

TRANSGENDER CHILDREN IN EDUCATION LAW AND FAMILY LAW

Transgender children have been the center of a lot of political issues and media focus. These children and all of the issues that come with them have been the ever-increasing subject matter of family law cases recently. If you find yourself on a family law case involving a transgender child you may be faced with issues such as what name and gender marker the child and/or parties are permitted to use for the child, how the child dresses, haircuts, what kind of counseling is appropriate, gender affirming care, and more. You may also find yourself dealing with the child's school, the Texas Education Agency, the Texas Attorney General's Office, the Governor's Office, and the United States Office of Civil Rights.

It is hard work raising children, full stop. The strain of divorce proceedings, living in two households and the stress between parents is terribly difficult for a child to endure. Add to that the issue of a child being transgender, well it can almost be too much to handle. No matter the politics and personal beliefs, a family with a transgender child is working very hard to support their child, pay attention to siblings, keep everyone safe and figure out what it all means. As attorneys, it is important that we recognize that we will be representing clients with transgender children, and they will be well-represented if we familiarize ourselves with concerns they are likely to have.

Education Issues

On a day-to-day basis, school will be a high priority topic for these clients. At school, transgender children's use of restrooms and locker rooms, participation in team sports, adherence to school dress codes, bullying and harassment are all real-life issues confronting our clients' children. State and Federal agencies and organizations have been providing their guidance.

The U.S. Supreme Court's decision in *Bostock v. Clayton County* that Title VII of the Civil Rights Act, a different federal statute, protects gay and transgender individuals from workplace discrimination. In *Bostock*, the Court concluded that to discriminate on the basis of sexual orientation or gender identity "requires an employer to intentionally treat individual employees differently because of their sex." Like Title VII, Title IX prohibits discrimination, including harassment, based on a person's sex.

In response to *Bostock*, as of June of 2021, the Office of Civil Rights interpreted Title IX to include sexual orientation and gender identity in the application of Title IX. The Office of Civil Rights stated it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department."

The Texas Association of School Boards (TASB) is a statewide educational association that serves and represents local Texas school boards and develops model school board policies. TASB offers a model policy that: (1) prohibits discrimination, harassment, dating violence, and retaliation against students; and (2) outlines remedial steps to report, investigate, and respond to concerns. Since 2005, a version of this policy has been at code FFH(LOCAL) in Texas school districts' policy manuals. The TASB policy prohibits various forms of discrimination, including

discrimination on the basis of sex, gender, or “any other basis prohibited by law.” However, the policy does not speak directly or solely about the rights of transgender students.

The Texas Education Code does not have much to say about transgender issues. However, Section 25.0021 of the code requires that a student be identified by his or her legal surname. This leaves the door open for transgender children to go by their chosen first name in school. TASB states that the Texas Education Agency (TEA) has informally stated that it will accept the student gender that a school district reports to TEA, including a report that changes the student’s gender following a student and/or parent request to alter the record. The United States Department of Education has stated that school districts have the option of complying with the student’s requests to change his or her name and gender. It seems that school districts should use the student’s preferred name and gender on class rosters, id badges, awards, etc, unless they want be the subject of an investigation or suit for sex-based discrimination under Title IX, according to the Office of Civil Rights and Department Of Justice.

These are new developments, but our clients are likely going to be aware of them. Understanding the local school board policies and the Office of Civil Rights’ interpretations of IX will assist you in guiding your clients through these challenges.

Medical Issues

Parental rights which may become particularly important to our clients with a transgender child include the right to consent to the child's medical care involving invasive procedures, and psychiatric, and surgical treatment; the right to consent for the child to medical care not involving an invasive procedure; and the duty to support the child, including providing the child with medical care not involving an invasive procedure. The Family Code does not define “invasive procedure.” But, in *Brennan v. Cedeno*, No. 2-09-020-CV, 2010 WL 2089979 (Tex.App.—Fort Worth 2010, no pet.) (memo op.; 5-20-10), the court ruled that applying orthodontic braces is not an invasive procedure based on the definition of “invasive procedure” contained in Texas Health & Safety Code § 85.202(3). An over-simplified definition under 85.202(3) could be a surgical entry into tissues, cavities, or organs. Medical practitioners have been treating puberty blockers and hormone therapy as invasive procedures, presumably based on the fact that those treatments include injections.

It is helpful to understand that puberty blockers are simply that, medications that temporarily pause puberty. Alternatively, hormone therapy is used to produce the development of physical characteristics of the gender that the child identifies with and are often not reversible. A clear example of an invasive procedure is surgery. Gender reassignment surgery is not an issue in every case involving a transgender child, but our clients are definitely aware of this option and often have strong opinions about it. A specific right to consent to gender reassignment surgery may come up in your case, even if it is not a present desire of the child and/or the parents. It is important to know that the current vernacular to describe puberty blockers, hormone therapy and sex reassignment surgery is “gender affirming care.” Regardless of how a parent views these interventions, it is useful for you and your client to use this term with experts and the court to demonstrate your knowledge of the subject.

Child's Name

Cases involving a transgender child will most likely include the issue of what name the child uses. Although a court can change a child's name pursuant to a SAPCR, the issue that will most often come up is a parent's right to decide what name a child will be used when registering for school, medical appointments, and government identification. A child and/or parent may or may not want to change a name and gender marker on a birth certificate, with social security, school enrollment, for example. Those decisions may be ripe at the time of litigation, or may only be anticipated future issues. It is important to discuss these issues with your client to determine their wishes and to be prepared to argue this issue in mediation or trial. It is possible to convince a third party (school, medical provider, etc.) that a parent who has the right to make education decisions and/or legal decisions for a child has the right to make the decision about the child's name. However, it would be prudent to consider including in the requested relief for your client the right to decide what name and gender a child may be registered with in these various situations.

Child Abuse?

On February 18, 2022, The Attorney General of Texas Ken Paxton, issued a non-binding opinion stating that gender affirming care, including puberty blockers, can legally constitute child abuse. On February 22, 2022, Texas Governor Greg Abbott released a letter directing the Texas Department of Family and Protective Services (DFPS) to investigate families that provide gender-affirming care to their children. At the time of the release of this article, DFPS opened nine investigations of parents for providing gender-affirming care to their transgender children. One of those families sued the Governor, the DFPS Commissioner, and DFPS. Texas Supreme Court held that that neither Attorney General Ken Paxton nor Gov. Greg Abbott's public letters were non-binding and neither had any grounds to direct the agency's actions. The Court concluded "The Governor and the Attorney General were certainly well within their rights to state their legal and policy views on this topic, but DFPS was not compelled by law to follow them."

DFPS is free to investigate claims of abuse as they always have been. Whether or not DFPS will investigate future complaints on gender affirming care is yet to be seen. If your client is contemplating making such a complaint, or defending against such a complaint, you will have to consider the political environment of the court of continuing exclusive jurisdiction before advising your client. It has been helpful to the authors to consult with mental health and medical experts with expertise in transgender issues with children before forming legal strategy in our clients' cases.