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# LGBTQIA+ UPDATE:

## TERMS TO KNOW, TEXAS LAW, AND TALKING HEADS



**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

- (1) Terms to Know
- (2) Texas Law (and trends around the Circuits)
- (3) Policy Updates
- (4) Talking Heads

# (1) Terms to Know

<p><b>Gender Expression</b></p> <p>How a person represents or expresses gender identity to others, often through behavior, clothing, hairstyles, voice, mannerisms, or physical characteristics.</p>	<p><b>Gender identity</b></p> <p>One's internal sense of gender, which may be different from one's assigned sex, and which is consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the person's core identity</p>
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<p><b>Gender nonconforming</b></p> <p>A term for individuals whose gender expression is different from societal expectations related to gender.</p>	<p><b>Cisgender</b></p> <p>Or simply "cis," is an adjective that describes a person whose gender identity aligns with the sex they were assigned at birth.</p>
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<p><b>Gender stereotypes</b></p> <p>Stereotypical notions of masculinity and femininity, including expectations of how boys or girls represent or communicate their gender to others, such as through their behavior, clothing, hairstyles, activities, voice, mannerisms, or physical characteristics.</p>	<p><b>Nonbinary</b></p> <p>A term that can be used by people who do not describe themselves or their genders as fitting into the categories of man or woman. A range of terms are used to refer to these experiences; nonbinary and genderqueer are among the terms that are sometimes used.</p>
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### Transgender male

Someone who identifies as male but was assigned the sex of female at birth. Also known as FTM or “female-to-male.”

### Transgender female

Someone who identifies as a female but was assigned the sex of male at birth. Also known as MTF or “male-to-female.”

### Sexual orientation

A term describing a person’s attraction to members of the same sex and/or different sex. Sexual orientation is a distinct concept from transgender status. In nondiscrimination law, however, sexual orientation and transgender status are frequently analyzed together.

### Transgender

A term for people whose gender identity is different from their assigned sex at birth. Medical treatments or procedures are not a prerequisite for recognition as transgender.

### Grammar

“they” or “them” is now a nonbinary way to address anyone. The *New York Times* agrees. So does Merriam-Webster, [which reports that “they” has been used as a singular pronoun since at least the 1300s.](#)

## (2) Texas and Trends around the Circuits

### Circuits on LGBTQ+ Students at a Glance:

3d	4th	5th	6th	7th	9th	11th
May use bathroom consistent with gender identity	May use bathroom consistent with gender identity	<b>No caselaw</b>	May use bathroom consistent with gender identity	Transgender students may bring claims of sex discrimination under Title IX	May use bathroom, locker room, and showers consistent with gender identity	May use bathroom consistent with gender identity
<i>Doe by &amp; through Area Sch. Dist., 887 F.3d 518, 538 (3d Cir. 2018)</i>	<i>Grimm v. Gloucester County Sch. Bd., 912 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020)</i> *SCOTUS declined to hear		<i>Dodds v. United States Dept of Educ., 845 F.3d 217, 221 (6th Cir. 2016)</i>	<i>Whitaker v. Kenosha Unified Sch. Dist. No. 1, Bd. of Educ., 858 F.3d 1034, 1035 (7th Cir. 2017)</i>	<i>Parents for Privacy v. Barr, 949 F.3d 1210, 1217–18 (9th Cir. 2020), cert. denied, 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020)</i>	<i>Adams by &amp; through Kesper v. Sch. Bd. of St. Johns County, 3 F.4th 1299 (11th Cir. 2021)</i>

### *Bostock v. Clayton County* 140 S.Ct. 1731 (2020)

- Gerald Bostock, a gay man, worked for Clayton County Georgia’s child welfare services. When he joined a gay recreational softball league he was fired from the department for “conduct unbecoming of its employees.”
- The Court ruled that an employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.
- Discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex—the very practice Title VII prohibits in all manifestations.

**John M. Kluge v. Brownsburg Community School Corp.,**  
2021 WL 2915023 (S.D. IN. July 12, 2021).

- Hired by BCSC in August 2014 to serve as a Music and Orchestra Teacher at BHS.
- BCSC implemented a policy (“Name Policy”) for all their teachers to address transgender students with their chosen names and pronouns
- Mr. Kluge and three other teachers requested meeting with the Principal, during which they presented a signed letter expressing their religious objections to transgenderism and other information supporting their position that BHS should not “promote transgenderism.”

**John M. Kluge v. Brownsburg Community School Corp.**

- Kluge identifies as a Christian and is an elder of Clearnote Church, which is part of the Evangel Presbytery.
- Serves as head of the youth group ministries, head of the Owana Program (a discipleship program for children), and a worship group leader.
- the Principal gave Mr. Kluge three options: (1) comply with the Name Policy; (2) resign; or (3) be suspended pending termination

**LEGAL ISSUES – Title VII – Religious Accomms**

1. Whether District was required to offer other accommodations
2. Whether Kluge's religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet
3. Whether the last-names-only accommodation was an undue hardship on the district

**LEGAL ISSUES – Religious Accomms**

**1. Whether District was required to offer other accommodations**

**Court:** The court ruled that BCSC’s failure to propose an alternative accommodation, or to engage in further discussions regarding a potential accommodation, did not violate Title VII.

“Title VII merely requires an employer to ‘show, as a matter of law, that any and all accommodations would have imposed an undue hardship.’”

**LEGAL ISSUES – Sincerely Held**

2. Whether Kluge's religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet

**Court:** Perfection is not required. “[A] sincere religious believer doesn’t forfeit his religious rights merely because he is not scrupulous in his observance; **for where would religion be without its backsliders, penitents, and prodigal sons?**”

The court also noted that the sincerity of an individual’s religious belief is a question of fact that is generally not appropriate for a court to determine at summary judgment. The court assumed without deciding that Mr. Kluge’s religious beliefs against referring to transgender students by their preferred names and pronouns were sincerely held.

**LEGAL ISSUES – Undue Hardship**

3. Whether the last-names-only accommodation was an undue hardship on the district

**Court:** Kluge established a prima facie case of discrimination based on failure to accommodate, so the burden shifted to BCSC to demonstrate that it could not provide a reasonable accommodation “without undue hardship on the conduct of [its] business.”

In the Seventh Circuit, requiring an employer “to bear more than a de minimis cost” or incur more than a “slight burden” constitutes an undue hardship. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

“The relevant costs may include not only monetary costs but also the employer’s burden in conducting its business.” *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at \*10 (S.D. Ind. Aug. 27, 2001).

## HOLDING

“BCSC is a public-school corporation and as such has an obligation to meet the needs of all of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge’s practice of using last names only.”

- BCSC presented evidence that two specific students were affected by Kluge’s conduct and that other students and teachers complained.

## *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021)

- A college professor, who taught theology, refused to refer to a transgender student in their class by their preferred pronouns
- Instead, he used only the student’s last name with no Mr. or Ms. before it to address them
- Sixth Circuit held that under the First Amendment the professor may refuse to use student’s preferred pronouns for religious reasons

## BATHROOMS, LOCKER ROOMS, SHOWERS

The EEOC has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity.

## Employee Preferred Names and Pronouns

In its decision in *Lusardi v. Dep’t of the Army*, the EEOC explained that although accidental misuse of a transgender employee’s preferred name and pronouns does not violate Title VII, **intentionally and repeatedly** using the wrong name and pronouns to refer to a transgender employee could contribute to an **unlawful hostile work environment**.

## Texas House Bill 25

- Requires trans students who play UIL sports to play on the team that corresponds with the gender they were assigned *at birth*
- You must use the birth certificate issued at the time of the student’s birth to determine their gender
- Went into effect January 18, 2022

## Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

- Title IX protects students from harassment who deviate from stereotypical gender norms.
- Bullying of a student because of the student’s nonconformity with gender norms is a form of harassment based on sex in violation of federal law.

## Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

- A school district may be liable under Title IX for employee or student harassment of transgender students when there is notice of harassment, followed by deliberate indifference and a failure to respond appropriately.
- It does not matter whether or not a harasser is the same or opposite sex.

## CHANGING STUDENT RECORDS

Texas Education Code section 25.0021 requires that a student be identified by his or her legal surname, or last name, as that name appears (1) on the student's birth certificate or other document suitable as proof for the student's identity, or (2) in a court order changing the student's name. However, Section 25.0021 does not address students' first names or genders.

## CHANGING STUDENT RECORDS

In general, a student's legal name is used on permanent records, especially when required by state or federal laws and regulations. For example, Texas school districts are required to complete and maintain permanently the academic achievement record, or "AAR" of high school students (often referred to as a "transcript"), including full legal name and gender.<sup>13</sup> Following guidelines developed by the Texas commissioner of education, the AAR must have the complete name from the student's birth certificate or other legal document, without use of nicknames or abbreviations.<sup>14</sup> The student's legal name, the name submitted to Public Education Information Management System (PEIMS) at the Texas Education Agency (TEA), and the name recorded on the AAR must be identical.<sup>15</sup> Any changes in the AAR must be dated, explained and kept as part of the student's permanent file.<sup>16</sup> TEA has informally stated that it will accept the student gender that a district reports through PEIMS, including a report that changes the student's gender following a student and/or parent request to alter the record.

## CHANGING STUDENT RECORDS

In contrast to permanent school records, however, teachers and other school district employees often informally address students by, and have non-permanent school records that reflect, preferred names or nicknames that are not a student's legal first name. A school district should apply this practice equally with transgender students. For example, the transgender student's preferred first name and gender should be used in speaking with the student and for class rosters, identification badges, awards, and any other similar purpose. OCR and DOJ's 2021 guidance cites a failure to address a transgender student by the student's chosen name and pronouns as an example of sex-based discrimination within the agencies' enforcement authority under Title IX.<sup>17</sup>

## Mandatory Student Name/Gender Changes

- Records must be amended when the school is provided a copy of a final, signed court order requiring that official government records be changed to reflect the new name/gender.
- The AAR and PEIMS records may be amended only when the district is presented with an official, revised birth certificate or court order signed by a judge.
- Documentation justifying and explaining the change to these records must be maintained permanently.

## Which Documents Cannot be Amended?

- PEIMS
- Academic Achievement Record/Transcript
- College exams (including but not limited to SAT/ACT/PSAT/TSI)
- College applications
- FAFSA/TAFSA
- College letters of recommendation
- Official college/university transcripts
- Texas State exams (STAAR, EOC, TX-KEA, ISIP, etc.)

## Permissive Student Name/Gender Changes

A student's name and gender on records may be changed upon request of the parent, guardian, or adult student in accordance with procedures adopted by the District in records such as except for the following records:

- Skyward (except for portions used for PEIMS/attendance reporting)
- Special Ed Manager or other special education software platform
- ID badges
- Class rosters
- Campus-based publications (e.g., yearbooks, athletic programs)
- High school diploma & graduation ceremonies

## Students with Disabilities

- "Gender Identity" issues should NOT be considered a disability, in and of themselves.
- In fact, Title II of the ADA specifically excludes **gender identity** disorders which do not result from physical impairments.
- We may consider providing accommodations under Title IX, outside of Section 504/special ed.
- BUT LGBTQIA+ students may be at higher risk of depression and/or anxiety, which could make a student eligible for section 504/special ed services.
- Focus on disability (e.g., depression/anxiety) in 504 plan/IEP.

## Students with Disabilities

- **KNOW YOUR POLICIES!!!** (And make sure your sped staff knows your policies).
  - Board Policy FFH (harassment based on protected class).
  - Board Policy FFI (bullying)
- Make sure your sped staff are aware of how their actions (or inaction) can amount to denial of FAPE.
- Investigate/address harassment and bullying (for any student!)

## Students with Disabilities

- **Investigation Complications**
  - The victim and/or the harasser may be unreliable
    - Time, place, details are harder than usual to determine
      - Story may change unintentionally (memory deficits)
    - May be completely made up; reality versus make-believe
    - Often even more susceptible to influence (from peers, parents, abusers)
    - May be more traumatized by the investigation than the alleged act
- **Consent Between Students Especially Cloudy**
  - Does student have the ability to consent?
    - Sped students often more "persuadable"
    - Reading "social cues" may be a deficit
  - Student version versus Parent version
    - Implications of "bad" and "good" especially powerful

## Students with Disabilities

- **Harm From Harassment is Often Magnified**
  - Special ed students may be impacted in different and more severe ways than their Gen Ed peers
    - Current disabilities manifest more severely
    - New disabilities develop
    - Re-evaluations may be necessary
    - Revised IEPs/BIPs required to ensure educational benefit

## (3) Policy Updates

EMPLOYMENT OBJECTIVES EQUAL EMPLOYMENT OPPORTUNITY	DAA (LEGAL)
Gay and Transgender	The prohibition against discrimination because of sex includes discrimination on the basis of an individual being gay or transgender. <i>Bostock v. Clayton County, Georgia</i> , 17-1618, 2020 WL 3146686, (U.S. June 15, 2020)
Gender Stereotypes	A district may not evaluate employees by assuming or insisting that they match the stereotype associated with their group. <i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)

EMPLOYEE WELFARE FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION	DIA (LEGAL)
Gay and Transgender	The prohibition against discrimination because of sex includes discrimination on the basis of an individual being gay or transgender. <i>Bostock v. Clayton County, Georgia</i> , 17-1618, 2020 WL 3146686, (U.S. June 15, 2020)
Gender Stereotypes	A district may not evaluate employees by assuming or insisting that they match the stereotype associated with their group. <i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)

### Proposed Title IX Updates

**Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics**

*Proposed §§ 106.10, 106.31(a)(2), 106.41(b)(2)*

The proposed regulations would make clear that Title IX prohibits all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics. (This proposed provision also addresses discrimination based on sex stereotypes and pregnancy or related conditions.) (Proposed § 106.10)

### Proposed Title IX Updates

**Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics**

*Proposed §§ 106.10, 106.31(a)(2), 106.41(b)(2)*

Prohibiting recipients from **separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm** (unless otherwise permitted by Title IX). This includes policies and practices that prevent a student from participating in a recipient's education program or activity consistent with their gender identity.

This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2))

### Proposed Title IX Updates

**Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics**

*Proposed §§ 106.10, 106.31(a)(2), 106.41(b)(2)*

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

(4) Talking Heads

## U.S. Dep. of Justice – Civil Rights Division

- The US Department of Justice released a memo on March 26, 2021, claiming that the Supreme Court's decision in *Bostock* should apply to Title IX.
- "Title IX's "on the basis of sex" language is sufficiently similar to "because of" sex under Title VII as to be considered interchangeable."
- "After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX's prohibition on discrimination "on the basis of sex" is that it includes discrimination on the basis of gender identity and sexual orientation."

## U.S. Dep. of Health and Human Services

- Beginning May 10, 2021, the Department of Health and Human Services (HHS) interprets and enforces Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.
- Section 1557 of the Affordable Care Act protects the civil rights of individuals who seek to access covered health programs or activities

## Gender Confirmation Surgery and Child Abuse

Governor Abbott requested the Texas Department of Family and Protective Services issue a determination on whether gender reassignment surgery for minors constitutes child abuse under state law

## Gender Confirmation Surgery and Child Abuse

- Jaime Masters, commissioner of TDFPS, wrote in her **response letter**:
  - "genital mutilation" constitutes "child abuse" under state law
  - "Such mutilation may cause a 'genuine threat of substantial harm from physical injury to the child,'"
  - "This surgical procedure physically alters a child's genitalia for non-medical purposes potentially inflicting irreversible harm to children's bodies. Generally, children in the care and custody of a parent lack the legal capacity to consent to surgical treatments, making them more vulnerable."

## Gender Confirmation Surgery and Child Abuse

- At this time, Arkansas and Tennessee have passed bills which ban gender reassignment surgery for minors
- Tennessee's only applies to prepubescent minors

## Attorney General Opinion KP-0396 Dec. 20, 2021

- "The NCAA transgender policy assumes that a brief period of testosterone suppression will eliminate male physical advantages over women; however, some scientific studies dispute that assumption and recognize the ongoing physical advantage biological males have over biological females following testosterone suppression."
- "To the extent that biological males retain a physical advantage over biological females, permitting them to compete against biological females disadvantages the biological females. Allowing such competitions denies biological females equal athletic opportunities to their biological male counterparts, contrary to the purposes of Title IX."



## Attorney General Opinion KP-0396

- Whether a university discriminates on the basis of sex in violation of Title IX must be analyzed on a case-by-case basis after fact finding, **which is beyond the scope of an Attorney General opinion.**

## Texas AG v. Pride

Attorney General Ken Paxton  
@kenpaxtonTX  
Liberal school districts are aggressively pushing LGBTQ+ views on Texas kids! All behind parents' backs! This is immoral and illegal.  
I will work with and for parents to hold deceptive sexual propagandists and predators accountable. See my letter

Dear Dr. Elizalde:

It has come to my attention that Austin ISD is currently hosting "Pride Week," during which "[c]ampuses are encouraged to plan activities that "engage, educate, and inspire" students concerning "LGBTQIA+" issues. Your district is further providing a week's worth of "inspiration guides" — instructional curriculum and lesson plans apparently for all ages, culminating in a "Pride Out" party taking place on Saturday, March 26.

By hosting "Pride Week," your district has, at best, undertaken a week-long instructional effort in human sexuality without parental consent. Or, worse, your district is cynically pushing a week-long indoctrination of your students that not only fails to obtain parental consent, but subtly cuts parents out of the loop. Either way, you are breaking state law.

## Dan Patrick wants to prioritize "Don't Say Gay" bill

- Patrick stated in April 2022 he wishes to prioritize a bill which prohibits classroom lessons on sexual orientation or gender identity for kids below the fourth grade or any instruction that is not "age-appropriate or developmentally appropriate" for older students
- To mirror Florida, Patrick's version of this bill enables a parent to sue a school district for damages if they believe it has broken the law. If they win, parents will receive money and recoup attorney fees.

## Graphic

- In a

**Gender Identity and Gender**

District Personnel and Agents shall not teach, instruct, train, or otherwise ensure any other school personnel or agents to teach, instruct, train, or otherwise communicate to any individual or group topics regarding sexual orientation or gender identity unless and until those individual persons or the entire group has fully consented to the topic.

District Personnel and Agents, while acting as agents or representatives of the District, shall not teach, instruct, train, or otherwise ensure Gender Fluidity (as defined herein). Not shall District Personnel or Agents be required to attend, teach, or otherwise communicate to any individual or group topics regarding sexual orientation or gender identity unless and until those individual persons or the entire group has fully consented to the topic.

For purposes of this public, "Gender Fluidity" means any theory or ideology that (1) espouses the view that biological sex is merely a social construct; (2) espouses the view that it is possible for a person to be any gender or more (i.e., non-binary) based solely on that person's beliefs or self-perception; or (3) espouses the view that an individual's biological sex should be changed to "match" a self-identified gender that is different from the person's biological sex.

Any instructional materials, as defined in EFAA (OCAs) and FERPA (OCAs), that adopt, support, or promote Gender Fluidity as defined herein shall be placed and made available and maintained in the District's Essential Content Area, as defined in EFAA (OCAs).

The District will not promote, require, or encourage the use of any of the instructional materials for students, teachers, or any other personnel in any manner that is inconsistent with the biological sex of each person as listed on (1) the person's official birth certificate, or (2) the person's official birth certificate as a predecessor, another person's record, or another person's record, or (3) the student's official birth certificate as corrected to have correctly stated the student's biological sex only if the student's name (1) corrected or (2) changed the time of the student's birth, or (3) modified by

view

2022

## Paxton Signs Women's Bill of Rights

- The "Women's Bill of Rights" is a document developed by the Independent Women's Voice urging codification of the common sense and reality-based definition of a woman
- An objective of the text is to remind the world that biology should not be ignored when discussing what makes a woman a woman
- Paxton signed it and issued a press release on September 7, 2022

## Paxton Sends Letter to Secretary of Education

- On September 12, 2022, AG Paxton sent US Sec. of Ed. Miguel Cardona a letter disagreeing with the administration's stance on "gender identity" and "sexual orientation"
- "Everyone agrees that academic institutions should take a hard stance against sexual harassment and discrimination in education, including by enforcing Title IX, as enacted by Congress. That commitment, however, should not come at the expense of other students' rights; nor should it force recipients to assume responsibilities that are not prescribed by statute. The Proposed Rule violates both principles."

- No binding 5<sup>th</sup> Circuit precedent on transgender student bathroom usage yet
- But federal authorities (EEOC & ORC) and courts following Bostock reasoning
- Prepare for new Title IX rules when they're official
- 2022 is an election year, so prepare for plenty of postulating and promises



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