns. It is increasingly common to see people include their preferred pronouns in e- mail signatures or social media bios.

B. As we are aware, most cisgender people tend to use either he/him/his or she/her/hers, depending on their biological sex. Non-binary, gender non-conforming, genderfluid, and transgender individuals, however, may not identify with the pronouns that correspond to their assigned sex. These individuals may use the pronouns that correspond to their gender identity instead (e.g., a transgender girl or woman may use she/her/hers, even though she was assigned male at birth), or they may use a different set of pronouns altogether. An increasingly common alternative is for a person to indicate that their preferred pronouns are they/them/theirs. Additionally, in some cases, a person who uses they/them/theirs may still prefer that verbs be conjugated in the singular (e.g., "they says" or "they thinks"). Other less frequently used gender-neutral pronouns include ze/zir/zirs, xe/xem/xyr, etc. In some cases, a person may not have any pronouns at all.

C. Some people may prefer pronouns that are a combination of words from these sets, such as he/them/theirs. This is less common, but it is still important to not assume that everyone uses the full set of pronouns. Some people may prefer multiple pronouns—e.g., someone's preferred pronoun may be either she or they. In that case, either pronoun is acceptable.

D. **"It."** Using the pronoun "it" to refer to a person is dehumanizing and disrespectful. Unless someone has specifically told you that their preferred pronouns are it/its, avoid using this pronoun when referring to a person.

E. **Why This is Important.** Many people whose pronouns correspond to their biological sex and to how they present to the world do not tend to spend a lot of time thinking about their own pronouns. As a result, it may take some practice to get familiar with asking for pronouns, and with using pronouns

other than he/him/his or she/her/hers.
For some people who are transitioning, have transitioned, or are gender non-conforming, however, pronouns can be an extremely important part of their identity. Using the incorrect pronouns, particularly in reference to a person who is experiencing gender dysphoria, may have negative and potentially traumatic psychological consequences. As we will discuss, refusing to use a student's preferred pronouns, or failing to intervene if other students are intentionally using the wrong pronouns to harass a gender non-conforming or transgender student, could also lead to legal liability for the school district.

IV. HIGH-PROFILE CASES & FEDERAL GUIDANCE

A. *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. App. 2020).

Plaintiff N.H., a high school freshman ("N.H."), who was born female but identified as male and socially transitioned to male, joined the boys swim team and was initially permitted to use the boys' locker room. Toward the end of his freshman year, however, the school district told N.H. that he had to use the girls' locker room. That same day, the school district reversed its determination, allowing him to continue to use the boys' locker room. N.H. was admitted to the hospital for mental health concerns that he reported arose from the original determination that he must use the girls' locker room. In N.H.'s sophomore year, Anoka-Hennepin also told him that he had to use the enhanced-privacy changing area, and that he would be punished if he continued to use the main boys' locker room. Shortly after this decision, N.H. transferred out of the school district and filed a charge of discrimination with the Minnesota Department of Human Rights ("MDHR") in 2017. In 2019, N.H. withdrew the pending MDHR charge and filed a lawsuit against the school district in District Court. On April 15, 2019, the MDHR joined the lawsuit on N.H.'s behalf.

In his lawsuit, N.H. contended that requiring him to use a facility other than the main boys' locker room violated his rights under the Minnesota Human Rights Act ("MRHA"), cited above, and the Equal Protection Clause of the Minnesota Constitution. The school district moved to dismiss N.H.'s suit for failure to state a claim. The motion was denied by the District Court. The school district appealed to the Minnesota Court of Appeals.

On appeal, the Minnesota Court of Appeals concluded that N.H. had stated a viable claim under the MHRA, and that transgender students who were denied the use of the locker room that corresponds to their gender identity

could bring a lawsuit under the MHRA. The Court of Appeals specifically noted that Section 363A.23 did not create an exemption for locker rooms. The Court also held that a student could sue under the Equal Protection Clause of the Minnesota Constitution, and that the school's policy would have to satisfy intermediate scrutiny. This standard of review requires that any school policy prohibiting transgender students from using the locker room that corresponded to their gender identities would have to be "substantially related to an important governmental objective." Although not ruling on this point, the Court of Appeals opinion also suggests that, based on the majority of recent federal decisions, a policy requiring a transgender student to use a separate locker room would not meet this standard.

Ultimately, no decision was reached as to whether the school district's policy with respect to transgender students was or was not discriminatory. Although ruling that the facts raised a viable claim under the law, the Court of Appeals sent the case back to the trial court for further proceedings. Pending continuing litigation, on March 23, 2021, the school district settled the lawsuit with the student for $300,000.

B. *Bostock v. Clayton Cty.*, 590 U.S. 644 (2020).

Bostock is a consolidated appeal of three employment-discrimination cases, involving employees who were terminated because of their sexual orientation or gender identity. In each of these cases, the employer admitted that the employee's sexual orientation or intent to transition to present as a transgender woman was the reason for the termination.

The U.S. Supreme Court granted certiorari, consolidated the cases, and addressed the question of whether Title VII's prohibition against employment discrimination "because of sex" encompasses discrimination based on an individual's sexual orientation, and whether Title VII prohibits discrimination against transgender employees based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

In a 6-3 opinion authored by Justice Neil Gorsuch, the Supreme Court began from the parties' assumption that "sex," as used in Title VII, refers to biological male or femaleness. The Court noted, however, that Title VII prohibits discrimination "because of sex," but not "solely because of sex." Rather, the Court held, "[s]o long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger [Title VII]." Accordingly, the Court held that it does not matter if factors besides the

plaintiff's sex were part of the termination decision. Rather, if changing the employee's sex would have produced a different result, the employer has committed sex discrimination.

As an example, the Court proposed the hypothetical of two employees, both of whom are attracted to men, and both of whom are identical in all respects, except that one employee is a woman and the other is man. If the employer fires the male employee solely for being attracted to men, then that employee has been treated worse than a female employee who is attracted to men, and so the decision is based on sex, and is discrimination.

As another example, the Court imagined a hypothetical employer who fired every female employee who was a fan of the New York Yankees. If that employer did not fire male employees for being fans of the New York Yankees, the fact that the termination was based on sports team preference does not change the fact that the termination is also discrimination based on sex—the employer is tolerating a trait in one sex, but not the other.

The Court further noted that sexual orientation and gender identity are "inextricably bound up with sex," and wrote that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms— and that 'should be the end of the analysis.'"

C. *B.P.J. by Jackson v. West Virginia State Board of Education*, 98 F.4th 542 (4th Cir. 2024).

At issue in this case is whether a West Virginia law called "Save Women's Sports Act," which states that athletic teams or sports designated for women cannot be open to male students, and defines maleness based on biological sex, should be applied to prevent the plaintiff, a transgender girl, from her school's cross country and track teams. The plaintiff takes puberty blockers and estrogen hormone therapy and has publicly identified as a girl since the third grade. The plaintiff brought an Equal Protection and a Title IX claim. On the Equal Protection claim, the Fourth Circuit Court of Appeals concluded there was a genuine dispute of material fact about whether individuals who are assigned male at birth but do not undergo puberty have a meaningful competitive athletic advantage over cisgender girls. The Fourth Circuit vacated the District Court's summary judgment for the defendants and remanded for further proceedings. On the Title IX

claim, the Fourth Circuit found that applying the Act to the plaintiff would violate Title IX. The Fourth Circuit reversed the District Court's summary judgment for the defendants and remanded with instructions for an entry of summary judgment for the plaintiff, holding that the challenged statute operates on the basis of sex and gender identity, and discriminates based on sex assigned at birth by prohibiting transgender girls, but not transgender boys, from participating in teams consistent with their gender identity. In November 2024, the U.S. Supreme Court denied petition for writ of certiorari.

D. *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024).

Two transgender women brought Title IX and Equal Protection challenges against Idaho's Fairness in Women's Sports Act, which banned transgender women and girls' participation in any public-school-funded women's sports and provided a sex dispute verification process allowing any individual to dispute the sex of any student athlete in the state and require her to undergo intrusive medical procedures to verify her sex. Male student athletes are not subject to a similar dispute process. The District Court found the Act discriminated against transgender women by excluding them from women's sports, and on the basis of sex by only subjecting female athletes to the invasive sex verification process. The Ninth Circuit Court of Appeals affirmed the District Court's grant of preliminary injunction to plaintiff Hecox and remanded for reconsideration of the appropriate scope of the injunction—whether the enforcement of the Act is enjoined in whole or in part, facially or as applied to particular persons. In July 2024, a petition for certiorari to the US Supreme Court was docketed.

V. LAWS APPLICABLE TO MINNESOTA SCHOOLS

A. The Minnesota Human Rights Act ("MHRA")

The MHRA expressly protects gender identity, which is defined as: "[A] person's inherent sense of being a man, woman, both, or neither. A person's gender identity may or may not correspond to their assigned sex at birth or to their primary or secondary sex characteristics. A person's gender identity is not necessarily visible to others." Minn. Stat. § 363A.03, subd. 50.

The MHRA prohibits discrimination on the basis of gender identity in a number of contexts, including: 1) public accommodations, 2) public services, 3) educational, and 4) employment. Minn. Stat. § 363A.02, subd.

1.

B. The Safe and Supportive Minnesota Schools Act

In 2014, the Minnesota Legislature also passed the Safe and Supportive Minnesota Schools Act, commonly referred to as the anti-bullying law. The definition of "bullying" under the statute expressly includes conduct that is directed at a student or students "based on a person's actual or perceived . . . sexual orientation, including gender identity and expression. . ." Minn. Stat. § 121A.031, sub d. 2(g). This means that any bullying towards a transgender student on the basis of their transgender status implicates the anti-bullying law and triggers the investigation and response obligations imposed by the statute.

C. The Expanding Scope of Federal Statutes Prohibiting Sex Discrimination

While no federal law expressly protects transgender employees or students *per se*, the current trend is that courts and administrative agencies are expanding the definition of "sex" under federal antidiscrimination statutes to prohibit discrimination based on gender identity. These statutes include Title VII and Title IX.

1. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

   A female senior manager was denied partnership at an accounting firm due to her "macho behavior." Her boss told her she would have a better chance at being promoted next year if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Supreme Court held that sex discrimination under Title VII included disparate treatment for failure to conform to sex-based stereotypes. Put another way, the Supreme Court has decided that the term "sex" includes more than just physical biological characteristics.

2. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000).

   Student alleged he had suffered discrimination in violation of Title IX due to harassment on the basis of sex due to his perceived sexual orientation. Citing *Price Waterhouse*, the U.S. District Court for the District of Minnesota held that Title VII prohibits discrimination based upon perceived failure to conform to sex-based stereotypes.

3. *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002).

   A female employee brought a Title VII sexual harassment claim after her employer (a public-school district) permitted a transgender female employee to use the women's restroom. The Eighth Circuit held that the school district's decision did not create a hostile work environment.

VI. COMMON ACCOMMODATION ISSUES

A. The Use of a Chosen Name or Pronoun

School districts should use and reinforce the use of the name and pronouns appropriate to the student or employee's identified gender.

Continued misuse, particularly if it is intentional, may lead to data privacy issues or a claim of disparate treatment or hostile environment discrimination.

Make efforts to maintain the confidentiality of the student's transgender status. For students undergoing a transition while attending the school, work to develop a plan for initiating use of the preferred name and pronouns consistent with the student's gender identity.

B. School Records

1. Day-to-day Documents and Assignments

   Similar to the use of a chosen name or pronoun, a school district should use and reinforce the use of a student's preferred name. This is consistent with the Dear Colleague Letter.

2. Official Records

   A school district is obligated under the MGDPA to ensure that it has established procedures to assure that all data on individuals is accurate, complete, and current for the purposes for which it was collected. This means that a school district's official records should reflect the student's legal name and sex (as they appear on a birth record or other official document).

3. FERPA

A student's gender is not considered public or directory information under FERPA. Use of a student's incorrect pronoun or incorrect name may violate FERPA.

C. Restrooms/Locker Rooms

1. Regulations promulgated under Title IX expressly provide that a recipient of federal funds "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex class shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

2. In the past, schools relied on *Goins v. West Corp.*, 635 N.W.2d 717 (Minn. 2001), for the proposition that students can be required to use the bathroom that corresponds to the sex they were assigned at birth. In *Goins*, an employer prohibited a transgender female employee from using the women's restroom. The Minnesota Supreme Court rejected the employee's sexual orientation discrimination claim, holding that the "MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender."

   Anoka-Hennepin sought to rely on *Goins* in the *N.H.* case. The Minnesota Court of Appeals, however, adopted the MDHR's position that *Goins* applies in the context of employment discrimination, not discrimination in the context of education. In particular, the Court of Appeals noted that education differs from employment because education is compulsory, and a right afforded by the Minnesota Constitution. Both of these arguments were advanced by the Minnesota Department of Human Rights as well, and are indicative of how that agency views these types of claims.

   For now, *Goins* is still the law when it comes to the workplace. *Bostock* expressly declined to address the issues of bathrooms and locker rooms. However, when it comes to students in a school setting, *N.H.* stands for the proposition that *Goins* is not applicable outside of the employment setting.

3. Providing a single-use or staff bathroom for a transgender student to use may not insulate the school district from liability. As the *N.H.* case shows, requiring transgender students to use single-occupancy

spaces, rather than multi-occupancy spaces, still constitutes differential treatment on the basis of gender identity.

D. Questions from Other Students or Parents

1. Data Practices Concerns

What information is public? "Directory data" does not include gender. A legitimate education need is required to access private education data under FERPA.

2. Parent's Wishes/Waivers

One of the common allegations that circulates periodically on social media is a claim that schools are concealing students' transgender status from their parents. To be clear, parents have the right to obtain information on their own children, including an honest answer to an inquiry about their own child's gender identity and expression at school, absent extreme circumstances. However, schools do not have an affirmative duty under FERPA or the MGDPA to proactively notify parents that their student identifies as transgender or gender-non- confirming.

3. Facial Challenges to Transgender Accommodation Policies.

In a recent Iowa case, a group of parents challenged a school district's policy for accommodating transgender students, alleging that it violated their right to child-rearing and their children's free speech rights. *Parents Defending Education v. Linn-Mar Cmty. Sch. Dist.*, 83 F.4th 658 (8th Cir. 2023). The child-rearing claim was based on the prospect that a gender support plan might be created without parental consent, and the free speech claim was based on the prospect that their children might be punished for not respecting another student's preferred name or pronouns. The lower court, U.S. District Court for the Northern District of Iowa, found that the parents were not entitled to an injunction, because they had not shown that they faced imminent, irreparable harm. No discipline had been imposed on their children pursuant to the school district's policy, and none of their children had gender support plans created under the policy. As the injuries were purely hypothetical, the parents lacked standing to challenge the policy. Further, because the injuries were purely hypothetical, the Court found that the parents were not likely to succeed on the merits of their claims. The parents

appealed. The Eighth Circuit Court of Appeals dismissed the violation of child-rearing claim as moot as the Iowa legislature passed a new law, Iowa Code § 279.78 (2023), prohibiting school districts from knowingly giving false information to a parent about a student's gender identity, and requiring school districts to notify the parent when the student requests a gender accommodation to affirm the student's gender identity. *Id.* at 665. The Eighth Circuit also reversed on the free speech claim, finding the parents were likely to succeed on the claim that the requirement to respect a student's gender identity was void for vagueness because the policy failed to define the term "respect", which also made it susceptible to arbitrary enforcement. *Id*. at 669. Finally, the Eighth Circuit remanded the case with directions to grant a preliminary injunction against this portion of the policy.

In *Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist.*, 95 F.4th 501 (7th Cir. 2024), a group of parents brought a case against the Eau Claire Area School District in Wisconsin alleging the School District's gender support policy violated the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment by interfering with parents' right to make decisions with and on behalf of their children. The District Court dismissed the case for lack of subject matter jurisdiction, explaining the parents brought a pre-enforcement facial attack on the policy without identifying a single instance of the School District applying the policy in a way that concerned or was detrimental to parental rights. *Id*. at 503. The Seventh Circuit Court of Appeals affirmed, stating the parents' "worry and concern do not suffice to show that any parent has experienced actual injury or faces imminent harm attributable" to the policy. *Id*. at 506.

In *T.F., et al., v. Kettle Moraine Sch. Dist*., 2021CV1650, 1 (Wis. Cir. Ct. 2023), two parents brought a challenge against the School District's gender support policy to allow, facilitate, and affirm minors' request to use a different gender identity at school without parental consent or even over parental objection. The Court found the School District violated the parental right to control healthcare and medical decisions by affirming the child's gender identity despite the parents' request to not do so. The Court enjoined the School District from allowing or requiring staff to refer to students using a name or pronoun that does not match their biological sex without express parental consent.

E. Athletic and Extracurricular Activities

1. In December of 2014, the Minnesota State High School League adopted a policy addressing eligibility determinations for transgender student athletes. Student-athletes are permitted to participate in sports "consistent with their gender identity or expression," and schools determine eligibility based upon the student's "consistent gender identity" or "the gender identity [that] is sincerely held as part of the student's core identity and is different from the student's sex assigned at birth." *2024-2025 MHSL Official Handbook*, Minnesota State High School League (MSHSL), at 61, https://www.mshsl.org/sites/default/files/2024-07/mshsl-handbook-300-series.pdf.

2. *Soule by Stanescu v. Conn. Ass'n of Schools, Inc.*, 57 F.4th 43 (2d Cir. 2022). In a recent opinion, the Second Circuit Court of Appeals affirmed the dismissal of a lawsuit brought by a group of cisgender high-school student-athletes alleging that allowing transgender girls to compete against them in track violated their rights under Title IX. The cisgender students sought an injunction to amend race records, alleging that their college admissions and scholarships and future employment were negatively impacted by the policy of allowing transgender girls to compete with cisgender girls. The Second Circuit found that the cisgender athletes were not deprived of their "chance to be champions," as alleged, because they were not prohibited from competing, and their alleged future injuries were purely speculative. Further, the Court found that Title IX does not prohibit treating transgender students consistent with their gender identity, and that the athletic conference's policy of basing eligibility on gender identity to prevent discrimination against transgender students was consistent with Title IX's anti-discrimination goals.

F. Protecting the Student's Safety

VII. DISPUTES WITHIN THE FAMILY

A. When Parents and Students Disagree

1. Families of transgender students play an important role in their child's well-being and success at school. Not all families will understand or support their child's gender identity. There may also be suspicions about whether the child's gender identify is firmly held.

2. The school district, parents, and students are all interested parties with specific roles and interests. The parents have clearly established parental rights. The school is responsible for providing a safe and supportive learning environment. The student is the member of the protected class. When parents and students disagree, the school is put in a situation of balancing the competing interests. Do you go against the student's or parent's wishes?

3. Guiding Principles:

    a. Case-by-case basis.

    b. Work toward a mutually agreeable outcome.

    c. Collaborate. Work with the parents and student to understand the needs of the student and pinpoint the areas of concern.

    d. Communicate. Respond to the concerns of the student and parents. Keep the lines of communication open.

    e. Share resources. Offer parents educational information and professional resources to help families meet the needs of their transgender child. Mental health professionals in the school may also be able to provide additional information and resources.

    f. Document. Documenting the school's efforts may prove useful should further dispute and litigation ensue. Reduce all conversations into writing and follow up any conversations in writing.

4. Example: Sarah, a high school student that was born female but identifies as male, wants to be called Seth along with the gender-neutral pronouns. The parents do not agree and want the student to be called by their given, legal name. How should the district respond?

5. Example: Sarah also wants the school to change her official record. How should the district respond?

B. When Parents Disagree about a Student

1. While not often discussed in the school setting, parental disagreement over a transgender child is an issue that has regularly come up in child custody cases.

   The "best interest factors" govern virtually all custody and parenting time decisions and the court is called to consider these factors to determine whether a requested outcome is in the child's best interest. Where parents are separated and do not agree about the best way to handle their child's upbringing, often the parties will involve the court. The same is true when the parents disagree on how to handle their child's gender identification.

2. Texas Case – In *Interest of Ja.D.Y.*

This case involved a custody dispute following a divorce in 2016. The mother contends the child is a transgender girl while the father maintains the child is male. The child is 7 years old. The mother brought an action seeking to modify the custody agreement to affirm the child's gender identify and require the father to embrace the child's gender expressions. The father denied that the child identified as female. In October of 2019, the judge ruled that the father and mother would maintain joint custody of their children. The court's ruling to maintain joint custody came just days after a jury had recommended giving the mother sole custody of the child.

As part of the order, the judge prohibited both parents from commenting publicly on the case until the child turns 18. The father had been very vocal in the media. The judge's ruling said both parents must agree on topics like medication, surgical, and psychological treatment. A parenting coordinator was also appointed to the family.

While we often look to courts to provide us with finality and guidance, this case shows the limitation of the court. The court's call to the parents to get along does nothing to help the school address the issue.

3. Ohio Case – *Smith v. Smith*, 2007-Ohio-1394, 2007 WL 901599 (Ohio Ct. App. 7th Dist. Jefferson County 2007) (unpublished).

The parties divorced and the mother was designated as the residential parent of the children with visitation rights to the father.

Several years after the divorce, the mother enrolled the child in school as a girl, which caused the father to bring an emergency motion in response. The court modified the custody arrangement initially so that both parents were designated as residential parents. The court also ordered that the child would not be encouraged or permitted to wear girl's clothes and was not permitted to go by a girl's name or be referred to as "she" or "her." The parents were also ordered to obtain psychological evaluations.

Following a subsequent hearing with competing experts, the court issued the order transferring custody to the father. The trial court held that the mother's conclusion that the child was transgender may have been premature. The court also found that the mother had shown a tendency to disregard court orders regarding the child's care. For instance, it was determined that the mother allowed the child to wear a bikini in violation of the court order and referred to the child as "Christmas" in violation of the order. The mother also frequently used the female pronouns in court, which she would correct after the fact. The concern was that the mother was pressuring her child into a certain gender identity.

The Ohio Court of Appeals affirmed that decision, noting: "Although this case reveals some of the severe limitations in using the judicial system to resolve complex and possible controversial childrearing and childhood mental health issues, we are bound by the law in this matter. Further, there is nothing to prevent the mother from filing her own request for change of custody should the circumstances change; for instance, on the onset of puberty … or a more clear and concise medical diagnosis."

4. New York Case – *In Matter of Laura E. v John D.*, 216 A.D.3d 1274, 2023 WL 3355656 (N.Y.A.D. 3rd Dept. 2023).

Petitioner (the mother) and Respondent (the father) shared legal and physical custody of their minor child. The mother later filed a petition for sole legal and physical custody of the child. The Family

Court granted sole legal and primary physical custody to the mother. The Family Court gave the father parenting time if the parties mutually agreed, with the mother having discretion over whether the parenting time should be supervised. The child's gender identity and their chosen name and preferred pronouns (male and they/them pronouns) were a major point of contention between the parents, as the father said using the child's chosen name or preferred pronouns was contrary to his Catholic faith. The father initially agreed to attend family counseling regarding this but stopped attending after storming out of the third session over an argument with the counselor using the child's preferred pronouns. The record evidence also showed the father took a rigid approach to parenting and repeatedly asserted the child must obey, had a stance of non-compromise, and hyper-focused on perceived slights instead of trying to co-parent for the child's well-being. The Appellate Court affirmed the grant of sole legal custody to the mother, but said the Family Court improperly delegated its authority to the mother regarding parenting time. The Appellate Court sent the case back to the Family Court to determine whether the father should have parenting time with the child or whether this would be detrimental to the child's welfare.

5. The same guiding principles detailed above apply.

Further, schools should be aware of guidance from outside authorities such as courts, custody evaluators or parenting consultants, and therapists.

6. If conflict continues, seek legal assistance and input.

There is not yet case law providing definitive guidance as to a school's obligations when parents disagree about their transgender student.

However, when challenged, recent cases have emphasized the harm transgender students face at school due to school policies. This is in part because the transgender student is the one that is a member of the protected class.

For instance, in both *N.H. and Lucero v. Anoka-Hennepin School District No. 11*, and *Grimm v. Gloucester Cnty. Sch. Bd.*, No. 15-54 (E.D. Va. Aug. 9, 2019), the courts emphasized the harm suffered by the students under the district policy. Medical authorities cited in

those decisions provide that excluding transgender students from sex-separate bathrooms and changing rooms that are consistent with their gender identity harms their health and may cause acute psychological damage. Courts have stated that it is widely accepted in the medical community that the treatment for gender dysphoria is for transgender people to socially transition and live their lives in a way that is consistent with the gender identity. As stated in *N.H. v. Anoka-Hennepin*:

> The segregation of transgender youth from these [bathroom and locker room] facilities increases their risk of depression, anxiety, and feelings of isolation associated with gender dysphoria. Research has found that transgender youth are at high risk of suicidal ideation and actions. Research also suggests that the risk of suicidal ideation and action is reversed if transgender youth can socially transition and live their lives in a manner that is consistent with their gender identity.

VIII. DISPUTES WITHIN THE SCHOOL

What if a teacher refuses to use the preferred name and pronoun of the transgender student?

A. *Vlaming v. West Point Sch. Bd.*, 302 Va. 504 (Va. 2023).

Lawsuit filed against the West Point School Board by Alliance Defending Freedom on behalf of Peter Vlaming, a former French teacher at the school. Vlaming was suspended and subsequently terminated after refusing to refer to a transgender male student by male pronouns. The suit alleged school district officials violated Vlaming's right to speak freely and exercise his religion. The Circuit Court dismissed the Complaint, and the Fourth Circuit Court of Appeals affirmed, holding that the teacher failed to assert any recognized federal cause of action. The teacher appealed to the Virginia Supreme Court, which disagreed with the Circuit Court, so it reversed and remanded for further proceedings. The Virginia Supereme Court found the teacher alleged legally viable free speech and exercise claims and had a property interest in his job and a corresponding right to not be terminated without just case.

B. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 2023 WL 4842324 (7th Cir., July 28, 2023)

John Kluge, a former orchestra teacher at Brownsburg High School, alleged he was forced to resign after he refused to comply with the school policy of addressing transgender students by their preferred names. Kluge argued that the policy goes against his religious beliefs and violates the First Amendment. After the policy was put into effect, Kluge claimed he reached a compromise with the school district where he was permitted, as an accommodation, to refer to all students using their last name. When students complained about the use of last names, the school district rescinded the accommodation.

The U.S. District Court for the Southern District of Indiana found that there was an objective conflict between Kluge's beliefs and the school district's policies, and that Kluge had stated a prima facie case of religious discrimination based on failure to accommodate. However, the Court also found that Kluge's proposed accommodation of using only the last names of students was not a reasonable accommodation, because it imposed an undue hardship on the school district. Specifically, the Court found, and Kluge admitted, that refusing to affirm transgender students in their identity could cause emotional harm to those students. The Court concluded that this emotional harm was an undue hardship for the school district because it would impact the district's ability to meet the needs of all its students. Further, the Court concluded that the last-name accommodation was unreasonable because it put the school district in danger of liability under Title IX. Accordingly, the Court concluded that "a name carries with it enough importance to overcome a public school corporation's duty to accommodate a teacher's sincerely held religious beliefs against a policy that requires staff to use transgender students' preferred names when supported by a parent and health care provider," and granted the School District's motion for summary judgment.

Most recently, Seventh Circuit Court remanded the case to the District Court for consideration of the U.S. Supreme Court's decision in *Gross v. DeJoy*, 143 S. Ct. 2279 (2023), which clarified the undue hardship standard applicable to Title VII cases for religious accommodation as follows: it would be an undue hardship if granting the accommodation would result in "'substantial increased costs in relation to the conduct of its particular business.'" *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F.Supp.3d 943, 957 (S.D.Ind., 2024). In April 2024, the District Court denied the teacher's motion for summary judgment on the failure to accommodate claim because reasonable juries could disagree on whether

his religious beliefs were sincere. The District Court granted the School District's cross-motion for summary judgment, finding that the Last Names Only Accommodation was an undue burden as it resulted in substantial harm and an unreasonable risk of liability.

The case remains active as an appeal was filed with the Seventh Circuit Court in May 2024.

C. ***Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021)**.

Nicholas Meriwether, a philosophy professor at a public university in Ohio, had a practice of referring to his students as "Mr." and "Ms.," or as "sir" or "ma'am" in conversation. At the beginning of the 2016-2017 school year, the university allegedly reminded faculty members that they were required to refer to students by their preferred pronouns, regardless of the professor's views on the subject, and regardless of any religious objections.

In 2018, Meriwether referred to a student who he perceived to be male on the first day of class as "sir." The student approached Meriwether after class and demanded to be treated as a woman, and referred to as "Ms." or "ma'am" in class. Meriwether expressed concern that his religious beliefs, which included prohibiting him from communicating messages about gender identity that he believed to be false, might prevent him from accommodating the student. The student complained, and, despite various proposals or efforts from Meriwether, including referring to the student by last name only, adding language to his syllabus that indicated he was using preferred pronouns because of university policy and in contradiction to his own beliefs, the college ultimately reprimanded him for not using the student's preferred pronouns. Meriwether sued, and the Sixth Circuit concluded that Meriwether's description of events stated a claim for First Amendment retaliation and failure to accommodate his religious beliefs.

D. Notwithstanding the foregoing, failure to address the issue of staff refusing to respect the wishes of a transgender student exposes the school to a possible discrimination claim from the student.

Do teachers have a responsibility to ensure that students use their classmates' preferred pronouns?

At the state level the Safe and Supportive Schools Act and the Minnesota Human Rights Act remain in effect, and teachers and other school personnel have responsibilities to prevent students from harassing their classmates based on their gender identity. In addition to respecting the student's preferred pronouns

themselves, therefore, staff should also ensure that students whose preferred pronouns do not correspond to their assigned sex are not harassed for this by their peers. Failure to do so could lead to a claim that the district was deliberately indifferent to harassment or allowed a hostile educational environment to continue.