

EDUCATION LAW UPDATE

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Education law encompasses many areas of the law. Certain statutes are specific to the field of education such as teacher tenure law, special education law and the like. However, education law also encompasses most, if not all, legal issues that face private businesses such as contracts, employment law, civil rights law, construction law, finance laws, etc. It would be impossible to provide a detailed discussion in the time and space allowed. This paper will, therefore, touch on a few issues that have arisen within the last couple of years that school boards, and their lawyers, have had to address

COVID-19 ISSUES

When the COVID-19 pandemic hit, schools and school systems were faced with never before seen issues. The end of the 2019-2020 school year was a time that everyone – administrators, teachers, students, parents and board lawyers were just muddling through trying to get to the end of the school year. As the 2019-2020 school year came to a close, the State Department of Education assured everyone that a Roadmap for Reopening Schools would be provided in time for everyone to get ready for the 2020-2021 school year. The Roadmap for Reopening finally came less than a month before school was due to open and consisted of an edict that local school systems were to offer both in-person and remote learning and it was up to local systems to figure out how to do it. This created many more questions than it did answers.

Some school systems chose to operate using staggered schedules with approximately half the students attending in person two days per week and the other half attending two days per week. The fifth day each week was used for cleaning and disinfecting. In addition to in-person learning, schools had to provide remote learning. This was accomplished by utilizing an online platform such as Schoology where teachers uploaded lessons into the system. Students would then download the lessons and complete their work and upload their work into the system. Teachers would then download the students' work and grade it. Some schools used platforms such as Edgenuity that provided preprogrammed lessons in certain subjects for students to download and complete before uploading their work for grading. Edgenuity was a self-contained system that did not require teachers to perform the work, but only required monitors to ensure that students were doing the work.

The combination of in-person and remote learning required additional work on the part of teachers who were teaching both in-person and remote classes. At least one lawsuit was filed by teachers seeking additional pay for the additional time spent teaching both in-person and remotely. In *Beasley, et al. v. Tuscaloosa County School System, et al.*, 2022 WL 1231232 (N.D. Ala. 2022), Plaintiffs filed suit claiming a violation of their right to Due Process under the Fourteenth Amendment as well as gender discrimination in violation of Title VII along with various state law claims against the School System and various others. The Defendants all filed motions to dismiss.

On April 26, 2022, the Court entered an Order dismissing Plaintiffs' federal claims and declining to exercise jurisdiction over the state law claims.

Another controversial issue was mask mandates. Should school systems require students, teachers, administrators and others to wear masks while at school? This issue was a hotly contested issue. School boards were flooded with individuals expressing their opinions as to whether masks should be mandated. Some school systems required masks while others made masks optional.

One of the first cases wherein a mask mandate was challenged was not a school related case, but was from Alabama. In *Case v. Ivey*, 542 F.Supp.3d 1245 (M. D. Ala. 2021), the Plaintiffs challenged the mask mandate included in the orders issued by Governor Ivey and State Health Officer Dr. Scott Harris. In the Complaint, Plaintiffs alleged various grounds that they argue made the mandates invalid. By the time the case was heard, many of the grounds were deemed moot because many of the restrictions in the orders had expired. In addition, the District Court noted that the Governor and State Health Officer have the statutory authority to make such orders in times of emergencies.

A series of lawsuits were filed against school boards around the nation regarding mask mandates. One of those cases was *MLP and GIP v. Bibb County Board of Education, et al.*, filed in the U. S. District Court for the Northern District of Alabama. The Complaint was the same Complaint that was filed in various other jurisdictions around the country challenging mask mandates with only the names being changed. The affidavit filed as an exhibit purportedly in support of the Complaint was actually an affidavit filed in a case in Ohio and discussed why the mask mandate and policies of that school system were flawed. The Court set the case for a status conference at which time the Plaintiff agreed to dismiss the case.

RECENT CASES

Two recent opinions of the Federal Courts are of interest as they pertain to school systems nearby. The first is *T.R. v. Lamar County Board of Education*, 25 F.4th 877 (11th Cir. 2022). In this case a teacher in one of Lamar County's schools smelled marijuana in a classroom. She alerted the principal who, along with the assistant principal, searched each student's belongings. They found drug paraphernalia in one student's backpack and two other students reported that they saw the student light a cigarette in class. The student was taken to the counselor's office and questioned. She admitted to smoking marijuana regularly but denied smoking in class. She also denied having marijuana on her person. The principal and guidance counselor decided to perform a strip search of the student. No marijuana was found. Soon thereafter, the student's mother arrived at the school. After a discussion was held, a second strip search was performed. Both searches were conducted in the counselor's office. The door was closed during both searches. However, the door contained a window that looked out into the hallway and the window was not covered during the searches. There was no evidence that anyone actually looked into the office while the searches took place, but it was possible. The student sued the school board, the superintendent and school administrators alleging a violation of her Fourth Amendment right to be free from an unreasonable search. The District Court entered summary judgment in favor of the Defendants and Plaintiff appealed.

On appeal, the Eleventh Circuit noted that, for a search by school officials to be reasonable, the Court must decide whether the search was justified at its inception and whether the search was reasonable based on the circumstances. The Eleventh Circuit found that the school officials could not meet their burden and reversed the District Court and remanded the case for further proceedings.

The second case was *Adams v. Demopolis City Schools*, 2022 WL 855288 (S. D. Ala. 2022). This was a tragic case. A nine year old girl was subjected to severe bullying at school. The bullying included incidents of verbal and physical bullying involving a boy shoving the girl, pulling her hair, calling her names (including the “n-word”) and making fun of her skin tone. Teachers wrote the boy up and sent him to the office for his conduct. School officials came up with various strategies to protect the girl from bullying. However, nothing seemed to work and the girl committed suicide. After her death, the girl’s family sued the board as well as the superintendent, principal, assistant principal and teacher for violations of her rights under Title IX, Title VI, her Fourteenth Amendment rights to substantive due process and equal protection and multiple state law claims. Following discovery, the Defendants moved for summary judgment.

The District Court first addressed Plaintiffs’ Title IX and Title VI claims of discrimination based on sex and race. The Court concluded after reviewing the evidence that the Defendants did not act with deliberate indifference to the bullying. Instead, they took steps to try to protect the child from bullying. As to the Fourteenth Amendment claims, the Court held that due process does not require the government to protect a citizen from offenses by private actors. Finally, the Court held that the state law claims against the board and school officials are barred by immunity. Based on its conclusions, the District Court granted Defendants’ motions for summary judgment. The Plaintiffs have appealed the District Court’s judgment to the Eleventh Circuit and that appeal is pending.

TRANSGENDER ISSUES

Issues involving transgender individuals are becoming more prevalent. The two areas in which these issues arise are in athletic competition and in restroom usage.

Athletic Competition

Recently, a swimmer named Lia Thomas has dominated the discussion regarding transgender athletes competing against other swimmers of the gender to which he or she identifies. For three years, Thomas swam as a member of the University of Pennsylvania men’s swim team. This year, Thomas swam as a member of the women’s team. Her participating in women’s events has been controversial to say the least. Many believe that she should not be allowed to swim against women. The NCAA, however, disagrees. NCAA regulations require a transgender female to complete one year of hormone therapy before they are allowed to compete against women. Thomas has been in therapy for two years. She hopes to qualify for and swim in the Olympics in 2024. According to International Olympic Committee rules, she will be eligible to do so if she continues her hormone therapy. It is not known if any litigation will be forthcoming regarding Lia Thomas. To date, there have been two cases regarding athletic competition by transgender individuals.

Soule v. Connecticut Association of Schools, Inc.
2021 WL 1617208 (D. Conn. 2021)

Plaintiffs were girls who participated in high school track competitions in Connecticut. The Connecticut Interscholastic Athletic Conference is the governing body for interscholastic athletics in Connecticut. The Conference has a policy that permits high school students to participate in sex-segregated sports consistent with their gender identity. In their Complaint, Plaintiffs alleged that the policy puts non-transgender girls at a competitive disadvantage in girls' track and, as a result, denies them rights guaranteed by Title IX. Plaintiffs were seeking a preliminary injunction to prevent transgender girls from competing against them during the 2020 Spring Outdoor Track season. The Court dismissed the case without reaching the merits of the claims. Instead, the Court ruled that, because all spring 2020 sports in Connecticut were cancelled due to the COVID-19 pandemic, there was no justiciable controversy to be decided.

Hecox v. Little
479 F.Supp.3d 930 (D. Idaho 2020)

The Idaho Legislature passed an act that prohibits transgender females from participating in athletic competition for females in the State of Idaho. In addition, the act provides that a female competitor may challenge the sex of an opponent who then could be subjected to invasive testing to confirm her sex. A transgender woman athlete who was enrolled at Boise State University filed suit challenging the act. In addition, a cisgender female high school athlete joined to challenge the portion of the act that allowed a competitor to challenge her sex. Both individuals claimed that the act violates the Equal Protection clause on its face and as applied and that it violates Title IX. The Plaintiffs requested a preliminary injunction preventing the implementation of the act.

The District Court issued a lengthy opinion discussing the issues in this case. As to the claim that the act was invalid on its face, the Court determined that it could not find that the act was invalid on its face and dismissed Plaintiffs' claims. However, the Court found that the act was invalid as applied.

In finding that the act was invalid as applied, the Court discussed pertinent Equal Protection law and determined that the act was to be reviewed utilizing a heightened scrutiny standard. The Court then held that the act discriminates between cisgender athletes who may compete on athletic teams consistent with their gender identity and transgender women who may not compete on athletic teams consistent with their gender identities.

After determining that the act discriminated against the transgender female college athlete, the Court turned to the cisgender female high school athlete. The Court held that the act, as applied, discriminates against cisgender female athletes in that it applies only to female athletes and not to male athletes.

Having determined that the act violated the Equal Protection clause, the Court entered a preliminary injunction preventing its implementation.

To date, these are the only cases that we could find pertaining to transgender participation in athletics. Neither of these cases are binding on state or federal courts in Alabama. However, the opinion in *Hecox* seems to be consistent with the rulings from other courts as to its application of Title IX and the Equal Protection clause.

Use of Restrooms

One of the most controversial issues is the use of restrooms by transgender individuals. Many believe that a person born male should only use restrooms designated for males and individuals born female should only use restrooms designated for females. As an alternative, any individual can use a restroom that is designated as unisex. Others, however, believe that an individual should be allowed to use the restroom consistent with his or her gender identity. This is an issue that will not go away until and unless all restroom facilities become single-user unisex restrooms with no designation as to whether they are for male or female use. While that is a solution to the issue, it is, in most cases, not economically feasible. A number of courts have been called upon to make a ruling as to this issue. The cases that we have found tend to be of two types. The first type are cases in which a transgender individual has sued seeking the right to use the restroom that comports with his or her gender identity.

Whitaker v. Kenosha Unified School Dist. No. 1 Board of Education
2016 WL 5239829 (E. D. Wisc. 2016)
858 F.3d 1034 (7th Cir. 2017)

Plaintiff's birth certificate identifies him as female. He lived as a female until middle school. In the seventh grade, Plaintiff asked his mother about treatment for transgender individuals. He was subsequently diagnosed with gender dysphoria. He began transitioning more publicly to live in accordance with his male identity. At the beginning of his sophomore year, he told everyone about his transition and asked that they refer to him using male pronouns and by his male name. In the spring of 2015, Plaintiff asked to be allowed to use the boys' restroom at school. The request was denied and Plaintiff was told that he would be allowed to use the girls' restroom or the single-user, gender-neutral restroom in the school office. In September of his junior year, Plaintiff began using the male-designated restrooms and did so without incident or complaint until late February when he was told that he couldn't use the boys' restroom. Plaintiff, however, continued to use the boys' restroom throughout the rest of the school year with no complaints or incidents.

Prior to the beginning of the next school year, Plaintiff filed suit in the Eastern District of Wisconsin against the School District and its Superintendent alleging that the refusal to allow him to use the boys' restroom was in violation of Title IX and deprived him of Equal Protection under the Fourteenth Amendment. Plaintiff sought a preliminary injunction from the District Court. The District Court entered an order granting the preliminary injunction. The School District appealed to the Seventh Circuit. The Seventh Circuit affirmed the District Court, finding that Plaintiff demonstrated a likelihood of success as to his Title IX claim because the Board's treatment of

Plaintiff was predicated on sex stereotypes, a practice prohibited by Title IX. The Seventh Circuit also held that Plaintiff demonstrated a likelihood of success as to Plaintiff's Equal Protection claim because the policy or practice of denying Plaintiff the use of the boys' restroom cannot be stated without referencing sex.

A. H. v. Minersville Area School District
290 F.Supp.3d 321 (M. D. Pa. 2017)
408 F.Supp.3d 536 (M. D. Pa. 2019)

Plaintiff was an eight year old second grade girl at Minersville Elementary School whose assigned gender at birth was male. Plaintiff is transgender and was diagnosed with gender dysphoria while in kindergarten. Since beginning kindergarten, Plaintiff presented as female both in and out of school. She uses a female name, dresses in girls' clothes, is addressed using female pronouns and is known to her classmates as a female. Before Plaintiff started kindergarten, her mother requested that Plaintiff be allowed to use the girls' restroom. The Superintendent denied the request because of the privacy rights of others but that Plaintiff could use a unisex restroom at the school. Restroom usage was not really an issue while Plaintiff was in kindergarten because the kindergarten classroom had one restroom for use by all students. While on a field trip, school staff made Plaintiff wait while the other students used the restroom. After the male students were finished using the restroom, a teacher cleared the boys' restroom of students and then made Plaintiff use it by herself while her classmates waited. This upset Plaintiff and resulted in some of her classmates asking her why she, as a girl, was using the boys' restroom. Prior to the following school year, Plaintiff's mother again asked that Plaintiff be allowed to use the girls' restroom. The request was again denied. Unlike the kindergarten classroom, classrooms in the grade school did not have single use restrooms. In May of that year, the Superintendent told Plaintiff's mother that Plaintiff would be allowed to use the girls' restroom. She used the restroom for the remainder of the school year. However, the District did not adopt a formal policy pertaining to restroom usage by transgender students.

Plaintiff filed suit alleging that the District's refusal to allow her to use the girls' restroom and its failure to adopt a policy pertaining to restroom usage violated Plaintiff's Title IX and Fourteenth Amendment rights. The District filed a motion to dismiss Plaintiff's claims. The District Court denied the District's motion, holding that when a school prohibits a transgender student from using the restroom corresponding with the student's gender identity, it violates both Title IX and the Equal Protection Clause. The case proceeded and both parties filed a motion for summary judgment. The Court, in a detailed opinion, determined that there were factual issues that had to be resolved and that it could not enter summary judgment as to either claim.

J.A.W. v. Evansville Vanderburgh School Corporation
323 F. Supp.3d 1030 (S. D. Ind. 2018)
396 F.Supp.3d 833 (S.D. Ind. 2019)

Plaintiff's assigned gender at birth is female; however, he has long identified as male. In the sixth grade, he began to feel uncomfortable using the girls' restroom in school. In the eighth grade, Plaintiff began to present himself as a boy. He began sporting a male haircut and wearing masculine clothing. He also asked teachers to address him by his chosen masculine name and to

refer to him using masculine pronouns. In the ninth grade, Plaintiff and another transgender student began using the boys' restroom to change for physical education. When school administrators learned of this, Plaintiff was told not to use the boys' restroom. As an alternative, Plaintiff was told to change in another girls' locker room that was not being used and for other restroom needs, to use the girls' restroom or a gender-neutral restroom in the nurse's office. Eventually, Plaintiff filed a lawsuit in District Court claiming a violation of Title IX and a deprivation of his right to Equal Protection under the Fourteenth Amendment.

Plaintiff sought a preliminary injunction directing the schools to allow him to use the boys' restroom. The District Court found that Plaintiff demonstrated a probability of success as to both claims and entered a preliminary injunction. The case proceeded and both parties filed motions for summary judgment. The District Court found that the school policy denying a transgender student the use of the restroom conforming to his or her gender identity violates Title IX, even if a gender-neutral alternative is provided. Furthermore, the District Court found that the policy violated the Equal Protection Clause of the Fourteenth Amendment as it impermissibly treated transgender students different than cisgender students.

Grimm v. Gloucester County School Board
400 F.Supp.3d 444 (E.D. Va. 2019)
972 F.3d 586 (4th Cir. 2020)
976 F.3d 399 (4th Cir. 2020)
141 S.Ct. 2878 (2021)

Plaintiff was identified as female at birth. However, he has always related to male characters and has always known that he is a boy. During his freshman year, Plaintiff disclosed to his parents that he was transgender and began therapy with a psychologist who diagnosed him with gender dysphoria. Plaintiff changed his first name to Gavin and began using male pronouns to describe himself. He also began using men's' restrooms in public and was referred to an endocrinologist for hormone treatment. Before the beginning of his sophomore year, Plaintiff and his mother met with the school guidance counselor. It was agreed that Plaintiff would use the restroom in the nurse's office. Plaintiff felt stigmatized by this practice and it was inconvenient and often caused him to be late to class. Plaintiff met with the guidance counselor and explained his situation and again sought permission to use the boys' restroom. The request was relayed to the school principal who spoke to the Superintendent of Education. The Superintendents told the principal that he would support whatever decision the principal made. The principal decided to allow Plaintiff to use the boys' restroom moving forward. Plaintiff used the boys' restroom for seven weeks without incident. At a subsequent Board meeting, the Board passed a policy limiting the use of restrooms to individuals of corresponding gender. Plaintiff filed a lawsuit against the Board alleging that the newly passed policy violated both Title XI and the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff and the Board each filed a motion for summary judgment. The District Court found in favor of Plaintiff as to his Title IX claim, noting that the policy allowed all students, except for transgender students, to use restrooms corresponding to their gender identity and that transgender students were singled out, subjected to discriminatory treatment and excluded from

spaces where similarly situated students are permitted to go. The Court also held that the discrimination constituted a violation of Plaintiff's right to Equal Protection.

The Board appealed the District Court's judgment to the Fourth Circuit. The Fourth Circuit, in a lengthy opinion, found that the policy created sex-based classifications for restrooms and there was no legitimate reason for the classifications. Similarly, the Fourth Circuit determined that the policy discriminated against Plaintiff based on sex and denied him Equal Protection. Based on its findings, the Fourth Circuit affirmed the judgment of the District Court. The Board petitioned for a rehearing en banc. The petition was denied as was the Board's petition to the U. S. Supreme Court for a writ of certiorari.

The second type of cases are those in which cisgender individuals have filed suit in an effort to prevent transgender individuals from using restrooms that are designated for individuals based on their sex at birth or their biological sex that are different from a transgender person's gender identity.

Doe v. Boyertown Area School District
276 F.Supp.3d 324 (E.D. Pa. 2017)
897 F.3d 518 (3rd Cir. 2018)

Plaintiffs were a group of cisgender students at Boyertown Area Senior High School. They filed suit in District Court alleging that the District's policy allowing transgender students to use restrooms, locker rooms and showers consistent with their gender identity violated their right to privacy under the Fourteenth Amendment; that it violated Title IX; and that it violated their rights under state law.

The District Court denied Plaintiffs' request for a preliminary injunction, holding that Plaintiffs' claimed constitutional right of privacy in their fully or partially unclothed bodies does not exist as a fundamental right. Additionally, the District Court found that any infringement served a compelling state interest – not to discriminate against transgender students. As to the Title IX claim, the District Court held that Plaintiffs had not met the threshold burden that they had suffered discrimination on the basis of sex. The Court held that the District treats all students similarly. Furthermore, according to the Court, Plaintiffs could not show a practice so severe, pervasive and objectively offensive that it undermined and detracted from their educational experience. On appeal, the Third Circuit agreed with the District Court's analysis and judgment and affirmed.

Parents for Privacy v. Barr
326 F.Supp.3d 1075 (D. Ore. 2018)
949 F.3d 1210 (9th Cir. 2020)
141 S.Ct. 894 (2020)

The Dallas School District No. 2 in Oregon implemented a Student Safety Plan that, among other things, permitted a transgender student to use the locker rooms, restrooms and showers consistent with his or her gender identity. Parents for Privacy, Parents Rights in Education and parents on behalf of their children filed suit in the District Court of Oregon challenging the Plan.

The first issue, as stated by the District Court, was whether high school students have a fundamental right under the Fourteenth Amendment not to share restrooms or locker rooms with transgender students? The District Court held that they do not. Although the District Court found that no such fundamental right exists, it considered whether any such right was infringed and, if so, if such infringement is narrowly tailored to serve a compelling government interest. The District Court then held that no infringement existed and, even if it did, the Plan was so narrowly tailored as to satisfy Constitutional scrutiny.

In addition to their Fourteenth Amendment claim, Plaintiffs alleged that the Plan violated Title IX. The District Court disagreed and held that there was no violation. Likewise, the District Court rejected claims that the Plan violated parents' right to direct the education and upbringing of their children or their right to the free exercise of religion under the First Amendment and the Religious Freedom Restoration Act.

Plaintiffs appealed the District Court's judgment to the Ninth Circuit. The Ninth Circuit addressed each issue in turn and affirmed the District Court. Plaintiffs filed a Petition for Writ of Certiorari in the U. S. Supreme Court. The Petition was denied.

Eleventh Circuit Case

To date, there has been only one case in the Eleventh Circuit that addresses restroom usage by transgender individuals. More time will be spent discussing this case as it will be controlling on schools in Alabama.

Adams v. School Board of St. Johns County, Florida **District Court Opinion** **318 F.Supp.3d 1293 (M.D. Fla. 2018)**

Plaintiff was born female. His birth certificate listed him as female. From an early age, his parents noticed that he chose playing with toys for boys and not for girls. Plaintiff enrolled in St. Johns County schools as a female entering the fourth grade. In middle school, he began going through puberty. He hated the feminine parts of his body and began showing signs of depression and anxiety. His parents took him to mental health professionals for treatment. At the end of the eighth grade, he told his parents that he was transgender. His therapist agreed and he began transitioning to present as a male. He cut his hair short, began wearing a chest binder and masculine clothing, asked people to use male pronouns when referring to him and he began using the men's restroom when in public. During the summer before Plaintiff entered the ninth grade, his mother informed the school that he was transitioning and would be attending high school as a boy. When Plaintiff began school in August, he presented as a boy and used the boys' restroom without incident. Approximately six weeks after school started, Plaintiff was called out of class and told that someone complained about him using the boys' restroom and that, going forward, he could use the girls' restroom or the gender-neutral restrooms.

Plaintiff's psychologist determined that he met the criteria for gender dysphoria and supported his request to begin treatment with an endocrinologist with medications to begin the physical transition to male. Plaintiff later had a double mastectomy. In addition to social and

medical transition, Plaintiff began the legal transition. He followed the procedures for the Florida Department of Highway Safety and Motor Vehicles to have the gender designation on his driver's license from female to male. He also followed the procedures of the Florida Department of Health, Office of Vital Statistics to change the designation on his birth certificate from female to male. He was successful in both endeavors.

The St. Johns County School System serves approximately 40,000 students in 36 schools. When a student enrolls, the system requires various documents, including a state health form and a copy of the student's birth certificate. The School System uses these documents to record the student's gender in its files. Once entered, the System will not change the official school records, even if a student, such as Plaintiff, later submits revised documents. If a student submits documents when he or she initially enrolls that show a different gender than was originally shown at the time of birth, the School System will accept the student as being of the gender shown on the revised documents and that student will be allowed to use the restroom that corresponds to the student's gender identity and to the revised documents.

For as long as anyone can remember, the unwritten policy was that boys would use the boys' restroom and girls would use the girls' restroom, using those terms as traditionally defined based on biological traits. This unwritten policy has been enforced through the student code of conduct, and a student was subject to discipline for failing to abide by the policy.

In 2012, the School Superintendent's Executive Cabinet adopted a set of Best Practices Guidelines to address concerns and issues related to transgender students. Among those guidelines were provisions allowing the use of name and gender pronouns corresponding with a student's consistently asserted gender identity; a procedure for updating school records; and allowing students to dress in accordance with their gender identity, among other items. With regard to restroom usage, the Best Practices Guidelines provided, "transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." However, the Best Practices Guidelines retained the existing policy that boys would use the boys' restroom and girls would use the girls' restroom based on biological traits.

After being told that he would no longer be allowed to use the boys' restroom and with the adoption of the Best Practices Guidelines, Plaintiff filed suit alleging that the School system violated his rights under the Equal Protection Clause of the Fourteenth Amendment and that it discriminated against him under Title IX by refusing to allow him to use the boys' restroom at school. The District Court conducted a bench trial and took evidence and heard arguments. The Court entered judgment in favor of Plaintiff.

In its opinion, the Court first looked at Plaintiff's Equal Protection claim. The Court discussed applicable law and then held that the School System's policy cannot be stated without referencing sex-based classifications as it requires "biological boys" to use the boys' restrooms or gender-neutral restrooms and "biological girls" to use the girls' or gender-neutral restrooms. As a result, the policy treated Plaintiff differently because, as a transgender boy, he does not act in conformity with the sex-based stereotypes associated with the sex he was assigned at birth. The court determined that, because the policy is inherently based upon a sex classification, a heightened review applies. Under this standard of review, for the policy to be upheld, the School System

bears the burden of showing that its gender classification is substantially related to a sufficiently important government interest. The School System argued that the policy is substantially related to student privacy and student safety, both of which are substantially related to a sufficiently important governmental interest.

In discussing student privacy, the District Court agreed that privacy is an important governmental interest. However, the Court found that allowing a transgender student to use the restrooms that match their gender identity doesn't affect the privacy protections already in place. The restrooms have stalls that allow a student to enter, close the door, relieve himself or herself, and leave. There were no reports of any problems from any boys or boys' parents during the six weeks that Plaintiff used the boys' restrooms. In fact, there was no evidence presented to the Court that any school official in the School System has ever heard of any incident anywhere that a transgender student using a restroom acted in a manner that involved another student's privacy. Evidence presented from other school systems likewise revealed no instances of an invasion of privacy.

With regard to safety, the School System argued that transgender students may be bullied or harassed in the restroom matching their gender identity and that cisgender students may not feel safe if a person with genitalia of the opposite sex is in the restroom with them. However, the Court noted, no evidence was presented that any incident of this nature had ever occurred either in the School System's schools or elsewhere.

As an alternative, the School System argued that its policy of allowing students to use gender-neutral restrooms provided an appropriate alternative to Plaintiff and nothing more is required. The Court was not persuaded, finding that Plaintiff was still stigmatized by this practice and that it invites more scrutiny and attention from the transgender student's peers.

After discussing Equal Protection, the District Court turned its attention to Plaintiff's Title IX claim. The Court framed the issue as being whether the restroom policy which excluded Plaintiff from the boys' restroom based on his transgender status is discrimination on the basis of sex as used in Title IX and its implementing regulations. The first question addressed by the Court is whether the term "sex" includes gender identity or does it, as the School System argued, mean "biological sex?" The court, after discussing the parties' arguments and the applicable law, held that the meaning of "sex" in Title IX includes "gender identity" for purposes of its application to transgender students. Once the Court reached this conclusion, it held that, as discussed in the Equal Protection portion of its opinion, Plaintiff had proven discrimination in violation of Title IX.

Having decided that Plaintiff was entitled to judgment in his favor, the Court turned to the appropriate remedy. The Court entered injunctive relief preventing the School System from enforcing its restroom policy against Plaintiff. The Court also awarded compensatory damages in the amount of \$1,000.00. The School System appealed the District Court's judgment to the Eleventh Circuit.

Circuit Court Opinion I
988 F.3d 1286 (11th Cir. 2020)

The appeal was assigned to a three judge panel. The panel, on a 2-1 vote, affirmed the District Court’s judgment. In its opinion, the Circuit Court noted that the District Court correctly applied the heightened scrutiny standard for Equal Protection claims. The Court then turned to the issue of whether the policy is rationally related to the School System’s legitimate interest in protecting privacy. The Court found that the policy did not meet the test. In reaching its decision, the Court found that the policy was administered arbitrarily because it not only treated transgender students differently than cisgender students, it treated transgender students differently, depending on whether they presented revised documents displaying the gender to which they identified at the time they enrolled in the School System or if they presented revised documents after they enrolled. In addition, the Eleventh Circuit agreed with the District Court’s determination that no evidence was presented to support the argument that privacy was endangered.

After concluding that Plaintiff had met his burden as to his Equal Protection claim, the Eleventh Circuit addressed Plaintiff’s Title IX claim. In affirming the District Court, the Court cited the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), which held that Title VII’s prohibition on sex discrimination in the employment context also forbids discrimination based on transgender status. The Court then held that the Supreme Court’s holding applies to Title IX as well. This being the case, the Court agreed with the District Court’s finding that the policy did, in fact, discriminate against Plaintiff.

Circuit Court Opinion II
3 F.4th 1299 (11th Cir. 2021)

Approximately eleven months after issuing its opinion, the Eleventh Circuit vacated its opinion and replaced it with a new opinion. In the revised opinion, the Eleventh Circuit declined to reach the Title IX question and reached only one issue – the Equal Protection claim.

In the revised opinion, the Eleventh Circuit again found that the policy is arbitrary in that it treats some transgender students different than other transgender students and it treats all transgender students different than cisgender students. The policy treats some transgender students different than other transgender students in that transgender students who presented amended birth certificates and the like at the time of enrollment were allowed to use the restroom corresponding to their gender identity whereas transgender students who had the documents amended after enrolling are not allowed to use the restroom corresponding to their identity. In addition, the policy treats transgender students different than cisgender students based on sex, a practice that is forbidden by the Equal Protection clause.

Circuit Court Opinion III
9 F.4th 1369 (11th Cir. 2021)

Approximately one month after the second opinion, the Eleventh Circuit issues an order vacating the second opinion and granting the School System’s petition for rehearing en banc. Oral arguments were heard earlier this spring and was taken under advisement.

Although the Complaint in Adams was filed nearly five years ago, it is not over yet. The Eleventh Circuit could issue a new opinion at any time. It is almost certain that, regardless of how the Eleventh Circuit rules, a Petition for Writ of Certiorari will be filed in the Supreme Court. It is equally as certain that this issue will remain unresolved until the Supreme Court issues a definitive opinion that puts the issue to rest.

School systems in Alabama, as well as Georgia and Florida will have to continue to wait for a definitive ruling from the eleventh Circuit, and possible the Supreme Court, before they will know what they are required to do with regard to restroom usage. Until then, school systems in this state will have to decide on their own how to proceed.

Alabama Legislation

On April 8, 2022, Governor Kay Ivey signed into law two acts passed by the Alabama Legislature pertaining to transgender minors. The first, the Alabama Vulnerable Child Compassion and Protection Act makes it illegal for any person to:

1. Prescribe or administer puberty blocking medication to stop or delay normal puberty.
2. Prescribe or administer supraphysiologic doses of testosterone or other androgens to females.
3. Prescribe or administer supraphysiologic doses of estrogen to males.
4. Perform surgeries that sterilize, including castration, vasectomy, hysterectomy, oophorectomy, orchiectomy and penectomy.
5. Perform surgeries that artificially construct tissue with the appearance of genitalia that differs from the individual's sex, including metoidioplasty, phalloplasty, and vaginoplasty.
6. Remove any healthy or non-diseased body part or tissue, except for a male circumcision.

In addition, the act forbids nurses, counselors, teachers, principals, or other administrative officials at a public or private school attended by a minor from encouraging or coercing a minor to withhold from the minor's parent or legal guardian the fact that the minor's perception of his or her gender or sex is inconsistent with the minor's sex or from withholding from a minor's parent or legal guardian information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex. A lawsuit has been filed in Federal District Court in Montgomery challenging the act. The Department of Justice has intervened in the lawsuit on behalf of the Plaintiffs.

The second act signed by Governor Ivey requires public K-12 schools in Alabama to require that every multiple occupancy restroom or changing area designated for student use be

designated for use by individuals based on their biological sex, i.e., the sex stated on an individual's original birth certificate. The act further prohibits an individual or group of individuals providing classroom instruction to students in kindergarten through fifth grade at a public K-12 school from engaging in discussions or instruction regarding sexual orientation or gender identity in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards that are to be developed by the State Board of Education. This act has not yet been challenged in court, but it most certainly will be.

Where does this leave school systems in Alabama? Do they follow the mandates of the Alabama Legislature and hope that, if the Eleventh Circuit agrees with the other jurisdictions that they don't get sued and incur enormous expenses defending their actions? Do they ignore the mandate of the Legislature because the Eleventh Circuit *might* agree with the other jurisdictions? These are the questions faced by school boards and their lawyers on a regular basis.