National Association of College and University Attorneys
Presents:

The Law of Gender Identity on Campus

Webinar

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9:00 AM – 11:00 AM Pacific

Presenters:

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University of Tennessee System (Knoxville)

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Webinar

The Law of Gender Identity on Campus

Becca Gose serves as Vice President and General Counsel for Oregon State University (OSU). As Chief Legal Officer, she leads the Office of the General Counsel, consisting of a team of attorneys focused on strategic and preventive advising, finding innovative solutions, and fostering collaborative problem-solving. Reporting directly to the President, Becca is a member of the University Cabinet and advises the Board of Trustees, President, Provost, and various levels of university leadership.

Becca has served OSU since 2010, as Assistant and then Associate General Counsel, and began her role as Chief Legal Officer in 2015. Prior to joining OSU, she was an associate litigation attorney in the San Francisco office of Munger, Tolles and Olson, where a portion of her practice was dedicated to representing higher education institutions. She received her JD from the University of California at Berkeley and her BA from the University of Colorado at Boulder. Following law school, she clerked for the Honorable David M. Ebel on the Tenth Circuit Court of Appeals.

Becca actively contributes to the higher-education legal community through her involvement in NACUA and is currently serving on the Board of Directors and chairs the Committee on Strategic Planning. Her prior engagements include participation on the Annual Conference Planning Committee, Committee on Legal Education, General Counsel Institute Planning Committee, and the NACUA Membership and New Members Committee. She has also been a speaker or a discussion leader at multiple NACUA conferences and workshops. Additionally, she serves on the Board of Trustees for the Corvallis Public Schools Foundation, currently as Immediate Past Chair and previously as Chair and Secretary.

Esther Henry is Associate General Counsel in the Office of the General Counsel of the University of Tennessee System (Knoxville), which she joined in May 2022. In this role, Esther primarily works on student affairs, faculty affairs, and employment matters.

Previously, Esther served as Senior Associate General Counsel in the Office of the General Counsel of Oregon State University (Corvallis) from June 2015 to May 2022. Esther supervised four attorneys and primarily practiced within student, employment, Title IX and sexual misconduct,

compliance and emergency response areas. In this role, Esther also advised the Threat Assessment Team, Clery Timely Warning response group, and Student Care Team.

Prior to OSU, Esther served at the Colorado School of Mines (Golden, CO) as Associate Counsel from October 2006 through June 2015, where she was a true generalist in a two-attorney office.

From September 2002 through October 2006, Esther was the HIPAA Project Manager and Privacy Officer for the University of Colorado Health Sciences Center (now the Anschutz Medical Campus) in Denver and Aurora. In this role, she was responsible for implementing HIPAA compliance, delivering employee training, and responding to privacy-related allegations and requests.

Esther began her higher education practice at the University of Colorado Health Sciences Center Office of General Counsel in September 2000. She was a Research Associate Attorney in that role and primarily advised related to the campus' health professions academic programs, public records, compliance and student matters.

Esther holds a Bachelor of Arts in Spanish and a Bachelor of Science in Management from Purdue University (West Lafayette). She received her J.D. from Indiana University (Bloomington) - Maurer School of Law.

Daniel Kaufman is a Partner with Michael Best & Friedrich LLP. Clients turn to Dan because he is an outstanding litigator and a trusted advisor on employment and other issues. His deep knowledge of employment law, exceptional judgment, and strategic advice enable clients to achieve their goals.

Businesses, colleges and universities, municipalities, and other clients rely on Dan’s proven litigation experience and proactive counsel on a broad range of issues, including:

- Discrimination and harassment suits
- Non-compete, non-solicitation, and confidentiality agreements
- Hiring, disciplining and terminating employees
- Retaliation and whistleblower claims
- Medical leaves and disability
- Wage and hour matters
- Litigation avoidance

Dan’s work is regularly honored by regional and national ranking organizations. He holds an AV® (preeminent/highest) rating from Martindale-Hubbell®. He received an award for excellence in pro bono service from the Judges of the United States District Court for the Northern District of Illinois and

the Chicago Chapter of the Federal Bar Association in 2010. Dan has held various leadership roles at Michael Best, including serving as the immediate past chair of the Labor & Employment Relations Group, previously serving as a member of the Management Committee and serving twice as the Managing Partner of the Chicago Office. Dan served as Law Clerk to the Honorable Charles L. Levin, Michigan Supreme Court, from Fall 1986 to Fall 1987.

Materials

The Law of Gender Identity on Campus[1]

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[1] The authors wish to thank NACUA's 2024-25 Law Fellow Rachel Jenkin and Senior Legal Resources Attorney Jacquelynn Rich Fredericks for their help preparing these materials.

I. CASE SUMMARIES

U.S. Dep't of Ed. v. Louisiana, 603 U.S. ____ (2024)

U.S. Supreme Court per curium denial of applications for stay in *Department of Education v. Louisiana*, No. 24A78 and *Cardona v. Tennessee*, No. 24A79. Multiple states filed suit against the U.S. Department of Education, Office for Civil Rights (OCR) challenging the Final Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, on multiple grounds, including arguing that the Rule exceeds the four corners of the Congressionally implemented statutory text, and sought preliminary injunction. The U.S. Districts of Louisiana and Kentucky granted plaintiffs' preliminary relief against enforcement of the Rule in the plaintiff states. The U.S. Courts of Appeal for the Fifth and Sixth Circuits declined to stay the respective injunctions. Subsequently, the Department made an emergency application to the Supreme Court seeking partial stays of the PIs pending resolution of the appeals before the Circuits. The Supreme Court reasoned that plaintiffs were entitled to preliminary injunctive relief on a trio of provisions of the Rule regarding the scope of the definition of sex discrimination, which includes discrimination on the basis of sexual orientation and gender identity, rejected the Department's request to sever those provisions and implement the remainder of the Rule, and thus, denied the emergency applications.

Texas v. Cardona (N.D. Tex. Aug. 5, 2024)

Memorandum Opinion and Order granting Plaintiff's Motion for Summary Judgment. Plaintiff, the State of Texas, sued seeking vacatur and permanent injunction on implementation or enforcement of the U.S. Department of Education's 2021 Notice of Interpretation, Dear Educator Letter, and Fact Sheet (the "Guidance Documents"), which cited the Supreme Court's decision in *Bostock v. Clayton County* to interpret the nondiscrimination protections of Title IX to prohibit discrimination on the basis of gender identity and sexual orientation. In granting summary judgment in favor of the State and awarding the requested relief, the court first held that the Guidance Documents are contrary to law and exceed the Department's authority, finding that (1) the statutory text uses "sex" to mean biological sex and "identifies many situations in which differential treatment and separation is permissible;" (2) the Guidance Documents conflict with or undermine provisions of Title IX; and (3) the Department exceeded the clear-statement requirement of the Spending Clause to give the States congressional notice of their obligations and attempted to decide a major question properly left to Congress. It rejected the Department's application of the underlying reasoning of Bostock to Title IX, noting that "Bostock stated without equivocation that it's holding only applies to Title VII." It further held that the Guidance Documents "constitute a substantive rule—rather than interpretive statements—subject to the APA's notice and comment rulemaking process." The court enjoined the Department from implementing or enforcing the interpretation "against Plaintiff and its respective schools, school boards, and other public, educationally based institutions." Update: On August 5, 2024, the court updated its order to provide, "This scope of this relief SHALL NOT extend to pending cases involving Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. § 106 on August 1, 2024)." The Department filed notice of appeal to the Sixth Circuit in October 2024.

L.M. v. Town of Middleborough, Massachusetts (1st. Cir. Jun. 9, 2024)

Opinion affirming the judgment of the district court. Plaintiff, a middle school student, brought First Amendment claims against the Town of Middleborough, Massachusetts and school officials after he was

prohibited from wearing a t-shirt that read "There Are Only Two Genders" at school. The district court found in favor of the school upon determining that the school's actions were justified and fell within the "material disruption" limitation, citing *Tinker v. Des Moines*. In upholding the judgment, the First Circuit reasoned that the t-shirt's message could negatively affect the psychological well-being of students with those identities and was likely to cause disruption in the classroom. As of November 12, 2024, a petition for writ of certiorari has been sent to the U.S. Supreme Court.

Muldrow v. City of St. Louis (Apr. 17, 2024)

6-3 decision vacating judgment and remanding. Plaintiff, a female former police officer for the St. Louis Police Department, contended the Department transferred her from one job to another because of her gender. Plaintiff alleged she was moved from a plainclothes job in a specialized division with substantial responsibility over priority investigations, to supervising one district's patrol officers with less involvement and primarily performing administrative work with a less regular schedule and no take-home car. She brought claims under Title VII, alleging sex discrimination. The Court ruled in plaintiff's favor and held that in order to succeed in a 42 U.S.C.S. § 2000e-2(a)(1) discrimination claim, a transferee has to show some harm respecting an identifiable term or condition of employment, but does not have to show that the harm incurred was significant, serious, or substantial. It further found that the lower court erred in requiring plaintiff to show that an allegedly discriminatory transfer resulted in a significant employment disadvantage.

Wood v. Fla. Dep't of Educ. (N.D. Fla. Apr. 9, 2024)

Order granting Plaintiff's Motion for Preliminary Injunction. The lead Plaintiff, a public high school teacher who is a transgender woman and prefers (but ceased using) she/her pronouns, sought preliminary injunction, on the basis of Title VII and the First Amendment, against a Florida Department of Education policy providing for every K-12 institution that "a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex." The court found plaintiff was unlikely to succeed on the merits of her Title VII claim, as the requirement that she be referred to as "Teacher," rather than "Ms.," was not an adverse employment action, and the record was insufficient to demonstrate the likelihood of success on a hostile work environment theory. Turing to her First Amendment claim, the court enjoined enforcement of the policy against plaintiff, finding that (1) plaintiff's statement of preference of pronouns was the highly personal, self-referential speech of a citizen that could not be confused with a government-created message (following the U.S. Supreme Court's "practical inquiry" regarding the religious expression in *Kennedy v. Bremerton School District*); (2) even though highly personal, the preference of pronouns is a publicly-oriented expression on a matter of "undisputed 'passionate political and social debate;'" and (3) the State provided no evidence that the use of plaintiff's pronouns would impede her official duties or adversely impact school operations to justify enforcing the viewpoint discriminatory prohibition in favor of the State's preferred opinion on pronouns.

Slusser v. Mountain West Conference (D. Colo. Nov. 13, 2024)

A dozen volleyball student-athletes along with San Jose State Assistant Coach Melissa Batie-Smoose have filed a lawsuit against the Mountain West, Commissioner Gloria Nevarez, the Cal State Board of Trustees and SJSU President Cynthia Teniente-Matson, among others. The suit also requests emergency injunctive relief in advance of the conference tournament, which starts November 27, and alleges violations of Title IX and First and 14th Amendment rights stemming from SJSU allegedly having a transgender player on its roster. From the suit: "Recently, the MWC, SJSU, and the other Defendants

have collectively manipulated MWC rules, diminished sport opportunities for women, spread inaccurate information, used their positions to chill and suppress speech with which they disagree, and punished dozens of female collegiate volleyball student-athletes for taking a public stand for their right to compete in a separate sports category, all in a concerted effort to stamp out debate over women's rights in sport." The suit goes on to argue that the SJSU player in question should be ineligible to play in the tournament and the Spartans transporting that player to the conference tournament is a violation of Title IX. "Review of the existing MWC policies, which do not set forth a clear policy or practice of imposing losses upon teams which choose not to play for safety reasons, also supports the conclusion the MWC TPP (Transgender Participation Policy) was specifically adopted to chill protests and other expressive conduct, including boycotts, on a women's rights issue."

State of Tennessee v. Dep't of Edu. (6th Cir. Jun. 14, 2024) (ongoing)
Twenty states challenged the Department of Education's Interpretation, Dear Educator Letter, and Fact Sheet and the EEOC's Technical Assistance Document interpreting Title IX and Title VII, respectively, to prohibit discrimination based on sexual orientation and gender identity. The district court granted a preliminary injunction against the guidance based on the plaintiffs' likelihood of success on the merits on the claim that the agencies did not engage in notice and comment rulemaking for what the court deemed to be a legislative rule, in violation of the Administrative Procedure Act (APA). *Tennessee v. U.S. Dept. of Ed.*, No. 21-cv-308, 2023 WL 1097255 (E.D. Tenn. July 15, 2022). The agencies appealed. On June 14, 2024, the Sixth Circuit Court of Appeals affirmed the preliminary injunction.

Hecox v. Little (9th Cir. Jun. 7, 2024) (ongoing)
A transwoman collegiate athlete enrolled in a state university challenged the Idaho "Fairness in Women's Sports Act" as violative of the Equal Protection Clause and Title IX, seeking to participate on the track team. The district court granted a preliminary injunction against the law's enforcement, reasoning that the plaintiff was likely to succeed on her Equal Protection claim, and that deprivation of this constitutional right was an irreparable harm. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020). On appeal, the Ninth Circuit determined that the issue was not moot, *Hecox v. Little*, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023), and the parties briefed the continuing issues in early March.

B.P.J. v. W.V. State Board of Edu. (4th Cir. Apr. 16, 2024) (ongoing)
A transgender middle school girl challenged the West Virginia "Save Women's Sports Act," which also applied to higher education institutions, as violative of Title IX and the Equal Protection Clause. The law prohibited B.P.J. from trying out for the girls' cross-country and track teams. The state prevailed at the district court and was granted summary judgment, with the court reasoning that the law (1) was not motivated by animus towards transgender athletes; (2) served an important governmental interest of providing equal athletic opportunities for females, and thus did not violate the Equal Protection Clause; and (3) did not violate Title IX because Title IX similarly authorized sex separated sports teams. *B.P.J. v. West Virginia State Board of Education*, No. 23-1078, 2023 WL 111875 (S.D.W.V. Jan 5, 2023). However, the student appealed and received a stay of the law pending appeal, *B.P.J.*, No. 23-1078 (4th Cir. Feb. 22, 2023), ECF No. 50, which the Supreme Court declined to vacate, *West Virginia, et al. v. B.P.J*, No. 22A800 (Apr. 6, 2023).[13] The 4th Circuit held that West Virginia's law excluding plaintiff from participating in girls' teams violated Title IX, and the district court erred in dismissing her claim. (Apr. 16, 2024). In July of 2024, West Virginia and the West Virginia Secondary School Activities Commission filed a petition for a writ of certiorari with the Supreme Court, Amicus briefs were filed in mid-August and awaiting review.

Barrett v. Montana (Mont. Supreme Ct. Apr. 26, 2024) (ongoing)
University students challenged the "Save Women's Sports Act" as violative of the independence of the state board of higher education, preserved in the Montana Constitution. The law required public schools, including public universities, to designate athletic teams based on sex assigned at birth and prohibited transgender women from participating on female sports teams. The district court held the law unconstitutional under the Montana Constitution, *see Barrett v. State*, No. DV-21-581B (Mont. Dist. Ct. Sep. 14, 2022), and the case is currently under review at the Montana Supreme Court.

Fellowship of Christian Athletes v. San Jose Unified Sch. District Board of Edu. (9th Cir. Sep. 13, 2023)
Opinion reversing the judgment of the district court. Plaintiffs, a student organization that required its members to adhere to a Statement of Faith (which included the belief that sexual relations should be confided to marriage between a man and a woman), allege the San Jose Unified School District revoked their official student club status, claiming it violated the district's non-discrimination policy. In reversing the district court's denial of plaintiff's motion for a preliminary injunction, the Ninth Circuit directed the district court to reinstate plaintiff as an official student club. Further, the Court concluded that the district's selective enforcement of its non-discrimination policy violated the Free Exercise Clause of the First Amendment. and the policies were generally not applicable because the district had discretion to grant exemptions from both its own programs and student programs.

Kluge v. Brownburg Cmty. Sch. Corp. (7th Cir. Apr. 7, 2023)
Order vacating the court's opinion and judgment and remanding to the district court in light of *Groff v. DeJoy*. Plaintiff, a former high school music teacher with the Brownsburg Community School Corporation who asserted that his sincerely held religious beliefs prevented him from engaging in any action to "promote gender dysphoria," brought discrimination and retaliation claims against Brownsburg after he was forced to resign rather than comply with the school's Name Policy requiring teachers to call students by their first names as listed in the school's database. The school initially permitted him to refer to all students by their last names only, but it withdrew the accommodation, asserting that it was harming students and disrupting the learning environment. The district court granted summary judgment in favor of Brownsburg. Initially, the Seventh Circuit affirmed, finding the school had sufficiently demonstrated that continuing the accommodation posed an undue burden on its mission of educating students according to its established theory and practice. However, "[i]n light of the Supreme Court's clarification in *Groff v. DeJoy* … of the standard to be applied in Title VII cases for religious accommodation," the Seventh Circuit vacated its former opinion and judgment and "remanded for the district court to apply the clarified standard to the religious accommodation claim in the first instance."

Vlaming v. W. Point Sch. Bd. (Va. Dec. 14, 2023)
Opinion reversing dismissal of plaintiff's claims and remanding for further proceedings. Plaintiff, a former French teacher at West Point High School, brought First Amendment, statutory, and contract claims against the West Point School Board after it terminated him when he referred to a transgender male student by the student's preferred name but avoided use of masculine third-person pronouns with respect to the student. In reversing dismissal and remanding for further proceedings on his First Amendment compelled speech claim, the Supreme Court of Virginia held that because he had not insisted on referring to the student by feminine pronouns the school's concern for orderly administration played "no role as a counterbalance to a teacher's right not to be compelled to give a verbal salute to an ideological view that violates his conscious and has nothing to do with the specific curricular topic being taught." Because it held that he had sufficiently alleged a First Amendment violation, the court also

permitted plaintiff's contract and statutory claims to proceed, noting that his contract was not terminable at will and statute protected him from termination without just cause.

Parents Defending Educ. v. Olentangy Local Sch. Dist. Bd. of Educ. (S.D. Ohio July 28, 2023)
Opinion & Order denying Preliminary Injunction. Plaintiff, a nationwide membership organization including parents and students attending the Olentangy Local School District, brought First Amendment claims against the District, challenging its policies on bullying and discriminatory harassment on the grounds that requiring students to use pronouns corresponding to a transgender student's identity would "require the students to affirm the idea that gender is fluid, contrary to their deeply-held religious beliefs." In denying preliminary injunction, the court held that plaintiff was unlikely to succeed on the merits under Tinker because the District's policies "prohibit only that subset of discriminatory speech that creates a threat of physical harm, interferes with students' educational opportunities, substantially disrupts the operation of schools, or causes or contributes to a hostile environment."

Toomey v. Arizona (D. Ariz. Feb. 26, 2021) (ongoing)
A transgender professor at the University of Arizona sued the state and university, arguing that the categorical exclusion from coverage of "gender reassignment surgery" under the university's health insurance plan is a violation of Title VII and the Equal Protection Clause. 2021 WL 753721 (Feb. 26, 2021). The district court denied defendants' motion to dismiss and certified the plaintiff's class but also denied the plaintiff's motion for a preliminary injunction. *Id.* at *1. The court reasoned that the requested injunction went well beyond maintaining the status quo and was thus a mandatory injunction; the injury complained of could in theory be compensated in damages (i.e., reimbursement for the "gender reassignment surgery" if the plaintiff prevailed); and the injunctive relief was materially identical to the ultimate relief the plaintiff sought. *Id.* at *5-6. As a result, the court did not reach the "likelihood of success on the merits" or other traditional preliminary injunction prongs, therefore giving no indication of the ultimate resolution of this case. (Note that the magistrate judge's report and recommendation determined that the plaintiff was unlikely to succeed on the merits because he had not shown that the exclusion of "gender reassignment surgery" is discrimination on the basis of transgender status. *Id.* at *3.) As of August 2023, the court granted plaintiff's Motion for Approval of Consent Decree and closed the case. The Decree was jointly agreed upon and required (1) Defendants to be "permanently enjoined from providing or administering a health plan for [employees of the Board] or the State and their beneficiaries that categorically excludes coverage of medically necessary surgical care to treat gender dysphoria;" (2) Defendants' health plans will "evaluate health care claims for surgical care to treat gender dysphoria pursuant to the health plan's generally applicable standards and procedures;" (3) State Defendants are "permanently enjoined from enforcing or applying ARS § 38-656(E) to the extent that it is inconsistent with [the] Consent Decree;" and (4) state Defendants agree to pay attorney's fees.

Kadel v. North Carolina State Health Plan for Teachers and State Employees (4th Cir. Dec. 1, 2021) (ongoing)
Transgender individuals and their parents sued state officials and three public universities to challenge the state health care plan's categorical exclusion of insurance coverage for treatments "leading to or in connection with sex changes or modifications." After significant procedural and jurisdictional litigation, the district court permanently enjoined the defendants from enforcing their coverage exclusion for "medically necessary services of treatment for gender dysphoria" as violative of the Equal Protection Clause. *Kadel v. Folwell*, No. 19-cv-272, 2022 WL 3226731 (Aug. 10, 2022). Defendants appealed but were denied a stay of the order pending appeal. 2022 WL 11166311 (Oct. 19, 2022). The district court

subsequently granted the plaintiffs' motion for summary judgment on their claim that the exclusion violated the ACA. 2022 WL 17415050 (Dec. 5, 2022). In April 2024, the Fourth Circuit decided in conjunction with a similar case from West Virginia that the healthcare plans in both states discriminated on the basis of gender identity and sex in violation of the Equal Protection Clause and the district court's decision was affirmed. As of July 26, 2024, defendants petitioned the Supreme Court for a writ of certiorari.

Adams v. School Board of St. Johns County (11th Cir. 2022) (en banc)

Transgender high school boy sued the school board alleging that the board's policy prohibiting him from using bathrooms that correspond to his gender identity violated both the Equal Protection Clause and Title IX. The district's Best Practices Guidelines, which the plaintiff's school followed, generally required students to use the bathrooms aligning with their sex assigned at birth, but also provided that "[t]ransgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." The district court ruled in the student's favor on both the Equal Protection and Title IX counts and was affirmed by a divided panel of the Eleventh Circuit. En banc, the Eleventh Circuit reversed, holding that although the challenged policy does make classifications based on sex, and is therefore subject to intermediate scrutiny, the state's important governmental objective to protect students' privacy interests in "shield[ing] their bodies from the opposite sex in the bathroom" justified the policy. As to the Title IX challenge, the court distinguished *Bostock* by noting that (1) the context of employment discrimination is categorically distinct from the context of schools and children; (2) discrimination on the basis of sex assigned at birth does not necessarily entail sex-stereotyping or discrimination based on transgender status in the way that discrimination on the basis of gender identity or sexual orientation does; and (3) Title IX, unlike Title VII, contains an express carve-out for providing separate toilet facilities on the basis of sex, meaning sex assigned at birth. The opinion rests heavily on the unique nature of public schools and the care of children. It is therefore unclear to what extent this reasoning would apply in a higher education setting.

School of the Ozarks, Inc. v. Biden, 41 F.4th 992 (8th Cir. 2022)

A private Christian college challenged a HUD memorandum as violative of the Administrative Procedure Act (APA), First Amendment, and the Religious Freedom Restoration Act (RFRA), which requires the federal government to demonstrate a compelling state interest to restrict a person's free exercise of religion. The agency memorandum stated that the agency would accept for filing and investigate all complaints of discrimination on the basis of sexual orientation and gender identity because the FHA's sex discrimination provisions prohibited such discrimination, in line with Title VII. School of the Ozarks "maintains single-sex residence halls and does not allow members of one sex to visit the 'living areas' of members of the opposite sex." The college would also prohibit transgender students from living in dormitories that conform to their gender identity. The court determined that the college's alleged injury was too speculative given that the policy had not been enforced against the college and there existed no credible threat that HUD would do so in the future. Furthermore, an injunction against implementing the memorandum would not stop HUD from investigating all complaints of sex discrimination as required by the FHA. The Eighth Circuit affirmed the district court's dismissal of the complaint and the school appealed to the Supreme Court. The Court denied the petition on June 20, 2023.

Religious Sisters of Mercy v. Becerra (8th Cir. De. 9, 2022)
Several private entities affiliated with the Catholic Church, including University of Mary, challenged the EEOC's interpretation of the ACA and other antidiscrimination laws to include discrimination on the basis of gender identity, as violative of the RFRA and the First Amendment. The plaintiffs argued that the interpretation would require them to perform and provide insurance coverage for "gender transitions." The district court granted the plaintiffs permanent injunctive relief from federal enforcement of the law to require provision of such services or coverage, finding that the plaintiffs had demonstrated imminent irreparable harm from the intrusion on their religious activities, a likely RFRA violation. The Eighth Circuit affirmed the district court's grant of permanent injunctive relief, except for recognizing the associational standing of the Church Benefits Association and remanded the case for further proceedings. Following the Eighth Circuit's holding, the parties litigated for a rehearing en banc but were ultimately denied by the Eighth Circuit in March of 2023.

Tudor v. Se. Okla. State Univ. (10th Cir. 2021)
The Plaintiff is a transgender woman who started teaching at Southeastern Oklahoma State University in 2004, at which time she presented as a man. In the spring of 2007, the Plaintiff notified Human Resources that they planned to transition, and she returned to teaching the next semester, now presenting as a woman. In fall 2008, the Plaintiff applied for tenure and the committee voted against tenure, so she withdrew her application. She applied again in 2009-2010, and although she was recommended to be granted tenure by a 4-1 vote of the committee, she was denied tenure. Further, her subsequent attempts to apply for and obtain tenure were not successful, resulting in her contract expiring and not being renewed in 2011. The Plaintiff sued alleging, in pertinent part, sex discrimination. Evidence to support the jury verdict in Plaintiff's favor on that claim included that the University's Vice President recommended that the Plaintiff be summarily fired after learning she is transgender; the Affirmative Action Officer made a sarcastic reference to the Plaintiff's new identity; and testimony of a tenure expert that the Plaintiff's portfolio was sufficient for tenure and that she was more qualified than other tenured professors in the same department. On appeal, the Tenth Circuit, citing Bostock v. Clayton County, 140 S. Ct. 1731 (2020), affirmed that discrimination based on transgender status constitutes discrimination on the basis of sex in violation of Title VII.

Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021)
Meriwether, a tenured professor at Shawnee State University, was an evangelical Christian who believed that gender was "set" at conception and could not be changed. The University maintained a non-discrimination policy that included gender identity, and institutional leadership informed Meriwether that he could face discipline for refusing to refer students by their preferred pronouns. Meriwether's compromise was to agree to refer to a trans-female student by her last name but would still use gendered pronouns for others in the class. The university concluded that still violated their discrimination policy as it did not treat all students equitably and that his refusal to use preferred pronouns was the basis for a disciplinary warning letter. Meriwether filed a Section 1983 action against the University, alleging that its nondiscrimination policy was factually incantational as it relates to gender identity. He also alleged that the University retaliated against him for protected speech, participated in content and viewpoint discrimination, attempted to compel his speech, interfered with his free exercise of religion, violated his rights "to be free from unconstitutional conditions," violated his due process and equal protection rights, violated various provisions of the State Constitution of Ohio, and breached his contract. The district court granted the University's motion to dismiss, but the Sixth Circuit reversed the district court's free speech and free-exercise holdings and vacated the dismissal of state-law claims. (In April 2021, the

University and Meriwether reached a settlement in which the University denied violating Meriwether's religious or free speech rights, agreed to pay $400,000 in damages and agreed to remove the warning letter.)

Business Leaders in Christ v. Univ. of Iowa (8th Cir. 2021)
As a state institution of higher education, the University of Iowa permits students to form student organizations. The University registers student organizations and requires them to adhere to the mission of the University, including its Human Rights Policy, which states, in pertinent part that "in no aspect of its programs shall there be differences in treatment based on gender identity." Further, registered student organizations must include a nondiscrimination clause in their constitutions, which includes gender identity, Plaintiff was founded as a religious organization, BLinC. In 2016, an openly gay member of BLinC expressed his interest in becoming a BLinC officer. While this member was told he could remain a member, he was told he could not be part of the executive leadership team for BLinC. This member filed a complaint with the University's Office of Equal Opportunity and Diversity, which investigated. The University believed this requirement would violate the school's Human Rights policy and the organization was required to submit a list of qualifications for leaders that are not based on sex/gender discrimination. The Court found that the facially neutral policy was applied in a discriminatory way when applied to the religious organizations because other organizations were allowed to choose members based on discriminatory characteristics (fraternities, sororities, student ethnic clubs).

Grimm v. Gloucester County School Board, 972 F.3d 586 (4th Cir. 2020)
Plaintiff, a transgender male secondary school student, sued the school board alleging that its policy prohibiting him from using restrooms consistent with his gender identity and refusal to amend his school records to reflect his gender identity constituted discrimination under Title IX and the Equal Protection Clause. The Fourth Circuit held that heightened scrutiny applied and concluded that because it found that the school district's restroom and records policies were not substantially related to an important interest in student privacy or maintaining accurate records, both violated the Equal Protection Clause. It also found that both policies constituted sex discrimination in violation of Title IX. On June 28, 2021, the U.S. Supreme Court declined to hear the school board's appeal of the Fourth Circuit's decision.

Bostock v. Clayton Cnty. (Jun. 15, 2020)
6-3 decision that Title VII of the Civil Rights Act of 1964 also protects employees from discrimination based on their sexual orientation or gender identity. The Court reasoned that firing someone for being gay or transgender necessarily involves discrimination based on sex, since it would not occur but for the individual's sex; emphasizing that Title VII prohibits all forms of sex-based discrimination, regardless of how the discrimination is labeled or its specific manifestation. The outcome affirmed the judgments of the Second and Sixth Circuits, which had ruled in favor of the employees, and reversed the Eleventh Circuit's judgment, sending the case back for further proceedings. The Court's majority opinion rejected the idea that Title VII's protections should be confined to traditional notions of sex discrimination and instead recognized the evolving understanding of sex and gender in modern society.

***Carcano v. McCrory*, 203 F. Supp. 3d 615, 621 (M.D.N.C. 2016)**
Plaintiffs, transgender students and employees of state universities, challenged the "bathroom bill" portion of a North Carolina law that required public agencies to ensure that multiple occupancy bathrooms, showers, and other similar facilities were reserved for, and only used by, people based on their "biological sex," which the law defined as the sex listed on their birth certificate. The district court preliminarily enjoined enforcement of the law finding that while the plaintiffs had not shown a

likelihood of success on the merits of their Equal Protection claim, they had done so with respect to their Title IX claim. It reasoned that an injunction would also preserve the status quo before the law was enacted and plaintiffs had already proven that irreparable injury would result, in part because single occupancy bathrooms were generally unavailable at plaintiffs' university. Upon further litigation, amended legislation, and election of a new governor, the parties entered a consent decree in 2019, which permanently enjoined the state defendants from prohibiting transgender students from using bathrooms aligned with their gender identities. Consent Judgment & Order, *Carcano v. Cooper*, No. 16-cv-00236 (July 23, 2019), ECF No. 296.

Ward v. Polite, 667 F.3d 727 (6th Cir. 2012)

Plaintiff, a former graduate student in counseling at Eastern Michigan University, sued after she was expelled for refusing to counsel students in same sex relationships. Plaintiff asserted that she could not provide affirming counseling based on her religious objections. In a meeting with faculty, the parties agreed that a remediation plan was not possible, and plaintiff was left with two options: withdrawal from the program or a formal review. The student chose the latter, and following formal review, she was expelled from the counseling program for violation of the American Counseling Association's code of ethics. The lower court granted the University's motion summary judgment reasoning that it enforced a "neutral and generally applicable curricular requirement." On appeal, the Sixth Circuit reversed and remanded, finding that plaintiff's request to have her client referred to another counselor was consistent with the code of ethics, which expressly provided for such referrals where the counselor was unable to "be of professional assistance to clients." The court also found that plaintiff was not adequately apprised of the "no referral policy," and a reasonable jury could find that she was expelled for her religious beliefs, and not because of a pedagogical objective.

Keeton v. Anderson-Wiley (11th Cir. Dec. 16, 2011)

Plaintiff, a former graduate student in the Counselor Education Program at Augusta State University (ASU) brought claims against the University alleging violations of free speech and free exercise rights. While in the program, plaintiff made it known that when counseling gay clients, she intended to address the morality of their sexual orientation, denounce certain behaviors, and engage in conversion therapy based on her religious beliefs. Program officials determined that plaintiff's planned approach violated the American Counseling Association's (ACA) Code of Ethics and accrediting guidelines. While contending the plan was not asking plaintiff to change her religious beliefs, the University offered a remediation plan as a condition of her enrollment. Plaintiff alleged the requirement to complete the remediation plan in order to stay in the program was a violation of her free speech and free exercise rights. In finding for the University, the Eleventh Circuit concluded that the remediation plan was viewpoint neutral and was appropriate since plaintiff expressed an intent to impose her personal religious views on her clients, rather than animated by her views about homosexuality. Further, the court noted that the University has "a legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics" specifically, in order to maintain an accredited program, and therefore, the remediation plan was an allowable effort to maintain consistency with the Code of Ethics, and a reasonable restriction on plaintiff's speech.

United States v. Skrmetti (6th Cir. Jul. 7, 2023)

In response to a set of laws passed in 2023 restricting certain medical treatments for transgender minors in both Tennessee and Kentucky, groups of transgender minors, their parents, and healthcare providers sued, arguing the laws violated equal protection and due process. The laws at issue prohibited healthcare providers from administering puberty blockers, hormone therapy, or sex-confirmation surgeries to

minors. The Sixth Circuit stayed the lower courts' injunctions in both states, finding that the laws have the potential to infringe on the fundamental rights of parents to direct their children's medical care and also discriminate based on sex. The case is set for argument before the U.S. Supreme Court on Dec. 4, 2024.

Zinner v. State of Tennessee (M.D. Tenn. Jan. 10, 2024)

Statement of Interest filed by the United States. Plaintiffs, a group of transgender women, brought sex discrimination claims based on their transgender status under Title VII in response to Tennesse's blanket exclusion for "surgery or treatment for, or related to, sex transformations" ("irrespective of whether the treatment qualifies as medically necessary treatment for gender dysphoria"). The United States submitted a Statement of Interest in the case to express its view on the application of Title VII's prohibition on sex discrimination to employer-based health insurance programs that include exclusions barring gender affirming care. Relying on *Bostock* the United States urged the court to find that "because the exclusion facially discriminates based on transgender status, [plaintiffs] sufficiently state a claim for sex discrimination under Title VII." The United States further disputes defendants' view that health insurance benefits are based on an employee's medical diagnosis rather than sex and urged that court to rule that the exclusion was "facial discrimination by proxy . . . where the proxy is a medical diagnosis that does not apply to non-transgender employees." Subsequently, defendant filed a motion to dismiss, and the litigation has been stayed pending the U.S. Supreme Court's grant of cert on *U.S. v. Skrmetti.*

Title IX[1]

Disputed Guidance Pre-Publication of the 2024 Regulations

Under the Biden Administration, several federal agencies issued guidance importing the *Bostock* holding, that discrimination on the basis of gender identity is sex discrimination, into Title IX, the Affordable Care Act (ACA), and the Fair Housing Act (FHA). Given that *Bostock* only applied to Title VII, and agencies previously did not interpret antidiscrimination statutes as expansively, several states challenged the agency guidance expanding sex discrimination to include protections for gender identity and sexual orientation.

See: State of Tennessee v. Department of Education, No. 22-5807 (6th Cir.) (ongoing); and, *Texas v. Cardona* (N.D. Tex. Aug. 5, 2024)

Also: School of the Ozarks, Inc. v. Biden, 41 F.4th 992 (8th Cir. 2022); and, *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022)

2024 Regulations

On April 19, 2024, the Department of Education released its final rule on Title IX, published in the Federal Register on April 29.[2] As anticipated from the previous Notice of Proposed Rulemaking, the 2024 regulations included within the protections of Title IX, protection against discrimination based on gender identity. The Department noted that the final regulations provide greater clarity regarding "…the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity…."[3] (Emphasis added.) Further, the Department noted that the final regulations clarify that, "…except as permitted by certain provisions of Title IX or the regulations, a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimus harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity…."[4]

In the accompanying fact sheet describing the final regulations, the Department summarized two components of the regulations:

- Prohibit discrimination against LGBTQI+ students, employees, and others. The rule prohibits discrimination and harassment based on sexual orientation, gender identity, and sex characteristics in federally funded education programs, applying the reasoning of the Supreme Court's ruling in *Bostock v. Clayton County*.
- Protect people from harm when they are separated or treated differently based on sex in school.

The final regulations clarify that a school must not separate or treat people differently based on sex in a manner that subjects them to more than de minimis harm, except in limited circumstances permitted by Title IX. The final regulations further recognize that preventing someone from participating in school (including in sex-separate activities) consistent with their gender identity causes that person more than de minimis harm. This general nondiscrimination principle applies except in the limited circumstances specified by statute, such as in the context of sex-separate living facilities and sex-separate athletic teams. The final regulations do not include new rules governing eligibility criteria for athletic teams.[5]

Resulting Litigation

Following the publication of the 2024 final regulations and prior to the compliance deadline of August 1, seven lawsuits were filed against the Department, seeking injunctions to prohibit the Department from enforcing the 2024 regulations:

Decision Date (all 2024)	**Plaintiff States**	**Court**	**Circuit**	**Status**
June 13	Louisiana, Mississippi, Montana, Idaho	U.S. District Court for the Western District of Louisiana	Fifth	Preliminary injunction granted (limited to plaintiff states)
June 17	Tennessee, Kentucky, Ohio, Indiana, Virginia, West Virginia	U.S. District Court for the Eastern District of Kentucky	Sixth	Preliminary injunction granted (limited to plaintiff states and intervenors)[6]
July 2	Kansas, Alaska, Utah, Wyoming	U.S. District Court for Kansas	Tenth	Preliminary injunction granted (limited to plaintiff states and any institution attended by a member of three plaintiff organizations)[7]
July 11	Texas	U.S. District Court for the Northern District of Texas	Fifth	Preliminary injunction granted (limited to Texas and two plaintiff professors)
July 24	Arkansas, Missouri, Iowa, Nebraska, North Dakota, South Dakota	U.S. District Court for the Eastern District of Missouri	Eighth	Preliminary injunction granted (limited to plaintiff states)
July 31	Alabama, Florida, Georgia, South Carolina	Court of Appeals for the Eleventh Circuit	Eleventh	Administrative injunction granted (limited to plaintiff states and four plaintiff organizations)
July 31	Oklahoma	U.S. District Court for the Western District of Oklahoma	Tenth	Preliminary injunction granted (limited to Oklahoma)

For a more detailed analysis, NACUA provides an excellent composite Title IX injunction tracker at: https://docs.google.com/spreadsheets/d/1185wuTcSzwHHWaPJcytffpslUvtUJv3Id1yKBZAWnbY/edit?gid=0#gid=0

The Department provided the following summary of the injunctions, last updated on September 13, 2024:
…pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf. Per Court order, this list of schools may be supplemented in the future. The Final Rule … do[es] not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.[8]

Where Does This Leave Institutions, Especially with the Upcoming Change in Administration?
Since the Supreme Court refused to grant a request by the Department that the provisions of the 2024 regulations that are *not* being challenged be permitted to go into effect while litigation continues, the Department is now barred from enforcing any portion of the 2024 regulations with respect to those jurisdictions and institutions subject to the injunctions. The Department must therefore continue to enforce the 2020 regulations. This likely means that institutions *may* adopt policies that comply with the 2024 regulations provided they do not undercut compliance with the 2020 regulations or conflict with applicable state law.
Possible pathways for changes to be made to the content or enforcement of the 2024 regulations include:

- Additional rulemaking (either via the regular process or expedited)
- Congressional action
- Impacts from decisions on the merits in pending lawsuits
- Additional guidance from the Department on enforcement priorities
- Operation of the lookback mechanism in the Congressional Review Act?[9]
  - Unlikely to be applicable to the 2024 regulations given the date of *sine die* adjournment
- Executive order?[10]

[1] The authors wish to recognize and thank Ishan Bhabha, Partner, Jenner & Block LLP, and Mary Roy, Director and Title IX Coordinator, Vanderbilt University, for their contributions to a previous version of portions of these materials.
[2] https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal
[3] 89 Fed. Reg. 83, 33476 (Apr. 29, 2024) .
[4] Id. at 33477.
[5] Fact Sheet: U.S. Department of Education's 2024 Title IX Final Rule Overview, at 4 (2024).
[6] The Department of Education applied to the U.S. Supreme Court for a partial stay of the injunctions in the Louisiana and Kentucky cases on July 22, 2024. The application was denied by the Court on August 16, 2024. U.S. Dep't of Ed. v. Louisiana, 603 U.S. ____ (2024)
[7] On July 15, 2024, the court released a listing of institutions that are subject to the injunction. Note that on July 19, 2024, the court issued an order extending the injunction to schools attended by current AND prospective members of the three plaintiff organizations. Kansas v. U.S. Dep't of Ed. (D. Kan. Jul. 19, 2024). An additional list of schools was added on November 12, 2024. Kansas v. U.S. Dep't of Ed. (D. Kan. Nov. 12, 2024)
[8] *See supra* note 5.
[9] *See* Congressional Research Service, "The Congressional Review Act: The Lookback Mechanism and Presidential Transitions" (Jul. 9, 2024).
[10] *See* Congressional Research Service, "Can a President Amend Regulations by Executive Order" (Jul. 18, 2018).

II. Checklist for Mitigating Risk

PREVENTING GENDER IDENTITY CLAIMS IN A UNIVERSITY SETTING

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WHERE LITIGATION COMES FROM

- Mistakes in policies and processes
- Communication issues
- Lack of information or knowledge about the employee's condition
- Comparable situations
- Perceived retaliation
- "Test cases" or outside challenges
- Difficult employees
- Out of nowhere

REASONS TO AVOID LITIGAITON

- High cost (money)
- High cost (resources—human)
- Reputational harm (institution generally, and institution as an employer)
- Diversion and distraction from mission and operations
- Impact the direct unit in which the case originated; create tensions, uncomfortable workplace
- Lead to other litigation (retaliation, similar claims)

CHECKLIST FOR MITIGATING THE RISK OF EMPLOYMENT CLAIMS

Below are some broad suggestions for how college and university administrators can work to mitigate the risk of employment claims. The reality is that colleges and universities routinely face a variety of employment claims, including claims filed by faculty, administrators, and other employees. Identifying who at your institution has the responsibility to implement these efforts is the first step in the process.

This is, of course, a non-exhaustive list.

A. Establish and Review Key Policies

1. Define discrimination and retaliation.
2. Establish zero tolerance for unlawful discrimination and retaliation.
3. Set forth complaint avenues and procedures.
4. Provide multiple avenues for complaints.
5. Provide notice of potential consequences.
6. Ensure that fairness (due process) is a fundamental part of any policy.
7. Periodically review and update policies.

B. Distribute, Post, And Remind About the Policies

1. Include management in the policy distribution.
2. Host policies on an accessible site.
3. Appointment letters/contracts should link to key policies employees should be familiar with.
4. Place the signed acknowledgement in the employee's personnel file.
5. Remind employees to report any workplace concerns.
6. Ensure employees are aware of how to utilize the complaint process.
7. Inform employees about significant policy updates.
8. Obtain employee acknowledgment of any policy updates.

C. Train Supervisors To:

1. Conduct proper performance evaluations.
2. Use consistent rule enforcement and performance expectations.
3. Fairly discipline employees.
4. Make objective "measurable" decisions, where possible.
5. Involve "non-charged" decision-makers.
6. Take all discrimination, retaliation, and other claims seriously.
7. How to spot and seek help with disability and leave issues
8. Report and seek guidance from Human Resources about complaints and other employee relations issues.
9. Respond to complaints promptly.
10. Monitor the situation.
11. Be good managers—be engaged, present, and proactive.
12. Know whom to consult and where to find helpful resources.
13. Live by the Golden Rule.

D. Factors To Consider When Disciplining And Terminating Employees

1. What are the specific facts of the employment situation?
2. What is the applicable policy?
3. Is the applicable policy reasonable?
4. How well does the policy apply to the particular situation?
5. How has the policy been applied in similar situations?
6. Has the policy been applied consistently?
7. How sound is the process leading to the potential discipline?
8. What, if any, notice or warning has the employee received about the potential consequences of non-compliance with the policy or other conduct potentially warranting discipline?
9. Were the previous violations and any corrective steps taken documented, and did the employee receive a copy of the documentation?
10. Has the employee had the time/opportunity to correct the problem?
11. What discipline, if any, would be consistent with the way the institution has handled similar situations?
12. How does the record of this employee compare with other employees who violated the policy or rule?
13. Do the decision-makers have any alleged discriminatory or retaliatory animus?
14. Has the discipline that has been imposed in similar situations resulted in employees in a protected category being disproportionately disciplined?

15. What, if any, discipline would a jury likely view as fair?
16. How would the discipline decision look in the press?

E. Retaliation Claims

1. Remind employees about the anti-retaliation policy.
   a. Employees who engage in protected activity should be reminded of the retaliation policy and the reporting procedure for any perceived retaliation.
   b. Managers who supervise an employee who has engaged in a protected activity should be reminded of the retaliation policy.
2. Steps to take after a complaint, charge or other protected activity:
   a. Limit knowledge to those with a "need to know."
   b. Meet with and support the complainant.
   c. Meet with accused individuals.
   d. Consider re-structuring the workplace to manage retaliation risks.
3. Conduct an effective independent internal investigation of the complaint
   a. You may have to proceed even in the face of a reluctant complainant's request that the institution not follow up on the complaint.
   b. Conduct a prompt investigation.
   c. Conduct a thorough investigation and document the results.
4. Consider using an independent person (s) to recommend or determine whether to take an adverse action against an employee who engaged in protected activity
   a. That person (s) would have no knowledge of the protected activity.
   b. That person (s) also might be more persuasive before a judge or a jury.
5. Key questions to ask before taking an adverse action against an employee who engaged in protected activity:
   a. Is any form of intervening favorable treatment of the complainant possible before taking an adverse action?
   b. Is the documentation accurate and complete?
   c. Do the results of the investigation justify the adverse action?
   d. Did the employee receive proper notice of the adverse employment action?
      i. Was the employee aware the adverse action would occur?
      ii. Was the employee given a sufficient chance to avoid the adverse action?
   e. Is the action to be taken consistent with the college or university's policies and practices?
      i. Is the college or university following its policies and practices?
      ii. Is the legitimate non-discriminatory or non-retaliatory reason understandable and plausible?
   f. How close in time is the adverse action to the protected activity?
   g. If this employee did not engage in the protected activity, would the employee still suffer this adverse action?

F. Key Questions To Ask To Assess A Possible Retaliation Lawsuit

1. What discrimination, retaliation and other claims might the complainant bring?
2. Was the activity protected?
   a. Did the plaintiff actually oppose discrimination in the workplace or participate in the opposition or investigation of discrimination in the workplace?

b. Did the plaintiff make a supervisor, management, or other proper agent aware of the complaint or other protected activity?
c. Was the plaintiff's complaint based on a good-faith belief?

3. Was there an adverse employment action?
   a. What adverse actions are alleged?
   b. How severe and numerous are the alleged adverse actions?
   c. Would a reasonable person in the plaintiff's shoes consider these to be materially adverse actions?
4. Was there causation?
   a. Did the decision-makers have knowledge of the protected activity?
   b. Is there temporal proximity?
   c. Did the college or university take any actions to break the causal connection?
5. Has the plaintiff met his or her burden?
   a. What is the employer's legitimate non-retaliatory reason for the adverse action?
   b. Will the plaintiff be able to meet his or her burden to prove that the employer's proffered reason is a pretext for retaliation?

G. Key Factors That Might Influence Decision-Makers (Hearing Panel, Investigator, Jurors) In An Employment Case

These factors are important to consider not only in the event of an internal grievance procedure, administrative hearing, agency investigation, and trial, but also in day-to-day decision-making because many of these considerations are important components of effective employee relations that also help to prevent and defend against claims.

1. How effective was the communication?
   a. Was the policy or rule well-communicated to the employee?
   b. Was the communication with the employee clear, understandable, and fair?
   c. How will the form of the communication be perceived? (e.g., formal legalistic letters, personal face-to-face meeting, phone call).
2. How effective was the process?
   a. Was there a process in place?
   b. Was the process followed?
   c. If not, why not?
   d. Was the process timely?
   e. If not, why not?
   f. Was the process thorough?
   g. Who ran the process?
   h. Who participated in the process?
   i. What is the disciplinary and other employment history of those involved in the process?
   j. Was the overall process fair?
3. Is there any direct evidence of a discriminatory or retaliatory animus?
4. How strong are the answers to the key questions asked before taking the adverse action?
5. What will the impact be of the other claims, if any, that remain in the case?
6. Did the college or university follow the Golden Rule?

    a. Did the decision-maker treat the plaintiff as the decision-maker would want to be treated?
    b. Will the jury believe the college or university treated the plaintiff fairly?
7. How clear, understandable, and plausible is the college or university's case?
8. What is the perception of the institution?
    a. How has the institution been portrayed in the press?
    b. What is the litigation history of the institution?
    c. What is the financial profile of the institution?
9. How sympathetic is the plaintiff?
    a. What is the employment history of the plaintiff?
    b. What are the personal and family circumstances of the plaintiff?
    c. What are the financial circumstances of the plaintiff?
    d. What is the plaintiff's medical condition?
    e. How much will a jury be able to identify with the plaintiff's claims and the plaintiff personally?
10. Who will the jury think has better witnesses?
    a. Will the decision-makers be good or bad witnesses?
    b. Which witnesses will be most credible?
    c. Which witnesses will be most likeable?

Representative Relevant Outline

Daniel A. Kaufman and Scott L. Warner, Retaliation And Whistleblower Issues In Internal Investigations: What To Do After The Whistle Blows, Presentation Before NACUA (November 6-8, 2013).

III. EXISTING NACUA RESOURCES

NACUANOTES:

From CLS v. Martinez to 303 Creative LLC: The Evolution of Student Organization Law with Respect to LGBTQ+ and Religious Student Organizations
Jessie Brown and Holly Peterson
September 13, 2024

Post-Bostock Collection of Demographic Data on Sex and Gender Identity
Melissa Carleton
July 14, 2022

Gender Identity and Gender Expression on Campus: Implementation in an Uncertain Legal Atmosphere
Marla Morgen and Troy Perdue
February 21, 2017

Transgender Issues on Campus
Jessie Brown
December 21, 2012

Conference and Workshop Materials:

Pregnant Pause: Campus Pregnancy Accommodations in a Shifting Regulatory Landscape
Bindu Kolli Jayne, Nikki Schmidtke, Kylie Stryffeler, and Jesse Krohn
2024 Annual Conference

Title IX and Gender Identity and Sexual Orientation Discrimination: Where Are We Now?
Lisa Karen Atkins, Carrie Meigs, Kasey Thomas, and Bethany Wagner
2024 Annual Conference

Clash of Rights: Developing Legal Areas Impacting Your LGBTQ+ Campus Community Members
Darren Reisberg, Toby Eveland, Becca Gose, Ryan Hagemann, and Marc Spindelman
2024 Annual Conference

They are the People in Your Neighborhood: Building LGBTQ+ Inclusive Workplaces and Campuses
Kaylie Straka, Arielle Kristan, and L. Rae
2024 Annual Conference

Transgender Student Rights: Regulatory and Litigation Trends and Practical Tips
Brandyn Hicks, Eréndira Rubin, and Amy Whelan
Spring 2023 CLE Workshop

The Weaponization and Defense of Faculty Members' Free Speech and Religious Freedom
Hannah Flower, Ashley Palermo, and Renaldo Stowers
2023 Annual Conference

Legal and Operational Considerations Regarding Transgender Students
Mary Roy, Ishan Bhabha, and Esther Henry
2023 Annual Conference

Achieving Inclusivity for Non-Binary, Transgender, and Gender Non-conforming Community Members
Junea Williams-Edmund, Catherine Spear, and Rachel Spraker
2022 Annual Conference

LGBTQ Rights & Religious Freedom: Common Ground and Common-Sense Solutions
Sarah Luke, Shannon Minter, Steve Sandberg
2022 Annual Conference

Addressing the Needs of Transgender Students and Employees in Uncertain Times
Debbie Osgood, Joshua D. Whitlock, and Laura T. Johnson
Spring 2019 CLE Workshop
NACUANET Discussions

Fraternity national headquarters declines to offer bid to transgender student
September 12, 2022

Admissions applications and preferred gender identity
May 13, 2019

Mandatory binary gender question on application
November 6, 2018

JCUL Articles:

Trans* Issues for Colleges and Universities: Records, Housing, Restrooms, Locker Rooms, and Athletics
Troy J. Perdue
41 JCUL 45 (2015)

"It Got Too Tough to Not Be Me:" Accommodating Transgender Athletes in Sport
Elizabeth M. Ziegler and Tamara Isadora Huntley
39 JCUL 467 (2013)

Resource Page: Gender Identity & Sexual Orientation Discrimination Resource Page

Websites & Relevant Links:

- NACUA Title IX Tracker
- Trans Case tracker
- Why I Changed My Birth Certificate 25 Years After I Transitioned

- Article with good summary of which states do and do not permit any changes to birth certificates after birth. Here the author discusses protectively changing the certificate before possible future restriction.
- Snapshot: LGBTQ Equality by State (visual aid)
- Augusta State: https://www.insidehighered.com/news/2012/06/27/judge-rejects-anti-gay-students-suit-against-augusta-state
- Eastern Michigan: https://www.opn.ca6.uscourts.gov/opinions.pdf/12a0024p-06.pdf (then they settle: https://www.thefire.org/news/after-sixth-circuit-loss-eastern-michigan-u-settles-expelled-counseling-student)
- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance
  - FACT SHEET: U.S. Department of Education's 2024 Title IX Final Rule Overview

IV. STATE LAWS AND INSTITUTIONAL POLICIES

State Laws

Assistant Secretary Lhamon previously commented that "frequently" state laws limiting the rights of transgender students have "fine print" providing exceptions if required by the federal Constitution or contradictory federal laws.

The following are a sampling of laws or legislation.

Pronoun Use Legislation

The legislation tends to limit transgender students' ability to designate pronouns by prohibiting policies requiring use of those pronouns or by asserting that others have a protected interest (either in academic freedom or free exercise) in not being compelled to honor such a designation. A few prohibit outright the use of designated pronouns for students under the age of 18.

- **Kentucky's SB 150 (enacted)** bars state agencies and schools from adopting policies requiring or recommending personnel to use pronouns that do not conform to the student's "biological sex," but the wording does not appear to compel speech.
- **Arkansas's HB 1468 Given Name Act (passed, but not yet enacted)** asserts legislative findings that the "selection and use of pronouns in classrooms" is a matter of academic freedom and "not merely an administrative or ministerial act by faculty members" or other employees. It protects school employees from adverse actions should they decline to address other individuals by preferred names, pronouns, titles. It would also *prohibit* public school teachers from calling any unemancipated minor under the age of 18 by any name or pronoun different from that assigned at birth. Presumably, this could affect college instructors and staff in some situations.
- **Arkansas's HB 1615 Conscience Protection Act (passed, but not yet enacted)** focuses on protecting the free exercise of religion. The sweep of the bill would seem to protect those who assert sincerely held religious beliefs (including perhaps regarding pronoun usage). It provides for a limited range of compelling government interests that might justify limiting such behavior.
- **Tennessee's SB 466 (crossed over, not yet passed)** would assert a right to free speech and expression at work for teachers and school officials such that they may not be compelled to use pronouns in a way with which they disagree.
- **Arizona's SB 1001 (crossed over, not yet passed)** prohibits school personnel from knowingly addressing a student under the age of 18 by a pronoun not corresponding to "biological sex" or a name other than that in official records without written permission from the student's parents. It also prohibits policies requiring school personnel to use those pronouns or names.
- **Source:** https://www.tracktranslegislation.com/ is useful on laws in this area.

Bathroom and Locker-Room Facilities Legislation

Arkansas provides a limited exception for ADA accommodations, and Iowa provides language for accommodations for students who desire "greater privacy." Some try to suggest limited ways to find workable arrangements without requiring renovations or permitting access to multi-user facilities corresponding to a student's gender identity.

- **Arkansas's HB 1156 (enacted) has a limited carveout at Ark. Code 6-21-120(d)(1) for adopting policies required by the ADA.**

- **Iowa's Senate File 482 (enacted)** forbids access to multiple occupancy restrooms or locker rooms, but it provides that "A student who, for any reason, desires greater privacy" may request different facilities. Among the possible alternatives the school may provide is controlled use of faculty restrooms or changing areas. **Kentucky's SB 150 (enacted)** similarly provides for access to faculty facilities as accommodation when a parent or guardian provides written consent to a request for accommodation.
- **Idaho's SB 1100 (enacted)**, by contrast, asserts legislative findings that there is a "natural right to privacy and safety in public school restrooms and changing facilities" and asserts that federal actions to the contrary are unconstitutional and violate students' rights. The law does provide for exemptions for single-occupancy restrooms and for reasonable accommodation.
- **Comprehensive listing:** https://www.lgbtmap.org/img/maps/citations-schools-nondisc.pdf

Athletics Laws

There are currently about 20 states that ban transgender student-athletes from participating in sports teams consistent with their gender identity. Most of this legislation seems to have originated in model legislation under the title "Fairness in Women's Sports" promoted by the organization Alliance Defending Freedom. The main enforcement mechanism in the typical legislation is a cause of action for a student who suffers a loss of opportunity or a director or indirect harm because someone did not enforce the ban. *Soule v. Connecticut Association of Schools* (2nd Cir. Dec. 16, 2022), however, suggests it might be hard to allege a harm that a court would redress. There is typically also an anti-retaliation provision, which might be a more straightforward allegation for a litigant to raise to the extent that it might be easier to allege an adverse action.

- **Kansas's HB 2238 Fairness in Women's Sports Act (enacted)** is a representative law. It provides a private cause of action for "any student who is deprived of an athletic opportunity or suffers a direct or indirect harm" from violations of the ban or who experiences retaliation from reporting a violation.
- **Tennessee's SB 2153 (enacted)** also follows this pattern. **Tennessee's HB 1895 (enacted)** adds to the same section of the Tennessee Code a provision by which a Local Education Agency will lose a portion of its funds if it does not comply with this ban for any reason other than a court or similar order.
- **Wyoming's SF 133 (enacted)** takes a slightly different form and provides a right to petition under the Wyoming Administrative Procedures Act for "any student or parent or guardian of a student aggrieved by" a violation of the ban on transgender students participating on athletic teams "designated for students of the female sex."
- **Comprehensive listing:** https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf

Universities as Health Providers

The following listing provides a general overview on where each state stands regarding coverage for transition-related care for state employees.

- **Comprehensive listing:** https://www.lgbtmap.org/img/maps/citations-healthcare-state-employees.pdf

Institutional Policies

- **University of Arkansas.** The Policies and Reports page of the Title IX site lists only the operative laws and required reports.

- **University of Florida.** The UF Office for Accessibility and Gender Equity maintains a page listing Laws & Policies, as well as one with relevant Statements. The policies described and/or linked on these pages follow very closely the relevant federal laws (e.g., Title IX) and state laws (e.g., the privacy policy has a carveout for Florida's Sunshine Law). The page on Athletics and Title IX is similarly sparse.

- **University of Massachusetts – Amherst.** UMass Amherst, by contrast, maintains a robust hub for resources at its Stonewall Center. A useful indicator of its level of policy development is the UMass Trans FAQ Resources page.

- **Carnegie Mellon University.** CMU's Office for Institutional Equity and Title IX maintains a robust page of resources related to Gender Identity. On this last page, a sidebar links to resources related to Preferred Names, All-Gender Restrooms, and Gender Affirming Care Navigation.

- **Furman University.** Furman (small, private, liberal arts in Greenville, SC) has a concise Transgender Student & Ally Resource Guide page that includes a policy statement providing, in part, that "Transgender and gender non-conforming students may use any facility consistent with their gender identity."

NACUA

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Webinar

The Law of Gender Identity on Campus

November 22, 2024

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Amanda McLean
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November 22, 2024

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Webinar

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The Law of Gender Identity on Campus

Becca Gose, Vice President and General Counsel, Oregon State University
Esther Henry, Associate General Counsel, University of Tennessee System
Dan Kaufman, Partner, Michael Best & Friedrich LLP

Agenda

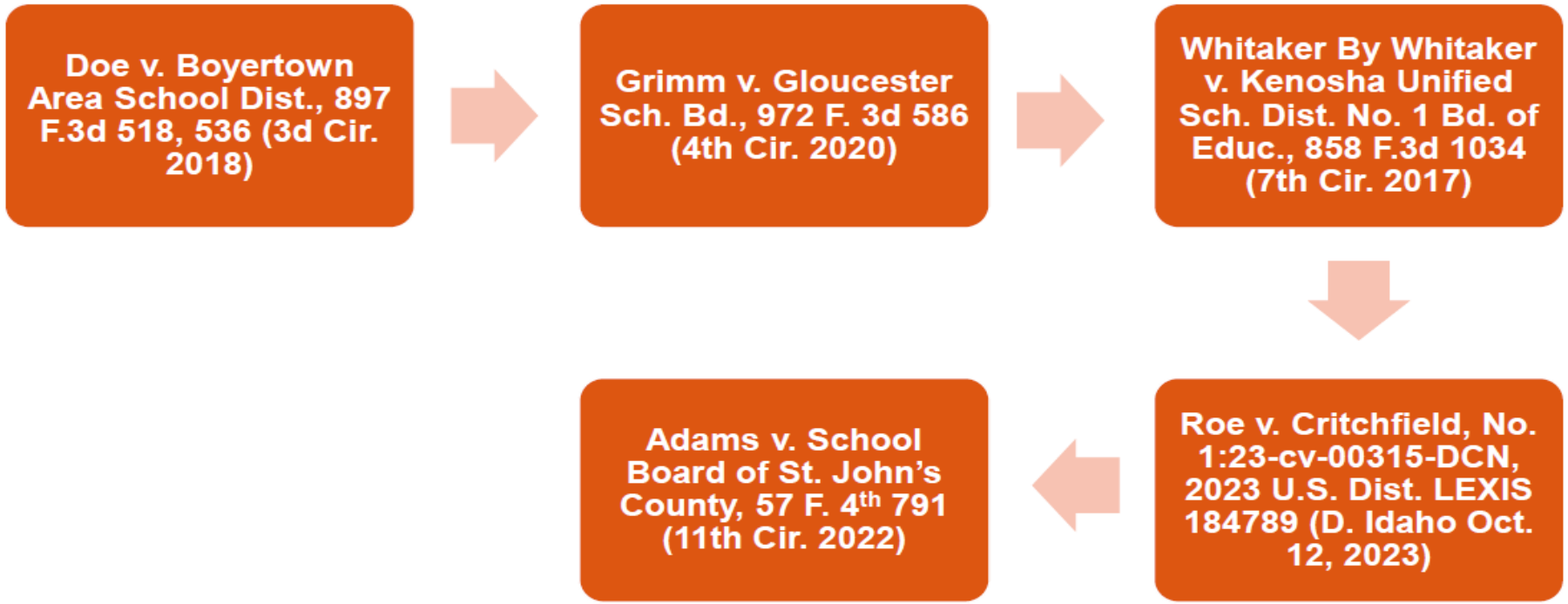
- Introduction
- Title IX
- Title VII
- Free Speech, Academic Freedom, Free Exercise of Religion, and Religious Accommodations
- State Trends
- Practical Tips and Considerations
- Audience Q&A and Closing Remarks

Title IX

Recent Developments in Title IX

- Cases interpreting Title IX's scope
- Challenges to federal guidance (2021 - ?)
- Notice and comment rulemaking (2022 – 2024)
- Final regulations published (2024)
- Lawsuits! (2024 - ?)
- Patchwork of compliance and enforcement between 2020 and 2024 regulations
- Where are we headed next?

Cases Interpreting Gender Identity



NACUA JUNE 26-29 2024 ANNUAL CONFERENCE COLUMBUS

See 2024 Annual Conference Materials (Session 1J, "Title IX and Gender Identity and Sexual Orientation Discrimination: Where Are We Now?")

Challenges to Federal Guidance

- *State of Tennessee v. Department of Education (6th Cir.)(ongoing)*
  - 20 states challenged the Department's Interpretation, Dear Educator Letter, and Fact Sheet and the EEOC's Technical Assistance Document interpreting Title IX and Title VII, respectively, to prohibit discrimination based on sexual orientation and gender identity (2021)
  - District court granted preliminary injunction (2022)
  - The Department appealed (2022)
  - Sixth Circuit affirmed (June 2024)

- *State of Texas v. Cardona (5th Cir.)(ongoing)*
  - Texas challenged the Department's guidance similar to the above (2023)
  - District court granted State's motion for summary judgment, ruling that the documents are unlawful, and enjoined the Department from implementing or enforcing the documents (June 2024)
  - Notice of Appeal to the Fifth Circuit by the Department (October 2024)

Rulemaking --> Final Rule Published (April 2024)

- Includes protections for gender identity and sexual orientation
  - "Discrimination on the basis of sex includes discrimination on the basis of … sexual orientation, and gender identity." (§ 106.10)
- Clarifies that, except as permitted by certain provisions of Title IX or the regulations, a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimus harm, including by adoption of a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity
  - "Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." (§ 106.31 (a)(2))
- Does NOT include a definition of gender identity
  - The Department "...determined that – consistent with the approach taken by many courts – it is unnecessary to articulate a specific definition of 'gender identity'...."
- Does NOT include eligibility criteria for participation in athletics
  - Still waiting since the NPRM published in April 2023

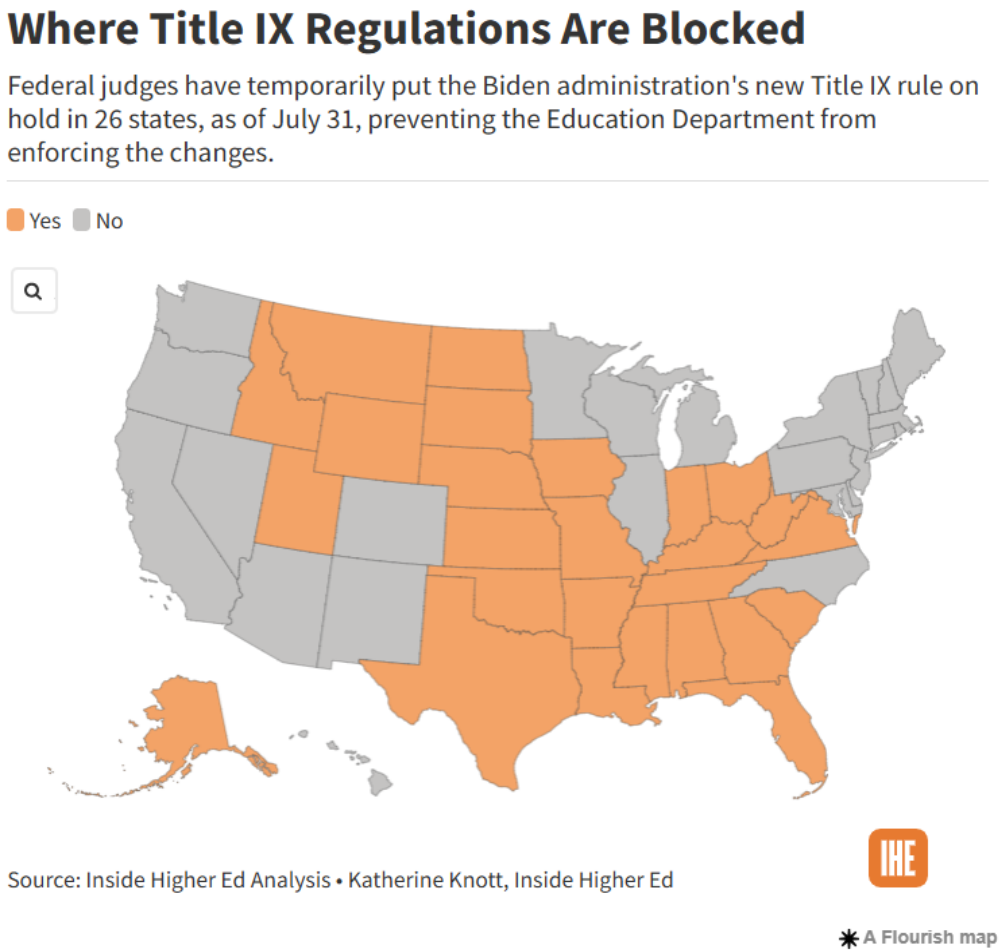
Lawsuits!

- Injunctions are currently in place in seven lawsuits that span 26 states
- Some institutions outside of those states are also impacted by the Kansas injunction, which includes institutions attended by members of three plaintiff organizations
  - Moms for Liberty, Young America's Foundation, and Female Athletes United
  - ATIXA summary: https://www.atixa.org/regs/#injunction
  - Grand River Solutions' list (organized by state): https://www.grandriversolutions.com/wp-content/uploads/2024/07/LIST-OF-INJUCTIONS-JULY-25-ORGANIZED-BY-LOCATION-5.pdf
  - Note that the court has ruled that prospective members of the organizations are also included in the injunction; the three plaintiff organizations have the ability to supplement their lists moving forward

Lawsuits! (cont.)

- The Department has now made clear in its Fact Sheet that it will continue to enforce the 2020 regulations in any state or against any institution that is subject to an injunction:
  - "As of September 13, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf. Per Court order, this list of schools may be supplemented in the future. The Final Rule and this resource do not currently apply in those states and schools. **Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.**" (Emphasis added.)

Resulting Patchwork of Compliance and Enforcement Between 2020 and 2024 Regulations



From: https://www.insidehighered.com/news/government/2024/08/01/how-legal-challenges-tied-title-ix-26-states

Lawsuits! (cont.)

- NACUA Title IX Injunction Tracker: https://docs.google.com/spreadsheets/d/1185wuTcSzwHHWaPJcytffpslUvtUJv3Id1yKBZAWnbY/edit?gid=0#gid=0
- Summary of claims

Where Are We Headed Next?

- 2024 regulations were not issued within the federal lookback period
- Should not be able to be rescinded or modified via executive order
- Guidance from the Department on enforcement priorities or interpretations?
- More notice and comment rulemaking
  - Either regular or expedited
  - Either a new rule or amendments
- Congressional action
- Impacts from pending litigation
  - Currently no national injunction of the 2024 regulations
  - Currently no split between circuits

Athletics

From the 2024 Rule: "The Athletics NPRM said a categorical ban on transgender students playing sports consistent with their gender identity would not satisfy the proposed regulation, but more targeted criteria, substantially related to sport, level of competition, and grade or education level, could be permissible. The Department is continuing to evaluate comments on that proposed regulation, and will issue its final rule on this standard for criteria for a student's eligibility to participate on sex-separate athletic teams in the future. Until that rule is finalized and issued, **the current regulations on athletics continue to apply**." (Emphasis added.)

Athletics (cont.)

- NCAA Transgender Student-Athlete Participation Policy
  - Participation for each sport to be determined by the policy for the national governing body of that sport
  - https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx
  - Updated May 2024

- NAIA Transgender Participation Policy
  - Participation in sports designated as male open to all
  - Participation in sports designated as female open to student-athletes whose biological sex is female (under certain specified conditions)("biological sex" is further defined in the policy)
  - https://www.naia.org/transgender/files/TG_Policy_for_webpage_v2.pdf
  - Approved April 8, 2024

Athletics (cont.)

- Developments and lawsuit surrounding individual team "boycotts"

  https://www.nbcnews.com/nbc-out/out-news/san-jose-state-volleyball-team-forfeits-transgender-rcna177314

  https://www.nytimes.com/athletic/5923566/2024/11/14/san-jose-state-volleyball-lawsuit-transgender-player/

- Other free speech developments regarding protests of transgender athletes
  - Federal court gives mixed signals in free speech case over parents protesting transgender athletes • New Hampshire Bulletin

Title VII

Title VII

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII and Gender Identity Before 2020

- For many years, there was an open question whether Title VII encompassed a prohibition against discrimination based on sexual orientation or gender identity.

- A split in the lower courts created uncertainty as the LGBTQ+ community increasingly sought to enforce their rights under Title VII.

- Some courts held that Title VII did not prohibit discrimination because of sexual orientation. *Bostock* remedied that split.

Bostock v. Clayton Cnty., 590 U.S. 644

Decision by U.S. Supreme Court - June 15th 2020

- Violation of Title VII to discriminate against an employee on the basis of sexual orientation or gender identity.

Key Quotes:

- "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."

- "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Though *Bostock* involved a termination, courts are increasingly applying *Bostock* to other terms and conditions of employment.

6–3 DECISION FOR BOSTOCK

MAJORITY OPINION BY NEIL GORSUCH

Title VII prohibits an employer from discriminating against an individual on the basis of sexual orientation.

Bostock Dissent

Kavanaugh

- Congress' role, not the courts, to amend Title VII.
- Discrimination "because of sex" is not reasonably understood to include discrimination based on sexual orientation.
- Traditional statutory interpretation requires a reading of what would be reasonably understood by the text. Any other interpretation would go against long-accepted notions of statutory interpretation.

Tudor v. Se. Okla. State Univ., 13 F.4th 1019 (10th Cir. 2021)

Tenth Circuit Court of Appeals - September 13, 2021

- Dr. Rachel Tudor – a transgender professor - sued her former employer, Southeastern Oklahoma State University, under Title VII claiming discrimination on the basis of sex, retaliation, and a hostile work environment after she was denied tenure and ultimately terminated.
- *Bostock* overruled the 10th Circuit's holdings in *Etsitty v. Utah Transit Authority* that transgender persons are not a protected class under Title VII.
- *Bostock* ruled that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. To discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.
- Dr. Tudor was discriminated against in violation of Title VII. Entitled to reinstatement and damages.

2024 Election Update: *Bostock* and Federal Law

- The Heritage Foundation's plans for the Trump Administration (Project 2025) include narrowing the federal interpretation of *Bostock* .
- Other Heritage Foundation goals include deleting the following terms from all federal laws, regulations, contracts, and grants:
  - sexual orientation and gender identity;
  - diversity, equity and inclusion;
  - gender;
  - gender equality;
  - abortion;
  - reproductive health.
- JD Vance "Dismantle DEI" Act of 2024:
  - Legislation introduced by Vance in the Senate – June 2024.
  - Would eliminate all DEI programs and funding from the federal government.

Retaliation

- Prima facie case for retaliation under Title VII:
  - Protected activity;
  - Adverse action – that might have dissuaded a reasonable worker from making or supporting a charge of discrimination;
    - Analyzed on a case-by-case basis;
    - Must go beyond minor annoyances and petty slights;
    - Reprimands may be materially adverse when they are coupled with collateral consequences.
  - Causation;
- *Muldrow v. City of St. Louis*, 601 U.S. 346 – "some harm" standard.

Muldrow v. City of St. Louis

***Muldrow v. City of St. Louis*, 601 U.S. 346**

U.S. Supreme Court – Decided April 17th 2024.

- 9 - 0 Decision

What level of harm to plaintiff's terms and conditions of employment from a forced job transfer is necessary to support a claim of Title VII sex discrimination?

- "Materially significant harm" v. "some harm" vs. no harm (discriminatory transfer itself is the harm)?
  - Court's decision: **"some harm."**
  - Less demanding "some harm" threshold will open the door to more plaintiffs.

EEOC 2024 Case Filing Statistics

- 4 cases under Title VII alleging sex discrimination based on sexual orientation;
- 3 cases under Title VII alleging sex discrimination based on gender identity;
- Over 40 cases alleging retaliation under various statutes enforced by the EEOC;
- 5 cases under the Pregnant Workers Fairness Act (PWFA).

New EEOC Guidance

Harassment and Discrimination Based On Gender Identity

April 29, 2024 - EEOC released new Enforcement Guidance on Harassment in the Workplace.

- Harassment based on gender identity included in what the EEOC considers unlawful harassment.
- Notably, misgendering included as harassment.
  - Misgendering: repeated and intentional use of a name or pronoun inconsistent with individual's known gender identity.

EEOC Strategic Enforcement Plan (2024-2028)

- Top Priority: Taking on cases that prevent harassment and discrimination against LGBTQI+ individuals.
- Commitment to addressing discrimination influenced by or arising out of backlash in response to local, national or global events – LGBTQI+ individuals listed as a group that may fall within this category.

Example:
Misgendering As Harassment

2024 Election Update: EEOC Leadership

- President-elect Trump likely to swap out the EEOC's general counsel and commission chair.
- Andrea Lucas – current commissioner – likely new commission chair.
  - Opposed EEOC's updates to harassment guidance.
  - Disagreed with agency's official position that misgendering someone, even repeatedly, can be considered unlawful harassment.

Pregnant Workers Fairness Act (PWFA)

Signed by President Biden – Effective June 27, 2023

- Creates reasonable accommodations for pregnant employees.

- Works in conjunction with ADA and previous Pregnancy Discrimination Act.

Covered Individuals: Employees and applicants who have known limitations related to pregnancy, childbirth, or related medical conditions.

Mandates interactive process. Employers may not require an employee to accept an accommodation other than a reasonable accommodation arrived at through the interactive process.

Cannot require employee to take leave if another reasonable accommodation can be provided that would let the employee keep working.

PUMP for Nursing Mothers

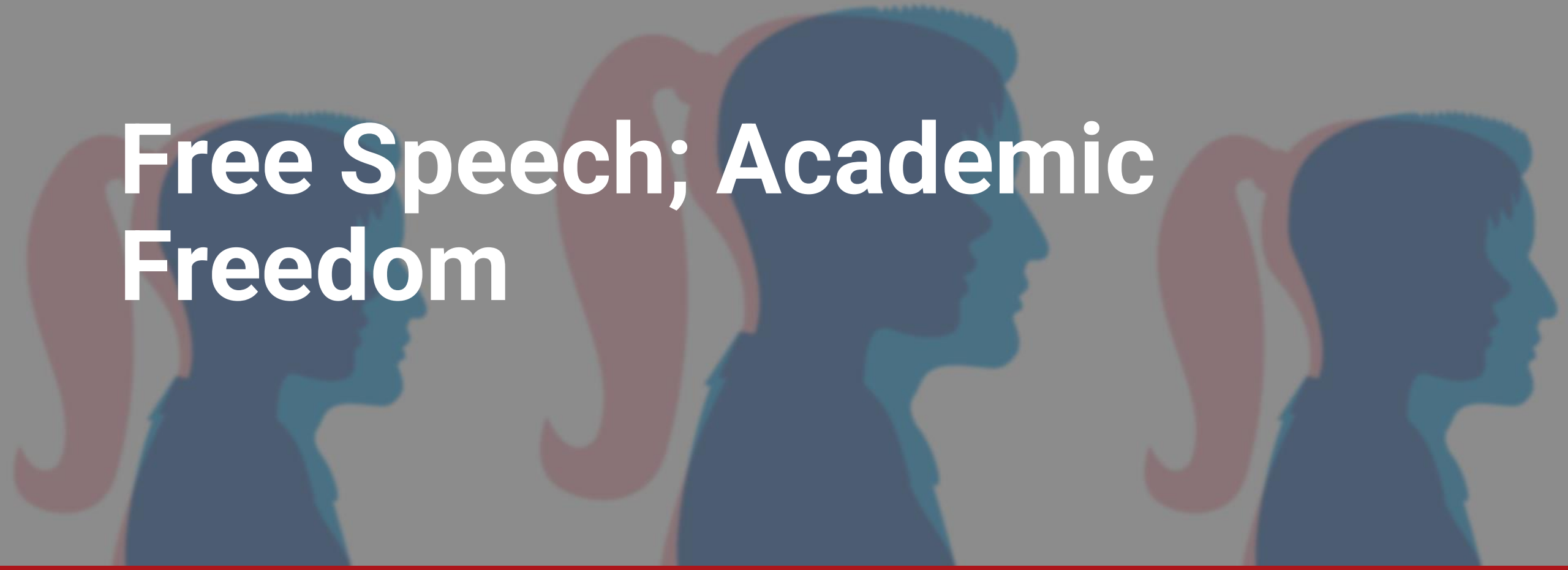
Signed by President Biden – Effective December 29, 2022

- Expands access to break time and space under the Fair Labor Standards Act to create better breastfeeding accommodations in the workplace. Requires employers to provide:
  - Reasonable break time for up to one year after giving birth in order to express breast milk.
  - A place, other than a bathroom, shielded from public view and free from intrusion of coworkers, to be used to express breast milk.

2024 Election Update:
Pregnant Worker Fairness Act Final Rules

- Anticipated new EEOC Chair Andrea Lucas voted against the EEOC's final rules for the PWFA.
  - Vocal advocate for pregnant workers but opposed final rules.
- Released statement explaining her opposition:
  - New rules create protection and accommodation for workers needing time away from work due to abortion, birth control usage, menstruation, infertility and fertility treatments, endometriosis; and miscarriage or stillbirth.
  - Said that protections should only apply to "a specific, actual pregnancy and childbirth of an individual worker, and particular medical conditions related to them."

Free Speech; Academic Freedom



Free Speech: Employee Speech

- Private citizen speech vs. speech as part of official duties?
  - If part of official duties, generally unprotected under *Garcetti*
  - Academic Freedom "carve out" in *Garcetti* dicta (accepted by many circuit courts) if speech in scholarship/teaching context
- If not part of official duties (or in academic freedom context), is the speech on "a matter of public concern" under *Pickering/Connick*?
- If it's on a matter of public concern, engage in *Pickering* balancing of employee interests in their speech with interest of employer in maintaining orderly workplace

Free Speech: Student Speech

- Students do not "shed their constitutional rights at the school house door."
  - Does speech materially and substantially interfere with the operation of the school or interfere with the rights of others? Can't be "undifferentiated fear or apprehension of disturbance." (*Tinker*; *Mahanoy*) Can be "reasonable forecast" of substantial disruption.
- If speech is "school sponsored," can restrict speech if it's "reasonably related to legitimate pedagogical concerns." (*Hazelwood*; *Axson-Flynn* and other cases have extended to university context)

Free Speech/Academic Freedom Challenges to Pronouns/Preferred Name Requirements

- Courts have addressed free speech challenges by educators or students who object to being required to use others' preferred pronouns or names.
  - Basis of objection: use of pronouns/names carry important message, and plaintiffs argue they should not be compelled to state a message that is counter to their religious, moral, ideological or political view
- More free speech cases have come out in favor of the plaintiffs so far, but this is a developing area

Free Speech Challenges to Pronouns/Pref'd Name Requirements, cont...

- *Meriwether* (6th Circuit) - Professor's use of pronouns to address students in political philosophy class fell within the academic freedom carve-out of *Garcetti* and so wasn't automatically unprotected as part of "official duties."
  - Matter of public concern. "Powerful message" tied directly into the national and controversial "struggle over the social control of language in a crucial debate about the nature and foundation, or real existence, of sexes."
  - Professor's interests outweighed university's, since the university refused to compromise (*i.e.*, allow him to use all last names in class) and there was no evidence of harm/hostile environment caused. Could have been a "robust and insightful in-class discussion" in his philosophy course and universities can't be "thought police." Lots of discussion re academic freedom.

Free Speech Challenges to Pronouns/Pref'd Name Requirements, cont...

- Other cases have held similar to *Meriwether*, ruling against the school/university in free speech challenges.
- Some also rely on US Supreme Court's recent *303 Creative* opinion to find the use of pronouns to be "highly expressive" speech that cannot be compelled against someone's will (given lack of sufficient evidence of real harm or disruption to school operations)
- *Geraghty (N.D. Ohio)*, *Vlaming (Va. S. Ct.)*, *Tennessee v. Cardona* (6th Circuit)

Free Speech Challenges to Pronouns/Pref'd Name Requirements, cont...

- Some have ruled in favor of K-12 school policies
  - *Willey* (D. Wyo.) - ruling against teacher; analyzed pronoun and preferred name requirement as compelling speech that is within "official duties" under *Garcetti* and so unprotected, as well as not speech on a "matter of public concern." (Distinguished *Meriwether* because it was a university professor)
  - *Parents Defending Education* (S.D. Ohio) - ruling in favor of school in free speech challenge by student objecting to using pronouns. Analyzed under *Tinker* and *Mahanoy*, finding Title IX hostile environment is a "substantial disruption"; pointing to social science research on harms to transgender students. (Distinguished *Meriwether* because it was a political philosophy class.)

Free Speech Challenge to State Policy Precluding Use of Preferred Pronouns/Names

- *Wood* (ND Fla) - Court held in favor of a transgender teacher who brought a first amendment challenge to a Florida policy that defined "sex" for public schools. In issuing a preliminary injunction against the enforcement of the policy against the teacher, the court held:
  - Teacher had her own first amendment right to use her own pronouns (noting that was highly expressive and personal speech);
  - It was a matter of public concern under *Pickering*; and
  - There was insufficient evidence that her use of her pronouns would impede school operations, so balance weighed in her favor.

Free Speech Challenges by Counseling Students On Treating LGBTQ Patients

- *Keeton* (S.D. Ga.) - Dismissed lawsuit by counseling student who challenged the university's right to require students to treat LGBTQ patients in supportive manner (relying on professional codes of practice/accreditation).
  - No free speech violation as just about professional conduct, not expressive activity. Viewpoint neutral policy (on face and in facts) – espousing own views on LGBTQ was off-limits to all counselors in treatment settings
- *Ward* (6th Cir.) - Court ruled in favor of counseling student in free speech challenge re requirement to treat LGBTQ patient. Not viewpoint neutral because student sought to refer patient elsewhere, which was allowed for other kinds of objections. Also comments pointing to religious hostility.

Free Speech Challenges Re Student Speech Against Transgender Rights

- First Circuit recently found in favor of a middle school that restricted a student's ability to wear a shirt that said, "There are only two genders."
  - Analyzing under *Tinker*, court held that the shirt would substantially disrupt the learning environment because of negative impact on transgender students.
  - *L.M. v. Town of Middleborough, Mass*. (1st Cir. 2024) (summarizing other cases re student speech targeting protected characteristics)
- Remains to be seen with other courts, given that in multiple pronoun cases, courts have weighed more heavily free speech rights to *not* use preferred pronouns (as compared to negative impact on transgender students' learning environments).

Free Exercise of Religion

Free Exercise of Religion

- *Employment Division v. Smith* – If regulation burdens religion, is the regulation neutral and generally applicable? If so, only need to show rationally related to legitimate government interest. If not, strict scrutiny – show regulation advances interests of highest order and is narrowly tailored
  - *Church of the Lukumi Babalu Aye v. City of Hialeah* – Even if facially neutral, facts showing targeting religious practice or religious animus means not generally applicable and must meet strict scrutiny
- Reminder: many states have mini-RFRAs with higher standards for government action

Free Exercise Challenges to Pronoun/Preferred Name Policies

- Several courts have found in favor of educators challenging pronoun/preferred name policies as violating free exercise

- *Meriwether* (6th Cir.) - Finding that policy was not neutral or generally applicable given evidence of comments showing religious animus and irregularities in investigation process.

- *Geraghty* (N.D. Ohio) - Finding that policy was not neutral or generally applicable because there was not a policy written down, so it was a "moving target" with individualized exceptions and required strict scrutiny. Left for jury the "battle of the experts" in terms of whether the harm to transgender students was sufficient to justify the policy under strict scrutiny.

Free Speech & Free Exercise Challenges to Non-Discrimination Policies for Recognized Student Orgs

- *Business Leaders in Christ* (8th Cir.) - University violated free speech/free exercise in prohibiting religious student org from having membership/leadership policies that excluded LGBTQ students.
  - Key: inconsistent application of university policy, given other clubs that were allowed to discriminate in favor of LGBTQ, women, national origin, etc...
- *Fellowship of Christian Athletes* (9th Cir.) - University violated free exercise clause in revoking religious student org status based on discriminatory membership/leadership policies
  - Key: evidence of religious animus; inconsistency & treating secular activity more favorably than religious; individual exemptions means not "generally applicable"

Religious Accommodation Under Title VII

Title VII Religious Accommodation

- *Groff v. DeJoy* – Increased "undue hardship" standard for employers denying religious accommodations from "anything more than *de minimus costs*" to "substantial increased costs in relation to the conduct of its particular business."
  - Can take into account burden accommodation imposes on other employees, so long as the burden affects operations
  - Bias/hostility to religion cannot be undue hardship
  - Requires more than "mere burden" or "some additional costs"

Religious Accommodation Challenges Related to Pronoun/Name Policies

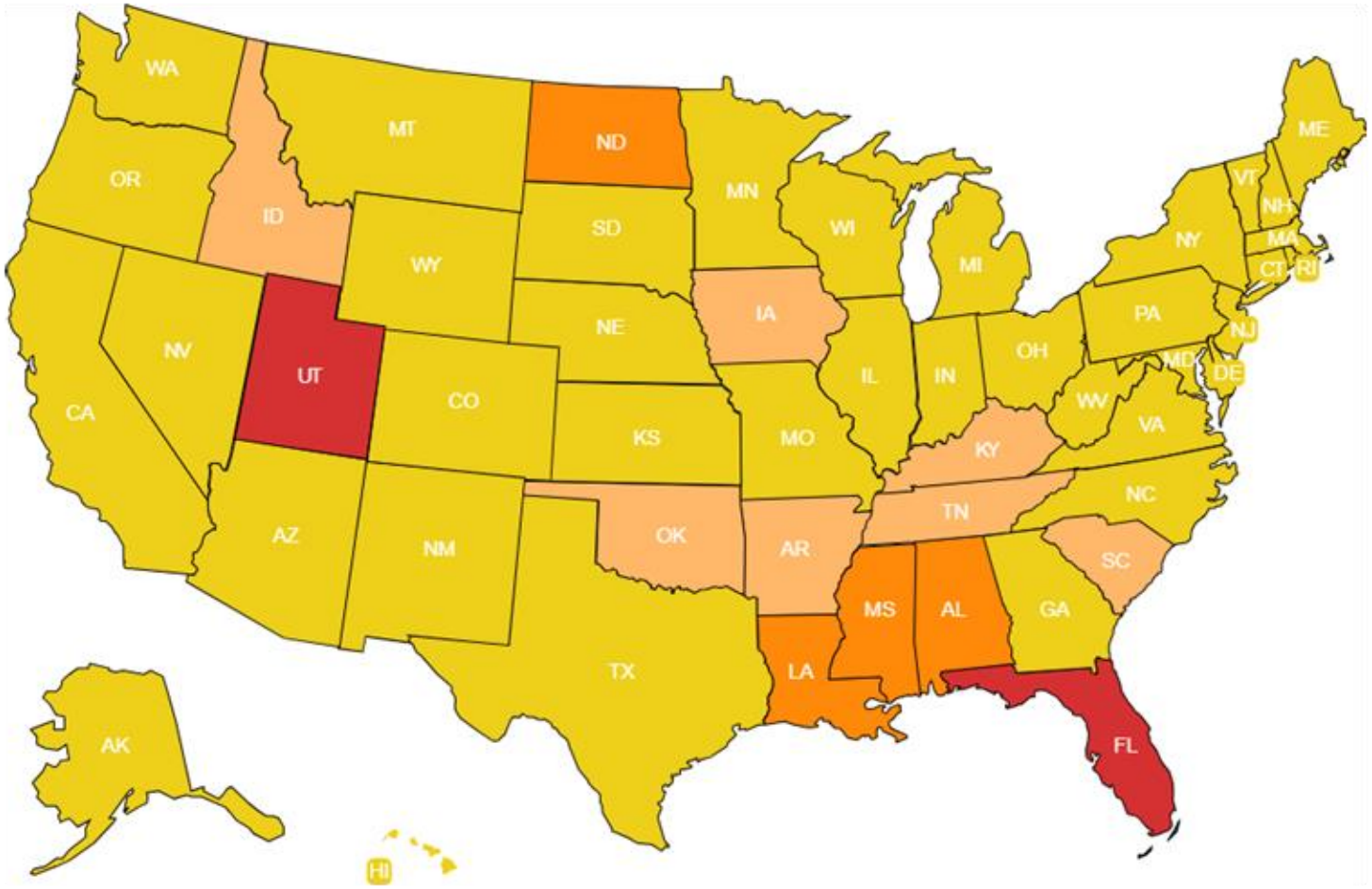
- *Kluge* (7th Cir.) - Ruling against teacher who sought Title VII religious accommodation of using last names only
  - Denied SJ for teacher because fact question as to whether teacher's religious belief was "sincerely held" (had used pronouns for transgender students in other contexts; questions regarding religious text)
  - Granted SJ for school because using last names only was "undue hardship" under *Groff*. Costs can be economic or non-economic.
    - Focused on mission – education for all and fostering learning environment of support/affirmation. Can define own legitimate mission. [Also *Trueblood,* WD Wash.]
    - Evidence that last name only caused substantial harm to students (complaints received re educational impact, disruption, students quitting orchestra)
    - Separate ground of undue hardship = unreasonable risk of liability from transgender students (noting Title IX, ADA, Equal Protection Clause)

State Trends

Restrooms and Other Facilities

- Two (soon three?) states currently provide that individuals must use bathrooms and facilities consistent with their gender assigned at birth in all government-owned buildings and spaces (including public higher ed)
- Four states currently provide the above for K-12 and *some* government-owned buildings
- Seven states provide the above for K-12
- Ten states define "sex" in ways that *may* impact access to bathroom and other facilities
- Movement Advancement Project map (clickable by state): https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans

Bathrooms & Facilities



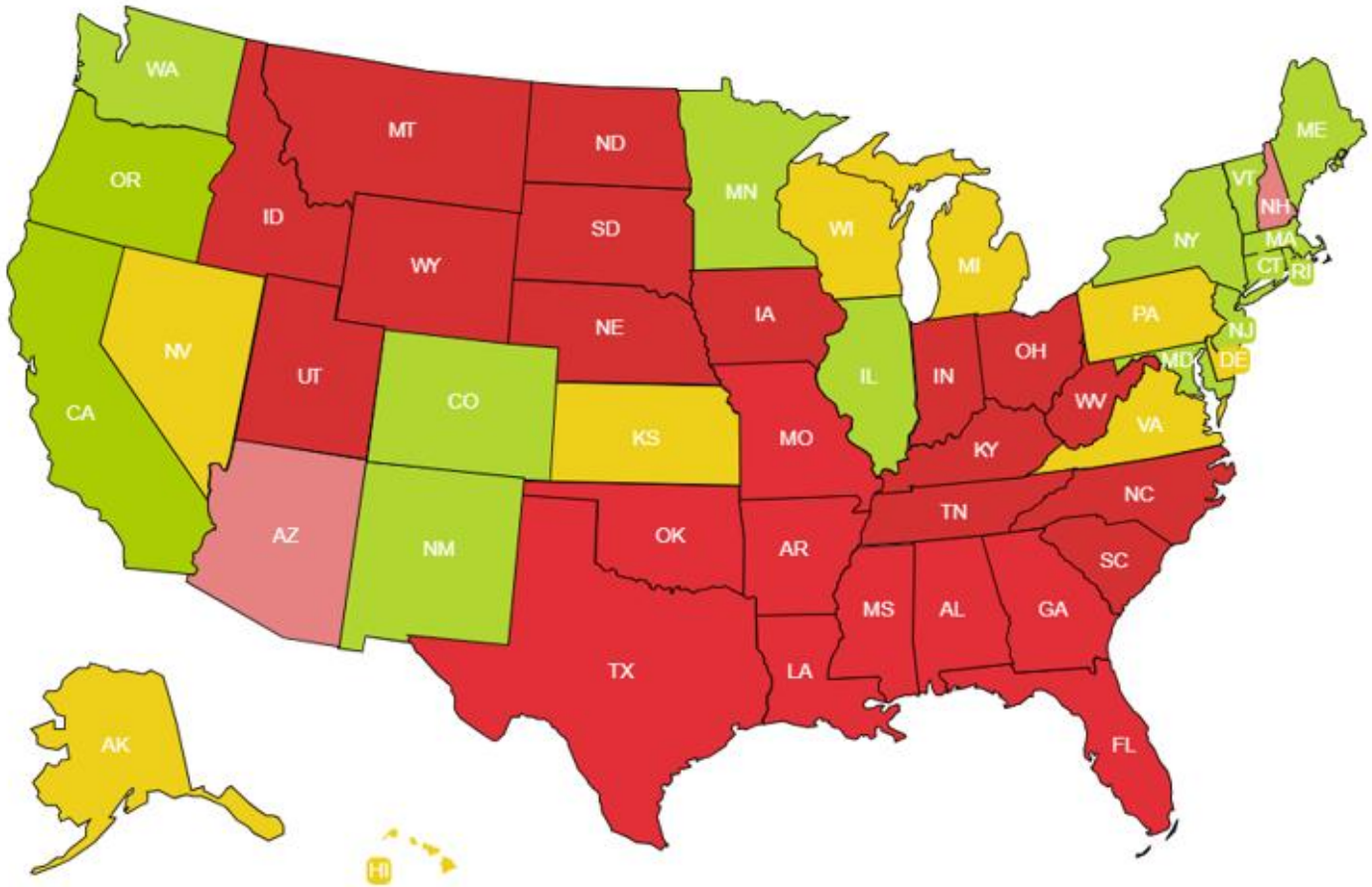
U.S. state-level law(s) regarding access to bathroom and facilities consistent with gender identity (eff. Nov. 8, 2024):

Two **states ban** use in government buildings, including K-12 schools and IHEs (Utah and Florida have criminalized usage).
Four **states ban** use in some government buildings, including K-12 schools.
Seven **states ban** use in K-12 schools (Idaho's ban was subject to temporary injunction.)
37 **states, five territories**, and **DC** have **no** state **ban**.
Note: Ten states across various categories have legal definitions of "sex" that may complicate access for people who are transgender.

Medical Care

- Monitor *U.S. v. Skrmetti;*
- Set for argument December 4, 2024;
- Challenge to 2023 Tennessee law banning gender-affirming care for those under 18;
- Alleges the ban violates the Equal Protection Clause and Due Process Clause (right of parental autonomy) and conflicts with the Affordable Care Act.

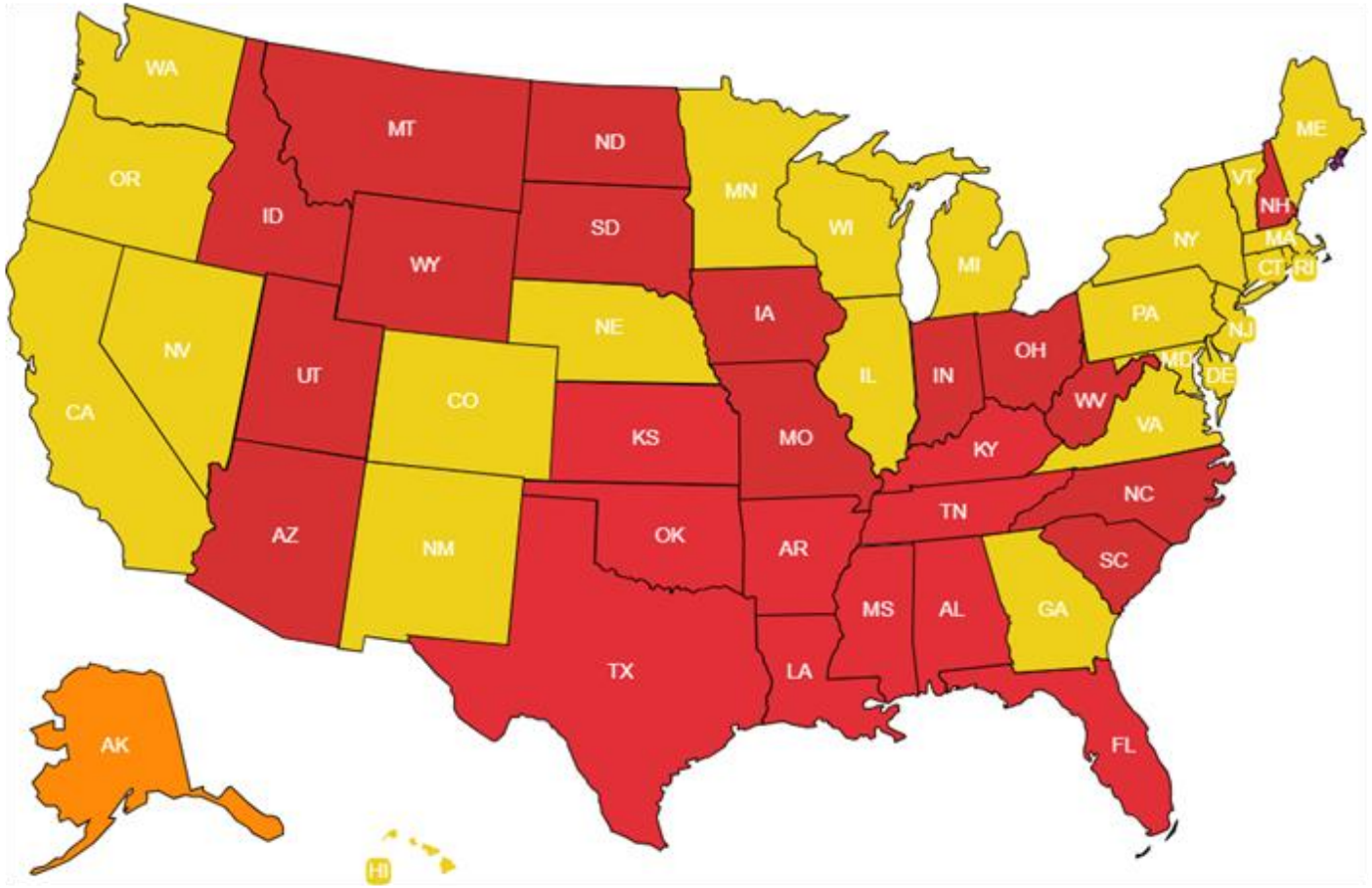
Affirming Medical Care



U.S. state-level law(s) regarding access to gender affirming medical care (eff. Nov. 1, 2024):

- **24 states** have laws that **prohibit/restrict**
- **Nine states + five U.S. territories** (American Samoa, Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, & U.S. Virgin Islands) **neither protect nor prohibit**
- **15 states + the District of Columbia** have laws that **protect/extend**
- **Two states have a mixed legal framework:** AZ banned surgical care for minors in 2022, but in 2023 the Governor issued an EO protecting other forms of healthcare; NH's law prohibiting care goes into effect Jan. 1, 2025

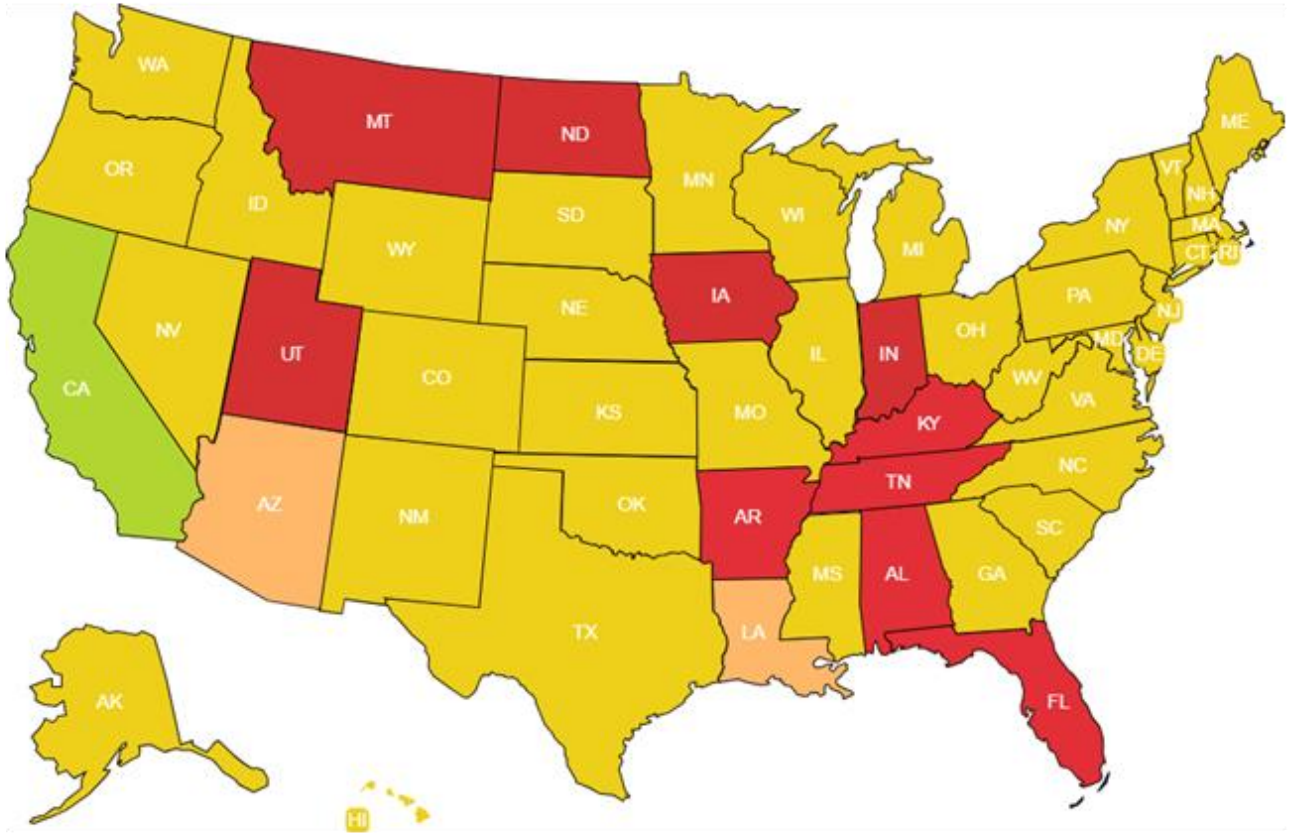
Athletics



U.S. state-level law(s) regarding access to athletics consistent with gender identity (eff. Nov. 20, 2024):

25 states ban transgender students from participating in sports consistent with their gender identity.
One state agency regulation bans transgender students from participating in sports consistent with their gender identity.
24 states, **five territories**, and **DC** have **no** state **ban**.
Note(s): MT's ban is permanently enjoined in postsecondary education, but not as to primary and secondary education; AZ, ID, UT, WV's bans are preliminarily enjoined by ongoing litigation; NH's ban is preliminarily enjoined to permit the individual plaintiffs to participate in sport during the pendency of ongoing litigation.

Pronouns



U.S. state-level law(s) regarding use of student pronouns consistent with their gender identity (eff. Nov. 21, 2024):

Ten states passed laws that teachers, staff, and peers are not required to use students' pronouns or names, if they do not align with the student's sex assigned at birth. Six states require parental notification when minor request to use a different name or pronouns.

Two states passed legislation restricting use of student pronouns that do not correspond with sex assigned at birth, that were not signed into the law by the state's governors. One of the two putative laws in LA would have permitted school personnel to decline to use students' pronouns and names based upon their personal "religious or moral convictions" regardless of parental approval of the name and pronouns.

37 states, five territories, and DC have no state ban expressly pertaining to student pronouns.

One state banned local school rules requiring parental notification regarding student-led request to change pronouns.

Note(s): MT and TN's laws also provide that school employees cannot be compelled to use students' pronouns; ND's law provides that school personnel may disregard the pronouns of both their students and colleagues; HB 686 was introduced in OH Nov. 15, 2024, which seeks to prohibit public postsecondary institutions from including a "pronoun" field in college applications.

State Trends: Restricting

- Barriers to requested gender on IDs;
- Free speech & expression bans;
- Healthcare restrictions;
- Public accommodations bans;
- Restricting student & educator rights;
- Weakening civil rights laws.

State Trends: Expanding

- Employment protections;
- Protections against conversion therapy;
- Laws against harassment and bullying;
- Laws permitting record updates to reflect gender identity;
- Laws enhancing insurance coverage for gender affirming care.

Practical Tips and Considerations

Gender Identity in University Records

Be mindful of how gender (and gender identity) is reflected in educational records.

Ask whether the recordkeeping options available reflect your institution's values.

Inquiries Into Gender Identity

EEOC Pre-Employment Inquiries As To Sex

- May ask if applicant is male or female
- May ask them to specify if they go by “Mr.” “Mrs” or “Miss”
  - If a pre-employment inquiry expresses any limitation as to sex, it is considered unlawful unless based on a Bona Fide Occupational Qualification

Student Information (Blends with Title IX)

- Title IX is silent on the collection of information regarding a student’s gender identity and/or sexual orientation.
- Once such information is collected, it would be protected from release without the student’s consent under the Family Educational Rights and Privacy Act (FERPA)
- Sometimes information on gender identity is requested as a matter of course.

- **Recommendation:** make the collection of gender identity information optional and only share on a need-to-know basis.

- **Ask:**
  - Is the information necessary to ensure that a person is qualified for a role?
  - Is information being used in a way that is permitted by law?

Tips and Takeaways

- Be human;
- Be proactive and collaborative;
- Be aware of changes in legal landscape;
- Be mindful of university policies, which may be more expansive than state/federal law;
- Be persistent and creative in finding ways to fulfill your institution’s values, including in situations where individual's rights may appear to conflict;
- Be careful to honor all of the rights involved, even where in conflict with other viewpoints.

Tips and Takeaways

- Be reasonable and viewpoint neutral
- Avoid evidence of religious/discriminatory animus (even where the policy itself is neutral and generally applicable)
- Apply policies thoughtfully and consistently
- Engage fully in the accommodation process
- Put the institution in a position to succeed -- to avoid and defend claims; assess litigation risks
- Be wary of retaliation claims


Questions?

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