Federal Case Law Update

August 2024

Jon Mayes

jmayes@boselaw.com

317-684-5245

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Topics

1. Title IX
2. Religious Accommodations for Employees
3. Claims Against "Gender-Affirming" Policies
4. Other Various and Sundry Issues
5. Upcoming U.S. Supreme Court Cases to Watch

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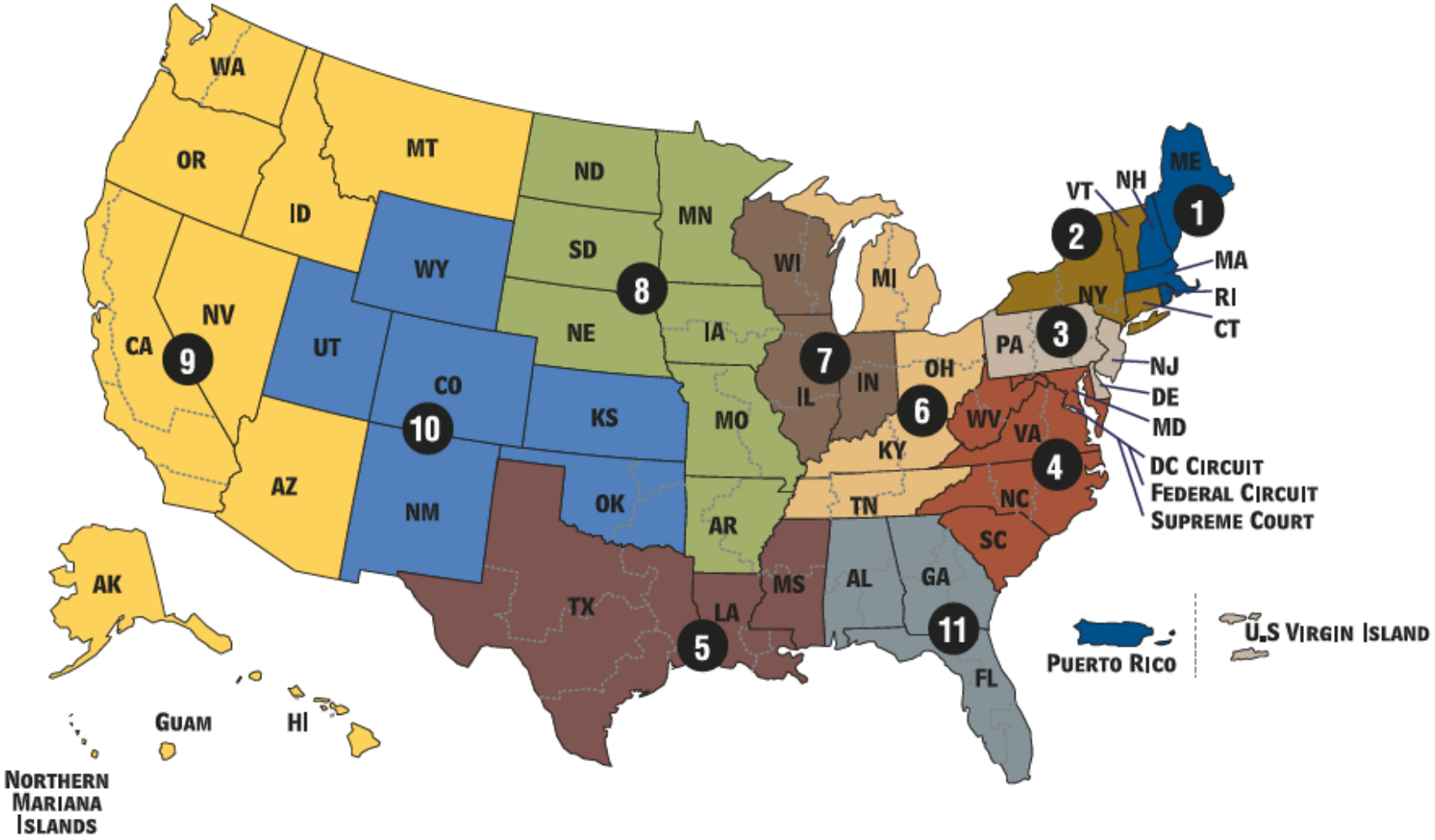
Geographic Boundaries

of United States Courts of Appeals and United States District Courts



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TITLE IX UPDATE

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Upcoming U.S. Supreme Court Cases to Watch

Williams v. Washington, No. 23-191

Issue(s): Whether exhaustion of state administrative remedies is required to bring claims under 42 U.S.C. § 1983 in state court.

Lackey v. Stinnie, No. 23-621

Issue(s): (1) Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988; and (2) whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988.

E.M.D. Sales v. Carrera, No. 23-217

Issue(s): Whether the burden of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is a mere preponderance of the evidence or clear and convincing evidence.

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Final Title IX Regulations

- Released April 19, 2024
- **Effective August 1, 2024**
- Final Title IX Regulations address anti-harassment provisions only

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Title IX Sports Regulations

- Proposed rule issued April 6, 2023
- USDOE's position is that April 2024 Final Regulations do not apply to sports
- "The Department's rulemaking process is still ongoing for a Title IX regulation related to athletics. The Department proposed amendments to its athletics regulations in April 2023, and received over 150,000 public comments, which by law must be carefully considered.

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Judicial Challenges

Four lawsuits challenge the 2024 Title IX regulations:

1. LA, MS, MT, ID, and 17 school boards in LA filed lawsuit in the Western District of Louisiana
2. **AL, FL, GA, SC and several special interests groups filed lawsuit in the Northern District of Alabama**
3. Texas along with two University of Texas professors filed a third lawsuit in the Northern District of Texas
4. On April 30, 2024, KY, TN, OH, IN, VA, and WV filed fourth challenge in Kentucky federal court

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Judicial Challenges: SC Case

- Northern District of Alabama case
- U.S. Department of Education sought stay of injunction (*e.g.*, a decision that would allow the Final Rule to go into effect while the appeal proceeded) at 11th Circuit but was denied
- On Jully 22, 2024, United States sought stay with U.S. Supreme Court
  - Sought same relief before Supreme Court in KY case
  - United States argues that Supreme Court should allow grievance procedure changes to go into effect but allow more controversial provisions to be paused
  - Briefing closed July 29, 2024 and no decision as of Aug. 5, 2024

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Final Title IX Regulations

1. Expands and clarifies definitions
2. Introduces "*de minimis* harm" standard
3. Expands pregnancy protections
4. Grievance process changes

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TITLE IX: TRANSGENDER ACCOMMODATIONS UPDATE

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Legal Theories

- Title IX
  - Recipients of federal funds generally prohibited from discriminating on the basis of sex but discrimination permitted in intimate facilities, certain sex-education programs, single-sex schools, and in athletics
- Equal Protection Clause, 14th Amendment to the U.S. Constitution
  - Gender discrimination is not permitted by governmental entities unless discrimination serves a legitimate, valid purpose

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A.C. v. M.S.D. Martinsville (7th Cir. 2023)

- Consolidated cases involving binary transgender student access to restroom and showers by middle school and high school students
- 7th Circuit chose not to reconsider its own *Whitaker* precedent
- "Litigation over transgender rights is occurring all over the country, and we assume that at some point the Supreme Court will step in with more guidance than it has furnished so far."

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A.C. v. M.S.D. Martinsville (7th Cir. 2023)

- "Finally, there is already a circuit split on the issues raised in this appeal. The Fourth Circuit has decided that denying gender-affirming bathroom access can violate both Title IX and the Equal Protection Clause, while the Eleventh Circuit found no violations based on substantially similar facts. . . . It makes little sense for us to jump from one side of the circuit split to the other, particularly in light of the intervening guidance in *Bostock*. . . . We cannot resolve the conflict between the Fourth and Eleventh Circuits on our own. Nor can we supply a new line of argument. Much of what is needed to resolve this conflict is present in the majority opinion and four dissents offered by the Eleventh Circuit in *Adams*; neither party here has broken new ground."
- Supreme Court denied *certiorari* Jan. 16, 2024; case continuing to be litigated

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B. P. J., et al., v. W. Va. State Bd. of Educ., et al., (S.D.W. Va. Jan. 5, 2023)

- 4th Cir. stayed district court's decision and prevented rule from taking effect while appeal was pending
- U.S. Supreme Court denied emergency application to remove stay
- 4th Cir. heard oral argument on appeal Oct. 2023

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Idaho

- ***Roe by & through Roe v. Critchfield* (2023)**
  - March 2023 Idaho passed law stating that students in Idaho public schools must use the bathroom or locker room that corresponds with their biological sex
  - Student filed suit and district court denies injunction citing circuit split
  - 9th Circuit appeal pending

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Idaho

- ***Hecox v. Idaho* (9th Cir. 2023)**
  - Transgender and cisgender woman athletes brought action alleging that Idaho statute categorically banning transgender women and girls from participating in women's student athletics and subjecting all female athletes to intrusive sex verification process violated Equal Protection Clause and Title IX
  - 9th Circuit distinguishes bathroom cases as involving privacy interests
  - Court rules against Idaho
  - *En banc* decision affirms lower court

Athletic Cases

- Idaho and West Virginia have appealed the 9th Cir. and 4th Cir. Decisions to U.S. Supreme Court
  - Should know in October if U.S. Supreme Court accepts case (and if so, decision in June 2025)
- Impact will likely extend to intimate facilities cases too

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“Gender-Affirming” Care Cases

- Many states have moved to regulate “gender-affirming” care for minors
- Special interest groups and United States sued to block enforcement alleging violation of Equal Protection Clause
- U.S. Supreme Court granted review of these cases
- Oral argument unlikely this calendar year and decision unlikely until June 2025
- Analysis is unlikely to impact significant aspect of Title IX transgender cases but will shed light on Equal Protection Clause claims

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Status of 4th Cir.

- 4th Cir. is like 7th Cir. where circuit court has recognized rights of transgender students under Title IX and Equal Protection Clause
- 4th Cir. has also ruled in *Williams v. Kincaid* that individuals with gender dysphoria may be protected under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973

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Religious Accommodations to Transgender Practices

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Religious Accommodations

- EEO Act of 1972 strengthened Title VII protections based on religion
- To state a prima facie case of religious discrimination based on failure to accommodate, a plaintiff must show that his religious belief or practice conflicted with a requirement of his employment and that his religious belief or practice was the basis for the discriminatory treatment or adverse employment action.

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Religious Accommodations (cont'd)

- Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to make a reasonable accommodation of the religious practice or to show that any reasonable accommodation would result in undue hardship.
- *Trans World Airlines v. Hardison* (1977): held that an employer suffers undue hardship if accommodating an employee's religion would require "more than a de minimis cost"

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E.E.O.C. v. Abercrombie & Fitch Stores, Inc. (U.S. 2015)

- Applicant was a practicing Muslim who wore a headscarf, applied for position and was qualified
- Asst. Mgr. was concerned that headscarf would conflict with the store's Look Policy.
- Dist. Mgr. relayed that headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Asst. Mgr. not to hire applicant.

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E.E.O.C. v. Abercrombie & Fitch Stores, Inc. (U.S. 2015)

- Mixed motive standard applies: "Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

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E.E.O.C. v. Abercrombie & Fitch Stores, Inc. (U.S. 2015)

But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather**, it gives them favored treatment**, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice." (Emphasis added.)

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E.E.O.C. v. Abercrombie & Fitch Stores, Inc. (U.S. 2015)

An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious ... practice," it is no response that the subsequent "fail[ure] ... to hire" was due to an otherwise-neutral policy. **Title VII requires otherwise-neutral policies to give way to the need for an accommodation**. (Emphasis added.)

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Patterson v. Walgreen Co.

- In 2020, Justices Alito, Thomas and Gorsuch issued an opinion in *Patterson v. Walgreen Co.* concurring in the denial of *certiorari*.
- "[W]e should reconsider the proposition, endorsed by the opinion in *Trans World Airlines, Inc. v. Hardison* that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a de minimis burden."

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Patterson v. Walgreen Co.

- "[T]wo other issues raised in the petition are important, specifically, (1) whether Title VII may require an employer to provide a partial accommodation for an employee's religious practices even if a full accommodation would impose an undue hardship, and (2) whether an employer can show that an accommodation would impose an undue hardship based on speculative harm."

Groff v. DeJoy

- The standard for undue hardship: "it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."

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Groff v. DeJoy

The U.S. Supreme Court said that:

- "courts must . . . take[] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost" of an employer.
- "courts should resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test."

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Meriweather v. Hartop et al. (6th Cir.)

- Devout Christian professor at public university in Ohio was informed by administration that he must use preferred pronouns
- Misuse of pronoun by professor generated Title IX complaint
- Professor attempted to find accommodation
- Professor issued written warning and filed a union grievance to have warning removed
- Due to threat of termination, professor filed suit

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Meriweather v. Hartop et al. (6th Cir.)

- Professor alleged that the university violated his rights under: (1) the Free Speech and Free Exercise Clauses of the First Amendment; (2) the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the Ohio Constitution; and (4) his contract with the university.

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Meriweather v. Hartop et al. (6th Cir.)

- Court focused on First Amendment claims and analyzed cases applicable in K-12 setting
- As a result, our court has rejected as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction."

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Meriweather v. Hartop et al. (6th Cir.)

- Thus, it held that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."
- Court found classroom speech was of public concern, and that the professor's interests outweighed the interests of a student injured by his pronoun usage
- Court also concluded that professor's Free Exercise claim also was viable.

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Kluge v. Brownsburg Community School Corporation (S.D. Ind. 2021)

- Teacher at public school who was Christian who believes transgenderism is sin and it is sinful for him to encourage students to engage in transgenderism
- Objected on religious grounds to policy requiring use of pronoun and name requested by students and was suspended
- Later was permitted to use last name only
- Students complained and so policy changed—last name only accommodation removed
- Forced to resign when he did not comply

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Kluge v. Brownsburg Community School Corporation (7th Cir. 2023)

- Court found that religious belief conflicted with a requirement of employment policy and that his religious belief was the basis for the adverse employment action
- Court applied "de minimis undue hardship" standard from *Trans World Airlines* to find that employer met Title VII standard
- 7th Cir. Affirmed in 134 page opinion in 2023
- Dissent references *Groff*; majority does not
- *En banc*, 7th Cir. remanded

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Kluge v. Brownsburg Community School Corporation (S.D. Ind. 2024)

- Decision following remand from 7th Cir. for Brownsburg
- Notice of appeal filed
- District Court weighed educational mission of school corporation with religious accommodations request

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Kluge v. Brownsburg Community School Corporation (S.D. Ind. 2024)

- "All consistent with the Supreme Court's decision in *Groff*, this is simply "common sense": a public school is not a typical business; a public-school student is not a typical customer. Far from maximizing shareholder value, the stated nature of BCSC's business is providing a supportive environment for students and respecting the legitimate expectations of their parents and medical providers. Ultimately, BCSC is entitled to determine that its legitimate mission does not stop at whether some students are literally blocked from entering the schoolhouse gates; rather, that mission can legitimately extend to fostering a safe, inclusive learning environment for all students and evaluating whether that mission is threatened by substantial student harm and the potential for liability."

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Kluge v. Brownsburg Community School Corporation (S.D. Ind. 2024)

- Court concluded that the risk for student harm and potential Title IX liability for not granting student accommodations weighed in favor of denying claims

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First Amendment Application

- In *Kluge*, teacher claim he was being compelled to speak in violation of his First Amendment rights
- District court dismissed and First Amendment dismissal not appealed to the 7th Circuit
- In the vacated 7th Circuit panel decision, the panel stated, "The district court correctly held that when Kluge was addressing students in the classroom, his speech was not protected by the First Amendment."

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Observations on *Kluge*

- Court's analysis balances teacher request with Title IX obligations under current 7th Cir. precedent on transgender protections, but what if the Title IX obligations fall away?
- Parties briefed the most-favored-nation status impact of *Abercrombie*, but District Court did not address it
- First Amendment compelled-speech claims still lurking in shadows

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CLAIMS AGAINST "GENDER-AFFIRMING" POLICIES

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Rights of Cisgender Students and Families

- Before 2023, parents or parent groups challenging gender-affirming policies in school districts have lost cases
- New theories and better equipped parent groups shift landscape in 2023
- Plaintiffs also pursuing state-law theories

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Doe by & through Doe v. Boyertown Area Sch. Dist. (3d Cir. 2018)

- Cisgender high school students, by and through their parents and guardians, brought action against school district and school officials alleging that district's policy of allowing transgender students to access bathrooms and locker rooms consistent with their gender identity violated their constitutional rights of bodily privacy, as well as Title IX and state tort law.

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Doe by & through Doe v. Boyertown Area Sch. Dist. (3d Cir. 2018)

- 3d Circuit affirmed denial of preliminary injunction
- Court found that privacy interest of families or their students was not invaded by transgender student use of restroom
- Denied claims under both 14th Amendment substantive due process and Title IX

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John and Jane Parents 1 et al v. Montgomery County Board of Education et al, (D. Md. Aug. 18, 2022)

- Parents challenged school policies for gender identity
- Court granted motion to dismiss
- Court found no constitutional due process right to be promptly informed of child's gender identity
- Under rational basis review, guidelines did not violate parent's right to direct child's education

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Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., (8th Cir., Sept. 29, 2023)

- Reversed district court
- Parents organization brought action on behalf of its members against school district, seeking declaratory and injunctive relief and alleging that district policy on treatment of transgender and gender-nonconforming students violated the right to child-rearing, under the Fourteenth Amendment's Due Process Clause, and the right to free speech under the First Amendment because staff might create a gender support plan without parental consent, and students' speech would be chilled because they would be punished if they did not respect another child's gender identity.

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Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., (8th Cir., Sept. 29, 2023)

- Court concluded that parent group was "likely to succeed on the merits of its First Amendment challenge to a portion of the policy, and that the other preliminary injunction factors are satisfied as to that claim."

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Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., (8th Cir., Sept. 29, 2023)

Under the policy, "[a]n intentional and/or persistent refusal by staff or students to respect a student's gender identity is a violation of school board policies." A student who fails to comply with the provision "shall be disciplined by appropriate measures, which may include suspension and expulsion." Parents Defending claims that the children of Parents D-G wish to express certain opinions about biological sex and gender identity at school, but fear that their speech may be considered "disrespectful" of another student's gender identity, and thus met with discipline.

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Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., (8th Cir., Sept. 29, 2023)

- A school district cannot avoid the strictures of the First Amendment simply by defining certain speech as "bullying" or "harassment." Parent G alleges that her child wishes to engage in an "open exchange of ideas" and to express beliefs that others might find disagreeable or offensive. The proposed speech is "arguably affected with a constitutional interest."

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Parents Defending Education v. Olentangy Local School District, (6th Cir. July 29, 2024)

- Pre-enforcement challenge to school district policies that prohibit harassment based on a variety of protected characteristics, including—as relevant here—gender identity.
- Ohio's fourth largest district promulgated several anti-harassment and anti-bullying policies.
- The policies prohibit students from repeatedly and intentionally using non-preferred pronouns to refer to their classmates.
- On behalf of certain parents and students, PDE seeks to enjoin the policies' enforcement based on the First Amendment's Free Speech Clause
- Court that evidence was thin on disruption but denied preliminary injunction
- Prohibition on intentional use of non-preferred pronouns not compelled speech because students may use first names instead of pronouns

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Anti-Bullying Laws

- "Safe School Climate Act" enacted in 2006

  1) "Harassment, intimidation, or bullying" means a gesture, an electronic communication, or a written, verbal, physical, or sexual act that is reasonably perceived to have the effect of:

  (a) harming a student physically or emotionally or damaging a student's property, or placing a student in reasonable fear of personal harm or property damage; or

  (b) insulting or demeaning a student or group of students causing substantial disruption in, or substantial interference with, the orderly operation of the school.

- Title IX anti-harassment provisions

- What happens with anti-bullying requirements interfere with a student's religious or free speech rights?

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Claims by Cisgender Students and Families – Board Considerations

- How do your policies and guidance provided to administration address students who do not honor pronoun requests?
- What guidance do you provide building administrators in responding to questions regarding gender identity of classmates and accommodations afforded students?
- Does your state have laws that provide a pathway for students or families to pursue legal remedies for these claims?

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OTHER VARIOUS AND SUNDRY ISSUES

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Teacher Speech

Macre v. Mattos, (1st Cir. 2024)

- Teacher posted six allegedly controversial memes to her personal TikTokaccount.
- A few months after posting the first few of the six memes, she interviewed for a teaching position and got the job.
- Soon after starting there, theTikTok posts came to light and things hit the proverbial fan.
- Concluding that to "continu[e][her] employment in light of [her] social media posts would have a significant negative impact on student learning," the school terminated teacher's employment.
- Recognized Free Speech right but right outweighed by interest in school to maintain educational environment

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Employee Online Harassment

Okonowsky v. Merrick Garland, (9th Cir. 2024)

- Staff psychologist at Bureau of Prisons claimed that a co-worker posted derogatory content on social media.
  - Instagram discussions of "gang banging" employee
  - Other overtly derogatory comments
  - Comments escalated after employee reported it to supervisors
- Employer took no action. The psychologist eventually resigned due to the lack of action and filed the lawsuit.
- Court denied summary judgment finding that the BOP did not do enough to remediate the harassment

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Employee Online Harassment

- New EEOC Guidance: "Although employers generally are not responsible for conduct that occurs in a non-work-related context, they may be liable when the conduct has consequences in the workplace and therefore contributes to a hostile work environment."
- The EEOC also noted that "[c]onduct that can affect the terms and conditions of employment, even if it does not occur in a work-related context, includes electronic communications using private phones, computers, or social media accounts, if it impacts the workplace."

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Social Media and Free Speech

Lindke v. Freed, (U.S. 2024)

- A public official who prevents someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if the official both (1) possessed actual authority to speak on the governmental entity's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.
- "[H]eavy presumption" that page is personal if lable is use (*e.g.,* "this is the personal page of _____")
- Repeating or sharing public information from another source does not make it an official site

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Upcoming U.S. Supreme Court Cases to Watch

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October Term 2024

Stanley v. City of Sanford, Florida, No. 23-997

Issue(s): Whether, under the Americans with Disabilities Act, a former employee — who was qualified to perform her job and who earned post-employment benefits while employed — loses her right to sue over discrimination with respect to those benefits solely because she no longer holds her job.

U.S. v. Skrmetti, No. 23-477

Issue(s): Whether Tennessee Senate Bill 1, which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," violates the equal protection clause of the 14th Amendment.

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October Term 2024

Williams v. Washington, No. 23-191

Issue(s): Whether exhaustion of state administrative remedies is required to bring claims under 42 U.S.C. § 1983 in state court.

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