aalrr Atkinson, Andelson Loya, Ruud & Romo
A Professional Law Corporation

Transgender Student Rights: A Review and Examination of Recent Cases

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PRESENTED BY:
Anthony M. Ramos, Partner

Cerritos • Fresno • Irvine • Marin • Pasadena • Pleasanton • Riverside • Sacramento • San Diego

AGENDA

- General Concepts
- Transgender Students
- Boardroom and Courtroom Battles
- Questions/Discussion

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Legal Terms

Definitions

1) Gender means sex, and includes a person's gender identity and gender expression (Cal. Educ. Code § 210.7)

2) Gender Expression means a person's gender–related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth (Cal. Educ. Code § 210.7)

3) Gender identity refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth (May 2016 DCL)

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Legal Terms

Definitions

4) Transgender describes those individuals whose gender identity is different from the sex they were assigned at birth. (May 2016 DCL)

5) Gender transition refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. (May 2016 DCL)

6) Sex assigned at birth refers to sex designation recorded on birth certificate. (May 2016 DCL)

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California Law: Transgender Students

Cal. Educ. Code section 220:

"No person shall be subjected to discrimination on the basis of disability, gender, **gender identity**, gender expression, nationality, race or ethnicity, religion, sexual orientation . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state financial aid."

Cal. Educ. Code section 221.5(f):

"A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities **consistent with his/her gender identity**, irrespective of the gender listed on the pupil's records."

Effective 1/1/2014

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Concern: People who are not truly transgender will abuse the law to gain access to facilities

California Department of Education guidance…

School districts must accept a student's assertion of their gender identity when:

1) the student expresses that identity at school or
2) there is other evidence that this is a sincerely held part of the student's core identity.

Examples include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.

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Transgender Confirmation

California Department of Education guidance…

If a student meets one of the examples, **school districts may not question** the student's **assertion of their gender identity except** in the rare circumstance **where school personnel have a credible basis for believing that the student is making that assertion for some improper purpose.**

The fact that a student may express or present their gender identity in different ways in different contexts does not, by itself, undermine a student's assertion of their gender identity.

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Transgender Confirmation

California Department of Education guidance…

A school cannot require a student to provide any particular type of diagnosis, proof of medical treatment, or meet an age requirement as a condition to receiving the protections afforded under California's antidiscrimination statutes. Similarly, there is no threshold step for social transition that any student must meet in order to have his or her gender identity recognized and respected by a school.

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What to do if presented with Transgender Student?

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ACCOMMODATING TRANSGENDER STUDENTS

- When a student requests the District to implement measures to reasonably accommodate the student's **consistently asserted gender identity**, we recommend the District engage the student and his/her parents, if appropriate, in an **interactive process** in order to identify and address potential issues.

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USING THE INTERACTIVE PROCESS

- Interactive Process: The interactive process requires time in order to gather information from the student and to develop a plan to help implement a smooth transition.
- Topics for Discussion:
  - Preferred Name/Pronouns
  - Privacy Interests of Student and Others
  - "Need to Know" People
  - Bathroom/Locker Room Usage
  - Safe People/Potential Bullies
  - Trainings/Assemblies
  - Athletic Participation
  - Student Records

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Privacy Issues to Consider

- Students have the responsibility to inform school authorities of their gender identity.
- Districts need to balance the privacy and safety of other students with a student's right to self-identify his or her gender and to take steps to ensure the student's assertion of gender identity is legitimate.
- All students have a right to keep their gender identity and assigned sex at birth private from others.
- The district should not disclose any of this information unless the student has authorized such disclosure or if the District is compelled by law.

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Gender Issues and Non-Supportive Parents (We will Return to this Topic Shortly)

- CDE FAQ's:
  - California Constitution - Minors enjoy a right to privacy under Article I, Section I of the California Constitution that is enforceable against private parties and government officials. The right to privacy encompasses the right to non-disclosure (autonomy privacy) as well as in the collection and dissemination of personal information such as medical records and gender identity (informational privacy).
  - "A student does not waive his or her right to privacy by selectively sharing this information with others."
- CDE Addresses Very Young Students:
  - "The student's age is not a factor. For example, children as early as age two are expressing a different gender identity."

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Competing Privacy Concerns

Students who are uncomfortable changing or using the bathroom with a transgender student can be given privacy options (separate facilities, private areas within locker rooms).

Communication is key: Notify parents of transgender policy.

Common Complaint: "I am told whenever my student watches a PG movie, but I did not know about the transgender policy"

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Gender Neutral Facilities

Cal. School Boards Assoc. Transgender Guidance…

- *Upon request*, districts should allow any student wanting privacy to use an alternate facility (e.g. restroom, locker room) not used or occupied by other students.
- *Upon request*, districts should allow a student to use the gender-specific facility consistent with gender identity.
- Districts cannot engage in any policy that singles out transgender students, even if the goal is to provide privacy. Requiring a transgender student to use separate facilities is not only a denial of equal access, it also may violate the student's right to privacy by disclosing the student's transgender status or causing others to question why the student is treated differently

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Gender Neutral Facilities

SB 760 (2023) – Requires all school districts, county offices of education, and charter schools to provide "at least one all-gender restroom" for pupil use.

- Compliance required by July 1, 2026
- Requires designated a staff member to "serve as a point of contact for implementation" of this requirement.

Districts are permitted to use an existing restroom to satisfy the requirements of SB 760.

Future modernization projects will be required to include all-gender restroom for exclusive use of pupils.

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CSBA Policies, Parental Notification Policies, Boardroom and Courtroom Battles

(Gina Ferazzi / Los Angeles Times)

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CSBA Policy 5145.3 – Nondiscrimination/Harassment

Addressing a Student's Transition Needs: The compliance officer shall arrange a meeting with the student and, if appropriate, the student's parents/guardians to identify and develop strategies for ensuring that the student's access to educational programs and activities is maintained. The meeting shall discuss the intersex, nonbinary, transgender, or gender-nonconforming student's rights and how those rights may affect and be affected by the rights of other students and shall address specific subjects related to the student's access to facilities and to academic or educational support programs, services, or activities, including, but not limited to, sports and other competitive endeavors.

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CDE FAQ #7 – Protecting Transgender Student Right to Privacy

Pursuant to the above protections, schools must consult with a transgender student to determine who can or will be informed of the student's transgender status, if anyone, including the student's family. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student's parents.

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Chino Valley USD Parental Notification Policy – BP 5020.1

Principal/designee, certificated staff, and school counselors, shall notify the parent(s)/guardian(s), in writing, within three days from the date any District employee, administrator, or certificated staff, becomes aware that a student is:

- Requesting to be identified or treated, as a gender (as defined in Education Code Section 210.7) other than the student's biological sex or gender listed on the student's birth certificate or any other official records…
- Accessing sex-segregated school programs and activities, including athletic teams and competitions, or using bathroom or changing facilities that do not align with the student's biological sex or gender listed on the birth certificate or other official records.
- Requesting to change any information contained in the student's official or unofficial records.

***Similar policies adopted in several additional school districts

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Attorney General Seeks Injunction to Block Implementation of Chino Parental Notification Policy

- On August 28, 2023, the Attorney General's Office filed a Complaint for Declaratory and Injunctive Relief against Chino Valley USD seeking:

"Declaratory and injunctive relief declaring Board Policy 5020.1's forced disclosure provisions unconstitutional according to the State Constitution and in violation of State law, and enjoining [the District] from implementing Policy 5020.1's forced disclosure provisions."

- Attorney General asserts Policy 5020.1 violates:
  - California Constitution Article I, Section 7 "by subjecting transgender and gender nonconforming students…to expressly discriminatory treatment."
  - Education Code section 200 because "Policy 5020.1's forced disclosure provisions discriminate against transgender and gender nonconforming students on the basis of their gender identity and expression by singling them out for unfavorable treatment."
  - Government Code 11135 by discriminating against transgender students in State funded programs
  - California Constitution Article I, Section 1, by "infringing on the privacy interests of transgender and gender nonconforming students."

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Attorney General Seeks Injunction to Block Implementation of Chino Parental Notification Policy

- Judge granted temporary restraining order on September 6, 2023.
- During hearing, the Judge said, "This is round one of a case that is ultimately going to need Legislative guidance to help the court."
- The Judge granted the Temporary Restraining Order stating that he understood,

"[T]here there may be many loving and caring parents that don't care one way or the other as long as their students are healthy, happy, and doing well in school. But that aside, unfortunately, that's not going to be the reality. There will be parents that don't take kindly to those disclosers so out of an abundance of caution, I'm going to grant the TRO that the People have requested…"

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Attorney General Seeks Injunction to Block Implementation of Chino Parental Notification Policy

- On October 19, 2023, the Judge granted a preliminary injunction blocking the portions of Chino Valley Policy 5020.1 that require parental notification when a student:
  - Requests to be identified or treated, as a gender (as defined in Education Code Section 210.7) other than the student's biological sex or gender listed on the student's birth certificate or any other official records…
  - Requests to access sex-segregated school programs and activities, including athletic teams and competitions, or using bathroom or changing facilities that do not align with the student's biological sex or gender listed on the birth certificate or other official records.
- Judge did not block the portion of the policy that required parental notification when a student requests to change any information in the student's official or unofficial records.

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Federal Courts Weigh In on Right to Parental Notification and CSBA Policy 5145.3

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Regino v. Staley (Chico Unified School District)

- Parent filed a request for temporary restraining order in Federal District Court alleging her daughter:
  - Expressed feelings of gender dysphoria at school and did not want school staff to tell her mom.
  - Had a counselor who began "socially transitioning" her and telling teachers to call student by preferred name and pronoun.
  - Was actively discouraged from telling her mom about her transition by the counselor and instead advised to tell other family members before she told her mother.
  - Was encouraged to seek medical advice by counselor.
- Student ultimately disclosed information to grandmother who immediately informed the mother.
- Mother expressed multiple complaints about Policy 5145.3

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Regino v. Staley (Chico Unified School District)

- Mother asserted that Policy 5145.3 violated her constitutional rights and challenged the policy both facially and as applied. She claimed that Policy 5145.3 violated her substantive due process rights to (1) make medical decisions for her children and to (2) make important decisions in the lives of her children that go to the heart of parental decision making.
- The Court held that Plaintiff sought an expansion of her parental substantive due process parental rights that was not supported by any precedent.

"On the Regulation's face, it is undisputable that the decision to openly express a transgender identity through the use of a different name and pronouns is made by the student, not the District; and Plaintiff has failed to demonstrate that the Court has the authority under substantive due process to direct the District's response to such a decision on the grounds that her parental rights apply. Federal courts are "courts of limited jurisdiction that have not been vested with open-ended lawmaking powers," so in the absence of an established constitutional right, **the legislature is best suited to address Plaintiff's concerns.**"

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Regino v. Staley (Chico Unified School District)

"As Defendant notes, Plaintiff's FAC and opposition to this motion to dismiss is filled with policy arguments challenging the wisdom of the Regulation. While reasonable minds may certainly differ as to whether Plaintiff's policy preferences are advisable, this Court is not the venue for this political debate. The issue before this Court is not whether it is a good idea for school districts to notify parents of a minor's gender identity and receive consent before using alternative names and pronouns, but whether the United States Constitution mandates such parental authority. This Court holds that it does not."

- The Court ultimately dismissed the Complaint with prejudice.

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Mirabelli v. Olson (Escondido Unified School District)

- Two middle school teachers requested a preliminary injunction in federal court seeking to prohibit the school district and the state from imposing any discipline against them if they violated Policy 5145.3.
  - Teachers asserted they maintain sincerely held religious beliefs that communications should be accurate and not "calculated to deceive or mislead a student's parent."
  - Teachers "allege[d] a well-founded fear of adverse employment action" if they violate Policy 5145.3.
  - Teachers also asserted that parents have a constitutional right to make decisions about the care and upbringing of their children.
- Court granted the injunction prohibiting any adverse employment action - against these two teachers only - if they failed to comply with Policy 5145.3.

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Mirabelli v. Olson (Escondido Unified School District)

- Court found that:
  - "The government approach articulated in AR 5145.3 is dramatically inconsistent with respected medical opinions." The opinion submitted by the plaintiffs was unrebutted and given "substantial weight."
  - Youth tend to make "impetuous and ill-considered life decisions."

"In the end, EUSD's policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to federal constitutional and statutory law as it is medically unwise."

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Mirabelli v. Olson (Escondido Unified School District)

- District argued that State law requires Policy 5145.3. The Court disagreed.
- "Concerning the California's state constitutional right to privacy for minors and regulations like AR 5415.3, the state's highest court has not had occasion to issue a binding interpretation, and no state appellate court decisions have been identified."
  - "[O]ne element of a right to privacy is a reasonable expectation of privacy. A student who announces the desire to be publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun, can hardly be said to have a reasonable expectation of privacy or expect non-disclosure."
  - "A child's right to privacy may be superior to other, unrelated individuals. Nevertheless, California appellate courts recognize that parents have constitutional rights and legal responsibilities and that generally a parent's rights are superior to a right of privacy belonging to their child."

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Mirabelli v. Olson (Escondido Unified School District)

- **Court held that Plaintiffs demonstrated likely success on the merits.**
- "[Plaintiffs] are entitled to preliminary injunctive relief from what the defendants are requiring them to do here, which is to subjugate their sincerely-held religious beliefs that parents of schoolchildren have a God-ordained right to know of significant gender identity-related events. There are, no doubt, some teachers that have no disagreement with AR 5145.3. This injunction does no violence to their constitutional rights."
- "The school's policy is a trifecta of harm: it harms the child who needs parental guidance and possibly mental health intervention to determine if the incongruence is organic or whether it is the result of bullying, peer pressure, or a fleeting impulse. It harms the parents by depriving them of the long recognized Fourteenth Amendment right to care, guide, and make health care decisions for their children. And finally, it harms plaintiffs who are compelled to violate the parent's rights by forcing plaintiffs to conceal information they feel is critical for the welfare of their students -- violating plaintiffs' religious beliefs."

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Groff v. DeJoy and potential impacts on transgender students and school employees.

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Kluge v. Brownsburg Community School Corp.

Facts:

- Kluge was hired as a High school music teacher at Indiana high school.
- The school became aware that several transgender students would be enrolling.
- District brought in individuals to speak to teachers about how they could support and encourage transgender students.
- In response, Kluge and three other teachers prepared a letter expressing religious objectives to "transgenderism" and urging the school not to require teachers to refer to transgender students by names or pronouns that teachers "deemed inconsistent" with the student's sex recorded at birth.

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Kluge v. Brownsburg Community School Corp.

Facts:

- Kluge believed that gender dysphoria was a "type/manifestation of effeminancy, which is sinful." Kluge also believed it was sinful to "promote" gender dysphoria and that calling the students by their preferred names would be "encouraging them in sin."
- The District adopted a policy wherein teachers were allowed to refer to students by the names and genders recorded in student data system. Students could only change names and preferred pronouns in student data system if they first presented a letter from a parent and a letter from a healthcare provider.
- Transgender students were also allowed to use restrooms of their choice and dress consistent with their gender identity.

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Kluge v. Brownsburg Community School Corp.

Facts:

- In 2017-2018, Kluge had two transgender students enrolled in his class.
- Both students met the requirement to change names and gender markers in the student data system.
- Kluge received confirmation of this in an email that said, "feel free to use "he" and "[student's preferred name]" when communicating.
- Kluge interpreted "feel free to use" as permissive. Kluge told his principal that he would not call the transgender students by their names in student data system even though that was the school policy because of his religious objection.
- Kluge was presented with three options; (1) comply, (2) resign, or (3) be suspended pending termination. Kluge chose suspension.

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Kluge v. Brownsburg Community School Corp.

Facts:

- At a meeting a few days later, Kluge presented two requested accommodations:
  - Refer to all students by last name only, "like a gym coach."
  - That he not be responsible for handing out gender-specific orchestra uniforms to students.
- His rationale was that he would treat the students like an "orchestra team working toward a common goal."
- The District agreed to these accommodations.
- A month later, another teacher (the faculty advisor of the Equality Alliance Club) complained that Kluge refused to call transgender students by their names.

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Kluge v. Brownsburg Community School Corp.

Facts:

- The teacher's complaint noted that both faculty and students were confused about the accommodations and the District's policy that clarification was needed to emphasize that it was "not ok to disobey" the rule regarding student names and pronouns.
- Kluge's conduct became a frequent topic of conversation amongst some students which was shared with faculty.
- A non-LGBTQ student in Kluge's class reported that the last name policy made him very uncomfortable and described Kluge's practice as "very awkward" because students knew why Kluge switched to using last names and that it made the transgender students in the class stand out.
- Some students believe Kluge ignored transgender students who raised their hand.

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Kluge v. Brownsburg Community School Corp.

Facts:

- Kluge also occasionally misspoke and used first names and gender honorifics rather than last names only.
- The two transgender students found the last names practice insulting and disrespectful. They also said it made them feel isolated and targeted.
- The faculty advisor reported that the students showed "emotional distress."
- Multiple teachers also reported that Kluge's practice was causing harm to students.
- The principal continued receiving complaints about the practice throughout the fall semester but hoped the issue would resolve itself.
- Principal finally met with Kluge on December 13 due to a continuation of complaints and a disruption to the learning environment.

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Kluge v. Brownsburg Community School Corp.

Facts:

- Kluge was told that transgender students felt dehumanized, that faculty avoid him, and that parents complain about him.
- Kluge told the principal the he was being persecuted and treated unfairly and that he left the meeting "encouraged all the more to stay" and not resign.
- The principal informed him he was not being singled out because of his faith but because of how he was handling the accommodation.
- After winter break, District informed all teachers that "last name only" policies were no longer permitted.
- Kluge was informed that his accommodation was no longer reasonable because it "was detrimental to kids."

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Kluge v. Brownsburg Community School Corp.

Facts:

- Kluge responded that using preferred names forced him to "encourage" students "in a path that's going to lead to destruction, to hell…"
- Kluge was again provided the option to comply, resign, or be suspended pending termination.
- Kluge was told he could submit a resignation effective at the end of the school year. He believed he could withdraw the resignation if he wanted.
- On April 30, 2018, Kluge submitted his resignation letter to be processed on May 29, 2018.
- On May 25, 2018, Kluge withdrew his resignation letter. A few hours later, the District locked him out of its buildings.

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Kluge v. Brownsburg Community School Corp.

Legal Proceedings:

- Kluge sued the District under Title VII for religious discrimination, retaliation, and hostile work environment. He also brought claims under the First and Fourteenth Amendment. All claims were dismissed and/or disposed in summary judgment.
- Kluge only appealed the summary judgment ruling on his Title VII claims claiming the District forced him to resign without demonstrating the accommodation caused an undue hardship.

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Kluge v. Brownsburg Community School Corp.

Court of Appeals:

- On appeal, the school district asserted that Kluge's accommodation created undue hardship by:
  - Frustrating the district's efforts to educate all students because the accommodation negatively impacted students and the learning environment for transgender students and other students as well.
  - Exposing the district to the risk of Title IX litigation brought by transgender students who claim sex-based discrimination based upon a theory of sex-stereotypying.
- Much, if not all, of the evidence submitted by the district in summary judgment was undisputed.

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Kluge v. Brownsburg Community School Corp.

Court of Appeals:

- The 7TH Circuity ruled in favor of the school district.
  - District presented "uncontradicted evidence" that Kluge's last name practice stigmatized transgender students and caused them demonstrable emotional harm.
  - Kluge's practice made his classroom, "tense, awkward, and uncomfortable."
  - His practice also disrupted other classrooms.

  "Allowing Kluge to continue in the practice thus placed an undue hardship on Brownsburg's mission to educate all of its students, and its desire to treat all students with respect and affirmation for their identity in the service of that mission."
- The Court declined to rule on the Title IX liability risk.

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Kluge v. Brownsburg Community School Corp.

Court of Appeals:

"Brownsburg has demonstrated as a matter of law that the requested accommodation worked an undue burden on the school's educational mission by harming transgender students and negatively impacting the learning environment for transgender students, for other students in Kluge's classes and in the school generally, and for faculty. Title VII does not require that employers accommodate religious practices that work an undue hardship on the conduct of the employer's business; that sometimes means that a religious employee's practice cannot be accommodated."

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Kluge v. Brownsburg Community School Corp.

In July of 2023, after SCOTUS ruled in Groff v. DeJoy, the 7th Circuit ruled as follows:

"In light of the Supreme Court's clarification in Groff v. DeJoy, 143 S. Ct. 2279 (2023), of the standard to be applied in Title VII cases for religious accommodation, our opinion and judgment in this case are vacated and this case is remanded for the district court to apply the clarified standard to the religious accommodation claim in the first instance. We leave to the district court's discretion whether to reopen discovery on remand."

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What's Next?

- Regino v. Staley is being appealed.
- People v. Chino Valley USD heading for trial
- Kluge v. Brownsburg settlement conference held on September 26, 2023.

The Big Question…

Will the legislature do anything about this?

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Question & Answer Session

Thank You

For questions or comments, please contact:

Anthony M. Ramos
(805) 660-9864
Anthony.Ramos@aalrr.com

aalrr
Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation

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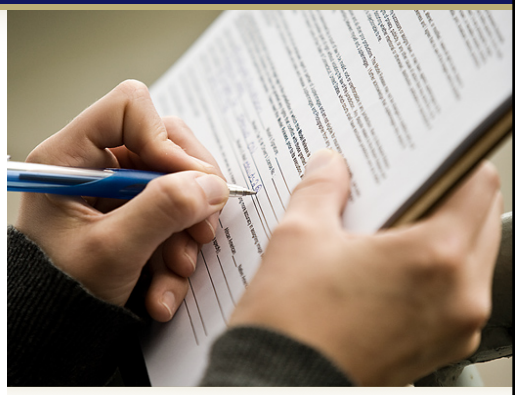

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