



**nsba**

**Protections for LGBTQ  
Employees and Students after  
*Bostock v. Clayton County***

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A New Era in Employment Law and Student Rights

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# Introduction

On June 15, 2020, in the waning days of its term, the Supreme Court of the United States issued a blockbuster ruling sure to influence legal rights for years to come. The case, *Bostock v. Clayton County, Georgia*, asked the High Court to decide whether federal law forbade an employer from firing an employee because that person is gay or transgender. In a ruling that surprised many by the number in the majority (6 -3) and the simplicity of the analysis, the Court decided that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination “because of...sex,” forbids an employer from firing an employee because that person is gay or transgender. The Court said: “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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”<sup>1</sup>

What does this mean for public school districts? Specifically, how should school board policies or employment practices be informed by the decision? And what kinds of operational shifts need to happen to accommodate the expectations of employees under the law? Beyond the world of employment, the Supreme Court’s ruling in *Bostock* is likely to affect the rights of students in public schools. Courts are now relying on the *Bostock* paradigm in applying student civil rights laws like Title IX, which also prohibit discrimination on the basis of sex. And, while not all sex and gender issues are addressed by *Bostock*, and federal and state agencies continue to disagree about the application of the law in some instances such as gender identity and athletics, *Bostock* does answer the vast majority of issues surrounding gender and sex, especially in the employment space.

We hope that this guide will serve not only to answer questions that may arise in these scenarios but also provide an issue-spotting venue for you as school leaders to begin the process of considering your school district’s policy and staff training needs in light of this new federal legal standard. As you travel through these pages, remember that your best sources for up-to-date legal information are your state association and your school lawyer member of the NSBA Council of School Attorneys. And, as always, stay tuned for updates to this publication in this evolving area of the law.



# Rights of LGBTQ Employees

## 1. What is meant by LGBTQ?

“LGBTQ” is an initialism that stands for lesbian, gay, bisexual, transgender, and queer or questioning (one’s sexual or gender identity).<sup>2</sup> The term “lesbian” is defined as a “woman who is emotionally, romantically, or sexually attracted to other women.” “Gay” is defined as “a person who is emotionally, romantically, or sexually attracted to members of the same sex.” “Bisexuals” are persons who are “emotionally, romantically, or sexually attracted to more than one sex, gender, or gender identity.” “Transgender” persons are those whose “gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.” The “Q” in the initialism can either stand for “queer” or “questioning.” Queer people are those who “express fluid identities and orientations.” Those who are “questioning” are “.... people in the process of exploring their sexual orientation.”<sup>3</sup>

## 2. What did the Supreme Court say in *Bostock v. Clayton County, Georgia* about LGBTQ employee rights?

*Bostock v. Clayton County* is one of three cases that were consolidated to be heard before the U.S. Supreme Court. In each case, a long-time employee claimed that he or she was fired for being gay or transgender.<sup>4</sup> Clayton County, Georgia, fired Gerald Bostock for conduct “unbecoming” a county employee shortly after he began participating in a gay recreational softball league. In *Altitude Express v. Zarda*, a skydiving company fired Donald Zarda days after he mentioned being gay.<sup>5</sup> Finally, in *R. G. & G. R. Harris Funeral Homes*, a funeral home fired Aimee Stephens, who presented as a male when she was hired, after she informed her boss that she planned to “live and work full-time as a woman.”<sup>6</sup> Each employee sued in federal court, alleging he or she had been discriminated against “because of sex” in violation of Title VII of the Civil Rights Act of 1964.

Three different appellate courts issued rulings in the cases, but the rulings were conflicting. The U.S. Court of Appeals for the 11th Circuit held that Title VII did not prohibit employers from firing employees for being gay. It ruled that Mr. Bostock’s suit could be dismissed as a matter of law. The U.S. Courts of Appeals for the 2nd and 6th Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed. All three cases were consolidated and heard together by the U.S. Supreme Court.

The Supreme Court ruled that an employer who fires an individual merely for being gay or transgender violates Title VII, which makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against an individual...because of such individual’s race, color, religion, sex, or national origin.”<sup>7</sup>

In its ruling in *Bostock*, the U.S. Supreme Court made it clear that Title VII's protections that prohibit employers from discriminating against employees based upon their race, color, sex, or national origin now apply to discrimination against an employee's sexual orientation or transgender status. The employee's sex does not need to be the sole or primary cause of the employer's adverse action.

### **3. What specific protections are available to LGBTQ employees under *Bostock*?**

After *Bostock*, it is a clear violation of Title VII<sup>8</sup> for an employer with more than 15 employees to fire an employee based on his or her status as gay or transgender. It is likely that federal courts will apply *Bostock* to situations where someone is alleged to have been fired based on his or her status as bi-sexual or questioning/queer, as well, though the Court did not address those terms specifically. Courts also are likely to apply *Bostock* in cases alleging other types of discrimination, in addition to firing, based on LGBTQ status. Just how or in what contexts remains to be seen.

*Bostock* likely opened the door for LGBTQ employees to assert all of the protections of Title VII, though the decision addressed only firing. Title VII prohibits employers from discriminating against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), or national origin. Title VII covers most employers in the public and private sector that have at least 15 employees, and it is applicable to most labor unions, employment agencies and the federal government.<sup>9</sup> The law protects employees from discrimination in hiring, firing, promotions, training, and benefits. It also protects employees from harassment and retaliation based on one of the listed characteristics or participating in a proceeding that addresses discrimination.<sup>10</sup>

### **4. Do LGBTQ employees in every state have the same protections from discrimination in employment?**

Because the Court decided that the federal law protects employees from being fired due to their status as gay or transgender, that federal protection now exists in every state. Many states also have their own human rights laws that protect LGBTQ employees from discrimination in the workplace. California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Michigan, Nevada, Minnesota, New Hampshire, New Jersey, Oregon, and New York are some of the states that protect LGBTQ employees from certain forms of employment discrimination. But even in states without such protections for LGBTQ employees, *Bostock* provides the basic protection against firing based on one's gay or transgender status.

Because state laws differ dramatically regarding what traits or categories are protected in the employment context, it is crucial that you consult with your state school boards association and your school attorney member of NSBA's Council of School Attorneys (COSA) to determine how the *Bostock* ruling may affect your state law.

**5. Under *Bostock*, are LGBTQ employees eligible for the same benefits to which other employees are eligible?**

Yes. It is very likely that the Equal Employment Opportunity Commission (EEOC) and federal courts will interpret *Bostock* as prohibiting employers from discriminating against LGBTQ persons in employment generally, which would include benefits.

**6. Does the law require school districts to recognize the marriages of gay employees?**

Yes. In *Bostock*, the Supreme Court did not rule on the issue of employer recognition of same-sex marriage, but it addressed that issue in 2015. In *Obergefell v. Hodges*, the Court ruled that marriage is a fundamental right and that the right to marry is guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the 14th Amendment of the United States Constitution.<sup>11</sup> The *Obergefell* ruling requires the federal government, states, and political subdivisions to recognize same-sex marriages.

**7. Are school districts required to provide benefits to the children and spouses of gay employees?**

Yes. School districts must provide employees with same-sex spouses the same benefits that they provide to other employees. Such benefits may include, but not be limited to, health benefits, retirement benefits, insurance benefits, benefits under the Family and Medical Leave Act (FMLA), healthcare spending accounts, COBRA, and dependent childcare.<sup>12</sup>

**8. Are school districts required to allow transgender employees to use bathrooms of the gender with which they identify?**

It depends on the law in your jurisdiction. The *Bostock* decision does not address numerous specific issues in workplaces such as dress codes, bathroom access, locker room access, religious liberty rights, First Amendment speech and religious freedom rights, Religious Freedom Restoration Act protections, and Title VII exemptions for religious employees.<sup>13</sup> Bathroom access for transgender employees is one area that continues to challenge employers and employees alike. The Occupational Safety and Health Administration (OSHA) requires employers to provide employees reasonable access to restrooms; and although federal law has not specifically addressed the issue, OSHA has developed *A Guide to Restroom Access for Transgender Workers*, which encourages employers to allow transgender persons to use bathrooms consistent with their gender identity.<sup>14</sup>

The following states have specifically outlined bathroom protections for transgender individuals: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C.<sup>15</sup>

School leaders should consult with your state school boards association and COSA member attorney to determine how the law in your jurisdiction affects your districts' policies and practices on employee restroom use.

### **9. Should school districts change policies so that they comply with the holding in *Bostock*?**

School district leaders should first consult with your state school boards association and your COSA attorney to review *Bostock*, *Obergefell*, and other relevant federal law, state law, and administrative guidance to determine what is required in your jurisdiction and whether your policies adequately reflect those requirements. You and your advisors may decide to add LGBTQ persons to any list of characteristics that are protected from employment discrimination under Title VII. Note that protection from discrimination includes protection from harassment and retaliation.

School districts should have grievance procedures that allow employees to file complaints alleging violations of Title VII and state human rights law, if applicable. Employment discrimination policies and procedures should advise employees of whom they should contact to file a complaint, describe an orderly process for investigating complaints, and indicate who is responsible for investigating the complaint and making the final determination that there was or was not a policy violation. Employment discrimination policies and procedures should state whether either party is entitled to an appeal, and it should address the type of notice of determination that should be given to the parties.

Keep in mind that, separate from your employment grievance procedures, employees have rights to bring state and/or federal administrative complaints to the federal EEOC and state-level counterparts.

### **10. What kind of staff training should school districts provide to ensure compliance with the *Bostock* ruling?**

Once a school district has developed a comprehensive policy, it should begin the process of training employees. Your state school boards associations are good sources for key concepts to cover, such as those listed below.

- The Supreme Court ruling in *Bostock* extends Title VII protections to LGBTQ employees.
- Title VII prohibits discrimination in the workplace, including in hiring, firing, promotions, training, benefits, harassment, and retaliation.
- The school district's discrimination policy specifically covers harassment and retaliation (explain and provide examples of both).
- Employees should contact the individual listed in the policy/procedure if they have a complaint alleging discrimination.
- The school district has a detailed complaint investigation process (explain).
- Staff members are provided copies of the employment discrimination policies and procedures and sign a form indicating the date they received the training and copies.



# Rights of LGBTQ Students

## **11. Does the *Bostock* decision address discrimination against LGBTQ students?**

No, but it will affect decisions in cases about student rights. The ruling in *Bostock* is limited to Title VII of the Civil Rights Act of 1964, which addresses discrimination in employment. “In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee,” the Court said. “We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.”

Although *Bostock* arose in the Title VII (employment) context, federal courts frequently use Title VII case law to interpret Title IX, part of the Federal Education Amendments enacted in 1972. Title IX prohibits discrimination based on sex in educational programs that receive federal money.<sup>17</sup>

## **12. Have courts used *Bostock* to rule in cases alleging discrimination against LGBTQ students?**

Yes. For example, the U.S. District Court for the District of Idaho in *Hecox v. Little* referred to *Bostock* and issued a preliminary injunction barring Idaho from enforcing its law that prohibits female transgender student-athletes from competing in women’s athletics based on gender identity.<sup>18</sup> The court determined that it was likely that Idaho’s law violates the 14th Amendment’s Equal Protection Clause and concluded that it “... will ultimately be required to decide whether Idaho’s law violates Title IX and/or is unconstitutional...”<sup>19</sup>

Four U.S. Courts of Appeals have issued rulings that Title IX’s anti-discrimination provisions apply to transgender students.<sup>20</sup> The 11th Circuit specifically applied *Bostock* to the student context, ruling that a school district’s bathroom policy that did not permit a transgender student to use the bathroom of his gender identity violated Title IX. Noting the similarities between Title VII and Title IX, the court held:

“Congress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces. And, as we have explained, the Supreme Court’s interpretation of discrimination based on sex applies in both settings.

With *Bostock*’s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex.”

It is likely that courts will continue to apply the reasoning in *Bostock* in cases where students claim that school districts violated Title IX by discriminatory actions based on the student’s LGBTQ status.

### **13. What guidance has the U.S. Department of Education's Office for Civil Rights (OCR) provided to school districts regarding rights of LGBTQ students?**

On Feb. 22, 2017, the U.S. Department of Justice (DOJ) and U.S. Department of Education (ED) issued a joint "Dear Colleague Letter"<sup>22</sup> rescinding the Obama administration's joint guidance, which said that school districts should allow transgender students to use sex-segregated restrooms and locker rooms based on gender identity. There is no current letter or policy statement by OCR providing guidance on the issue of bathroom/locker room use by transgender students.

The Feb. 22, 2017, DOJ/ED letter reiterated that Title IX protects LGBTQ students from bullying and harassment. "[T]his withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment," it asserted. The letter promised that ED "will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms."<sup>23</sup>

On Aug. 31, 2020, ED's acting assistant secretary for Civil Rights issued a letter confirming that OCR would investigate a complaint that a student was discriminated against on the basis of her biological sex, by reason of her sexual orientation. The letter said "... OCR's understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex."<sup>24</sup>

See answer to Q 20 below for more on OCR guidance regarding participation in athletics.

### **14. Have courts ruled that school districts have a duty to protect students from bullying and harassment based on LGBTQ status?**

Yes, a few courts have found that students have a valid claim alleging that a school failed to protect them from harassment and harm by other students due to their sexual orientation, but those decisions were based on the 14th Amendment's Equal Protection or Due Process clauses, not the Title IX/Title VII framework described above. The U.S. Court of Appeals for the 7th Circuit held in 1996 that a student had an equal protection claim alleging discrimination based on both gender and sexual orientation for a school's failure to stop harassment based on sexual orientation. *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996). The court stated: "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one....Therefore, although it presents a closer question than does Nabozny's gender claim, we hold that reasonable persons in the defendants' positions in 1988 would have concluded that discrimination against Nabozny based on his sexual orientation was unconstitutional."<sup>25</sup> Some lower federal district courts that have issued rulings in favor of gay/lesbian and transgender students on the basis of Equal Protection but have rejected the Title IX claims.<sup>26</sup>

One federal district court in Tennessee pointed out: "Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also ... be subjected to forms of sex discrimination prohibited under Title IX."<sup>27</sup>

**15. Have courts ruled that school districts must allow transgender students to use the bathroom and locker room facilities of their gender identity?**

Yes, several have. The U.S. Courts of Appeals for the 3rd, 4th, 6th, 7th, and 11th Circuits have held that under Title IX, transgender students can use sex-segregated facilities at schools based on gender identity.<sup>28</sup> Courts issuing these rulings have explained that bathroom policies requiring transgender students to use a restroom corresponding to their biological sex, or a separate restroom apart from other students, discriminate against them based on sex.

In addition, several U.S. District courts have ruled that transgender students have a right to use sex-segregated restrooms and locker rooms at school based on gender identity.<sup>29</sup>

**16. What policies and practices should schools develop to protect LGBTQ students from discrimination, including harassment and bullying?**

Schools can be difficult environments for LGBTQ students. A school district's lack of policies and practices that affirm and support LGBTQ youth—and a failure to implement protective policies that do exist—may lead to LGBTQ students facing bullying, exclusion, and discrimination in school. This puts them at physical and psychological risk and limits their education. Currently, 21 states and the District of Columbia have passed laws that require K-12 schools to address bullying and harassment of students by their peers based on sexual orientation and gender identity.<sup>30</sup>

You, as school district leaders, should consult your state school boards association and COSA attorney to ensure that your policies and procedures are consistent with the *Bostock* holding, federal case law addressing harassment of LGBTQ students, and state law, and that your staff is ensuring operational compliance. Consider the need to re-train or conduct follow-up training on any changed policies.

**GLSEN recommends that school policies:**

- **Accept the gender identity that each student asserts.** There is no medical or mental health diagnosis or treatment threshold that students must meet to have their gender identity recognized and respected. The assertion may be evidenced by an expressed desire to be consistently recognized as the sex consistent with their gender identity.
- **Allow students to use their chosen name and gender.** School staff should privately ask transgender or gender nonconforming students how they want to be addressed in class and in school communication with the student's parents or guardians, with whom the student may not have shared their gender identity.
- **Ensure equal access to all school facilities according to a student's gender identity.** Schools may maintain separate restrooms, locker rooms, or changing facilities for male and female students, provided that they allow all students equal access to facilities that are consistent with their gender identity. In addition to transgender boys and girls, some students do not identify as male or female. When gender-neutral options are not available, these students may need to make an individual determination about which facility is safest and most comfortable for them.

- **Allow all students to participate in physical education classes and intramural sports in a manner consistent with their gender identity.** All students should be permitted to participate in interscholastic athletics in a manner consistent with their gender identity, under the guidelines established by the state interscholastic association.

*\*But see answer to Q20 below, regarding court challenges to state laws on this issue.*

- **Evaluate all gender-based activities, rules, policies, and practices,** including classroom activities, school ceremonies, and school photos, and maintain gender-segregated policies only when absolutely necessary.
- **Ensure that dress codes are gender neutral.** Any policies based on gender differences must permit students to dress in compliance with the school's dress code consistent with their gender identity and expression.
- **Ensure that all personally identifiable and medical information relating to transgender and gender-nonconforming students, like all students, is kept confidential.** School staff should not disclose any information that may reveal a student's transgender status to others, including parents or guardians and other school staff, unless legally required to do so or unless the student has authorized such disclosure.

And, specifically, that anti-bullying and harassment policies:

- **Prohibit bullying and harassment of students on any basis and expressly enumerate the characteristics of sexual orientation, gender identity, and gender expression,** in addition to other protected classes such as race, ethnicity, color, national origin, sex, disability, and religion.
- **Have clear and timely procedures** regarding responsibilities for investigation and timeline for addressing reported incidents.
- **Ensure that all school staff members address bullying incidents** fairly by curbing unnecessary discretion and intervene effectively in ways that do not blame LGBTQ students, or any student, for their own victimization.
- **Have a clear parental notification process** for reporting incidents of bullying and harassment at the

## **17. Must school districts include affirming representation of LGBTQ communities in curricula? Should they?**

It depends on the state. Five states (California, Colorado, Illinois, New Jersey, and Oregon) have laws that require curricular standards to include affirming representation of LGBTQ communities in K-12 schools.<sup>32</sup> Under affirming statewide curricular standards, LEAs and schools develop curriculum that is uniquely tailored to meet the needs of communities. There are five states (Alabama, Louisiana, Mississippi, Oklahoma, and Texas) that have so-called “No Promo Homo” laws that prohibit positive and affirming representation of LGBTQ identities in K-12 schools.<sup>33</sup> The remaining 40 states have neither inclusive curricular standards nor “No Promo Homo” legislation.

Teaching Tolerance (a project of the Southern Poverty Law Center) recommends that schools develop an inclusive curriculum that fosters a safe and welcoming atmosphere for all students.<sup>34</sup> A positive and supportive environment can assist learning for those who identify as LGBTQ by reducing the level of “minority stress” experienced. School districts should consider reexamining curricula to ensure LGBTQ students feel represented.

**18. Are school districts prohibited from discriminating against LGBTQ students in allowing non-curriculum related clubs?**

Yes. In 1984, Congress passed the Equal Access Act to prohibit discrimination against certain student groups based on the viewpoints they express. The Equal Access Act forbids public secondary schools that receive federal funds from denying “equal access” to non-curricular student groups that meet on school property outside of instruction time based on the “religious, political, philosophical, or other content of the speech” at their meetings.<sup>35</sup> For more information about the Equal Access Act, visit the Department of Education’s “Legal Guidelines Regarding the Equal Access Act and the Recognition of Student-led Noncurricular Groups” at <https://www2.ed.gov/policy/elsec/guid/secletter/groupsguide.doc>. Many LGBTQ students organize Genders and Sexualities Alliance Network (GSA) clubs, which can serve as important resources for students and as supportive spaces to counteract bullying and generalized silence about issues of importance to them.

**19. Do any laws prohibit school districts from discriminating against LGBTQ students in extracurricular activities?**

Laws and policies that prohibit school districts from discriminating against LGBTQ students in extracurricular activities vary by state. As of August 2020, 16 states have policies that help facilitate full inclusion of trans/nonbinary/gender-nonconforming students in high school athletics. A requirement for medical “proof” and/or certain disclosures are in place in guidance promulgated in 14 states.<sup>36</sup> There are 10 states that do not issue statewide guidance on best practices that should be implemented in schools. Additionally, there are approximately 11 states that have policies viewed as creating additional barriers to inclusion of trans/nonbinary/ gender-nonconforming students.<sup>37</sup>

**20. Are there any laws that specifically address participation by transgender girls who want to participate on girls’ sports teams?**

State law is the first place to check, and in many states, the answer is no. Transgender students’ participation in competitive athletics is a rapidly evolving area of law and varies widely by state. Legislation that prohibits discrimination against students in K-12 schools on the basis of sexual orientation and gender identity exists in less than half the states and the District of Columbia.<sup>38</sup>

While state law is the first place to check, federal law also plays a role. As described above, in June 2020, the U.S. Supreme Court held that firing an *employee* based on that person’s status as homosexual or transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964.<sup>39</sup> The Office of Civil Rights (OCR) within the U.S. Department of Education quickly addressed the effect of this ruling on its enforcement of Title IX, which forbids discrimination based on sex in programs receiving federal financial assistance. OCR asserted, “OCR does not enforce Title VII, and *Bostock* does not control the Department’s interpretation of Title IX.” The *Bostock* opinion did not, the department said, affect its position that “[the Title IX] regulations authorize single-sex teams based only on biological sex at birth – male or female—as opposed to a person’s gender identity.”<sup>40</sup>

Two recent cases have tested the application of Title IX to the participation of transgender student-athletes in competitive athletics.

- In *Soule v. Connecticut Association of Schools, Inc.*, three female Connecticut high school track and field athletes sued the Connecticut Interscholastic Athletic Conference (CIAC) and several of its participating school districts seeking to reverse the CIAC rule allowing athletes to compete in sports corresponding with their gender identity. According to the complaint, by allowing transgender females to compete in girls' sports, CIAC was depriving their cisgender peers of "opportunities for participation, recruitment, and scholarships" in violation of Title IX.<sup>41</sup> In June 2020, OCR concluded its investigation and issued a letter of findings. It determined that CIAC and the school districts named in the case violated Title IX because their actions caused female student-athletes' athletic opportunities to be provided to "male" student-athletes.<sup>42</sup>

After issuing its letter of findings against the athletic conference, OCR demanded written assurance from participating districts that they would forego all participation in interscholastic athletics through the CIAC until it revised its policy to prohibit the participation of transgender athletes. If they did not do this, they would forego federal funding from the Magnet School Assistance Program (MSAP). The school districts and OCR negotiated an agreement that resulted in the release of the MSAP funding.<sup>43</sup>

In sum, if your state has a similar policy and receives MSAP funding, allowing transgender females to compete in girls' competitive athletics could cause that funding to be interrupted or withheld.

- In *Hecox v. Little*, transgender college athletes filed a federal lawsuit challenging a new Idaho law that banned transgender women from competing in women's/girls' sports.<sup>44</sup>

In August 2020, the U.S. District Court for the District of Idaho granted a motion for preliminary injunction in favor of the student-athlete plaintiffs. It prohibited Idaho from enforcing its law barring transgender female student-athletes from participating on women's/girls' athletic teams until a decision on the merits of the plaintiffs' claims. "In short," explained the court, "the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics."<sup>45</sup>

## **21. What should schools take into consideration as they develop policies and procedures that address the issue of transgender athletics?**

Ideally, a transgender student should have the same opportunities to participate in competitive athletics as non-transgender students. However, a school board developing a policy on transgender students' participation in athletics must carefully consider social, community, and legal issues related to privacy, safety, and constitutional protections.

In those sports not governed by the state's athletic association, a transgender student should, in general, be permitted to participate consistent with the student's gender identity at school. This is particularly true where state statutes or regulations or local policies prohibit discrimination on the basis of transgender status. However, before adopting such a policy, school boards should be aware that the participation of a transgender student on the team aligned with the student's gender identity may raise concerns from parents, students, and opposing teams who cite safety issues or complaints

of unfair advantage.

For sports governed by the state's athletic association, participation rules are likely to be regulated by the association. Some state athletic associations have policies or regulations permitting transgender athlete participation on a team for the gender with which they identify. Some require a doctor's verification. Other states permit their participation only on the team that coincides with their birth-assigned sex or the sex that appears on their birth certificate. Some states have no policy at all for the participation of transgender students.<sup>46</sup>

## ENDNOTES

<sup>1</sup> *Bostock v. Clayton Cnty, Ga.*, 140 S.Ct. 1731, 1737 (2020).

<sup>2</sup> "LGBTQ." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/LGBTQ>. (last visited Oct. 18, 2020).

<sup>3</sup> Human Rights Campaign, Glossary of Terms, <https://www.hrc.org/resources/glossary-of-terms>. (last visited Oct. 18, 2020).

<sup>4</sup> 140 S. Ct. 1731, 1737-38 (2020).

<sup>5</sup> *Id.* at 1738.

<sup>6</sup> *Id.*

<sup>7</sup> 42 U. S. C. §2000e-2(a)(1) (2020).

<sup>8</sup> 42 U.S.C. §2000e-2(a)(1) (2020).

<sup>9</sup> <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>.

<sup>10</sup> *Id.*

<sup>11</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>12</sup> National School Boards Association, National Education Association, and The School Superintendents Association, *Same-Sex Marriage: What the Decision in Obergefell Means for School Districts*, (July 2015), <https://nsba.org/-/media/NSBA/File/legal-same-sex-marriage-guide-july-2015.pdf?la=en&hash=044FDE1BE6D70BFD752221DD5075BEE7457FD20A>.

<sup>13</sup> U.S. Equal Employment Opportunity Commission, What You Should Know: The EEOC and Protections for LGBT Workers, <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-protections-lgbt-workers>.

<sup>14</sup> U.S. Dept. of Labor, Occupational Safety and Health Administration, Best Practices: A Guide to Restroom Access for Transgender Workers, <https://www.osha.gov/Publications/OSHA3795.pdf>.

<sup>15</sup> hr simple, Gender and Workplace Bathrooms, <https://www.hrsimple.com/blog/workplace-bathroom-gender-requirements-transgender-lgbq>.

<sup>16</sup> *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1751 (2020).

<sup>17</sup> 20 U.S.C. §1681 et seq. (2020).

<sup>18</sup> *Hecox v. Little*, \_\_\_\_\_ F.Supp.3d \_\_\_\_\_ 2020 WL 4760138 (D. Idaho Aug. 20, 2020).

<sup>19</sup> *Id.* at \*37.

<sup>20</sup> *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 2636 (2019); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 2020 WL 5034430 (4th Cir. Aug. 26, 2020); *reh'g denied*, \_\_\_ F.3d \_\_\_, 4th Cir., Sep. 22, 2020; *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S.Ct. 1260 (2018); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *pet. for cert. filed* Jul. 23, 2020; *Adams v. School Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020).



<sup>21</sup> *Adams v. School Bd. of St. Johns Cnty.*, 968 F.3d at 1305.

<sup>22</sup> “Dear Colleague Letter,” U.S. Department of Justice and U.S. Department of Education (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> OCR Complaint No. 04-20-1409 Letter of Notification, U.S. Department of Education Office for Civil Rights, Region IV (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/letters/20200831-letter-of-notification.pdf>.

<sup>25</sup> *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996).

<sup>26</sup> *Montgomery v. Independent School Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2011); *Tyrrell v. Seaford Union Free School Dist.*, 792 F.Supp.2d 601 (E.D. N.Y. 2011); *O.H. v. Oakland Unified School Dist.*, 2000 WL 33376299 (N.D. Cal. Apr. 17, 2000).

<sup>27</sup> *Tumminello v. Father Ryan High School, Inc.*, 2015 WL 13215456, \*4 (M.D. Tenn. Dec. 7, 2015).

<sup>28</sup> *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 2636 (2019); *Grimm v. Gloucester Cnty. Sch. Bd.*, \_\_\_ F.3d \_\_\_, 2020 WL 5034430 (4th Cir. Aug. 26, 2020); *reh'g denied*, \_\_\_ F.3d \_\_\_, 4th Cir., Sep. 22, 2020; *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S.Ct. 1260 (2018); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *pet. for cert. filed* Jul. 23, 2020; *Adams v. School Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020).

<sup>29</sup> *A.H. v. Minersville Area Sch. Dist.*, 408 F.Supp.3d 536 (M.D. Pa. 2019); *J.A.W. v. Evansville Vanderburgh Corp.*, 396 F.Supp.3d 833 (S.D. Ind. 2019); *M.A.B. v. Board of Educ. of Talbot Cnty.*, 286 F.Supp.3d 704 (D. Md. 2018); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F.Supp.3d 1075 (D. Ore. 2018); *Students and Parents for Privacy v. U.S. Dep't of Educ.*, 2017 WL 6629520 (N.D. Ill. December 29, 2017); *Board of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F.Supp.3d 850 (S.D. Ohio 2016).

<sup>30</sup> GLSEN, *Policy Maps*, <https://www.glsen.org/policy-maps>.

<sup>31</sup> GLSEN, *Respect for All Policy Recommendations to Support LGBTQ Students*, <https://www.glsen.org/activity/respect-all-policy-recommendations-support-lgbtq-students>.

<sup>32</sup> GLSEN, *Policy Maps*, <https://www.glsen.org/policy-maps>.

<sup>33</sup> No Promo Homo laws are state or local laws prohibiting the “promotion of homosexuality” that expressly forbid teachers of health/sexuality education from discussing lesbian, gay, or bisexual people or topics in a positive light. While these laws generally are written to apply only to sexual health education, they are often vague can be misapplied by schools to limit other parts of the curriculum, school events and programs, and even extracurricular activities. To the extent these laws are used to limit the activities of supportive student groups, such as GSAs, they may conflict with the Equal Access Act. GLSEN, “No Promo Homo” Laws, <https://www.glsen.org/activity/no-promo-homo-laws>.

<sup>34</sup> Teaching Tolerance (a project of the Southern Poverty Law Center), *Creating An LGBT-Inclusive School Climate, A Teaching Tolerance Guide for School Leaders*, <https://www.tolerance.org/sites/default/files/2017-11/Teaching-Tolerance-LGBT-Best-Practices-2017-WEB-Oct2017.pdf>.

<sup>35</sup> 20 U.S.C. § 4071 (2020).

<sup>36</sup> GLSEN, *Policy Maps*, <https://www.glsen.org/policy-maps>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020).

<sup>40</sup> US DOE OCR, *Resources for LGBTQ Students*, <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>.

<sup>41</sup> *Soule et al. v. Connecticut Association of Schools, Inc.*, No. 3:20-CV-00201 (D. Conn Feb. 12, 2020).

<sup>42</sup> US DOE OCR, Revised Letter of Impending Enforcement Action, August 31, 2020, CT Interscholastic Athletic Conference Glastonbury PS, Bloomfield PS, Canton PS, Cromwell PS, Danbury PS, Hartford PS, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>.

<sup>43</sup> National School Boards Association, *Legal Clips*, <https://community.nsba.org/cosa/blogs/thomas-burns/2020/09/22/ed-secy-devos-plans-to-deprive-schools-in-connecti>.

<sup>44</sup> *Hecox v. Little* \_\_\_\_\_ F.Supp.3d \_\_\_\_\_, 2020 WL 4760138 (D. Idaho Aug. 20, 2020).

<sup>45</sup> *Id.* at \*35.

<sup>46</sup> GLSEN, *Policy Maps*, <https://www.glsen.org/policy-maps>.



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