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A Lesson to Learn: Transgender Students Face Discriminatory School Policies in Texas

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I. Introduction

Throughout the United States, transgender¹ students have seen a legislative push² against their individual rights.³ Such measures range from bathroom bills to forced outing provisions⁴, endangering students with irreparable harm. States such as Florida⁵ and New Jersey⁶ have seen pushback through litigation regarding sexual orientation and gender identity (“SOGI”), with cases developing as I write this paper.

Texas is one state that has continued to make headlines in anti-LGBTQ+ discourse, including the recent court decision upholding an injunction against the state that allows for the continuance of gender affirming care in response the state’s determination that “certain medical procedures and . . . certain drugs [given] to children diagnosed with gender dysphoria can legally

¹ See Erik Fredericksen, *Protecting Transgender Youth After Bostock: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 Yale L.J. 1149, 1196-1200 (2023) (discussing the process of transitioning and gender-affirming care).

² On April 19, 2024, President Biden finalized a Title IX revision that will be implemented as of August 2024. The revisions clarify that Title IX protects against discrimination based on sexual orientation and gender identity and provide guidance on several issues addressed in this paper. The revision states that sex-segregated bathrooms become a Title IX violation “when it denies a transgender student access to a sex-separate facility or activity consistent with that student’s gender identity.” Disclosure to a parent of a student’s gender identity is not necessarily prohibited under Title IX when “their parent who has the legal right to receive disclosures on behalf of their child.” Respecting an individual’s preferred pronouns seems to have a sliding scale test, where it can either been seen as harassment “based on the student’s nonconformity with stereotypical norms,” but “a stray remark” would not qualify; the right of free speech must also be protected. Notably absent from being explicitly addressed in the revision is a transgender student’s ability to participate in athletic activities based on their gender identity. Therefore, several issues addressed in this paper will inevitably continue to be addressed in litigation. See Geoff Mulvihill, *New Federal Rule Bars Transgender School Bathroom Bans, but It Likely Isn’t the Final Word*, ASSOCIATED PRESS NEWS (Apr. 23, 2024, 9:20 AM), <https://apnews.com/article/title-ix-transgender-bathroom-bans-645b5564ce227a9efe2c05f883609ae8/>.

³ Harper Seldin, *Trans Students Should Be Treated with Dignity, Not Outed by Their Schools*, ACLU (Jan. 26, 2023), <https://www.aclu.org/news/lgbtq-rights/trans-students-should-be-treated-with-dignity-not-outed-by-their-schools/>.

⁴ *Id.*

⁵ See, e.g., Jeff McMillian et al., *What to Know About a Settlement that Clarifies What’s Legal Under Florida’s ‘Don’t Say Gay’ Law*, ASSOCIATED PRESS NEWS (Mar. 12, 2024, 3:25 PM), <https://apnews.com/article/dont-say-gay-florida-settlement-schools-lgbtq-f7850eedcb8bc6a117690d2b84aff671/> (explaining the settlement resulting from litigation against Florida’s “Don’t Say Gay” policy, including the rollback of provisions that classroom materials and books referencing LGBTQ+ must be permitted).

⁶ See, e.g., Hannah Gross, *Transgender Students: How Controversy over NJ School Policy Is Taking a Toll*, NJ SPOTLIGHT NEWS (Oct. 31, 2023), <https://www.njspotlightnews.org/special-report/nj-transgender-students-say-school-policy-controversy-changes-take-toll/> (explaining that several school districts in New Jersey have repealed a protective policy for transgender students, resulting in detrimental impact for such students including forced outing).

constitute child abuse” under the Tex. Family Code.⁷ The Texas legislature has also attempted to pass bills that would disparately impact transgender students with limited success.⁸ Locally, school districts such as Katy Independent School District (“KISD”)⁹ have implemented similar policies.

This paper will analyze KISD’s newly enacted policy regarding gender fluidity to determine whether the policy is legally permissible. KISD’s policy violates the Tex. Educ. Code, Title IX, the Equal Protection Clause, and the students’ privacy rights through the Fourteenth Amendment and FERPA. While the policy also likely violates laws such as the First Amendment, such analyses are beyond the scope of this paper.

II. Texas State Authority

a. The Texas Education Code

The State of Texas statutorily authorizes each school board its powers and duties.¹⁰ Under the Tex. Educ. Code, each board is required to “develop and update a long-range plan for public education,”¹¹ including establishing its curriculum and graduation requirements¹². The required curriculum¹³ contains a physical education provision whereby the board is directed to take *gender* and cultural differences in students’ interest¹⁴. The Code later distinguishes interscholastic athletic competition “based on biological sex,”¹⁵ defining biological sex as reflecting what is listed on the student’s official birth certificate¹⁶, or another government record¹⁷, “entered at or near the time of

⁷ *Abbott v. Doe*, No. 03-22-00126-CV, 2024 Tex. App. LEXIS 2258, at *2-3 (Tex. App. Mar. 29, 2024) (citing to Tex. Att’y Gen. Op. No. KP-0401(2022), 2022 Tex. AG LEXIS 8, 2022 WL 579379, at *1).

⁸ See Section II, *infra*.

⁹ See Section II, *infra*.

¹⁰ Tex. Educ. Code § 7.102.

¹¹ *Id.* § 7.102(c)(1).

¹² *Id.* § 7.102(c)(4).

¹³ *Id.* § 28.002.

¹⁴ *Id.* § 28.002(d)(7).

¹⁵ *Id.* § 33.0834.

¹⁶ *Id.* § 33.0834(a)(1).

¹⁷ *Id.* § 33.0834(a)(2).

the student’s birth”¹⁸ or modified due to a scrivener or clerical error¹⁹.²⁰ Effectively, this prevents a student who amends their birth certificate to correspond to their present gender identity from introducing their amended birth certificate to establish their “sex” with the educational institution.

On the other hand, the term “gender” is mentioned a total of twenty-three times throughout the Code, including a provision which directs each board to establish a task force to study, evaluate, and recommend mental health services, training, and the impact of such services to address disparities including race, ethnicity, and gender.²¹ The phrase “gender identity” is specifically used under the diversity, equity, and inclusion (“DEI”) provision, which includes a clause directing the board of a higher education institution to limit DEI initiatives to those mandated by federal law, with a restriction on training for DEI referencing “race, color, ethnicity, sexual identity, [and] sexual orientation.”²²

Among the curriculum provisions, the Code includes a section dedicated to health and sexual education.²³ In the broader health context, each district’s board must establish a local school health advisory council²⁴ to implement policies, procedures, and curriculum to address physical and mental health concerns, including suicide²⁵, through health education²⁶, parental involvement²⁷, school health services which incorporate mental health services²⁸, a comprehensive school counseling program²⁹, and “a safe and healthy school environment”³⁰. The counseling

¹⁸ *Id.* § 33.0834(c)(1).

¹⁹ *Id.* § 33.0834(c)(2).

²⁰ This provision was enacted on Oct. 25, 2021. 2021 Bill Text TX H.B. 25.

²¹ *Id.* § 38.308(a)(2)(C).

²² *Id.* § 51.3525(b)(1)(E)(i).

²³ *Id.* § 28.004.

²⁴ *Id.* § 28.004(a).

²⁵ *Id.* § 28.004(a)(2).

²⁶ *Id.* § 28.004(a)(2)(A).

²⁷ *Id.* § 28.004(a)(2)(D).

²⁸ *Id.* § 28.004(a)(2)(F).

²⁹ *Id.* § 28.004(a)(2)(G).

³⁰ *Id.* § 28.004(a)(2)(H).

program requires the school counselors to include individualistic guidance to monitor a student's educational, personal, and social development³¹, and “system support to support the efforts of teachers, staff, parents, and other members of the community in promoting . . . personal[] and social development of students”³².

In addition to guidance for curriculum requirements, the Code prohibits certain materials that sweep from kindergarten through the twelfth grade.³³ For example, “a teacher may not be compelled to discuss a widely debated and currently controversial issue of public policy or social affairs,”³⁴ but if a teacher chooses to discuss such a matter, they must “explore that topic objectively and in a manner free from political bias”³⁵. In the matter of extracurricular activities, the code prohibits any “extracurricular activity sponsored or sanctioned by a school district . . . [from] tak[ing] place at an athletic club located in the United States that deny any person full and equal enjoyment of equipment or facilities . . . because of . . . sex.”³⁶

b. Legislative Proposals

On February 21, 2023, Sen. Bryan Hughes (R) introduced a bill to amend Tex. Educ. Code § 28.004, the Health and Sexual Education provision, under S.B. 1072.³⁷ According to Sen. Hughes's statement of intent, S.B. 1072 was drafted in response to the passing of H.B. 1525.³⁸ Sen. Hughes asserted that H.B. 1525 reformed review and adoption of “curriculum related to human sexuality instruction” by including parents in the review process and enhancing parental “rights over a child's access to such curriculum.”³⁹ As a result, Sen. Hughes expressed concern with the

³¹ *Id.* § 33.005(b)(3).

³² *Id.* § 33.005(b)(4).

³³ *Id.* § 28.0022(a).

³⁴ *Id.* § 28.0022(a)(1).

³⁵ *Id.* § 28.0022(a)(2).

³⁶ *Id.* § 33.082(a).

³⁷ 2023 Bill Text TX S.B. 1072.

³⁸ S. 88-1072, at 1 (Tex. 2023), <https://capitol.texas.gov/tlodocs/88R/analysis/pdf/SB01072S.pdf>.

³⁹ *Id.*

possibility of public schools sidestepping the intent of H.B. 1525 by “having events or commentary on human sexuality and calling such things as ‘extracurricular.’”⁴⁰

To address his concerns, Sen. Hughes proposed a new provision to the code, Sec. 28.0043, which would explicitly restrict instruction regarding SOGI.⁴¹ Sec. 28.0043(a) would prohibit a school employee “from providing or allowing a third party to provide instruction, guidance, activities, or programming regarding [SOGI] to students enrolled in prekindergarten through 12th grade.”⁴² This provision would be limited from infringing on First Amendment protections and permitting authorized personnel from providing physical or mental health-related services, “subject to any required parental consent.”⁴³ In other words, barring First Amendment and approved health-related services, any discussions regarding SOGI outside of authorized curriculum materials would be prohibited. Although the Senate passed S.B. 1072 on May 2, 2023, the bill died upon arrival in the House on May 6, 2023.⁴⁴

This was not the only attempt from the 88th Texas legislature to restrict SOGI instruction and discussions in schools, however. On March 10, 2023, Rep. Steve Toth (R) proposed H.B. 5236, which died quickly on March 24, 2023.⁴⁵ Rep. Toth proposed adding Sec. 38.451 to the Tex. Educ. Code, which would focus on sex-segregated bathrooms and changing facilities.⁴⁶ The proposal defined the term “sex” to refer to a person’s “biological sex,” which is derived from a person’s official birth certificate.⁴⁷ The birth certificate must be “correctly stated”⁴⁸, paralleling the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 2023 Bill Text TX S.B. 1072.

⁴³ *Id.*

⁴⁴ TX SB1072 | 2023-2024 | 88TH LEGISLATURE | LEGISCAN, <https://legiscan.com/TX/bill/SB1072/2023/> (last visited April 4, 2024).

⁴⁵ BILL TEXT: TX HB5236 | 2023-2024 | 88TH LEGISLATURE | INTRODUCED | LEGISCAN, <https://legiscan.com/TX/text/HB5236/2023/> (last visited April 4, 2024).

⁴⁶ 2023 Bill Text TX H.B. 5236.

⁴⁷ *Id.*

⁴⁸ *Id.*

language from Tex. Educ. Code § 38.0834. The proposed “private facility” provision included narrow exceptions, such as custodial services, emergencies, or other similar circumstances.⁴⁹ As with Tex. Educ. Code § 38.0834, this provision would have prohibited students who amend their birth certificates to align with their gender identity to submit and request a change in their “sex” with an educational institution.

Both Sen. Hughes’s and Rep. Toth’s bills were introduced within one month of each other. Collectively, the bills would have limited discussions regarding SOGI and would have disparately impacted students based on their SOGI. These bills indicate that the discourse between sex and gender identity nationwide had influenced their introduction. Although both bills ultimately died relatively quickly, LGBTQ+ discourse would continue on a more local scale through the introduction of discriminatory school policies.

III. Katy Independent School District

a. Background

Based in Katy, Texas, KISD comprises over 88,000 students spanning 181 square miles and containing seventy-four schools.⁵⁰ As reported in 2018, 36.2% of the student population is Latinx, 30.0% is white, 15.9% is Asian or Asian Pacific Islander, and 13.5% is Black or African American.⁵¹ A total of 28.2% of students are economically disadvantaged, represented by the percentage of students eligible for free or reduced-price lunches.⁵² The average teacher-student ratio is 15:1, with the district also holding eighty-five full-time school counselors.⁵³ KISD has an

⁴⁹ *Id.*

⁵⁰ Statistical Overview of the Katy Independent School District, U.S. NEWS, <https://www.usnews.com/education/k12/texas/districts/katy-isd-110947#:~:text=Overview%20of%20Katy%20Independent%20School,74%20schools%20and%2088%2C368%20students/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

annual revenue of over one billions dollars, with 59.6% coming from local, 35.9% from state, and 4.5% from federal.⁵⁴ Spending is broken down to approximately \$9,333 spent per student each year, totaling over \$539 million spent on instruction and over \$260 million on support services.⁵⁵ In 2018, the high school graduation rate was reported at 94.7%.⁵⁶

KISD has established itself as reputable regarding academic success. In 2022, the Texas Education Agency’s Accountability Rating System awarded KISD an “A” in 2022, making it the second-largest school district in Texas to receive the score.⁵⁷ The ranking was based on criteria such as graduation rates, student passing rates, and “closing the gaps” between disadvantaged groups, the latter of which happened to be KISD’s highest contributing factor towards its grade.⁵⁸ This achievement could be presented as an example of KISD’s consistency with its official mission and beliefs, which include providing “unparalleled learning experiences designed to prepare and inspire each student to live an honorable, fulfilling life . . . to create the future,” highlighting characteristics such as respect, collaboration, open-mindedness, and empathy.⁵⁹

Success has not come unburdened to KISD, however, as evidenced within the past three years of discourse surrounding the LGBTQ+ community. In 2021, KISD’s board made headlines for blocking websites to organizations such as The Trevor Project, an organization dedicated to suicide prevention among the LGBTQ+ community.⁶⁰ In 2022, KISD’s board received further publicity regarding its lack of support of the LGBTQ+ community, including book and material

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Katy Earns an “A” in 2022 TEA Accountability Rating System*, KATY INDEPENDENT SCHOOL DISTRICT, <https://www.katyisd.org/site/Default.aspx?PageType=3&DomainID=10&PageID=13&ViewID=6446ee88-d30c-497e-9316-3f8874b3e108&FlexDataID=8490/>.

⁵⁸ *Id.*

⁵⁹ *About Katy ISD*, KATY INDEPENDENT SCHOOL DISTRICT, <https://www.katyisd.org/domain/3776/>.

⁶⁰ Shelley Childers, *Katy ISD Continues to Block LGBTQ+ Resource Websites as Student Appeals for Change Again*, ABC 13 (Dec. 14, 2021), <https://abc13.com/katy-isd-lgbtq-sites-blocked-school-board-resources-inaccessible/11336566/>.

bans, not only affecting students who may want or need such support and/or representation, but also restricting teachers from maintaining their own classroom libraries and thus establishing a more inclusive space.⁶¹⁶²

b. The Policy

KISD's position on LGBTQ+ discourse solidified in 2023 when it proposed an amendment to the district's policies. The board, lead by current president Victor Perez, proposed a policy (the "Policy") regarding "Student Welfare: Parental Authority and Gender Fluidity Matters," which was ultimately approved by a narrow 4-3 vote in its meeting on August 28, 2023.⁶³ Prior to the Policy's adoption, President Perez asserted that the Policy was drafted to guide teachers and clarify what they can and cannot do.⁶⁴ Furthermore, President Perez claimed that the Policy keeps students safe by not allowing the district to keep secrets by "concealing things that everybody knows about in the school and the parent is the last to find out."⁶⁵ The Policy is therefore promoted as a facially neutral policy to promote the safety and well-being of student through parental involvement, as well as protecting district staff's choice in recognizing a student's preferred pronouns.

A reading of the Policy suggests that it is far from neutral in its entirety. The Policy, as approved and posted on KISD's official website,⁶⁶ includes the following provisions:

- Section 1.1 defines a person's "sex" as determined by the person's official, correctly stated birth certificate. This incorporates the

⁶¹ Dominic Anthony Walsh, *Katy School Students Come Together as Censorship of LGBTQ+ Voices Ramps Up*, HOUSTON PUBLIC MEDIA (Dec. 14, 2022, 8:00 AM), <https://www.houstonpublicmedia.org/articles/education/2022/12/13/439351/katy-school-students-come-together-as-censorship-of-lgbtq-voices-ramps-up/>.

⁶² Mike Hixenbaugh, *Banned: Books on Race and Sexuality Are Disappearing from Texas Schools in Record Numbers*, NBC NEWS (Feb. 2, 2022, 11:56 AM), <https://www.nbcnews.com/news/us-news/texas-books-race-sexuality-schools-rcna13886/>.

⁶³ August 28, 2023, Board Meeting, KATY ISD, TX, <https://katyisdtx.new.swagit.com/videos/270381/>.

⁶⁴ Ritwan Balogun, *Katy ISD Board to Vote on Proposal Requiring Teachers to Inform Parents of Transgender Student, Preferred Pronoun* (Aug. 23, 2023, 5:26PM), <https://www.click2houston.com/news/local/2023/08/23/katy-isd-board-to-vote-on-proposal-requiring-teachers-to-inform-parents-of-transgender-student-preferred-pronoun/>.

⁶⁵ *Id.*

⁶⁶ Policy Code FA – Parent Rights and Responsibilities, KATY ISD BOARD POLICY MANUAL, <https://pol.tasb.org/PolicyOnline/PolicyDetails?key=594&code=FA#localTabContent/>.

definition of “biological sex” from Tex. Educ. Code § 38.0834 and essentially adopts Rep. Toth’s proposed definition of “biological sex”⁶⁷ regarding private facilities.

- Section 1.1 also defines “gender fluidity” as “[a]ny belief, theory, or ideology” that supports the view that gender is a social construct, that “it is possible to be any . . . or no gender (i.e., non-binary),” that biological sex “should” be changed to align with a person’s gender identity, and that supports “hormone therapy or other medical treatments or procedures to temporarily or permanently alter a person’s body.”⁶⁸ In other words, the Policy defines “gender fluidity” as the validity of transgenderism, and by extension, gender-affirming care.
- Section 1.2 acts as an overview to the Policy, explaining the district’s “ultimate goal” is to ensure “students are safe to learn and grow,” and not engage in “social transitioning of students.” The Policy explicitly respects the “right to free speech, biological facts, and grammatical accuracy.” Further, the Policy attempts to avoid liability by assuring students and staff will be treated with respect and its anti-bullying and anti-harassment policies will continue to be enforced. Compliance with the Policy is asserted to not constitute bullying or harassment. In effect, the Policy allows misgendering of transgender persons and exempts misgendering from disciplinary actions.
- Section 1.3 addresses parental authority by emphasizing a parent’s role in “guiding the beliefs and protecting the health and well-being of their children.” District staff are restricted from “diagnosing or treating gender dysphoria,” and district personnel will not be “employed as experts” for such treatment; rather, these rights will remain with the parents.
- Sections 1.4 and 1.5 describe the Policy as developed to protect and “provide students equal opportunity, privacy, and safety” to biological males and females in sex-segregated spaces, including bathrooms, locker rooms, and changing facilities. This is comparable to Rep. Toth’s objective in his proposal and includes similar language in a provision that has exceptions for custodial and maintenance staff or emergencies.⁶⁹
- Section 1.6 prohibits staff from promoting, requiring, or encouraging the use of pronouns towards students or any persons that do not correspond to a person’s biological sex. Staff cannot ask a student for their preferred pronouns. In practice, this severely restricts the use of pronouns for any non-cisgendered persons, including students or staff, especially if respecting a transgender

⁶⁷ 2023 Bill Text TX H.B. 5236.

⁶⁸ Policy Code FA, *supra* note 66.

⁶⁹ 2023 Bill Text TX H.B. 5236.

student's pronouns would qualify as "encouragement" under the Policy.

- Section 1.6 allows a minor student with parental consent, or an adult student, to request in writing the use of preferred pronouns, but "the [d]istrict cannot and will not compel [d]istrict staff or other students" to respect those requests "in any manner that would violate the speaker's First Amendment rights." While this provision allows staff to retain the choice of whether they wish to acknowledge the student's preferred pronouns, the process a student will go through to obtain such permission to use their preferred pronouns may ultimately remain disrespected.
- Section 1.6's final provision requires staff to "notify parents if their child requests" to be "identified as transgender, change [their] name, or use different pronouns at school." This provision can potentially out students to their parents without the students' consent and lead to potential irreparable harm.
- Section 1.7 prohibits what Section 1.2 deems as "[g]ender fluidity content" from being included in the classroom, such as instructional materials. Some examples of forbidden materials include "displays, communications, and related signage," and staff are forbidden from instructing, referring, or guiding "any student to any Internet website, chat room, or other online forum . . . regarding gender fluidity, unless . . . approved" by the district in its authorized curriculum. This closely reflects Sen. Hughes's proposal in forbidding SOGI conversations from outside of authorized curriculum, although the Policy is narrowly focused on gender identity rather than sexuality.⁷⁰

Prior to the adopting the Policy, but still on August 28, 2023, the board held a meeting to discuss such matters and invited the public to voice their opinions.⁷¹ Eighty-four individuals from the community spoke regarding the Policy: fifteen were in support, while sixty-nine were opposed.⁷² Supporters of the Policy expressed concerns of feeling excluded from their child's development, with some repeating rhetoric of an "agenda" and "indoctrination,"⁷³ concerns regarding the spending of taxpayers' dollars and how funds should be dedicated to improving

⁷⁰ 2023 Bill Text TX S.B. 1072.

⁷¹ August 28, 2023, Board Meeting, *supra* note 63.

⁷² *Id.*

⁷³ See Erik Fredericksen, *supra* note 1, at 1191 (explaining that beginning in the 1970s, "opposition to the growing movements for queer rights raised alarms about homosexual 'recruitment' and indoctrination" (citations omitted)).

“education” (such as reading, writing, and arithmetic), and the safety of their children in schools.⁷⁴ On the other hand, opposers of the Policy mentioned statistics regarding mental health and suicide rates among the transgender community (including experiences among KISD students), the impact that support within the educational system can have on students, and the dangers that would arise from the implementation of the Policy.⁷⁵ Perhaps the most common theme recited by those opposed to the Policy was that *all* students deserve safety and protection from the school, and that the Policy only protects the majority and excludes an extremely vulnerable minority.⁷⁶ Opposers also mentioned taxpayers’ dollars, but instead affiliated their concerns with potential litigation that could arise from legal challenges to the Policy.⁷⁷ Some opposers addressed concerns with the board members themselves, with one parent addressing a board member’s misunderstanding of gender identity by comparing the idea of gender identity could lead to a student choosing to identify as a cat.⁷⁸ Included among the opposing speakers were fourteen students enrolled within KISD, parents, teachers, psychologists, and Texas Rep. Jon Rosenthal.⁷⁹

The board subsequently held a discussion regarding the Policy. President Perez expressed his belief that the Policy did not “target” or “out” anyone, and that concealing such information from parents was different than outing a student.⁸⁰ The board acknowledged the concern for suicide rates, but instead relied on those statistics to support the position of disclosure as mitigation.⁸¹ Regarding restrooms, a member of the board explained that private and/or gender-neutral restrooms were available throughout the district.⁸² One board member supporting the Policy read

⁷⁴ August 28, 2023, Board Meeting, *supra* note 63.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

an email from a student who was confused about her gender identity, the student explaining that a teacher called her a boy because of “boyish tendencies.”⁸³ Further, President Perez explained that the Policy would not encourage “bullying” because the student initiates the conversation rather than the staff.⁸⁴ When a board member claimed that kids would feel targeted by the Policy in a way that is analogous to bullying, President Perez reaffirmed his position by suggesting that teachers “don’t ask then tell,” and thus such conduct could not constitute bullying.⁸⁵ President Perez clarified this position by stating that the Policy would not preclude private discussions, but only come into effect when a student asks to use preferred pronouns.⁸⁶ One board member expressed concern regarding the use of different names and asked whether the Policy extended to nicknames (*e.g.*, a student named Robert asking to be called Bobby), but then said she “thinks she knows what [Perez] means” under the provision.⁸⁷

At least some of the concerns raised by opposers have come to fruition. As of November 2, 2023, KISD disclosed the identities of nineteen students who either identified as transgender or requested pronouns different than ones assigned at birth to their parents, averaging out to one notification every three days.⁸⁸ Students have voiced opinions of heightened stigma with gender identity due to the Policy, instilling fear in what has “become less of a safe space” for LGBTQ+ youth.⁸⁹ On November 13, 2023, Students Engaged in Advancing Texas (“SEAT”), a student-led organization “demonstrating youth visibility in educational policymaking,” filed a complaint with

⁸³ *Id.* This concern suggests that there is confusion regarding transgenderism and the process of transitioning with discrimination merely based on sex stereotypes. See Erik Frederickson, *supra* note 1, at 1196-1200 (explaining the transitioning process and gender dysphoria).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Miranda Dunlap, *Under Katy ISD Gender Policy, Student Identities Disclose to Parents 19 Times Since August*, HOUSTON LANDING (Nov. 2, 2023), <https://houstonlanding.org/under-katy-isd-gender-policy-student-identities-disclosed-to-parents-19-times-since-august/>.

⁸⁹ *Id.*

the U.S. Department of Education regarding the Policy, asserting a Title IX violation.⁹⁰ SEAT has also asserted that the Policy intrudes on students’ free expression and privacy, alleging that the Policy has an adverse impact on transgender students by discriminating based on gender identity and “perpetuating harmful sex stereotypes and heteronormative gender roles.”⁹¹ SEAT seeks to have the Policy repealed, provide damages to those harmed by the Policy, establish “professional LGBTQ+ inclusion training for district personnel, and codif[y] nondiscrimination protections for gender identity.”⁹²

IV. Legal Analysis

a. Title IX

KISD’s policy and Tex. Educ. Code § 33.0834 both violate Title IX. Title IX of the Civil Rights Act of 1964 is a federal statute providing that “[n]o person . . . 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.”⁹³ Although the language of Title IX does not expressly include the terms “sexual orientation” or “gender identity,” courts generally look to other precedent of the Civil Rights Act of 1964 when understanding Title IX’s scope and meaning.⁹⁴ Specifically, precedent regarding Title VII became a beacon of hope to LGBTQ+ plaintiffs claiming Title IX violations in 2020 with the *Bostock*⁹⁵ decision.

⁹⁰ *Discrimination Complaint Filed Against Katy ISD by SEAT over Transgender Policy*, KATY TIMES (Dec. 29, 2023, 8:48 AM), <https://katytimes.com/stories/discrimination-complaint-filed-against-katy-isd-by-seat-over-transgender-policy,62083#:~:text=Students%20Engaged%20in%20Advancing%20Texas,by%20the%20Katy%20Independent%20School/>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 20 U.S.C. § 1681(a).

⁹⁴ *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (“Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.”); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996) (interpreting “actual notice” under Title IX by reviewing precedent under Title VI and Title VII).

⁹⁵ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

In *Bostock*, the Court considered whether Title VII protects individuals from discrimination in the workplace based on SOGI.⁹⁶ The Court answered in the affirmative based on Title VII’s protection from discrimination on the basis of sex.⁹⁷ The Court reasoned that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,” clarifying the scope of “sex” as a but-for cause of discrimination.⁹⁸ Furthermore, an employer who “intentionally discriminates against [an] individual . . . in part because of sex” is “all Title VII has ever demanded to establish liability.”⁹⁹ The Court also clarified that “the plaintiff’s sex [does] not need [to] be the sole or primary cause” of the adverse action.¹⁰⁰ While acknowledging that SOGI are “distinct concepts from sex,” Title VII protects against “all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.”¹⁰¹ In other words, because discrimination based on SOGI necessarily discriminates based on sex, the term “sex” acts as a type of umbrella term to encompass SOGI in its application.

Within the opinion, the Court provided hypotheticals to explain its rationale. For example, Justice Gorsuch suggested a circumstance where an employee attends an office party and introduces the employee’s wife to the employer.¹⁰² If the employee is a woman, and the employer subsequently fires the employee for being homosexual, the employer intentionally discriminates against the employee based in part by their sex when discriminating based on sexual orientation.¹⁰³ In this situation, discrimination against sexual orientation inherently includes but-for

⁹⁶ *Id.* at 1737.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1741.

⁹⁹ *Id.* at 1744.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1746-47.

¹⁰² *Id.* at 1742.

¹⁰³ *Id.*

discrimination against the employee’s sex. The same rationale applies in the case of a transgender employee. As the Court explained, an “employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”¹⁰⁴ In other words, discrimination against transgender individuals inherently includes sex as a but-for cause based on traits or actions that may include sex stereotypes.¹⁰⁵

Justice Gorsuch provided some guidance regarding the scope of the majority’s holding. Title VII discrimination is focused on “individuals, not groups,”¹⁰⁶ with the Court clarifying that employers treating groups of men and women comparably does not affect the analysis—“an employer who fires both lesbians and gay men doesn’t diminish but doubles its liability”¹⁰⁷. However, the Court expressly left some questions unanswered in the opinion. First, the issues of “sex-segregated bathrooms, locker rooms, and dress codes” were not before the Court and thus not addressed.¹⁰⁸ Second, conflicts with the intersection of Title VII and the free exercise of religion were described as “nothing new,” but were “questions for future cases.”¹⁰⁹ These unresolved issues, as well as the question of whether *Bostock* applies to Title IX claims, resulted in a slew of litigation across the country.

After *Bostock* was decided, additional guidance was published regarding its application to Title IX claims. On January 20, 2021, President Biden issued Executive Order 13988, which states that laws prohibiting sex discrimination, including Title IX, the Fair Housing Act, and the Immigration and Nationality Act, “prohibit discrimination on the basis of gender identity or sexual

¹⁰⁴ *Id.* at 1741.

¹⁰⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (finding that sex stereotyping on the basis of gender constitutes discrimination on the basis of sex under Title VII).

¹⁰⁶ *Id.* at 1740.

¹⁰⁷ *Id.* at 1748.

¹⁰⁸ *Id.* at 1753.

¹⁰⁹ *Id.* at 1754.

orientation” if those laws “do not contain sufficient indications to the contrary.”¹¹⁰ In its policy section, the Executive Order states that “[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports,” while also mentioning dress code for adults in relation to sex-based stereotypes.¹¹¹

Partially in light of the Executive Order, the U.S. Department of Justice Civil Rights Division released a memorandum expressing the agency’s belief that *Bostock*’s reasoning applies to Title IX on March 26, 2021.¹¹² The memorandum explained that Title IX, like Title VII, applies to sex discrimination against individuals, and Title IX’s language “on the basis of sex” is sufficiently similar and essentially interchangeable to the “because of sex” language under Title VII.¹¹³ On June 22, 2021, the Department of Education’s Office for Civil Rights likewise released a written statement interpreting *Bostock* as applying to Title IX.¹¹⁴ Furthermore, the Department of Education found that the “text of both statutes contains no exception for sex discrimination that is associated with an individual’s sexual orientation or gender identity,” and thus courts should apply a broader rule.¹¹⁵ In sum, the *Bostock* holding extends to Title IX in protecting an individual’s SOGI because Title IX and Title VII are similarly constructed and interpreted.

Case law has been developing with various interpretations of Title IX’s scope throughout the nation.¹¹⁶ In *Neece*, one district court in Texas considered whether *Bostock* applied to Title

¹¹⁰ 86 Fed. Reg. 7023 (Jan. 25, 2021).

¹¹¹ *Id.*

¹¹² Memorandum from Pamela S. Karlan, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice Civil Rights Div., to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021) (on file with author).

¹¹³ *Id.*

¹¹⁴ Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 117, 32637 (June 22, 2021).

¹¹⁵ *Id.* (citing *Bostock*, 140 S. Ct. at 1747).

¹¹⁶ See e.g., *Grimm*, 972 F.3d at 619 (holding that the school’s restroom policy violated Title IX); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (upholding an injunction for the plaintiff, finding that “allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls). But see *Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 817 (11th Cir. 2022) (holding that sex-segregated bathrooms based on biological sex do not violate Title IX, finding that Congress is responsible for amending Title IX to include gender identity and not the judiciary).

IX.¹¹⁷ The court held that it does not, finding that legal standards of Title IX and Title VII are “not identical . . . in every material instance,” and that the words “because of” and “on the basis of” sex are “not necessarily synonymous.”¹¹⁸ The court is erroneous for two reasons. First, Title VII defines the terms “because of sex” and “on the basis of sex” together, which suggests the terms are synonymous or at least interchangeable.¹¹⁹ Second, while *Bostock* emphasizes the phrase “because of sex” within Title VII, the first paragraph of the opinion shows Justice Gorsuch describing Title VII as discriminating “on the basis of race, color, religion, sex, or national origin.”¹²⁰ If the phrases were as exclusive as *Neece* suggests, neither the definition under Title VII nor Justice Gorsuch’s words in *Bostock* would use them interchangeably.

The same court also considered whether the *Bostock* holding was narrowly applied to SOGI as a status, or whether it extended to correlated conduct, such as dress codes, bathrooms, and pronouns.¹²¹ Relying on precedent of Title VII, the district court held that the *Bostock* application does not necessarily extend to conduct, citing cases that distinguish between the two.¹²² The court is flawed in its distinction between status and conduct. The status at issue in the case was an individual’s gender identity, while the conduct in question was using a private facility based on the individual’s gender identity, which inherently implicates the individual’s sex.¹²³ Applying the analysis from *Bostock*, the question becomes whether a transgender individual is discriminated against compared to a cisgender individual in using a private facility that corresponds to their

¹¹⁷ *Neece v. Becerra*, No. 2:21-CV-163-Z, 2022 U.S. Dist. LEXIS 75847, at *37 (N.D. Tex. Apr. 26, 2022).

¹¹⁸ *Id.*

¹¹⁹ 42 U.S.C. § 2000e(k).

¹²⁰ *Bostock*, 140 S. Ct. at 1737.

¹²¹ *Texas v. EEOC*, 633 F. Supp. 3d 824, 829-30 (N.D. Tex. 2022).

¹²² See, e.g., *In re Union Pac. R.R. Employment Prac. Litig.*, 479 F.3d 936, 942 (8th Cir. 2007) (holding that Title VII protected “sex” as a status, but did not protect an employee seeking contraception fertility treatments as conduct); *E.E.O.C. v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1032 (11th Cir. 2016) (holding that Title VII protect “race” as a status, but did not cover an employee with dreadlocks as an expression of racial pride as conduct).

¹²³ *Texas v. EEOC*, 633 F. Supp. 3d at 836.

gender identity. The conduct here is the same—using a private facility based on sex. Rather, the distinction between whether an individual is permitted from using the chosen private facility is their gender identity and whether their sex assigned at birth matches that gender identity. Cisgender individuals whose gender identity matches their sex-assigned at birth are *not* prohibited from using their corresponding private facilities, but transgender individuals whose gender identity does not match their sex-assigned at birth *are* prohibited. Because sex was defined as a “correctly stated birth certificate” that expressly excludes transgender individuals, sex is a but-for cause of the discrimination. The challenge is not that sex-segregated bathrooms are discriminatory per se, but rather it is about discrimination towards a person being barred from using the facility that corresponds to their gender identity.

With this understanding of *Bostock* and its application and scope, KISD’s Policy violates Title IX. Section 1.1’s definition of sex as biological based on a person’s “correctly stated” birth certificate is in direct conflict with the *Bostock* definition of “sex,” which incorporates SOGI. Sections 1.4 and 1.5 violate Title IX because they target individuals based on sex—not necessarily because sex-segregated facilities are challenged, but rather because the use of such facilities based on one’s gender identity is inherently discriminatory because of sex. Many courts have held similarly regarding transgender individuals’ use of private facilities, although others have held otherwise.¹²⁴ Section 1.6 violates Title IX because the use of pronouns is not necessarily “conduct,” but corresponds to an individual’s “status.” Because gender identity is protected under *Bostock*, the analysis would compare a cisgender individual’s use of identifying pronouns versus a transgender individual’s use of identifying pronouns. While a cisgender individual does not need to request the use of pronouns to correspond to their identified gender, a transgender person must

¹²⁴ See *supra* note 116.

request such use because the Policy requires pronouns to correspond to their “correctly stated” birth certificate, which is not objectively correctly stated. Furthermore, even if a transgender person requests the use of a preferred pronoun, Section 1.6 does not require district staff to adhere to this request, leaving transgender individuals subject to being misgendered, while cisgendered individuals do not face such treatment. Thus, such policies are strictly focused on the “status” of gender identity rather than the specific conduct.

KISD and the Policy’s supporters adamantly argue that “sex” is defined by what is assigned at birth.¹²⁵ Although not expressly in the Policy, the board and the Policy’s supporters will likely argue that there are biological differences that distinguish males from females, and thus those differences justify the policy. Particularly, I anticipate this would be present in arguing against allowing transgender students to participate in athletic extracurriculars that align with their gender identity. This approach is overbroad and discounts the possibility of gender-affirming medical care such as hormone therapy and puberty blockers, and “state reliance on physical differences calls for careful examination to ensure” such claims do not cover “social, role-based judgments.”¹²⁶

Likewise, because Tex. Educ. Code § 33.0834 uses the same language for interscholastic athletic competitions, the Code also violates Title IX. Specifically, the Code’s definition of “sex” denies transgender students the “full and equal enjoyment of equipment or facilities” because of sex. While Texas could argue that transgender students may still enjoy equipment or facilities based upon their “biological sex,” that reasoning conflicts with the definition of sex that *Bostock* provides and would not likely be determined “full and equal enjoyment.” In upholding such policies, there would need to be evidence that there are physical differences that affect performance rather than reproductive physiological differences that do not likely impact athletic performance,

¹²⁵ August 28, 2023, Board Meeting, *supra* note 63.

¹²⁶ Erik Frederickson, *supra* note 1, at 1208.

and such evidence must be substantial and not merely sex-stereotypes.¹²⁷ If such evidence is insufficient, the argument would not only fail under Title IX, but would likely also fail under the Equal Protection Clause of the Fourteenth Amendment.

b. The Equal Protection Clause

Based on *Bostock*'s holding that clarifies the definition of "sex," KISD's Policy and the Tex. Educ. Code violate the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹²⁸ Specifically, courts have begun considering whether SOGI is a quasi-suspect class that deserves intermediate scrutiny in an Equal Protection Clause analysis.¹²⁹ If so, this would further protect SOGI in future causes of action, and policies such as KISD's would need to pass muster under such scrutiny.¹³⁰¹³¹

In *Grimm*, the Fourth Circuit addressed whether transgender status is a quasi-suspect classification under the Equal Protection Clause.¹³² The plaintiff in *Grimm* challenged the school's policy of promoting safety and privacy of students by restricting bathroom facilities to "biological genders,"¹³³ defined as "the sex marked on the student's birth certificate"¹³⁴. The court held that,

¹²⁷ See, e.g., *Hivey v. Ivy Tech Cmty. Coll.* 853 F.3d 339, 351-52 (7th Cir. 2017) (holding that a lesbian woman could file a Title VII claim based on gender-stereotyping).

¹²⁸ U.S. Const. amend. XIV, § 1.

¹²⁹ See Erik Frederickson, *supra* note 1, at 1165-68 (arguing that *Bostock*'s reasoning rested on anticlassification rather than antisubordination, which the Court has used to apply intermediate scrutiny).

¹³⁰ Consider Justice Thomas's concurrence in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022). Justice Thomas proposed that the Court, in the future, "should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." By clarifying the scope of "sex" under the Fourteenth Amendment to include SOGI, there will be an alternative way for LGBTQ+ individuals to challenge discriminatory laws.

¹³¹ See *Bostock*, 140 S. Ct. at 1833 (Kavanaugh, J., dissenting) ("All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination . . .").

¹³² *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020).

¹³³ *Id.* at 599.

¹³⁴ *Id.* at 608.

like the Seventh and Eleventh Circuits, school districts that rely on sex listed on birth certificates in deciding which bathroom a student uses “necessarily rests on a sex classification.”¹³⁵

The court separately analyzed whether “transgender” was a suspect class through a four part test: (1) whether “the class has been historically subject to discrimination”¹³⁶; (2) whether “the class has a defining characteristic that bears a relation to its ability to perform or contribute to society”¹³⁷; (3) whether “the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics”¹³⁸; and (4) whether “the class is a minority lacking political power”¹³⁹.¹⁴⁰ The court answered in the affirmative, finding that: (1) transgender individuals have historically experienced high rates of violence and discrimination in education¹⁴¹; (2) being transgender does not have a relation to ability to perform or contribute to society, and that gender dysphoria, while not always experienced, is treatable¹⁴²; (3) gender identity is mostly “formulated” at an early age, and is “as natural and immutable as being cisgender,” although “being transgender marks the group for different treatment”¹⁴³; and (4) transgender individuals make approximately 0.6% of the adult population and are underrepresented in each branch of government¹⁴⁴. This analysis, in conjunction with *Bostock*’s clarification of discrimination “because of sex,” supports the court’s conclusion that “transgender,” or gender identity, is a quasi-suspect class.

After identifying gender identity as a quasi-suspect class, the court applied an intermediate scrutiny analysis of whether the policy was substantially related to an exceedingly persuasive state

¹³⁵ *Id.* at 608 (citing *Whitaker*, 858 F.3d at 1051).

¹³⁶ *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

¹³⁷ *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41 (1985).

¹³⁸ *Bowen* at 602.

¹³⁹ *Id.*

¹⁴⁰ *Grimm*, 972 F.3d at 611.

¹⁴¹ *Id.*

¹⁴² *Id.* at 612.

¹⁴³ *Id.* at 612-13.

¹⁴⁴ *Id.* at 613.

interest.¹⁴⁵ The court held that it was not because (1) the plaintiff had used the restroom corresponding to his gender identity for seven weeks without incident prior to the policy's enactment, and (2) there was no evidence that "bodily privacy of cisgender boys using the boys restrooms did not increase" when the transgender plaintiff used those restrooms.¹⁴⁶ Furthermore, the court acknowledged that "none of [the board's] fears have materialized," noting that its concerns were "philosophical" and the policy was "marked by misconception and prejudice."¹⁴⁷ Based on these findings, it is likely that the court would have found that the policy would have violated the Equal Protection Clause under rational basis scrutiny because there was evidence of animus, although the court did not conduct such an analysis.¹⁴⁸

The KISD Policy violates the Equal Protection Clause of the Fourteenth Amendment because it does not survive constitutional muster. Like in *Grimm*, where the school's bathroom policy violated the Equal Protection Clause under intermediate scrutiny, KISD's Policy under Sections 1.4 and 1.5 are essentially identical and thus also violate the Equal Protection Clause. In the broader scope, the provisions regarding facility and pronoun use violate the Equal Protection Clause under intermediate scrutiny for similar reasons as *Grimm*. Like in *Grimm*, where the court found that the plaintiff's discrimination was based on "failing to conform to the sex stereotype propagated by the [school's] [p]olicy," transgender students in KISD prohibited from using private facilities matching their gender identities likewise experience discrimination based on sex stereotypes. Furthermore, as the court in *Grimm* found that the school's policy was not substantially related to an exceedingly persuasive interest, KISD's Policy undergoes a similar analysis. In the board meeting on August 28, 2023, the board did not present any evidence

¹⁴⁵ *Id.* at 607 (citing *United States v. Virginia*, 518 U.S. 515, 534 (1996)).

¹⁴⁶ *Id.* at 614.

¹⁴⁷ *Id.* at 614-15.

¹⁴⁸ *Id.* n. 13.

suggesting there were any safety or privacy issues prior to the policy being implemented, only that there was fear and concern.¹⁴⁹ Additionally, the existence of private and gender-neutral facilities can be argued to address any privacy concerns students may have. The Policy’s general purpose, stated to promote safety and well-being, has therefore not been demonstrated to be substantially related to address any exceedingly persuasive safety concerns.

Even if a court were to apply rational basis scrutiny, there is evidence of animus behind the Policy. Specifically, the Policy’s narrow definition of “sex” expressly excludes *all* transgender individuals from using facilities that correspond with their gender identity. Those in support of the Policy also spoke generally, regarding transgenderism as “delusional thinking,” “biblically [in]correct,” philosophical concerns, a general and prejudicial misunderstanding of what transgenderism is, and, like the board, supporters did not present any evidence of prior incident within the district.¹⁵⁰ The presence of animus supports a change of the Policy that would encourage discussion and awareness of gender identity. The animus seemingly derives from a misunderstanding of what gender identity is, and inclusion of such topics being discussed can become an effort to mitigate such animus and promote further the safety and well-being of students and transgender individuals within the district. The main counterargument defending the Policy would likely be that parental disclosure can help address the alarming statistics regarding transgender students’ mental health and well-being. However, the Policy suggests that the district should not be involved at all, prohibiting many discussions and spaces that could promote inclusivity and may further mitigate those statistics. Ultimately, KISD’s arguments would likely be insufficient to survive intermediate scrutiny and potentially rational basis due to findings of animus.

¹⁴⁹ August 28, 2023, Board Meeting, *supra* note 63.

¹⁵⁰ *Id.*

c. The Texas Education Code

The KISD Policy violates the provisions within the Policy itself, as well as the Texas Education Code. Although neither the KISD board nor the Policy’s supporters presented evidence of harm, the Policy’s opposers did. Many opposers, especially teachers and students, provided anecdotes of personal experiences and experiences of members of the LGBTQ+ community close to them that posed safety concerns, including physical and mental harm.¹⁵¹ Opposers also frequently quoted The Trevor Project, finding that 41% of LGBTQ+ youth “seriously considered attempting suicide in the past year,” with “transgender, nonbinary, and/or people of color report[ing] higher rates than their peers,” such as 60% feeling “discriminated against in the past year,” 15% “threatened with or subjected to conversion therapy,” and 56% unable to access mental healthcare.¹⁵²

Sociological studies support the opposers’ arguments against the Policy. Transgender people are “up to three times more likely to report or be diagnosed with a mental health disorder” compared to the general population,¹⁵³ and are nearly nine times more likely to attempt suicide compared to the general population.¹⁵⁴ According to the National Transgender Discrimination Survey, 97% of transgender people, when employed, reported mistreatment at work, or hid their gender identity to “avoid such treatment.”¹⁵⁵ Transgender people have also reported harassment in places such as schools (78%), including physical assault at schools (35%) and “public

¹⁵¹ *Id.*

¹⁵² *Data Makes a Difference – LGBTQ Data that Makes a Difference*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/research/>.

¹⁵³ Em. Med. Ass’n & GLMA: Health Professionals Advancing LGBTQ Equality, *Issue Brief: Transgender Individuals’ Access to Public Facilities* 2 (2018).

¹⁵⁴ Sandy E. James et al., Nat’l Ctr. For Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 114 (Dec. 2016).

¹⁵⁵ Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 552 (2016).

accommodation” (8%).¹⁵⁶ Regarding bathroom policies specifically, “more than 40% of transgender students fast, dehydrate, or find ways not to use the restroom” when forced to use a restroom that does not correspond to their gender identity.¹⁵⁷ In *Grimm*, the plaintiff expressed stigma¹⁵⁸ associated with needing to use a separate restroom, suffered recurring urinary tract infections, and was constantly late to class due to the distance between the restroom and classrooms¹⁵⁹. In Texas specifically, a study of LGBTQ+ students reported the following statistics¹⁶⁰:

- 40% of students reported hearing school staff making negative remarks about someone’s gender expression.
- 74% of students reported verbal harassment based on sexual orientation.
- 59% of students reported verbal harassment based on gender expression.
- Over 25% of students reported physical harassment based on gender or SOGI.
- 58% of students reported prevention from using their gender-affirming name or pronouns in school.

Based on the outweighing evidence of safety concerns by the opposers in contrast to the mere speculation and unprecedented fear of safety concerns of the supporters, the Policy violates Tex. Educ. Code § 28.004(a). Specifically, mental health concerns, including suicide, are expressly addressed in Tex. Educ. Code § 28.004(a)(2), and transgender individuals comprise a class of individuals that needs greater protection than the general population. The Policy’s Section 1.3

¹⁵⁶ *Id.* at 553.

¹⁵⁷ *Grimm*, 972 F.3d at 597 (citing Br. Of Amici Curiae the Nat’l PTA, GLSEN, Am. Sch. Counselor Ass’n, and Nat’l Assoc. of Sch. Psychologists in Support of Pl.-Appellee 5 (citing Joseph Kosciw et al., GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay Bisexual, Transgender, and Queer Youth in Our Nation’s Schools* 14 (2018))).

¹⁵⁸ Erik Frederickson, *supra* note 1, at 1189, (“[A]ntidiscrimination law has long shown a special concern for the harms that stereotype-entrenching state action inflicts on children” (citing *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494 (1954); *United States v. Windsor*, 570 U.S. 744, 772 (2013); *Obergefell v. Hodges*, 576 U.S. 644, 688 (2015))).

¹⁵⁹ *Grimm*, 972 F.3d at 598-600.

¹⁶⁰ *Free to Be Me: A Toolkit to Protect LGBTQIA+ Students’ Rights*, RESOURCES FOR TRANSGENDER YOUTH IN TEXAS, <https://www.txtranskids.org/toolkit/>.

limits the mental health care that students would have access to by excluding gender identity treatment, which also violates Tex. Educ. Code § 28.004(a)(2). This effectively contradicts the general provision to create a “safe and healthy school environment,”¹⁶¹ as transgender individuals in KISD are expressly excluded and put in a position that will inevitably cause substantial harm. Section 1.2 of the Policy explains that district staff should not engage in “social transitioning of students” in violation of Tex. Educ. Code § 33.005(b), a provision that encourages educational, personal, and social development of students.¹⁶²

While KISD might argue that the Policy provides for the safety and development of students, evidence suggests that repressing gender-affirming care does more harm than good.¹⁶³ In 2022, a survey conducted through The Trevor Project showed that 51% of transgender youth identified school as a gender-affirming, and thus a safe and comfortable, space compared to only 32% of transgender youth that identified home as affirming.¹⁶⁴ However, transgender youth in gender-affirming homes saw a 14% rate of attempted suicide in the past year, compared to 18% with only a gender-affirming school.¹⁶⁵ These statistics suggest that school is generally shown to be a more gender-affirming space, while gender-affirmation at home is more impactful. While this statistic may provide some support to enacting the Policy, the other statistics showing harms that transgender students face in schools also presents concerns. The tension between these two statistics is essentially each side’s best argument in disclosing transgender students’ gender identity or request for pronouns to their parents via KISD’s Policy under Section 1.6.

¹⁶¹ Tex. Educ. Code § 28.004(a)(2)(H).

¹⁶² Erik Frederickson, *supra* note 1, at 1159 (“LGBT persons transgress sex-specific role expectations, undermining assumptions not just about each sex’s complementary sexual roles but also about their roles in society” (citation omitted)).

¹⁶³ *See Id.* at 1202, (explaining the state withholding gender-affirming care is more “long-term” than any effects of gender-affirming care, including the administration of puberty blockers).

¹⁶⁴ 2022 National Survey on LGBTQ Youth Mental Health, THE TREVOR PROJECT, <https://www.thetrevorproject.org/survey-2022/>.

¹⁶⁵ *Id.*

d. The Right to Privacy

While students have a right to privacy and parents have a right to their child's upbringing, Section 1.6 likely violates the students' rights. There is, however, difficulty in determining an appropriate remedy to balance those concerns in the most efficient and beneficial way for the students. Section 1.6 under KISD's Policy is the cause of such tension, specifically because the Policy would disregard a student's request to keep their gender identity private from their parents by mandating staff to disclose such information to the parents regardless.¹⁶⁶ At the same time, Section 1.6 forces privacy upon students by prohibiting staff from questioning a student's preferred pronouns, which has an effect of keeping a student's gender identity "in the closet" unless they are comfortable with parental disclosure.¹⁶⁷

Students as individuals have "the right to explore, determine, and establish their gender identity without governmental limit," including access to mental health treatment without parental consent.¹⁶⁸ On the other hand, parents are granted "the right to guide their child's upbringing free from governmental interference."¹⁶⁹ The parental right, similar to other curriculum cases within education doctrine, does not give parents ultimate authority "to dictate the curriculum or control how educational institutions address gender identity," but rather the "right to decide whether to send their child to a specific school."¹⁷⁰ Furthermore, students presenting as their identified gender at school presents a question of whether that deserves a right of "privacy," unlike other privacy doctrine under the Fourteenth Amendment.¹⁷¹

¹⁶⁶ Policy Code FA, *supra* note 66.

¹⁶⁷ *Id.*

¹⁶⁸ Stephen McLoughlin, *Toxic Privacy: How the Right to Privacy Within the Transgender Student Parental Notification Debate Threatens the Safety of Students and Compromises the Rights of Parents*, 15 DREXEL L. REV. 327, 345-47 (2023) (citations omitted).

¹⁶⁹ *Id.* at 349.

¹⁷⁰ *Id.* at 350-51 (citations omitted).

¹⁷¹ See e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding that the state did not have a legitimate state interest to "justify its intrusion into the personal and private life of the individual"); *Griswold v. Connecticut*, 381

The American Civil Liberties Union (“ACLU”) issued a sample letter for students and parents to address the issue of privacy on August 26, 2020.¹⁷² The letter explains that SOGI are both considered “private” information,¹⁷³ and that disclosure of such information may violate sex discrimination law¹⁷⁴. The ACLU also provided support that a student’s presenting of their gender identity in school does not diminish the student’s right to keep such information private.¹⁷⁵ This addresses President Perez’s assertion that the school should not “conceal what everybody knows”—a student being “out” at school does not automatically mean that the student’s identity can be disclosed to parents without infringing the students’ privacy rights. Furthermore, the Family Educational Rights and Privacy Act (“FERPA”) “protects students against disclosure of personally identifiable information.”¹⁷⁶ In defining “personally identifiable information,” the National Association of Secondary School Principals “has recognized that students’ ‘transgender status, legal name or sex assigned at birth is confidential medical information and considered ‘personally identifiable information’ under’ FERPA,” suggesting that disclosure could violate the school’s FERPA obligations and/or the student’s constitutional privacy protections.¹⁷⁷

Although the ACLU provides a strong argument, there is a concern regarding statistics and safety involving disclosure, or refraining from disclosure, of such information in determining what would be in the students’ best interests. In his article, Stephen McLoughlin proposed a solution to

U.S. 479, 485 (1965) (holding that the Fourteenth Amendment protected the right to privacy with regards to the relation of marriage and physical space of the marital bedroom).

¹⁷² Letter, *Open Letter to Schools About LGBTQ Student Privacy*, ACLU (Aug. 26, 2020), <https://www.aclu.org/documents/open-letter-schools-about-lgbtq-student-privacy/>.

¹⁷³ See *Whalen v. Roe*, 429 U.S. 589, 599-600 (finding that individuals have a constitutional right to control the nature and extent of highly personal information released about them); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (holding that transgender status is “excruciatingly private and intimate”).

¹⁷⁴ Letter, *supra* note 172 (citing *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016) (holding that disclosure of an employee’s transgender status via email established prima facie evidence under Title VII for harassment or a hostile work environment).

¹⁷⁵ *Id.* (citing *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005)).

¹⁷⁶ Letter, *supra* note 172 (citing 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00, *et seq.*).

¹⁷⁷ *Id.* (citing NASSP, *Position Statement on Transgender Students* (2016), <https://www.nassp.org/top-issues-in-education/position-statements/transgender-students/>).

this tension in what he calls the Parental Consultation/Student Control Process (the “Process”).¹⁷⁸ The Process involves: (1) an initial intake meeting where the educational institution would provide staff such as counselors to discuss with the student their gender identity; (2) a disclosure meeting where students, parents, and a professional can meet, with the professional mediating, to ensure that the parent gets involved while the professional educates them on such matters in a safe space for the student; and (3) a gender identity support plan created by the educational institution to determine how the student’s gender identity is addressed within the schools, and any additional resources and support for the student based on the meetings and the student’s progress.¹⁷⁹ McLoughlin proposes this plan should be amended into Title IX.¹⁸⁰ The Process, if implemented, would address several issues discussed in this paper: privacy for students, involvement for parents, awareness and education on gender identity, and most importantly, resources and support for students who are disparately marginalized.

Based on the ACLU’s notice on FERPA and developing case law regarding privacy, KISD’s Policy under Section 1.6 violates both FERPA and the students’ constitutional right to privacy. The likelihood of harm towards transgender individuals is exacerbated by Section 1.3, which provides that districts would not allow staff or employ experts to diagnose or treat gender dysphoria.¹⁸¹ It is an unfair assumption that forcing school staff to disclose a student’s gender identity to their parents would result in harm to the student. However, because there is potential for substantial harm, including a higher risk of mental health issues, attempted suicide, physical and mental abuse, and possible homelessness, it is also unfair to assume the opposite.

¹⁷⁸ Stephen McLoughlin, *supra* note 168, at 387.

¹⁷⁹ *Id.* at 387-90.

¹⁸⁰ *Id.* at 386.

¹⁸¹ Policy Code FA, *supra* note 66.

Regarding the Tex. Educ. Code and KISD's Policy provisions that provide for general safety and welfare, the privacy issue is more challenging to arrive at a conclusion. Adopting the Process would address both students' and parents' privacy concerns while ensuring that the students' general safety and welfare and promoted as best as possible under such circumstances. Although the Process should ultimately be implemented in Title IX, a more immediate solution would be for school districts to adopt a form of the Process into their school policies, and states, such as Texas, should incorporate a form of the Process into the Education Code via an amendment through the legislature.

V. Conclusion

The current wave of discriminatory policies against transgender students will inevitably continue to develop, while litigation fighting against those policies will follow. KISD's Policy violates several federal and state laws, including the Tex. Educ. Code, Title IX, FERPA, the students' right to privacy under Fourteenth Amendment, and the Equal Protection Clause. While such measures are often politicized, the focus and priority should be the students. Statistics consistently show the substantial harms that transgender students face, and are further supported through experiences shared by teachers, parents, and students themselves.

While several courts have acknowledged the potential harm to transgender students, there needs to be a viable solution to prevent such harm going forward. Even if SEAT wins its impending litigation against KISD, blanket provisions will not likely address the most significant issues. Thus, the Process should at least be adopted into school policies to enforce consistent protections against discrimination because of SOGI while simultaneously addressing parental involvement. This would mitigate the potential harm of disclosing a student's gender identity to a parent while also educating the parent on what gender identity is. While the parent will maintain the right to raise

their child, each parent can be better prepared to address complex issues with guidance and support from the school. Likewise, the students will have their privacy rights and gender identities respected. Most importantly, and what all parties and persons involved would likely agree to, school policies should ensure that *all* students have a safe and productive environment when they go to school. Children not only deserve it—they need it.