

11-14-2022

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Conflicting Interests in Name and Pronoun Policies in K-12 School

Manni Jandernoa\*

The year of 2022 has brought a record amount of anti-transgender legislation proposed in states throughout the country, many targeting transgender youth.<sup>1</sup> These proposed changes can make transgender students “nervous” to go to school.<sup>2</sup> Anti-transgender legislation in general has caused transgender and nonbinary youth to worry about access to gender affirming medical care, bathrooms, and school sports.<sup>3</sup> There are more than 300,000 transgender youth throughout the country, and youth make up 18 percent of the transgender population.<sup>4</sup> Unlike the anti-transgender legislation, a 2022 proposed update to Title IX seeks to expand federal protections against discrimination based on gender identity or sexual orientation for students, further enshrining the 2021 clarification that *Bostock v. Clayton County* applies to Title IX.<sup>5</sup> School teachers and administrators are left navigating the disconnect between prioritizing student well-being, parental demands, teachers’ rights, and complying with state and federal regulations.

In 2020, the Supreme Court in *Bostock* held that discrimination “because of sex” under Title VII necessarily includes discrimination based on sexual orientation and gender identity.<sup>6</sup> Since then, courts have generally applied this holding to Title IX claims and the Education Department under the

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<sup>1</sup> Ann Branigin & N. Kirkpatrick, *Anti-Trans Laws are on the Rise. Here’s a Look at Where – and What Kind*, WASH. POST (Oct. 14, 2022 at 8:00AM).

<https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/>.

<sup>2</sup> Michaela Winberg, *Trans Students Say they are Nervous to go to School under Anti-trans Legislation*, NPR (Sept. 8, 2022 at 5:13PM) <https://www.npr.org/2022/09/08/1121869386/trans-students-say-they-are-nervous-to-go-to-school-under-anti-trans-legislation>.

<sup>3</sup> A 2022 survey found that 93 percent of transgender and nonbinary youth in 2022 worried about medical care, 91 percent about access to bathrooms, and 83 percent about school sports. THE TREVOR PROJECT, 2022 National Survey on LGBTQ Youth Mental Health 14 (2022), [https://www.thetrevorproject.org/survey-2022/assets/static/trevor01\\_2022survey\\_final.pdf](https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf).

<sup>4</sup> Jody L. Herman, Andrew R. Flores, and Kathryin K. O’Neill, *How Many Adults and Youth Identify as Transgender in the United States*, THE WILLIAMS INSTITUTE UCLA L. 1 (June 2022) <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>.

<sup>5</sup> Proposed Title IX changes 34 CFR part 106 (2022); Notice of Interpretation, Fed. Reg. 34 CFR Ch. 1 (2021).

<sup>6</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746-47 (2020).

Biden administration has given a notice of interpretation of the same.<sup>7</sup> Before and after *Bostock*, lawsuits across the country have typically held that preventing transgender students from using restrooms conforming to their gender identity is a violation of state law, and/or the Equal Protection Clause and/or Title IX.<sup>8</sup> Further, lawsuits filed by cisgendered students or their parents have failed to successfully prevent policies that allow trans students to use the preferred bathroom.<sup>9</sup>

School pronoun policies have the potential to include even more conflicting individual interests – that of the transgender student, their parent, and their teacher. If students are treated differently based on their transgender status with respect to use of preferred name and pronoun, the school could be liable to a discrimination claim under Title IX and state laws similar to claims regarding access to bathrooms. Further, a recent 4<sup>th</sup> Circuit decision in *Williams v. Kincaid* found that diagnosed gender dysphoria is not categorically excluded from coverage under the ADA.<sup>10</sup> This case raises the possibility that students diagnosed with gender dysphoria may also be able request accommodations under the ADA, theoretically including usage of that students' preferred name and pronouns. In addition to protection against legal liability, schools have interests in affirming transgender students' identities for their safety. Studies show that "affirming the identities of transgender children can substantially reduce" the increased risk of mental illness, substance abuse, and suicide.<sup>11</sup>

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<sup>7</sup> Notice of Interpretation, Fed. Reg. 34 CFR Ch. 1 (2021).

<sup>8</sup> See, e.g., *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014) (holding denial was a violation of MHRA); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (denying stay of preliminary injunction allowing student to use bathroom aligning with gender, otherwise a violation of Title IX); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1041-42 (S.D. Ind. 2018) (granting preliminary injunction allowing student to use bathroom aligning with gender, otherwise a likely violation of Title XI and Equal Protection); *Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399, 403 (2020) (holding denial was a violation of Title IX and Equal Protection).

<sup>9</sup> See *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018), cert denied, 139 S. Ct. 2636 (Mem) (2019) (holding that a policy permitting transgender students to use the bathroom aligning with their gender was not a violation of four cisgender students' bodily privacy and Title IX); *Parents for Privacy v. Dallas Sch. Dist. No.*, 949 F.3d 1210, 1240 (9th Cir. 2020), cert. denied, 141 S. Ct. 894 (2020) (holding that policy allowing transgender students to use bathrooms aligning with gender did not violate cisgender students' constitutional right to privacy).

<sup>10</sup> *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022).

<sup>11</sup> Patrick D. Murphree, *Schools in the Middle: Resolving Schools' Conflicting Duties to Transgender Students and Their Parents*, 86 UMKC L. Rev. 405, 407 (2017).

In addition to student interests, a potential problem can arise when transgender students have preferred names and pronouns that conflict with their parents' wishes. How do schools navigate affirming student identities while avoiding "outing" students to their parents?

Further, religious beliefs have been used by some teachers to justify their refusal to follow school name and pronoun policies. The following are two court cases that have considered the competing interests between rights of public school teachers in K-12 schools and that of the transgender student.<sup>12</sup> In *Vlaming v. West Point School Bd.*, a teacher claimed violations of free speech and free exercise of religion after being fired for refusing to use a transgender student's preferred name and pronoun.<sup>13</sup> In *Kluge v. Brownsberg Cmty. School Corp.*, a music teacher sued his prior employer for forcing him to resign after refusing to use a transgender student's preferred name.<sup>14</sup> The court concluded that "a name carries with it enough importance to overcome a public school'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."<sup>15</sup> Further it held that the school could not provide religious accommodation to Kluge without undue hardship to the school.<sup>16</sup>

As of 2022, transgender students are protected against discrimination based on gender identity under Title IX, which would likely include the use of name and pronouns. The question remains what rights, if any, do parents have when they do not agree with the name and pronoun chosen by a transgender student. Further, while *Kluge* suggests that teachers do not have a religious exception to avoid following K-12 school name and pronoun policies, this issue is still yet to be broadly litigated.

Edited by Allison Frisella

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<sup>12</sup> *Meriwether v. Hartop* is similar case, but it is not discussed here because it involves a professor at a college and not a K-12 school. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

<sup>13</sup> The federal case was remanded to state court for issues of jurisdiction. *Vlaming v. W. Point Sch. Bd.*, 480 F. Supp. 3d 711 (E.D. Va. 2020), *aff'd*, 10 F.4th 300 (4th Cir. 2021).

<sup>14</sup> *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F.Supp. 3d 814, 819 (S.D. Ind. 2021).

<sup>15</sup> *Id.* at 849.

<sup>16</sup> *Id.*