LEGAL MEMORANDUM ON LGBTQ+ STUDENTS' RIGHTS

Addendum to COPAA Session 5.9: Creating a Safe and Affirming School Environment for LGBTQ+ Youth in the Era of "Don't Say Gay" Laws and More

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A. The Rights of LGBTQ+ Students

- The **right** to a **safe & affirming learning environment**
- The **right** to **use, and be consistently addressed with, affirmed name and pronouns**
- The **right** to **freedom of speech & expression**
- The **right** to **access sex-segregated spaces, including bathrooms and locker rooms, that feel safe and affirming for the student**
- The **right** to **privacy, including informational privacy and bodily autonomy**
- The **right** to a school environment **free from discrimination, harassment, & bullying**

B. The Sources of the Legal Protections for LGBTQ+ Students

- **Title IX of the Education Amendments of 1972**
- **The Equal Protection and Due Process Clauses of the 14th Amendment**
- **The First Amendment**
- **The Family Education Rights and Privacy Act (FERPA)**
- **The Americans with Disabilities Act (ADA)**
- **The Individuals with Disabilities Education Act (IDEA)**
- **Section 504 of the Rehabilitation Act**

C. Case Law Regarding LGBTQ+ Students' Rights

- *A.C. v. Metro. Sch. Dist. of Martinsville,* 75 F.4th 760 (7th Cir. 2023)
- *Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1311–1320 (M.D. Fla. 2018); *Adams by and through Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1297–99 (11th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1308–11 (11th Cir. 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 2022 WL 18003879 (11th Cir. Dec. 30, 2022) (en banc)
- *A.H. v. Minersville Area Sch. Dist.,* 408 F. Supp. 3d 536,564 (M.D. Pa. 2019)
- *Bd. of Ed. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.,* 208 F. Supp. 3d 850 (S.D. Ohio Sept. 26, 2016)
- *Bd. of Educ. of Westside Comm. Sch. v. Mergens,* 496 U.S. 226, 239–40 (1990)
- *Bd. of Educ. v. Pico*, 457 U.S. 853, 855 (1982)
- *B.P.J. v. West Virginia State Bd. of Ed.*, 550 F. Supp. 3d 347 (S.D.W.Va. 2021); *B.P.J. v. W. Va. State Bd. Of Educ.,* No 2:21-cv-00316, 2023 WL 111875 (S.D.W. Va. Jan 5, 2023); *B.P.J. v. W. Va. State Bd. Of Educ.,* No 2:21-cv-00316, 2023 WL 1805883 (S.D.W. Va. Feb. 7, 2023)
- *C.N. v. Wolf*, 2007 WL 9702949, at *5 (C.D. Cal. Dec. 14, 2007)
- *D.H. ex rel. A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821, 833 (M.D. Tenn. 2022)
- *Doe ex rel. Doe v. Yunits*, 2000 WL 33162199, at *3 (Mass. Super. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000)
- *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267 (W.D. Pa. 2017)
- *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974)
- *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) *
- *Grimm v. Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 610 (4th Cir. 2020)
- *Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023)
- *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1075-77 (D. Nev. 2001)
- *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ.02–1531PHX–SRB, 2004 WL 2008954, at *9 (D. Ariz. June 3, 2004)
- *M.A.B. v. Bd. of Ed. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. March 12, 2018)
- *Mahanoy Area School Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021)
- *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1193 (C.D. Cal. 2007).
- *Parents for Privacy v. Dallas Sch. Dist. No. 2,* 326 F. Supp. 3d 1075, 1106 (D. Or. 2018), *aff'd sub nom. Parents for Priv. v. Barr,* 949 F.3d 1210 (9th Cir. 2020)
- *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) *
- *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120-1124 (11th Cir. 2022) *
- *Sterling v. Borough of Minersville*, 232 F .3d 190, 193, 196 (3d Cir. 2000)
- *Tinker v. Des Moines Indep. Cnty Sch. Dist.*, 393 U.S. 503, 506 (1969) *
- *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1284-85 (D. Utah 1998)
- *Whitaker ex rel. Whitaker v.* Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017)

- *Wyatt v. Kilgore Indep. Sch. Dist.,* 2011 WL 6016467 (E.D. Tex. Nov. 30, 2011) *rev'd in part, vacated in part sub nom. Wyatt v. Fletcher,* 718 F.3d 496 (5th Cir. 2013)

* *Asterisk denotes cases that are not directly related to LGBTQ+ students or issues but contain helpful argument and legal analysis that can be relied upon in protecting the rights of LGBTQ+ students.*

D. Legal Framework for Protecting LGBTQ+ Students' Rights

(1) The First Amendment

The First Amendment, as applied to the states through the Fourteenth Amendment and enforceable pursuant to 42 U.S.C. § 1983, provides in part that the government "shall make no law . . . abridging the freedom of speech." Laws that impermissibly chill the exercise of students' constitutionally protected speech, based on the content and viewpoint of their speech (such as the "Don't Say Gay" laws) violate the First Amendment.

Such efforts to suppress speech based on the government's opposition to the speaker's view are often facially unconstitutional, but also unconstitutional as applied to individual students and families when they explicitly censor[1] messages of inclusion, affirmation, and support with respect to students' LGBTQ+ sexual orientation and gender identity.

The First Amendment also protects a student's right to receive information and ideas. A student's constitutional right to receive information is violated when, for example, library materials are removed or curriculum/classroom instruction is curtailed for a purpose not reasonably related to a legitimate pedagogical concern. Schools may not remove books containing LGBTQ+ content from school libraries to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[2] "[T]he Constitution protects the right to receive information and ideas," a right that extends to students with respect to materials in a school library.[3] Restrictions on this right constitute a cognizable First Amendment injury.

Some states have enacted and introduced laws that prohibit use of students' or teachers' affirmed names and pronouns. For example, Florida's expanded "Don't Say Gay" law states that "[a]n employee or contractor of a public K-12 educational institution may not provide to a student his or her preferred personal title or pronouns if such preferred personal title or pronouns do not correspond to his or her sex."[4] Such laws violate the First Amendment because they require transgender teachers to shed their titles and pronouns at the schoolhouse gate because they are not the titles and pronouns that the state has sanctioned as permissible. Further, in states like Florida, there are

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[1] *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120-1124 (11th Cir. 2022).
[2] *Bd. of Educ. v. Pico*, 457 U.S. 853, 855 (1982).
[3] *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).
[4] Fla. Stat. § 1000.071, subsection 3.

accompanying enforcement mechanisms giving the state board of education the power to revoke the educator certificates of teachers who violate these provisions. These laws unconstitutionally restrain speech in violation of the Free Speech Clause of the First Amendment to the U.S. Constitution because they prohibit transgender teachers (and in some states, students as well) from using the titles and pronouns that express who they are, the same way that their colleagues and peers do.

The bathroom bans that are being introduced in states across the country to prevent transgender students from using bathrooms aligned with their gender identity also implicate the First Amendment. In addition to pure speech, the First Amendment protects expressive conduct and activities that are "'intended to be communicative' and, 'in context, would reasonably be understood . . . to be communicative.'"[5]

Federal courts have found that everyday activities of transgender people related to their gender expression are protected forms of symbolic speech, insofar as they are intended to be communicative and are understood in context. *See, e.g.*, *Monegain v. Va. Dep't of Motor Vehicles*, 491 F. Supp. 3d 117, 136 (E.D. Va. 2020) (quotation omitted) (activities include dressing and going by a particular name to reflect one's gender, where a trans woman's presentation "as a female conveyed a [protected] message of 'public concern'"); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *5 (Mass. Super. Ct. Oct. 11, 2000) (engaging in commonplace mannerisms to reflect that identity, such as "applying make-up in class," may be "a further expression of gender identity"), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ.02–1531PHX–SRB, 2004 WL 2008954, at *9 (D. Ariz. June 3, 2004) (a trans person's use of an affirming restroom represented protected speech because her "expression of her gender . . . ha[d] its genesis . . . in her everyday existence.").

Courts long have held that " coming-out speech," including in school settings, constitutes protected First Amendment activity. *See, e.g., Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (student speech); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1075-77 (D. Nev. 2001) (same); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1284-85 (D. Utah 1998) (coming-out speech by teacher); *Karnoski v. Trump*, 2017 WL 6311305, at *9, vacated by stipulation, Case No. 2:17-cv-01297 (W.D. Wash., Aug. 5, 2019); *Log Cabin Republicans v. U. S.*, 716 F. Supp. 2d 884, 926 (C.D. Cal. 2010), vacated as moot, 658 F.3d 1162 (9th Cir. 2011).

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[5] *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1598 (2022) (Alito, J., concurring) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984)); *see also Hurley v. Irish- Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (recognizing the First Amendment shields expressive acts such as refusing to salute a flag, wearing an armband in protest, displaying a Communist flag, and more).

Expression of gender identity through one's appearance also is protected expression.[6] Public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[7] Under the First Amendment, schools may not restrict student speech merely to avoid controversy or to avoid the "discomfort and unpleasantness that always accompany an unpopular viewpoint."[8] The Constitution allows schools to control student speech only in very narrow circumstances.[9] Indeed, schools have a strong interest and obligation to protect a student's unpopular expression in particular because "America's public schools are the nurseries of democracy."[10]

(2) The Due Process Clause

The Due Process Clause of the Fourteenth Amendment, enforceable pursuant to 42 U.S.C. § 1983, provides that "[no] state shall . . . deprive any person of life, liberty, or property, without due process of law." Under the Fourteenth Amendment to the United States Constitution, a governmental enactment like the "Don't Say Gay" and other LGBTQ+ curriculum and censorship laws are unconstitutionally vague if they fail to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement.[11]

Governmental enactments are unconstitutionally void for vagueness when their prohibitions are not clearly defined. Such enactments may also be void for vagueness if they inhibit First Amendment freedoms. Vague prohibitions inhibit freedom of speech when individuals do not know whether their speech is permitted and choose not to exercise their rights for fear of the consequences. It is unconstitutional when these laws invite discriminatory enforcement because of their failure to provide reasonable notice as to what conduct is prohibited, giving the school staff, teachers, and administrators tasked with policing it wide discretion to decide how, when, and against whom to apply it.[12] This, combined with the fact that these laws often invite and empower hostile parents to sue, invites arbitrary and discriminatory enforcement.[13]

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[6] *See Doe ex rel. Doe v. Yunits*, 2000 WL 33162199, at *3 (Mass. Super. Oct. 11, 2000).
[7] *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).
[8] *Tinker*, 393 U.S. at 509.
[9] *Mahanoy Area School Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021) (noting exceptions for lewd student speech, speech advocating for illegal drug use, and speech bearing the imprimatur of the school).
[10] *Id.* at 2046.
[11] *See Wollschlaeger v. Governor, Fla.,* 848 F.3d 1293, 1319-20 (11th Cir. 2017) (en banc); *see Dream Defs. v. DeSantis*, 559 F. Supp. 3d 1238, 1281 (N.D. Fla. 2021) (enjoining law because "an individual of ordinary intelligence could read the [statute] and not be sure of its real-world consequence").
[12] *See Graynard v. City of Rockford*, 408 U.S. 104, 108 (1972).
[13] See, e.g., League of Women Voters of Fla., Inc., 2022 WL at *70 (statute encouraged discriminatory enforcement where officials interpreted law based on their own understanding of vague terms).

Additionally, as discussed in section (A) regarding the First Amendment, minors do not shed their constitutional rights at the schoolhouse gate,[14] and this includes students' fundamental right to privacy under the United States Constitution, which encompasses "the right to determine whether or not sensitive information about oneself will be disclosed to others." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (federal constitutional right to privacy not only protects individual's right to bodily autonomy but also the right to control the nature and extent of highly personal information released about that individual); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (fundamental liberties include "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" such as a person's sexual orientation).

For some LGBTQ+ youth, their sexual orientation and/or gender identity constitute highly sensitive and personal information, the disclosure of which could have tragic consequences. For example, when police officers threatened to disclose to a young man's family that he was gay, he took his own life rather than facing what he feared would be family rejection.[15] As such, school officials must have a *genuine*, *legitimate* interest in disclosing a student's sexual orientation and/or gender identity, such as protecting the student's well-being, health, or safety, or an express statutory mandate requiring the disclosure. *See, e.g. Nguon v. Wolf,* 517 F. Supp. 2d 1177, 1193 (C.D. Cal. 2007) (student's "right to privacy with regards to her sexual orientation falls under the broader right to informational privacy" under federal law); *C.N. v. Wolf,* 2007 WL 9702949, at *5 (C.D. Cal. Dec. 14, 2007) ("this Court's decision will likely lead subsequent courts to conclude that the right to privacy in one's sexual identity is now clearly established").

(3) Equal Protection Clause

The Equal Protection Clause of the U.S. Constitution laws imposes a duty on schools to treat LGBTQ+ students equally, and school policies that classify students on the basis of sex are presumptively unconstitutional. Enforceable pursuant to 42 U.S.C. § 1983, the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Equal Protection Clause treats sex-based classification, and thus classifications based on gender identity and sexual orientation, as a "suspect" or "quasi-suspect" class subject to intermediate scrutiny, which requires the state to bear the burden of proving that the sex-based classification is "exceedingly persuasive."[16] The state must demonstrate the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those

[14] *Tinker v. Des Moines Indep. Cnty Sch. Dist.,* 393 U.S. 503, 506 (1969).
[15] *Sterling v. Borough of Minersville,* 232 F .3d 190, 193, 196 (3d Cir. 2000).
[16] *See Grimm*, 302 F. Supp. 3d at 749 (citing *City of Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)).

objectives."[17] In most cases brought under this theory, the state has failed to defeat heightened scrutiny under the common argument that the policy is "protecting other students' privacy rights" because the policies are typically not genuine and rather are based on conjecture and abstraction, rather than any facts or evidence or demonstrated privacy/safety concerns.

The LGBTQ+ curriculum and censorship laws, including the "Don't Say Gay" laws, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating against students and parents based on sex, sexual orientation, gender identity, and transgender status, both facially and as applied. These laws also shame and stigmatize these students and families, invite school officials, teachers, and classmates to view them as inferior, harm their long-term health and well-being, and deny them equal educational opportunities on the basis of their sex.

Over the past year, states that have passed such laws have born witness to the fostering of an anti-LGBTQ+ climate in public schools, cultivating a culture of silence and non-acceptance of LGBTQ+ students and LGBTQ+ families, and discouraging school officials from complying with their obligations to treat all students equally. However, states and school districts may not endorse the hostility of certain parents to acknowledging in school that LGBTQ+ people exist. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("private biases" are not "permissible considerations for" government action); *see also Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (personal religious or philosophical objections to gay people may not constitutionally be given the imprimatur of the Government). "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948).

Classifications based on sex, sexual orientation, and transgender status all warrant heightened scrutiny. *See*, *e.g.*, *Sessions v. Morales- Santana*, 137 S. Ct. 1678, 1689-90 (2017) (sex); *Baskin v. Bogan*, 766 F.3d 648, 654- 657 (7th Cir. 2014) (sexual orientation); *SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 484 (9th Cir. 2014) (sexual orientation); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012) (sexual orientation), *aff'd*, 570 U.S. 744 (2013); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610-13 (4th Cir. 2020) (transgender status); *Karnoski v. Trump*, 926 F.3d 1180, 1199-1201 (9th Cir. 2019) (transgender status); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (transgender status). Because these traits "generally provide no sensible ground for differential treatment,"[18] government must provide an "exceedingly persuasive justification" for legislation that differentiates on those bases.[19] Classifications based on sexual orientation and transgender status warrant such scrutiny both in and of themselves

[17] *Id.* at 749 (citing *U.S. v. Virginia*, 518 U.S. 515, 524 (1996).
[18] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).
[19] *United States v. Virginia*, 518 U.S. 515, 531 (1996).

and as forms of sex discrimination. As the Supreme Court recognized in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020), discrimination on the bases of sexual orientation and transgender status "necessarily entails discrimination based on sex."

(4) Title IX

Title IX is a federal law banning sex discrimination in schools. It states "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). As such, Title IX prohibits discrimination "on the basis of sex" in "any education program or activity" that receives federal funding (20 U.S.C Section 1681(a)), which includes discrimination against LGBTQ+ students, who must be provided "equal access to educational programs and activities."

Courts have made it clear that this includes discrimination against someone because they are transgender or do not comply with gender stereotypes.[20] Title IX applies to all schools that receive federal money, including nearly all public schools. As a condition of receiving federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[21] A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. Schools have a responsibility to provide a safe and nondiscriminatory environment for *all* students, and harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex.[22]

Transgender students have a right under Title IX to be treated according to their gender identity, *including* when it comes to restroom access. Over 300 school districts across the country have implemented policies to explicitly protect the rights of transgender students and various courts have ruled that Title IX's protections extend to transgender students. Fo r example, a transgender male being denied access to the boys' restroom at school could bring a sex discrimination claim under Title IX. To state a claim for sex discrimination, the student would need to demonstrate that he was 1)

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[20] *See Grimm v Gloucester Cty Sch Bd,* 302 F.Supp.3d 730 (E.D. Va. 2018); *Adams v. Sch. Bd. of St Johns County,* No. 3:17-cv-739-J-32JB (M.D. Fla. 2018); *Whitaker v. Kenosha Unified Sch. Dist. No 1 Bd. Of Educ.,* 858 F.3d 1034 (7th Cir. 2017).

[21] *Dear Colleague Letter: Transgender Students*, U.S. Departments of Education and Justice (2016).

[22] *See*, *e.g., Resolution Agreement, In re Downey Unified Sch. Dist., CA,* OCR Case No. 09-12-1095, (Oct. 8, 2014).

excluded from participation in an education program because of his sex, 2) that the educational institution was receiving federal financial assistance at the time of the exclusion, and 3) that the improper discrimination caused him harm.[23] Addressing the first factor, the Seventh Circuit ruled that a policy requiring students to use bathrooms not in conformity with their gender identity subjects a transgender student to different rules, sanctions, and treatment than non-transgender students and amounts to discrimination on the basis of sex under Title IX.[24] Addressing the third factor, *Grimm* held that the location of the 'single-user' restrooms (which were located far away from the transgender students' classes), coupled with the stigmatization and physical and mental anguish inflicted upon the student, caused harm. The policy preventing the student from using the boy's restrooms like every other boy punished him for his gender non-conformity in violation of Title IX.

(5) The Family Education Rights and Privacy Act (FERPA)

FERPA protects the personal information of students in their school records, prohibits the sharing of information without permission of the students or their parents, and gives parents the right to request that the school amend their child's legal name and/or sex assigned at birth on their education records in order to ensure that the records do not violate their child's privacy rights (i.e. "outing" the student without consent).[25] This includes information about their transgender status (including dead name and sex assigned at birth/former gender marker) or medical history. FERPA applies to any educational institution or agency that receives federal funding.[26]

FERPA gives parents certain rights with respect to their child's education records. These rights include, pursuant to 20 U.S.C. 1232g(a)(2), the right "to challenge the content of such student's education records, in order to ensure that the records are not *inaccurate, misleading, or otherwise in violation of the privacy rights of students*, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein."[27]

When a child's name is, for example, John Doe, and he uses he/him pronouns and identifies as a boy, when his records reflect, or teachers/staff refer to him using his dead name (i.e. birth name – "Jane Doe" or incorrect pronouns - "she/her"), it is inaccurate, misleading, and in violation of his rights to privacy. The disclosure of his sex assigned at birth and name given at birth "outs" him as transgender to anyone who hears this name

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[23] *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. VA. 2018).
[24] *Whitaker,* 858 F.3d 1034, 1049-50 (7th Cir. 2017).
[25] *See* 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00 et seq.
[26] *Daywalker v. UTMB at Galveston*, WL 94297 (5th Cir. Jan. 19, 2024).
[27] *See also, Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990) and *Goodreau v. Rector & Visitors of Univ. of Virginia*, 116 F. Supp. 2d 694 (W.D. Va. 2000).

used or sees his records, compromises his privacy and his safety (national studies demonstrate that trans youth experience disproportionately high rates of harassment and bullying), and discloses legally protected personally identifiable information without the student or his parents' consent. Though the case law regarding the use of FERPA to support transgender students' privacy rights is sparse, Courts have analyzed the intersection of FERPA and other nondiscrimination laws, such as the Equal Protection Clause, and have found that refusal to update education records to reflect affirmed name and pronouns violates the rights of the transgender student.[28] Advocates and attorneys should use this framework to argue that refusal by a school board to update a student's name and gender marker to conform with their government issued identification on the basis of the student's identity as a transgender individual constitutes a willful ministerial error based on sex discrimination.

(6) The IDEA and Section 504 of the Rehabilitation Act

Transgender individuals are disproportionately likely to be diagnosed with one or more disabilities (39%, compared to 15% of the U.S. population), and transgender people are 6x as likely to have serious difficulty concentrating, remembering, or making decisions because of a physical, mental, or emotional condition.[29]

While gender identity issues are not in and of themselves disabilities, this population is in vital need of protection in educational settings. Given the exorbitantly high rates of depression, anxiety, and emotional/psychological distress that many trans teens experience, some many qualify under an emotional disability eligibility or otherwise qualify for a 504 plan to allow meaningful access to school.[30]

The IDEA requires that schools make available a free appropriate public education to eligible children with disabilities through special education and related services. 20 U.S.C. § 1412(a)(1). The IDEA requires that public schools create an Individual Education Plan (IEP) for every child receiving special education services. 20 U.S.C. § 1414(d). An IEP can provide the positive supports and accommodations necessary to provide trans students meaningful access to school when it is otherwise being denied.

Section 504 is a civil rights act for persons with disabilities, which provides that persons with disabilities cannot be denied benefits or discriminated against in any program receiving federal financial assistance. It prohibits the denial of opportunity to participate in or benefit from school's aid, benefit or service. 29 U.S.C. § 794. Section 504

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[28] *Grimm, 972 F.3d at 615; Id.* at 606 (parents and students do not have to exhaust administrative remedies prior to filing suit, including exhaustion of administrative remedies under FERPA, especially if the gravamen of the suit is discrimination).
[29] *Id.* at James, S.E. (2016).
[30] *Gender Identity and Special Needs,* Special Education Law Blog (2017).

does not specifically list disabilities for eligibility, but defines disability as an impairment that substantially limits one or more major life activities. Learning is a major life activity.

If a trans student is eligible under the IDEA or Section 504, it can be helpful to utilize an IEP or 504 Plan to ensure that bathroom access, correct name and pronoun usage, and other essential needs of students are met. These plans are particularly helpful when physical, emotional, and/or psychological exceptionalities are present during the student's transition process. Not *all* students who are transitioning need an IEP or a 504 Plan. If the child is adjusting well to the transition and has no exceptionalities, is achieving academic benchmarks, and the school is treating the student fairly, exploring IEP and 504 plans is likely not necessary.

(7) Americans with Disabilities Act (ADA)

When the ADA was enacted in 1990, Congress excluded a list of diagnoses from the definition of "disability" in the Act, including a now obsolete class of diagnoses called "gender identity disorders." As such, Title II of the ADA specifically *excludes* "gender identity disorders not resulting from physical impairments" from its definition of disability. 28 CFR 35.104(5)(i).

However, in 2017, the first federal district court recognized gender dysphoria as a disability under the ADA. A federal district court in Pennsylvania ruled in *Blatt v. Cabela's Retail, Inc.* that a transgender woman could move forward with a sex discrimination lawsuit against her employer under the ADA, despite the long standing explicit exclusion that previous was thought to categorically bar transgender people from seeking relief from discrimination under the ADA. The judge found that while simply *being transgender* would be insufficient for an ADA claim, the diagnosis of gender dysphoria (a diagnosis added to the DSM-V in 2013 that describes the significant distress that some transgender people experience) was a medical condition worthy of protection against discrimination. *Blatt v. Cabela's Retail, Inc.,* No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

More recently, in *Williams v. Kincaid,* 45 F. 4th 759 (4th Cir. Aug. 16, 2022), the Fourth Circuit Court of Appeals considered again whether "gender dysphoria" was categorically excluded from the definition of "disability" under the ADA. There, the district court held, and the Fourth Circuit agreed, that gender dysphoria is a distinct diagnosis from the now obsolete diagnosis of "gender identity disorders" and thus not categorically excluded under the ADA. On June 30, 2023, the U.S. Supreme Court denied cert on the case,[31] allowing the Fourth Circuit's opinion to remain in effect, and creating precedent upon which attorneys and advocates nationwide should rely in utilizing the ADA to protections transgender individuals from discrimination.

[31] 143 S. Ct. 2414 (2023).