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## Prioritizing Student Well-Being: Name and Pronoun Policies in K-12 Schools

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## **PRIORITIZING STUDENT WELL-BEING: NAME AND PRONOUN POLICIES IN K-12 SCHOOLS**

### **ABSTRACT**

*While federal protections against discrimination for LGBTQ students have increased in the past few years, at the same time state legislatures have proposed hundreds of anti-LGBTQ bills targeting transgender youth. With more students identifying as transgender or nonbinary, there is a need for clear policies on the usage of chosen names and pronouns in K-12 public schools. Schools need to be prepared to handle transgender and nonbinary students before a need arises. This article discusses the potential conflicts between the individual interests involved when name and pronoun policies are applied in K-12 public schools.*

*When drafting and enforcing name and pronoun policies, school administrators must navigate the disconnect between prioritizing student well-being, teachers' rights, parental demands, and complying with sometimes conflicting state and federal laws. Public schools should create policies that support transgender and nonbinary students through the usage of gender-affirming names and pronouns not only to follow federal law, but also to support the students' health, well-being, and academic success. Ultimately, student well-being should be the priority.*

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## INTRODUCTION

Henry is a 5th grade student at a new public school. Henry is a cisgender girl. She was assigned female at birth and uses she/her pronouns. She loves her new school and has started to make friends. She feels welcome in all her classes but one, math. Her math teacher keeps calling her a boy. Originally, all her classmates used she/her pronouns for her and called her a girl, but now they have started to mix up pronouns.

Henry does not understand why everyone thinks she is a boy. Her math teacher says that “Henry” is a boy’s name and that Henry doesn’t look like a girl, so she must be a boy. But Henry knows she is a girl and has known so all her life. She is distraught with her teacher’s refusal to use her correct pronouns and is horrified that her classmates might stop calling her a girl altogether.

Henry stops participating in math class and then slowly starts to skip math class. Her math grades plummet. She develops stomach aches when she goes to school and often asks her parents if she can stay home. Her self-esteem has also starkly dropped. She stops participating in her other classes and eats alone at lunch.

To most people, the math teacher’s actions in this story seem clearly harmful. Henry’s math teacher is creating a harmful environment at school, where Henry is forced to be, and is inhibiting her ability to learn. The consensus may disappear, though, if Henry uses she/her pronouns but her sex assigned at birth is male. There may be even less consensus on whether a school in that circumstance can require the math teacher to refer to Henry as a girl.

The year 2023 brought a record amount of anti-transgender legislation proposed in states throughout the country, many targeting transgender youth.<sup>1</sup> In 2023 alone, over 500 anti-LGBTQ bills were proposed and at least 230 of these were specific to schools and education.<sup>2</sup> These proposed changes can make transgender students nervous to go to school.<sup>3</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>4</sup> The trend at the

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1. 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), <https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/> [https://perma.cc/VV2Z-9BGC]; Minami Funakoshi & Disha Raychaudhuri, *The Rise of Anti-Trans Bills in the US*, REUTERS (Aug. 17, 2023), <https://www.reuters.com/graphics/USA-HEALTHCARE/TRANS-BILLS/zgvorreyapd/> [https://perma.cc/DE3B-5ULQ].

2. See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (Dec. 21, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> [https://perma.cc/D2XF-RCJF].

3. Michaela Winberg, *Trans Students Say They are Nervous to go to School under Anti-Trans Legislation*, NPR (Sept. 8, 2022), <https://www.npr.org/2022/09/08/1121869386/trans-students-say-they-are-nervous-to-go-to-school-under-anti-trans-legislation> [https://perma.cc/5VWX-A78Y].

4. 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

federal level is in the opposite direction. For example, a 2022 Department of Education proposed rule interpreting Title IX seeks to clarify and expand federal protections against discrimination based on gender identity or sexual orientation of students.<sup>5</sup> Faced with these diverging trends, school administrators are left to navigate the disconnect between prioritizing student well-being, teachers' rights, parental demands, and complying with sometimes conflicting state and federal laws.

While issues of gender-affirming bathroom and sports team policies have been widely litigated,<sup>6</sup> school name and pronoun policy disputes are only beginning to enter the courtroom.<sup>7</sup> School name and pronoun policies have the

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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) [<https://perma.cc/A77G-6V32>].

5. *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

6. *See, e.g.*, *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014) (holding denial to use gender-affirming bathroom was a violation of MHRA); *Dodds v. 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.*, 396 F. Supp. 3d 833, 842 (S.D. Ind. 2019) (finding that a policy requiring students to use bathroom aligning with sex assigned at birth violated Title XI); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) (holding denial was a violation of Title IX and Equal Protection), *reh'g en banc denied*, 973 F.3d 399 (4th Cir. 2020); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (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), *cert. denied*, 139 S. Ct. 2636 (Mem) (2019); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1240 (9th Cir. 2020) (holding that policy allowing transgender students to use bathrooms aligning with gender did not violate cisgender students' constitutional right to privacy), *cert. denied*, 141 S. Ct. 894 (2020); *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020) (granting preliminary injunction preventing application of state law preventing transgender women from participating in women's sports teams), *aff'd* 2023 WL 1097255 (9th Cir. 2023); *A.M. by E.M. v. Ind. Pub. Sch.*, 617 F. Supp. 3d 950, 970 (S.D. Ind. 2022), (granting a preliminary injunction to prevent the application of state statute prohibiting transgender girl student from participating on girls' softball team), *appeal dismissed* 2023 WL 371646 (7th Cir. 2023); *Soule by Stanescu v. Conn. Assn. of Sch.*, 2021 WL 1617206 at \*1 (D. Conn. 2021) (dismissing lawsuit by parents of non-transgender students against policy allowing transgender students to participate in sports consistent with gender identity), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *but see reversed and remanded by appeal en banc* 90 F.4th 34, 42 (2d Cir. 2023) (directing trial court to decide whether the complaint stated a redressable Title IX claim).

7. *See, e.g.*, *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300, 304-05 (4th Cir. 2021) (teacher alleging violations of free speech and free exercise after being fired for refusing to use transgender student's preferred name and pronoun); *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021) (professor contesting discipline after refusing to use transgender student's preferred pronoun), *reh'g en banc denied*; *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861, 864 (7th Cir. 2023) (teacher contesting employer requiring him to use transgender student's preferred name when "not consistent with their sex assigned at birth"); *Loudoun Cnty. Sch. Bd. v. Cross*, 2021 WL 9276274,

potential to implicate multiple conflicting legal interests including that of the student, teacher, and parent.<sup>8</sup> With each conflict in interest, schools must choose whom to prioritize, in addition to protecting against liability to the school under federal and state law.

K-12 schools should adopt gender-affirming name and pronoun policies, ideally before there is a need for that policy's application.<sup>9</sup> These policies should prioritize student well-being, not only for public health purposes but to ensure compliance with federal law. This article first defines key terms. Then it argues the need for gender-affirming name and pronoun policies in K-12 schools while noting the conflicting interests involved in the application of such policies. Following is a discussion on the public health and legal rationale to prioritize student well-being in drafting and applying gender-affirming name and pronoun policies. Next, this article discusses the potential First Amendment protections of teachers when these policies are applied. Finally, this article addresses how parental rights have been addressed thus far by courts with the application of these policies.

#### I. DEFINITIONS OF KEY TERMS

Before discussing this topic further, it is important to ensure a common understanding of data and key terms. There are around 300,000 transgender youth throughout the country, and youth make up about eighteen percent of the transgender population.<sup>10</sup> *Transgender* is an umbrella term for individuals whose gender identity does not align with cultural expectations based on their

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at \*1 (Va. Aug. 30, 2021) (granting preliminary injunction ending leave without pay for public school teacher who spoke out against proposed gender-affirming policy at the school board meeting); Ricard v. USD 475 Geary Cnty. Sch. Bd., 2022 WL 1471372, at \*1 (D. Kan. May 9, 2022) (teacher contesting application of gender-affirming name and pronoun policy); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 123-4 (S.D. Md. 2022) (parents of students contesting school policy including gender-affirming name and pronoun provision); Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist., 629 F. Supp. 3d 891, 898 (N.D. Iowa 2022) (parents of students seeking a preliminary injunction against enforcement of school policy addressing the treatment of transgender students, including name and pronoun provisions).

8. In addition to these individual interests, there is a school and general public interest in the policies enforced by public K-12 schools. This article focuses on the individual interests of students, teachers, and parents, which ultimately influence the overall interest of schools in providing a public education.

9. While not possible in all schools, for those schools that have not had a transgender or nonbinary student enrolled, having a policy beforehand will allow them to be better prepared to support the students.

10. Jody L. Herman, Andrew R. Flores, & Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States*, THE WILLIAMS INST. UCLA L. (2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/> [https://perma.cc/F3R4-3275].

sex assigned at birth.<sup>11</sup> Biological characteristics, “such as primary and secondary sex characteristics and hormones,” make up a person’s sex.<sup>12</sup> Thus, a person’s sex assigned at birth is the sex they were born with (male, female, or intersex) based on these biological characteristics.<sup>13</sup> *Gender* describes the socially and culturally constructed norms and expectations for women, men, and gender-diverse people, typically based on sex assigned at birth or outward appearances.<sup>14</sup> *Gender identity* is one’s internal concept of oneself as man, woman, both, or neither.<sup>15</sup> *Gender expression* is an external manifestation of one’s gender identity, but it may not align with societal expectations for that gender.<sup>16</sup> Thus, the label “transgender” is used to describe any individual whose sex assigned at birth is not the same as their gender identity. A subset of the transgender population are those individuals who identify as nonbinary.<sup>17</sup> *Nonbinary* describes individuals whose gender identity is neither man nor woman, or some combination of both.<sup>18</sup> Going forward, “TNB” will be used to refer to persons who are either transgender or nonbinary.

A *gender transition* is the “process by which a person strives to more closely align their internal knowledge of gender with its outward appearance.”<sup>19</sup> This can include a social transition such as selecting different names, pronouns, clothing, or being recognized by others as their gender identity.<sup>20</sup> It can also include a physical transition with medical treatment to modify their bodies.<sup>21</sup>

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11. Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals’ Experiences with Misgendering*, 3 STIGMA & HEALTH 53, 54 (2018); *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN (Jan. 21, 2022), <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [<https://perma.cc/QUU2-W6VA>] [hereinafter HRC].

12. McLemore, *supra* note 11, at 54.

13. However, the binary concept of sex is being questioned more and more with advances in technology. Instead of binary categories, new research has supported the placement of sex differences on a spectrum as chromosomes, hormones, cells, and anatomy all factor into sex, but do not always match up. Claire Ainsworth & Nature Magazine, *Sex Redefined: The Idea of 2 Sexes is Overly Simplistic*, SCI. AM. (Oct. 22, 2018), <https://www.scientificamerican.com/article/sex-redefined-the-idea-of-2-sexes-is-overly-simplistic/> [<https://perma.cc/G6GR-B424>].

14. *Gender and Health*, WORLD HEALTH ORG., [https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1) [<https://perma.cc/NR54-7RSD>].

15. *Sexual Orientation and Gender Identity Definitions*, *supra* note 11.

16. *Id.*

17. *Transgender and Non-Binary People FAQ*, HUM. RTS. CAMPAIGN (Mar. 2, 2023), <https://www.hrc.org/resources/transgender-and-non-binary-faq> [<https://perma.cc/CL55-6ANW>] [hereinafter HRC]. While this definition of “transgender” includes individuals who are nonbinary, not all nonbinary persons use the transgender label. The general definitions in this section are an attempt to illustrate the current usage of these terms for an understanding of how they are used in this article. However, language is constantly evolving and not universal.

18. *Transgender and Non-Binary People FAQ*, *supra* note 17.

19. *Sexual Orientation and Gender Identity Definitions*, *supra* note 11.

20. *Id.*

21. *Id.*

Gender transitions look different for each TNB individual and can occur across a long period of time. Similar to sexual orientation, gender transitions often include a process of “coming out” in some or all areas of one’s life.<sup>22</sup> *Gender-affirming* is used in this article to describe actions that enable and support a person’s gender identity.

*Misgendering* is the incorrect classification of another person’s gender identity.<sup>23</sup> This can occur through the intentional or unintentional use of incorrect pronouns, honorifics, or descriptive words.<sup>24</sup> *Deadnaming* is when a person intentionally or unintentionally calls a TNB individual by their prior name, which may still be their legal name, used pre-transition.<sup>25</sup> Some transgender individuals are also clinically diagnosed with *gender dysphoria* which is “a condition that is characterized by debilitating distress and anxiety resulting from the incongruence between gender identity and birth-assigned sex.”<sup>26</sup>

## II. CONFLICTING INTERESTS AND POTENTIAL LIABILITIES – PUTTING STUDENTS FIRST

When applying name and pronoun policies, a public-school environment may involve three different types of individual actors: (1) students, (2) employees/teachers, and (3) parents. Sometimes these actors have interests that align with each other, while other times they conflict. On top of that, a public school as an entity must navigate asserted conflicts of these interests while maintaining its own purpose. Further complications can occur when community politics involve outside actors, such as interest groups and politicians. Ultimately, the public school must balance the individual interests of the student, teacher/employee, and parent in order to successfully provide a public education to students.

With more students identifying as TNB,<sup>27</sup> the need for clear policies on the usage of chosen names and pronouns is evident. A lack of chosen name and pronoun policy could expose a school to liability for discrimination by

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22. *Transition Roadmap*, UCSF GENDER AFFIRMING HEALTH PROGRAM, <https://transcare.ucsf.edu/transition-roadmap> [<https://perma.cc/G9Y2-EKDF>].

23. McLemore, *supra* note 11.

24. KC Clements, *What Does it Mean to Misgender Someone?*, HEALTHLINE (Sept. 18, 2018), <https://www.healthline.com/health/transgender/misgendering> [<https://perma.cc/FRE8-PWL3>].

25. KC Clements, *What is Deadnaming?*, HEALTHLINE (Sept. 18, 2018), <https://www.healthline.com/health/transgender/deadnaming> [<https://perma.cc/9XA8-BHPS>].

26. *Grimm*, 972 F.3d at 594-95.

27. See Azeen Ghorayshi, *Report Reveals Sharp Rise in Transgender Young People in the U.S.*, NY TIMES (June 10, 2022), <https://www.nytimes.com/2022/06/10/science/transgender-teen-agers-national-survey.html> [<https://perma.cc/P5SE-AENW>].



individual teachers against TNB students.<sup>28</sup> However, these types of policies are considered by some to be controversial.<sup>29</sup> When public schools do have these policies, parents and teachers have objected to the policies based on what they assert to be their respective individual rights.<sup>30</sup> When drafting and enforcing name and pronoun policies, K-12 schools should prioritize student well-being and the facilitation of a successful learning environment, both of which are integral goals of public schools.

A. *Gender-Affirming Name and Pronoun Policies Prioritize Student Well-Being*

Primary and secondary school students are required to spend the majority of their waking hours in school. This reality positions schools to have a great impact, both positive and negative, on students' mental health and overall well-being.<sup>31</sup> LGBTQ youth in general experience adversity at higher rates than their non-LGBTQ peers.<sup>32</sup> While fifty-four percent of LGBTQ youth battle symptoms of depression, only twenty-nine percent of non-LGBTQ youth battle these symptoms.<sup>33</sup> LGBTQ youth also disproportionately experience "homelessness and marginal housing due to rejection by families and communities."<sup>34</sup> Thirty-five percent of transgender youth, compared to eight percent of non-LGBTQ youth, have skipped school because they felt unsafe at or commuting to school.<sup>35</sup> Also, seventy-eight percent of non-LGBTQ youth earn mostly As and Bs, compared to fifty-five percent of transgender youth.<sup>36</sup>

1. Public Health Concerns Reinforce the Need for Gender-Affirming Policies

Schools should have policies 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,

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28. In these cases, the school would need to have actual notice of the Title IX violations by teachers and show deliberate indifference to these violations. *See Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 275-76 (1998).

29. *See, e.g., supra* note 7 and accompanying text.

30. *Id.*

31. *See* HUM. RTS. CAMPAIGN, 2018 LGBTQ YOUTH REPORT 8 (2018).

32. *See* Project Thrive, *LGBTQ Youth Are Living in Crisis*, HUM. RTS. CAMPAIGN (2020), <https://perma.cc/5BJB-MQBV>; NAT'L LGBTQIA+ HEALTH EDUC. CTR., SUPPORTIVE HOUSING AND HEALTH SERVICES FOR LGBTQIA+ YOUTH EXPERIENCING HOMELESSNESS: PROMISING PRACTICES 2 (2020) [hereinafter PROMISING PRACTICES].

33. Project Thrive, *supra* note 32.

34. PROMISING PRACTICES, *supra* note 32, at 10.

35. Project Thrive, *supra* note 32.

36. *Id.*

and suicide.<sup>37</sup> First names are often gender-specific and thus can hold a lot of meaning once a TNB individual socially transitions.<sup>38</sup> Pronouns and honorifics are even more gender-specific than names. Accordingly, the process of socially transitioning, which can include changing names and pronouns, is linked with better mental health in TNB youth.<sup>39</sup> One 2018 study showed that “[t]ransgender youth who were able to use their chosen names in multiple contexts reported fewer depressive symptoms and less suicidal ideation and behavior.”<sup>40</sup> According to this study, even simply adding one environment where a chosen name could be used resulted in a twenty-nine percent decrease in suicidal ideation and a fifty-six percent decrease in suicidal behavior.<sup>41</sup> The experience of being deadnamed or misgendered at school can add stress,<sup>42</sup> impacting a student’s ability to learn. In fact, transgender students who experience greater harassment, which can include being deadnamed or misgendered repeatedly, have significantly lower grade point averages.<sup>43</sup>

## 2. Gender-Affirming Policies Protect the School from Potential Liability

In addition to public health reasons, schools should create gender-affirming name and pronoun policies to comply with federal law and to protect against liability for sex discrimination claims. Federal law that prohibits sex discrimination has been interpreted to prohibit discrimination on the basis of gender identity.<sup>44</sup> Cases considering this issue under Title VII culminated in 2020, when 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>45</sup> Since then, courts have generally applied this holding to Title IX claims, and the Education Department under the Biden administration has given a notice of interpretation of the same.<sup>46</sup> Before and after *Bostock*, courts across the country have typically held that preventing transgender students from using restrooms conforming to their gender identity

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37. Patrick D. Murphree, *Schools in the Middle: Resolving Schools’ Conflicting Duties to Transgender Students and Their Parents*, 86 UMKC L. REV. 405, 407 (2017).

38. See Stephen T. Russel et al., *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 503 (2018).

39. See Russel et al., *supra* note 38.

40. These multiple contexts were work, school, home, and with friends. Russel et al., *supra* note 38, at 505.

41. *Id.*

42. See McLemore, *supra* note 11, at 61.

43. *Grimm*, 972 F.3d at 597.

44. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746-47 (2020).

45. *Id.*

46. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg 32637, 32638 (June 22, 2021).

is a violation of state law, the Equal Protection Clause, and/or Title IX.<sup>47</sup> Further, lawsuits filed by non-TNB students or their parents have failed to successfully stop policies that allow transgender students to use the preferred bathroom.<sup>48</sup> However, this landscape is constantly being challenged as states continue to propose laws that govern school policies regarding bathroom usage on the basis of sex assigned at birth.<sup>49</sup>

If students are treated differently based on their TNB status with respect to the use of chosen names and pronouns, the school could be liable for discrimination under Title IX, the Equal Protection Clause, and state laws. The same is true for claims regarding access to bathrooms.<sup>50</sup> While there has not been an Equal Protection or Title IX case brought by a student for being misgendered by teachers, the analysis for that circumstance would likely mirror the transgender bathroom cases. Both instances concern the different treatment by school personnel of transgender students from their cisgender peers. One example of this analysis is the 2020 *Grimm v. Gloucester* case.<sup>51</sup> There, the Fourth Circuit Court of Appeals held that the prevention of a transgender student's use of the bathroom aligning with their gender identity violated both Title IX and the Equal Protection Clause.<sup>52</sup>

The affected student, Gavin Grimm, went to Gloucester High School, which had male, female, and unisex restrooms available to its students.<sup>53</sup> By Grimm's sophomore year, he had socially transitioned to a boy at home and school.<sup>54</sup> While Grimm had agreed to use a gender-neutral bathroom in the nurse's office at the start of the year, he found it "stigmatizing to use a separate [bathroom]" and developed anxiety and shame from using this bathroom.<sup>55</sup> In addition, that bathroom was out of the way and often caused Grimm to be late to class.<sup>56</sup>

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47. 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*, 845 F.3d at 222 (denying stay of preliminary injunction allowing student to use bathroom aligning with gender, otherwise a violation of Title IX); *J.A.W.*, 323 F. Supp. 3d at 1041-42 (granting preliminary injunction allowing student to use bathroom aligning with gender, otherwise a likely violation of Title XI and Equal Protection); *Grimm*, 972 F.3d at 593 (holding denial was a violation of Title IX and Equal Protection).

48. See *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (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), *cert denied*, 139 S. Ct. 2636 (Mem.) (2019); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1240 (9th Cir. 2020) (holding that policy allowing transgender students to use bathrooms aligning with gender did not violate cisgender students' constitutional right to privacy), *cert. denied*, 141 S. Ct. 894 (2020).

49. See ACLU, *supra* note 2.

50. See, e.g., *supra* note 47 and accompanying text.

51. *Grimm*, 972 F.3d at 593.

52. *Id.* at 594.

53. *Id.*

54. *Id.*

55. *Id.* at 598.

56. *Id.*

Grimm then spoke with the school administration and was permitted to use the boy's bathrooms.<sup>57</sup> After complaints within the district, the school policy changed to require that students use the restrooms corresponding with their sex assigned at birth, and further required that any students with "gender identity issues . . . be provided an alternative appropriate facility."<sup>58</sup> Around the same time, more single-use restrooms had been built, but these continued to be out of the way of classes.<sup>59</sup>

Even after Grimm provided the school with his amended birth certificate and updated documentation, which aligned with his male gender identity, the school refused to amend his school records and still prevented him from using the boy's bathroom.<sup>60</sup> Grimm eventually avoided using the restroom and as a result suffered from recurring urinary tract infections.<sup>61</sup> As a junior, Grimm was hospitalized for suicidal ideation.<sup>62</sup> He ultimately sued the school district alleging a violation of his rights under Title IX and the Equal Protection clause.<sup>63</sup>

### 3. Title IX Requires Gender-Affirming Bathroom Policies

Title IX applies to any K-12 school that receives federal funding,<sup>64</sup> and provides 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."<sup>65</sup> Because "on the basis of sex" in Title IX is nearly identical to the language in Title VII, it also proscribes discrimination based on sexual orientation or gender identity because of *Bostock*.<sup>66</sup> While analyzing the Title IX claim, the court in *Grimm* addressed three questions: whether the school's decisions were "on the basis of sex," whether Grimm was harmed because of them, and whether as a result this was unlawful discrimination.<sup>67</sup>

First, the court found that the bathroom policy was applied on the basis of sex, given *Bostock's* holding that discrimination based on transgender status is necessarily discrimination on the basis of sex.<sup>68</sup> The school referenced Grimm's sex assigned at birth in its application of the bathroom policy.<sup>69</sup> Any exclusion

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57. *Id.*

58. *Id.* at 599.

59. *Id.* at 600.

60. *Id.* at 593.

61. *Id.* at 600.

62. *Id.*

63. *Id.* at 593.

64. *See* 20 U.S.C. § 1681(a).

65. 20 U.S.C. § 1681(a).

66. *Grimm*, 972 F.3d at 616 (citing *Bostock*, 140 S. Ct. 1741).

67. *Id.* at 616.

68. *Id.*

69. *Id.*

of Grimm from the boy's bathroom because he was transgender still included his sex assigned at birth as a but-for cause of the exclusion.<sup>70</sup>

Second, the court found that Grimm was clearly harmed by the bathroom policy.<sup>71</sup> The physical locations of the bathrooms were inconvenient, causing him to be late for class, and on multiple occasions, he had to leave after-school events because they were not available.<sup>72</sup> In addition, while noting the spiritual harms of historical racial segregation, the court commented that "the stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX" because it brings attention and scrutiny from other students.<sup>73</sup> Therefore, the court held that Grimm's emotional and dignitary harm caused by using separate bathrooms was legally cognizable under Title IX.<sup>74</sup>

Third, the court found that the application of the bathroom policy was unlawful discrimination.<sup>75</sup> For purposes of Title IX, discrimination "mean[s] treating that individual worse than others who are similarly situated."<sup>76</sup> Applied to Grimm's case, the court found that Grimm was treated worse than other similarly situated students because he was the only student who could not use the restroom that aligned with his gender identity.<sup>77</sup>

*B. Title IX Should also Require Gender-Affirming Name and Pronoun Policies*

The same logic applied in Gavin Grimm's case applies to other aspects of social transition and gender expression, including name and pronoun policies. Accordingly, the U.S. Department of Education recommends that K-12 schools enact policies that support the use of names and pronouns that align with students' gender identity, regardless of birth names or sex assigned at birth.<sup>78</sup> Further, it recommends the use of policies that safeguard student privacy, such as when TNB students' birth names and biological sex are not aligned with their gender identity.<sup>79</sup> In contrast, since the start of 2023, many state lawmakers have proposed state laws across the country that would control school policies on

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70. *Id.*

71. *Id.* at 617.

72. *Id.*

73. *Id.* at 617-18.

74. *Id.* at 618.

75. *Id.* at 619.

76. *Id.* at 618 (quoting *Bostock*, 140 S. Ct. at 1753).

77. *Id.*

78. *Supporting Transgender Youth in School*, U.S. DEP'T EDUC. (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf> [<https://perma.cc/MKT6-C8VW>].

79. *Id.*

name and pronoun usage, often requiring parental consent for any variance from sex or name assigned at birth.<sup>80</sup>

When a K-12 school does not have a policy that ensures the use of gender-affirming names and pronouns, this leaves the decision up to individual teachers/employees. However, whether or not there is a policy, the actions of teachers/employees are still governed by Title IX.<sup>81</sup> Even just one teacher who refuses to use gender-affirming names and pronouns of TNB students could lead to Title IX violations. Any analysis of a violation of Title IX based on purposeful misgendering or deadnaming of TNB students would be fact dependent. However, a general application of the three questions posed in *Grimm* to hypothetical claims is possible: whether the misgendering or deadnaming is applied on the basis of sex, whether the student is harmed by being misgendered or deadnamed, and thus whether the misgendering or deadnaming is unlawful discrimination.<sup>82</sup>

When there is a policy or a teacher that requires the use of pronouns or honorifics that align with sex assigned at birth, that policy is necessarily applied to students on the basis of sex. A transgender girl would be called by he/him pronouns because of her biological sex. A cisgender boy would be called by he/him pronouns and “Mr.” because of his biological sex. The refusal to use pronouns that align with the gender identity of TNB students relies on the fact that these pronouns do not follow the societal delineations of pronouns based on sex assigned at birth or biological sex. This is similar to the bathroom policy in *Grimm* which assigned students to certain restrooms on the basis of biological sex.<sup>83</sup>

Unlike pronoun or honorific usage, a policy or teacher that determines name usage based on legal names could arguably be applied for reasons other than sex. This determination would depend on how the policy is applied to students who are non-TNB. If names other than legal names, such as nicknames, are permitted for non-TNB students, then refusal to do so for TNB students would seem to be applied on the basis of sex. If no nicknames were allowed, this might seem less like a policy that is applied on the basis of sex. But even without a legal requirement, the public health implications of affirming TNB students’ identities through the usage of chosen names should be enough reason to have a gender-affirming policy.<sup>84</sup>

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80. See ACLU, *supra* note 2.

81. See *Gebser*, 524 U.S. at 290 (“[In] cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.”).

82. See *Grimm*, 972 F.3d at 616.

83. *Id.* at 593.

84. See *supra* Section II.A.

The second question regarding whether purposeful misgendering causes harm to the student is very fact specific. Similar to the stigma of being forced to use a separate restroom,<sup>85</sup> the purposeful misgendering and/or deadnaming of a TNB student, or even avoiding using honorifics or pronouns for that student only, brings attention and scrutiny from other students to that student's gender identity. Whether that treatment manifests in a drop in participation, grades, self-esteem, attendance, or mental health, the stigma and attention brought by the difference in treatment is harmful enough on its own. Such stigma and attention is a distraction from the main purpose of school, learning. It is also a stigma that non-TNB students do not have to experience based on their gender identity. Any purposeful misgendering or deadnaming of a student directly counteracts that student's attempts to live in a way that more genuinely supports their gender identity, and instead reduces that student to their sex assigned at birth.

The final question is whether misgendering a student is unlawful discrimination—whether the TNB student is treated worse because of sex than others who are similarly situated. Similar to Grimm, who was the only student not allowed to use the bathroom that aligned with his gender identity, any TNB student who is purposefully misgendered or deadnamed is treated worse than non-TNB students whose names and pronouns align with their biological sex. This calls TNB students out for being different from their non-TNB peers. Even if a teacher uses pronouns or honorifics for all other students except TNB students, and uses only last names for the TNB students, this still singles out that student. As one article commented, “[i]magine if a teacher used Mr. or Ms. for everyone in the class except for the one Asian-American student or lone Black student. We would view that discrimination as both facial and palpably hostile.”<sup>86</sup>

Another way to analyze the effects of purposeful misgendering is to compare Title IX with Title VII harassment cases that discuss the creation of a hostile work environment through severe and pervasive misgendering. Regarding an Equal Employment Opportunity Commission decision that found Title VII was violated when the employer denied equal access to restrooms aligning with gender identity, the EEOC stated that “although accidental misuse of a transgender employee’s preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to

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85. *Grimm*, 972 F.3d at 617-18 (explaining that “[t]he stigma of being forced to use a separate restroom is likewise sufficient to constitute harm under Title IX” because it brings attention and scrutiny from other students).

86. Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 640 (2022).

a transgender employee could contribute to an unlawful hostile work environment.”<sup>87</sup>

Any policy or teacher that requires pronouns and names to align with the sex assigned at birth would necessarily be based on biological sex. Further, the purposeful misgendering and deadnaming of TNB students bring attention and scrutiny from other students to that student’s gender identity. Misgendering and deadnaming TNB students treat them worse than non-TNB students. While non-TNB students are referred to by names and pronouns aligning with their gender identities, TNB students are not. Therefore, the purposeful misgendering and deadnaming of students would likely be discrimination under Title IX.

### C. *The Equal Protection Clause Requires Gender-Affirming Bathroom Policies*

In addition to Title IX, the Equal Protection clause applies to public schools and prohibits discrimination.<sup>88</sup> The Fourteenth Amendment’s Equal Protection Clause ensures that states cannot deny equal protection of the laws to any person.<sup>89</sup> This clause is “essentially a direction that all persons similarly situated should be treated alike.”<sup>90</sup> It protects against state-imposed classifications and intentional and arbitrary discrimination.<sup>91</sup> To begin an Equal Protection analysis, one must first determine which level of scrutiny applies to the policy or action: strict, intermediate/heightened, or rational basis.<sup>92</sup> The level of scrutiny is based on class distinctions.<sup>93</sup> Strict scrutiny is applied to race-based classifications.<sup>94</sup> Heightened/intermediate scrutiny is applied to sex-based classifications, because they are quasi-suspect as some sex-based distinctions are deemed appropriate, unlike race-based distinctions.<sup>95</sup>

In *Grimm*, the court determined that intermediate scrutiny applied because the bathroom policy relied on sex-based classifications.<sup>96</sup> The contested policy

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87. *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC (June 15, 2021), [https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender#\\_edn7](https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender#_edn7) [<https://perma.cc/93PP-AAYK>].

88. *See id.*

89. U.S. CONST. amend. XIV, § 1.

90. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

91. *See Grimm*, 972 F.3d at 607.

92. *See United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

93. *Grimm*, 972 F.3d at 607.

94. *Id.* at 607 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995)).

95. *Id.* at 607-08; *see Virginia*, 518 U.S. at 532 n.6.

96. *Grimm*, 972 F.3d at 607-08. In the alternative to the sex-based analysis, the court also discusses how transgender people are at least a quasi-suspect class in itself based on various district court decisions. The class of people who are transgender are historically discriminated against, and thus would deserve a heightened scrutiny for any adverse treatment based on that class. In both sex-based analysis and quasi-suspect class, the court determined that heightened/intermediate scrutiny would apply. *Id.* at 610-11.



limited usage of bathrooms to individuals with “corresponding biological genders,” understood as meaning biological sex.<sup>97</sup> The court cited similar circuit court decisions which noted that the contested bathroom policies “cannot be stated without referencing sex.”<sup>98</sup> In addition to the policy itself, the court noted that Grimm was also discriminated against because he did not conform to sex stereotypes, or “overbroad generalizations regarding the sexes.”<sup>99</sup>

Once the standard of heightened scrutiny is applied, the classification “fails unless it is substantially related to a sufficiently important government interest.”<sup>100</sup> For the classification to stand, there must be an “exceedingly persuasive justification” for it.<sup>101</sup> In *Grimm*, the court found the bathroom policy improper because it was not “substantially related to a sufficiently important government interest”—protecting student privacy.<sup>102</sup> Grimm had used the boy’s bathrooms for several weeks without issue.<sup>103</sup> The court also noted that having Grimm use the girl’s bathrooms, while he dressed and appeared as a boy, would actually create more privacy issues.<sup>104</sup> Because the “bodily privacy of cisgender boys using the boy’s restrooms did not increase while Grimm was banned,” the policy was not substantially related to protecting student privacy.<sup>105</sup>

*D. The Equal Protection Clause Should Also Require Gender-Affirming Name and Pronoun Policies*

Similar to bathroom policies, a teacher who uses pronouns based on biological sex necessarily utilizes a sex-based classification. When teachers refuse to use gender-affirming pronouns/honorifics because they do not align with biological sex, that decision makes a generalization based on biological sex. Because of this, intermediate/heightened scrutiny should apply to an Equal Protection Claim based on the purposeful misgendering/deadnaming of TNB students.

For the second part of the heightened scrutiny analysis, there must be some sort of exceedingly persuasive government interest for either having a policy that limits gender-affirming name and pronoun usage or allowing teachers to purposefully misgender and deadname TNB students.<sup>106</sup> Once identified, that

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97. *Id.* at 608.

98. *Id.* (quoting *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1051 (7th Cir. 2017)).

99. *Id.* at 609 (quoting *Virginia*, 518 U.S. at 533).

100. *Id.* at 608 (quoting *Cleburne*, 473 U.S. at 441).

101. *Id.* (quoting *Virginia*, 518 U.S. at 534).

102. *Id.* at 607. The court also found that the failure to amend school records was a violation, because the school’s decision is not “substantially related to its important interest in maintaining accurate records” when Grimm’s legal gender was male. *Id.* at 615.

103. *Id.* at 614.

104. *Id.*

105. *Id.*

106. *See id.* at 608.

interest needs to be substantially related to a sufficiently important government interest.<sup>107</sup> Because of the public health reasons to affirm TNB children’s gender identities,<sup>108</sup> it is unclear what state interest there would be in requiring names and pronouns to align with sex assigned at birth, or in allowing a teacher to purposefully misgender or deadname a student.

*E. Teachers’ First Amendment Rights Should Not Overshadow Student Well-being*

Because name and pronoun policies govern employee speech, any of these types of policies that a school applies potentially involve the First Amendment freedom of expression.<sup>109</sup> A public school, like any other government employer, has a dual role of providing services as well as acting within the constraints of the First Amendment.<sup>110</sup> The public school must “balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>111</sup>

When determining if public employee speech is protected by the First Amendment, courts typically apply the *Connick-Pickering* and *Garcetti* inquiry.<sup>112</sup> As a threshold requirement, before going to the *Connick-Pickering* analysis, *Garcetti* poses the question of “whether the employee spoke as a citizen” or as an employee.<sup>113</sup> If this first requirement is not met then the analysis stops, and there is no First Amendment protection.<sup>114</sup> If the analysis continues, then the public employee must prove the speech was on a matter of public concern while rebutting “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”<sup>115</sup> The public employer can only enforce “those speech restrictions that are necessary for [the employer] to operate efficiently and effectively.”<sup>116</sup>

1. *Garcetti* Threshold – Speaking as a Citizen or Employee

When courts analyze whether a public employee’s speech is a matter of public concern, “[t]he critical question . . . is whether the speech at issue is itself

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107. *See id.*

108. *See supra* section II.A.1.

109. *See* U.S. CONST. amend. I.

110. *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006).

111. *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968).

112. *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568; and *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

113. *Id.* at 421, 418 (citing *Pickering*, 391 U.S. at 568).

114. *Id.* at 421, 418 (citing *Connick*, 461 U.S. at 147).

115. *Id.* at 418 (citing *Pickering*, 391 U.S. at 568).

116. *Id.* at 419.

ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."<sup>117</sup> In *Lane v. Franks*, the Supreme Court held that a public employee's subpoenaed testimony about information learned on the job was outside the scope of ordinary job duties.<sup>118</sup> Contrastingly, in *Garcetti* the court held that a public employee who prepared an internal memorandum for supervisors recommending the dismissal of a case was not speaking as a citizen on a matter of public concern.<sup>119</sup> In *Garcetti*, the fact that the expression was made at work or that it was related to the speaker's job was not dispositive, for the First Amendment may in some cases protect "expressions made at work" and/or "related to the speaker's job."<sup>120</sup> Instead, the *Garcetti* Court focused on the fact that the memorandum was created pursuant to the public employee's daily professional duties.<sup>121</sup> If the employee's speech is created by "simply performing his or her job duties" there is no First Amendment protection.<sup>122</sup>

Like *Garcetti*, where preparation of an internal memorandum for superiors was considered an aspect of the employee's daily professional duties,<sup>123</sup> a teacher purposefully misgendering or deadnaming a student is an expression made at work and pursuant to their daily professional duties. A teacher talking to and interacting with their students in the classroom is a key component of their daily professional duties—classroom instruction. Calling on students is integral to classroom discussion. Unlike a teacher critiquing a name and pronoun policy at a school board meeting<sup>124</sup> or a teacher giving an opinion to a newspaper,<sup>125</sup> a teacher misgendering a student only involves the teacher and students in the classroom and occurs while they are teaching, the very activity they are employed to do.

## 2. The Academic Freedom Exception Merely Removes the *Garcetti* Threshold

In *Garcetti*, the Supreme Court clarified that its decision did not address whether the analysis regarding the public concern applied to scholarship or teaching.<sup>126</sup> In *Meriwether*, the 6th Circuit Court of Appeals went a step further

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117. *Lane v. Franks*, 573 U.S. 228, 240 (2014).

118. *Id.* at 238.

119. *Garcetti*, 547 U.S. at 422.

120. *Id.* at 420-21.

121. *Id.* at 421-22.

122. *Id.* at 422-23.

123. *Id.* at 422.

124. *See Cross*, 2021 WL 9276274 at \*1 (granting preliminary injunction that ended public school teacher's leave without pay after teacher spoke out against proposed gender-affirming policy at school board meeting).

125. *See Pickering*, 391 U.S. at 564, 572-73.

126. *Garcetti*, 547 U.S. at 425.

and argued that academic freedom was an exception to *Garcetti*.<sup>127</sup> The justification for this was based on precedent that “universities occupy a special niche in our constitutional tradition”<sup>128</sup> and that academic freedom for universities “does not tolerate laws that cast a pall of orthodoxy over the classroom.”<sup>129</sup> In that case, a professor at a public university brought claims for violations of free speech and free exercise after being reprimanded for refusing to follow the school’s pronoun policy.<sup>130</sup> Concerning the free speech claim, the court held that “the academic freedom exception to *Garcetti* covers all classroom speech related to matters of public concern whether that speech is germane to the contents of the lecture or not.”<sup>131</sup>

While it is unclear whether academic freedom applies to K-12 schools,<sup>132</sup> in *Meriwether*, even after deciding that *Garcetti* did not bar Meriwether’s free speech claim, the court still applied the balancing framework of *Pickering* and *Connick*.<sup>133</sup> In other words, academic freedom merely takes away the threshold requirement added to the First Amendment analysis in *Garcetti*.

### 3. *Pickering* – Speech on a Matter of Public Concern

If misgendering or deadnaming a student somehow survives the *Garcetti* threshold, next it needs to fall under speech on a matter of public concern within the First Amendment protection analysis.<sup>134</sup> If misgendering or deadnaming is considered discrimination,<sup>135</sup> then it might not even be speech in the first place.<sup>136</sup> Laws that govern conduct, such as treason or discrimination, may sometimes regulate conduct that is in the form of speech.<sup>137</sup> A hiring sign that says “whites only” is speech, but it is also discriminatory conduct strictly prohibited by Title VII.<sup>138</sup> Similarly, hostile work environments are often created by employee speech but are also prohibited by Title VII.<sup>139</sup> Thus, if deadnaming and misgendering of a TNB student creates a hostile environment or is discriminatory, that speech would not be entitled to First Amendment protection.<sup>140</sup>

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127. *Meriwether*, 992 F.3d at 507.

128. *Id.* at 504 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

129. *Id.* at 509 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

130. *Id.* at 498, 512.

131. *Id.* at 507.

132. See Corbin, *supra* note 86, at 652-54, for a more in-depth discussion regarding the application of academic freedom in K-12 schools.

133. *Meriwether*, 992 F.3d at 507-08.

134. *Pickering*, 391 U.S. at 574.

135. See *supra* Section II.A.2.

136. See Corbin, *supra* note 86, at 665.

137. *Id.* at 665.

138. *Id.* at 655 n.237.

139. *Id.*

140. *Id.*

With respect to whether name and pronoun usage is a matter of public concern, a teacher refusing to use one student's name and pronouns in their classroom is not part of a public debate about pronouns; it is only about respecting that individual student's name and pronouns. In *Pickering*, the topic of the contested speech made by the teacher was a critique of his school's allocation of funds in conjunction with a proposed tax increase for school revenue.<sup>141</sup> The statements made by the teacher were made publicly and about a subject that had current public attention.<sup>142</sup> The court determined that where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as a member of the general public he seeks to be."<sup>143</sup>

While a discussion about pronoun policies and gender identity is a matter of current public debate, the usage of names and pronouns by a teacher in a classroom does not contribute to that public debate in any respect. Further, such speech is performed in a classroom and not a public forum. The mere usage of pronouns is not even a classroom discussion about gender identity or gender-diverse pronouns. While the overall societal discussion of gender identity is a matter of public debate, the use of an individual's chosen name and pronouns is not. Unlike a teacher critiquing a name and pronoun policy at a school board meeting<sup>144</sup> or a teacher giving an opinion to a newspaper,<sup>145</sup> both of which contribute to some sort of public discussion, a teacher misgendering a student only involves the teacher and students in the classroom.

#### 4. *Pickering* – Balanced Against Adequate Government Justification

The balancing that occurs for First Amendment speech of public employees weighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" against the interests of the employee, as a citizen "commenting upon matters of public concern."<sup>146</sup> The greater the importance of the speech to a matter of public concern or if the speech more substantially involves a matter of public concern, the more disruption an employer may have to accept.<sup>147</sup>

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141. *Pickering*, 391 U.S. at 564.

142. *Id.* at 572.

143. *Id.* at 574.

144. *See Cross*, 2021 WL 9276274 at \*1 (granting preliminary injunction that ended public school teacher's leave without pay after teacher spoke out against proposed gender-affirming policy at school board meeting).

145. *See Pickering*, 391 U.S. at 564, 572-73 (holding that teacher's dismissal from public employment improper because teacher has a right to speak on issues of public importance).

146. *Id.* at 568.

147. Corbin, *supra* note 86 at 669 n.256 (citing *Connick*, 461 U.S. at 164 n.4; *Lane*, 573 U.S. at 242).

In *Pickering*, the contested speech voiced a difference of opinion on how school funds should be allocated and addressed the issue of whether the school needed more funds.<sup>148</sup> Any increase in funds is decided by the public, and thus “free and open debate is vital to informed decision-making by the electorate.”<sup>149</sup> In addition, the court noted that the contested speech did not interfere with the “teacher’s proper performance of his daily duties in the classroom” or with the school’s overall operation.<sup>150</sup> Statements in the letter did not directly critique any coworker or superior that the teacher normally interacted with during his job.<sup>151</sup> The letter was even published after the proposed tax increase was already defeated, meaning that it did not even have the potential to sway voters to withhold support for an increase in school funds.<sup>152</sup> The court ultimately held that “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.”<sup>153</sup>

Even if a teacher’s use of a TNB student’s chosen name and pronouns was considered speech as a citizen on a matter of public concern, the First Amendment protection could still fail when balanced against an adequate government justification.<sup>154</sup> First, how does a teacher’s use of a TNB student’s name and pronouns add to the public debate surrounding gender identity and gender-diverse pronouns? Does it contribute to a classroom discussion? While any teacher contesting a name and pronoun policy certainly would be adding to the public debate if they spoke at a school board meeting<sup>155</sup> or wrote an opinion in the newspaper,<sup>156</sup> using a student’s name and pronouns adds nothing to the public debate. Conversely, the government has many potential justifications for controlling speech involving the usage of names and pronouns of students. One pertinent government justification for this type of policy would be compliance with Title IX and the Equal Protection Clause.<sup>157</sup> When a public-school teacher speaks in their classroom, they must follow certain anti-discrimination, safety, and curriculum policies. Is there a meaningful difference between these types of policies and gender-affirming name and pronoun policies? If purposeful misgendering and deadnaming is a violation of Title IX and the Equal Protection

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148. *Pickering*, 391 U.S. at 571.

149. *Id.* at 571-72.

150. *Id.* at 572-73.

151. *Id.* at 570.

152. *Id.* at 571.

153. *Id.* at 573.

154. *See id.* at 568, 573.

155. *See Cross*, 2021 WL 9276274 at \*1 (granting preliminary injunction that ended public school teacher’s leave without pay after they spoke out against proposed gender-affirming policy at school board meeting).

156. *See Pickering*, 391 U.S. at 564, 572-73 (holding that teacher’s dismissal from public employment improper because teacher has a right to speak on issues of public importance).

157. *See supra* Section II.A.2.

Clause,<sup>158</sup> the regulation of name and pronoun use would not be any different than other anti-discrimination policies. Other justifications include prioritizing student health, well-being, and learning ability.<sup>159</sup> Purposefully misgendering a student disrupts the classroom, at the very least, for that affected student.

##### 5. Any Religious Accommodation Must Not Cause an Undue Burden

Even if a teacher is not protected by the First Amendment for purposefully misgendering a student, that teacher might request an accommodation if a gender-affirming name and pronoun policy infringes on a sincerely held religious belief.<sup>160</sup> Only a handful of cases have specifically discussed the rights of K-12 teachers who disagree with gender-affirming name and pronoun policies, none of which have been decided by the Supreme Court.<sup>161</sup> Two cases involved teachers who sought a religious accommodation to avoid following a gender-affirming name and pronoun policy.<sup>162</sup> These teachers believed that using gender-affirming names or pronouns would be “promoting transgenderism”<sup>163</sup> or more than two genders.<sup>164</sup> The policy was not analyzed in one of these cases because the teacher was willing to comply sufficiently to avoid violations;<sup>165</sup> but the other case, *Kluge v. Brownsburg Community School Corporation*, directly addressed the issue.

In *Kluge*, a music teacher sued his prior employer for forcing him to resign after refusing to use transgender students’ preferred names, “to the extent that he deemed those names not consistent with their sex recorded at birth.”<sup>166</sup> At first, the school allowed a religious accommodation for Kluge to refer to all students by last names only.<sup>167</sup> However, this accommodation was revoked after multiple students and teachers complained.<sup>168</sup> The school argued that Kluge’s accommodation “negatively impacted students and the learning environment” and exposed the school to the risk of Title IX litigation brought by transgender

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158. *See supra* Section II.A.2.

159. *See supra* Section II.A.1.

160. *See Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861, 864 (7th Cir. 2023), *vacated on reh’g*, 2023 WL 4842324 (7th Cir. 2023).

161. *See generally Kluge*, 64 F.4th at 864; *Ricard*, 2022 WL 1471372 at \*1. In *Vlaming*, a teacher claimed violations of First Amendment free speech and free exercise of religion after being fired for refusing to use a transgender student’s preferred name and pronoun. *Vlaming*, 10 F.4th at 304. This case, however, has yet to be decided on the merits after removal to federal court was denied. *Id.* at 305.

162. *Kluge*, 64 F.4th at 864; *Ricard*, 2022 WL 1471372 at \*3.

163. *Kluge*, 64 F.4th at 866-67.

164. *Ricard*, 2022 WL 1471372 at \*1.

165. *Id.* at \*3.

166. *Kluge*, 64 F.4th at 864.

167. *Id.* at 869.

168. *Id.* at 869-73, 875.

students.<sup>169</sup> While the Court of Appeals did not analyze the First Amendment claim, it stated that “the district court correctly held that when Kluge was addressing students in the classroom, his speech was not protected by the First Amendment.”<sup>170</sup> And while “Title VII provides more protection for an employee’s religious speech than the First Amendment, . . . its protection is limited to accommodations that do not work an undue hardship on the employer.”<sup>171</sup> Thus, the Court of Appeals focused its discussion on whether Kluge’s accommodation created an undue hardship for the school.<sup>172</sup>

Because Kluge had met his burden to show that the name and pronoun policy conflicted with his sincerely held religious belief, the school had the burden of proving that it could not provide a reasonable accommodation “without undue hardship on the conduct of [its] business.”<sup>173</sup> The business of the public school is “its constitutional and statutory charge to educate all students who enter its doors.”<sup>174</sup> The last names only accommodation stigmatized the transgender students, and made them feel “disrespected, targeted, isolated, and dehumanized.”<sup>175</sup> Other students and teachers reported that the practice created a “tense, awkward and uncomfortable” classroom environment and “resulted in students being uncertain about how to behave and how to address their transgender classmates.”<sup>176</sup> While some students and teachers were not bothered by the accommodation, the Court of Appeals noted that “it was not necessary for the school to find that Kluge’s practice harmed all of the students before the school was justified in addressing the situation.”<sup>177</sup> Because education is the business of every school, “emotional harm to students and disruptions to the learning environment are objectively more than *de minimis* or slight burdens to schools.”<sup>178</sup>

Moreover, the accommodation increased the risk of Title IX liability, further showing undue hardship.<sup>179</sup> As the trial court noted, Title VII “does not require employers to provide accommodations that would place them ‘on the ‘razor’s edge’ of liability.”<sup>180</sup> Allowing the accommodation to continue when two transgender students felt “targeted and dehumanized” increased this liability

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169. *Id.* at 884-85.

170. *Id.* at 892.

171. *Id.*

172. *Id.* at 884.

173. *Id.* (quoting 42 U.S.C. § 2000e(j)).

174. *Id.* at 884.

175. *Id.* at 894.

176. *Id.*

177. *Id.* at 888.

178. *Id.* at 886-87.

179. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 845-46 (S.D. Ind. 2021), *aff’d*, 64 F.4th 861, 864 (7th Cir. 2023), *vacated on reh’g*, 2023 WL 4842324 (7th Cir. 2023).

180. *Id.* at 845.



risk.<sup>181</sup> However, the Court of Appeals declined to discuss “whether Kluge’s accommodation created an additional undue hardship by exposing the school to liability under Title IX” because undue hardship had already been shown through the emotional harm and disruptions to the learning environment.<sup>182</sup>

The Court of Appeals ultimately concluded that “[a]llowing Kluge to continue in the practice . . . placed an undue hardship on Brownsburg’s mission to educate all of its students, and its desire to treat all students with respect and affirmation for their identity in the service of that mission.”<sup>183</sup> “Because no reasonable jury could conclude that a practice that emotionally harms students and disrupts the learning environment is only a slight burden to a school, and because no other accommodations were available,” the school proved undue hardship as a matter of law and summary judgment was affirmed.<sup>184</sup>

During the litigation of *Kluge*, the Supreme Court clarified the standard for analyzing religious accommodation claims in *Groff v. DeJoy*.<sup>185</sup> While certain circuits, including the Seventh Circuit in *Kluge*, had latched onto the phrase *de minimis* cost from prior precedent as the threshold to establish undue hardship, the Supreme Court explained that this phrase did not fully encompass the standard.<sup>186</sup> If an employer seeks to refuse a religious accommodation, they must show that the resulting “burden is substantial in the overall context of [the] employer’s business.”<sup>187</sup> This analysis must be performed while considering all relevant factors such as the accommodation at issue, its effect on the business, and the associated costs and size of the business.<sup>188</sup> The hardship placed on the business by the accommodation must be excessive or unjustifiable in order for it to cause the employer an undue hardship.<sup>189</sup>

*Kluge* was first decided in favor of the school in the trial court, and the case was appealed and affirmed by the Seventh Circuit Court of Appeals.<sup>190</sup> However, in light of the ruling in *Groff*, the Seventh Circuit Court of Appeals vacated their prior ruling in *Kluge* and remanded the case back to the district court in order for the clarified standard to be applied.<sup>191</sup> Even though the ultimate standard will be different, the facts and circumstances considered by the court will still be relevant in the remanded *Kluge* case.<sup>192</sup> The trial court originally

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181. *Id.* at 845-46.

182. *Kluge*, 64 F.4th at 894.

183. *Id.* at 894.

184. *Id.* at 891.

185. *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

186. *Id.*; see *Kluge*, 64 F.4th at 886-87.

187. *Groff*, 600 U.S. at 468.

188. *Id.* at 470-71.

189. *Id.* at 469.

190. *Kluge*, 548 F. Supp. at 849, *aff’d*, 64 F.4th 861 (7th Cir. 2023), *vacated and remanded*, 2023 WL 4842324 (7th Cir. 2023).

191. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 2023 WL 4842324, at \*1 (7th Cir. 2023).

192. See *Groff*, 600 U.S. at 470.

noted that the requested accommodation caused hardship to the school by interfering with educating all students and creating Title IX liability.<sup>193</sup> While this hardship was clearly more than *de minimis*,<sup>194</sup> it is also likely substantial and unjustifiable as it interfered with the very purpose of the public school—to provide an education to *all* of its students.<sup>195</sup>

*Kluge* illustrates how even a seemingly neutral accommodation, such as treating everyone the same by using only last names and no pronouns, could still cause undue hardship to a public school.<sup>196</sup> “Title VII does not require the school to adopt an accommodation that, although facially neutral, does not work that way in practice.”<sup>197</sup> Would the situation be different if Kluge had always called students only by last name and no pronouns/honorifics? There are only a few options for accommodations from name and pronoun policies: 1) use last names and no pronouns/honorifics for all students, 2) use last names and no pronouns/honorifics for the TNB student only, and 3) do not refer to any student names or pronouns. The second option, as explained earlier, singles out the TNB students from others and could contribute to liability under Title IX or the Equal Protection Clause.<sup>198</sup> On the other hand, the third option of not referring to or calling on students at all seems impossible, or likely to interfere with the ability to effectively teach. That leaves the first option as the only potentially viable one. However, if the teacher slips up in any instances and uses first names, pronouns, or gender-specific honorifics for cisgender students, similar to *Kluge*, then the use of solely last names most of the time might appear to be a result of the transgender students in the classroom.

### C. *Parental Rights Add Complications When Unsupportive of Child’s Gender Identity*

In addition to the separate interests of students and teachers, a potential problem can arise when transgender students have preferred names and pronouns that conflict with their parents’ wishes, or when students socially transition at school but have not done so at home yet. How do schools navigate affirming student identities while avoiding “outing” students to their parents? And what happens when teachers have religious qualms about keeping parents out of the loop? To complicate matters further, state legislatures are increasingly getting involved in school policies governing parental control of child

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193. *Kluge*, 548 F. Supp. 3d at 843-46.

194. *Id.* at 845.

195. *See id.* at 844-45.

196. *See Kluge*, 64 F.4th at 891.

197. *Id.*

198. *See supra* Section II.A.2.

upbringing and the requirement of parental consent if teachers use a name or pronoun different from that assigned at birth.<sup>199</sup>

Thus far in this article, most of the discussion has been centered around either a TNB student that is supported by their parents, or a TNB student that does not expressly have unsupportive parents. This analysis could be altered when a student seeks to socially transition at school, while the parents are vocally against it.<sup>200</sup> In addition, school policies regarding parental disclosure have been contested both by parents and teachers who did not want to follow them.<sup>201</sup> At the same time, schools must be mindful of the individual safety risk, both physical and emotional, of each TNB student when deciding how to proceed with parental disclosure of gender identity.<sup>202</sup> Safety concerns are especially salient because LGBTQ youth disproportionately experience “homelessness and marginal housing due to rejection by families and communities.”<sup>203</sup>

In a Maryland Federal District Court case, parents of public school students sued the board of education based on their rights as parents regarding the school district’s policy on student gender identity.<sup>204</sup> The contested policy includes many provisions regarding best practices to support TNB students, including ones that foresee parental involvement with gender-support plans.<sup>205</sup> However, other portions advise against disclosure of student pronouns or gender identity to parents without prior student consent.<sup>206</sup> Ultimately all of the claims made by the parents were dismissed, and the court found that the parents did not have a fundamental right to be promptly informed of their child’s gender identity when it differed from that usually associated with the sex assigned at birth.<sup>207</sup>

The First Amendment rights of teachers will not justify creating harm to students either. While *Ricard* discussed the free exercise rights of a teacher, the policy at issue regulated how teachers refer to students’ names and pronouns with parents.<sup>208</sup> In that case, the court noted that there would be a compelling

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199. See ACLU, *supra* note 2.

200. See generally Murphree, *supra* note 37, at 405.

201. See, e.g., *John & Jane Parents 1 v. Mont. Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 123-24 (D. Md. 2022); *Ricard*, 2022 WL 1471372 at \*1.

202. See generally Murphree, *supra* note 37 at 405 n.1; Misha Valencia, *Why We Need to Stop Outing LGBTQIA Students*, PARENTS (last updated Aug. 29, 2023), <https://www.parents.com/parenting/dynamics/lgbtq/stop-outing-queer-teens/> [https://perma.cc/NV4K-8XX9].

203. PROMISING PRACTICES, *supra* note 32, at 10.

204. *John & Jane*, 622 F. Supp. 3d at 123.

205. *Id.* at 125.

206. *Id.* at 124.

207. *Id.* at 130, 144, 147.

208. *Ricard*, 2022 WL 1471372 at \*8-9. “If a rule that burdens religious exercise is not neutral and generally applicable, it will survive constitutional challenge only if the government can demonstrate ‘interests of the highest order’ and that the rule in question is ‘narrowly tailored’ to achieve those interests.” *Id.* at \*4. The court did not find that the policy was neutral and generally

interest for a school to avoid disclosure of preferred name and pronouns to a parent, “where there is a particularized and substantiated concern” that disclosure could lead to harm to the child.<sup>209</sup> However, the policy at issue did not make any distinctions between situations where there was or was not an actual safety concern about parental disclosure, making it overinclusive.<sup>210</sup> “An appropriately tailored policy would, instead, make an individualized assessment whether there is a particularized and substantiated concern of real harm—as opposed to the generalized concern of parental disagreement—and prohibit disclosure only in those limited instances.”<sup>211</sup>

These two cases illustrate that, while policies regulating parental disclosure can exist, there are complexities involved concerning the rights of teachers, parents, and students. To prioritize student well-being while withstanding legal challenges, a policy regulating parental disclosure should be individualized to the particular needs of that student.<sup>212</sup> However, with more states proposing laws requiring prior parental consent and disclosure for any social transition,<sup>213</sup> schools may be limited in their ability to do so. Similar to addressing teachers’ rights, the priority should be student safety and well-being.

#### CONCLUSION

As of 2022, TNB students are federally protected against discrimination based on gender identity under Title IX and the Equal Protection Clause, which should prohibit purposeful deadnaming and misgendering of TNB students. In addition to following federal law, public schools should create policies that support TNB students through the usage of gender-affirming names and pronouns to support TNB student health, well-being, and academic success. Schools need to be prepared to handle affirming TNB students before a need arises.

When teachers are required to follow these gender-affirming name and pronoun policies, the public school is regulating the speech of a public employee, which has some First Amendment protection. However, any claim

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applicable because it allowed for countless exceptions such as inadvertent disclosures to parents or compliance with the Family Educational Rights and Privacy Act (FERPA). *Id.* at \*5. Further, the policy did not have a compelling government interest because the reason given for the original change was to comply with FERPA, even though the interpretation of compliance was incorrect. *Id.* at \*7.

209. *Id.* at \*8.

210. *Id.*

211. *Id.*

212. For a more in depth discussion of parental rights with respect to their child’s gender identity in school, see generally Murphree, *supra* note 37; Maggi Paino & Suzanne Eckes, *Do Parents Have a Fundamental Right to Know About Their Child’s Gender Identity in School?*, 405 ED. LAW. REP. 17 (2022).

213. *See* ACLU, *supra* note 2.

brought by a disgruntled teacher will likely not meet the requirements to gain First Amendment protection. If *Garcetti* is applied to K-12 school instruction, the use of names and pronouns of students in compliance with school policy would likely be considered part of a teacher's daily professional responsibilities, and thus would not be protected by the First Amendment. Even if *Garcetti* is not applied, First Amendment protection still might fail due to the classification of misgendering and deadnaming TNB students as discriminatory conduct instead of speech. The public school has a responsibility to regulate public employee conduct to ensure they do not violate the Equal Protection clause or other applicable law. While a discussion about gender identity may be a matter of public concern, a teacher's use of the name and pronouns of a TNB student does not meaningfully contribute to that discussion. Contrastingly, the government has many interests in controlling the teacher's speech in using gender-affirming names and pronouns—to comply with Title IX and the Equal Protection Clause, and in prioritizing student health, well-being, and learning ability. Thus, the balancing test would likely weigh in favor of the government justification, overpowering the employee speech's contribution to a matter of public concern.

Title VII, as well, is unlikely to require a different outcome. Because requests for religious accommodations may bring undue hardship to the school either by interfering with the learning environment or exposing the school to a greater risk of liability under Title IX, schools may not offer religious accommodations to the gender-affirming name and pronoun policies in the classroom. The facts in *Kluge* illustrate the need to have a policy in place, and teachers who have issues with it to request accommodation before a need to apply the policy arises. Had the teacher always used solely last names, it might not have been interpreted as opposing the TNB student's gender identity.

While policies regulating parental disclosure can exist, there are complexities involved concerning the rights of teachers, parents, and students. To prioritize student well-being while withstanding legal challenges, it appears that a policy regulating parental disclosure should be individualized to the particular needs of that student. Ideally, parents will be supportive of their TNB children. But when there is no support or awareness, schools should be careful not to out students, especially when there is an individual emotional or physical safety risk.

Ultimately, student well-being should be the priority when drafting gender-affirming name and pronoun policies. When teachers disagree with these gender-affirming policies, their speech will unlikely be protected under the First

Amendment. Furthermore, any request for religious accommodation must not open the school up to more legal liability under Title IX or the Equal Protection Clause.

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