October 12, 2020

To: All Texas Public School Board Members

Re: School boards voting on sexual orientation, gender identity, and gender expression policies, including TASB Local Policy Update 115

We are writing to you to be a resource for complex issues that you are being asked to implement under Texas Association of School Boards (TASB) Local Policy Update 115. TASB sent information to school boards this summer recommending changes in school policy that appear to be based on the recent U.S. Supreme Court ruling *Bostock v. Clayton County,* 140 S.Ct. 1731 (2020), that LGBT political advocates are using for radical changes in dress codes and other matters. You may also have been contacted by the American Civil Liberties Union (ACLU) about implementing a "gender neutral" dress code. However, the recommendations by both TASB and the ACLU are politically motivated and are based on flawed legal analysis that should be viewed with caution. In fact, the U.S. Department of Education recently announced their official position in a September 1, 2020 letter on the Supreme Court's ruling in *Bostock,* and specifically concluded that Title VII employment issues do not apply to these Title IX school student issues.

This letter examines in great detail the legal reasoning of the letter from the U.S. Department of Education, analyzes the letter from the ACLU[1], and explains why school boards should not adopt Local Policy Update 115 from the Texas Association of School Boards (TASB). You will learn that Local Policy Update 115 is problematic because:

1. The U.S. Department of Education concluded that the *Bostock* ruling does not apply to schools in all settings.

2. *Bostock* cannot be used to justify changes on policies in relation to same-sex institutions like restrooms, housing, separate toilets, showers, and sports teams.

3. The ACLU's application of *Bostock* to school dress codes directly conflicts with the Supreme Court's decision, and schools should not change their policies.

4. TASB has no legal authority over school boards, and school boards should not rely on their flawed suggestions in Local Policy Update 115.

[1] https://www.aclutx.org/sites/default/files/aclu_of_texas_letter_on_dress_and_grooming_codes_.pdf

1. **The U.S. Department of Education concluded that the *Bostock* ruling does not apply to schools in all settings.**

In the June 2020 term, the U.S. Supreme Court ruled in *Bostock v Clayton County* that employers cannot discriminate based on "sexual orientation" and "gender identity" in employment decisions. The Court reasoned that treating an employee differently because of the employee's sexual orientation or gender identity would necessarily involve consideration of the employee's "sex" which is prohibited under Title VII of the 1964 Civil Rights Law.

Both TASB and the ACLU claim that the Court's decision on Title VII would have sweeping implications on all law and policies. That is incorrect. *Bostock* was narrowly decided, and it does not apply to school students, which are governed by Title IX.[2]

In fact, the Supreme Court explicitly held that its decision only applies to employment law. Justice Gorsuch wrote that the Court firmly rejects the idea that the *Bostock* holding would have sweeping implications on all regulations and statutes regarding sex discrimination.

In addition to the Supreme Court's limitation on *Bostock's* impact outside of Title VII, the Department of Education's own analysis affirms that the text and purpose for Title VII and Title IX are different; thus, the Court's interpretation of Title VII does not govern the proper interpretation of Title IX. The history of both federal statutes explains the difference. By definition, Title VII exists to protect employees against discrimination based on certain specified characteristics: race, color, national origin, sex, and religion. In contrast Title IX is a narrow, targeted law focused on eradicating discrimination against females in education programs. It contains numerous carveouts that allow schools and colleges to maintain single sex institutions, dorm rooms, athletic teams, and other programs where the biological difference between males and females demand separation. The Department concluded that "Title IX differs from Title VII in important respects. Title IX has different operative text, is subject to different statutory exceptions, and is rooted in different Congressional power."[3]

2. ***Bostock* cannot be used to justify changes on policies in relation to same-sex institutions like restrooms, housing, separate toilets, showers, and sports teams.**

The Department of Education further concluded that *Bostock* does not apply to decisions of sports teams, student housing, and separate toilets, locker rooms and shower facilities. Indeed, the *Bostock* decision reiterated that other federal laws, which authorize sex-segregated bathrooms, locker rooms, and dress codes, were not before the court and that the Court could not prejudge any such question. 140 S.Ct. at 1753. *Bostock* is an employment case and schools should not use *Bostock* as their justification for radically overhauling student policies. Any policy changes to add special protections based on sexual orientation and gender identity for students or anyone would

[2] The *Bostock* decision involved three consolidated cases. One of these was *R.G. &G.R. Harris Funeral Homes v. EEOC* which involved biological male who desired to identify and dress as a woman while at work. However, the Court declined to specifically rule on how its decision would impact sex-specific dress codes – something that has long been permitted under Title VII.

[3] U.S. Dep't of Education, Office of Civil Rights, Revised Letter of Impending Enforcement Action at 34 Aug. 31, 2020), available at https://bit.ly/3mS3Db5.

be wrong not only because the Supreme Court is not forcing schools to make such policies, but also because these changes have not been approved in federal law or Texas state law. In fact, legislation that seeks to add sexual orientation and gender identity to state law have been considered and rejected every time by the Texas legislature, including as recent as 2019.

3. The ACLU's application of *Bostock* to school dress codes directly conflicts with the Supreme Court's decision, and schools should not change their policies.

The ACLU's letter ominously warns that the "school's dress and grooming code appears to contain provisions that were recently declared unconstitutional by a federal court in Texas." But the case cited by the ACLU did not involve a transgender student wanting to dress as what the student identifies, rather, it explored whether an African American boy can wear shoulder length or longer "locs" just as a girl of any race can also wear shoulder length (or longer) hair. Later in the letter, the ACLU begins to tangentially argue that, "*Bostock's* holding marks a dramatic shift in the context of employment discrimination, and it also applies to schools subject to Title IX."

As discussed in the Department of Education's letter and from our examination of Title IX's history, the ACLU's claim that *Bostock* applies to student-focused policies under Title IX is false. The ACLU is wrongly attempting to apply a Supreme Court case that expressly rejected its application to other federal laws –including Title IX. Even more concerning is the reasoning behind why schools should overhaul their dress code policies in order to provide special protections based on gender identity.

One explanation the ACLU gives is that TASB revised school policies to comply with federal law. TASB is currently advising school districts to write policies containing "sexual orientation" and "gender identity" special protections. But TASB is not rewriting policies based on education law. Rather, they are dishonestly using *Bostock* as a justification to impose their own radical progressive policy preferences on schools across the state. Simply put, there is no federal law requiring any school district to change their policies to include the terms "sexual orientation," "gender identity," or "gender expression."

In an addendum to its letter, the ACLU argues that "maybe" requiring students to ascribe to gender norms in their dress and grooming is considered discrimination. The ACLU points to a 7th Circuit case concerning male basketball players' hair length, and a court case concerning girls wearing "skorts" that was decided by a federal court in North Carolina. Yet neither of these cases is binding in Texas. And while the ACLU cites the more well-known case in Mississippi of a lesbian female student who wanted to wear a tuxedo to prom, the decision in that case was more determinant on a student's free speech rights at a voluntary event. Again, the case in Mississippi was a federal court case that is not binding precedent in Texas.

Next, the ACLU claims that there is sex discrimination even if a dress code equally burdens male and female students. Not only is this claim legally false[4], but it would invariably lead to

[4] Many courts have overwhelmingly arrived to this conclusion in *Bellisimo Westinghouse Elec. Corp.,* 764 F.2d 175 (3d Cir. 1985), where the court held that "dress and grooming requirements regarding workers are permissible under Title VII as long as they, like other rules, are enforced broadly, between men and women, even though the specific requirements may differ." *Id.* at 181. Even in cases where a student may argue that they are being stereotyped into

undermining other policies concerning sex-specific sports, restrooms, and private spaces. The claim of equal burden is what allows for sex- specific restroom facilities in work places and public spaces. Describing the "equal burden" analysis as discriminatory allows for a claim to be made that restrooms, sports teams, and dressing rooms that are sex separated should no longer exist. The U.S. Department of Education has stated that this analysis is wrong.

Lastly, the ACLU asks the school districts to make changes to their policies "in light of evolving law." Asking school districts to add divisive, litigious, and politically charged terms such as "gender identity" to their policies when there is no law that requires such changes is not sound legal reasoning. Such an approach is placing school districts in serious legal jeopardy. Therefore, the ACLU's application of *Bostock* to school dress code is incorrect and schools should not rely on it or change their policies and instead should contact the Texas Attorney's General office, the office that would be responsible for defending or choosing not to defend government school districts when lawsuits and legal questions arise on these matters.

School boards should consider the reasons for having dress codes in the first place. Just as an employer wants to present a particular image when determining a dress code for employees, schools likewise want to implement dress codes that lessen the distractions from learning. These determinations should not be second guessed by the ACLU or other groups who view schools as a vehicle to promote their agenda. Schools are supposed to educate and train young people for a life where they will have to abide by rules set by their employer.

4. TASB has no legal authority over school boards, and school boards should not rely on their flawed suggestions.

TASB's goal of "Local Policy Update 115" appears to be to change all school policies so that they align with where TASB thinks the Supreme Court "maybe" and will eventually rule.[5] Many school districts will be receiving or have received guidance from the TASB encouraging them to change all school policies to add language that would grant special protections for "sexual orientation", "gender identity", and "gender expression." This letter has already explored why the legal reasoning for the proposed changes would be wrong. The *Bostock* decision was about how to apply current federal law which protects the classification of "sex" in employment settings. It is our understanding that all school districts already have "sex" as a protected class for employment purposes. Therefore, it is not necessary to change their employment policies in order to follow *Bostock*. It is important to recognize that school districts are not required to follow TASB's recommendations because TASB is not a governmental organization and does not hold any legislative power. TASB's purpose is explained on its website. School districts should only rely on binding court precedent and not wishful predictions.

TASB describes itself as "a voluntary, nonprofit, statewide educational association that serves and represents local Texas school boards and was established in 1949 with two main goals in

dressing according to their biological sex and not their gender identity, the Supreme Court has held there is no independent cause for sex stereotyping. *Price Waterhouse v. Hopkins*, 490 U.S. 228(1989).

[5] Leander ISD TASB Policy Comparison https://v3.boardbook.org/Public/PublicItemDownload.aspx?ik=46787418

mind".[6] The fact that TASB is voluntary should suggest that a school board owes no obligation to TASB. School boards do not have to be a part of TASB, yet TASB has 1,025 Texas school districts in its membership.[7] Membership to TASB requires a membership fee and some legal advice requires a paid subscription.

Therefore, TASB's status as a non-governmental, voluntary, lobbying organization should signal to school districts that TASB's policy proposals should be taken as suggestions. School board members are called and elected to serve the parents and students in the school district while keeping in mind the taxpayers who help fund the district. If school districts are looking to implement policy, it would be more appropriate to look to the legislature, the Texas Education Agency, or the Texas Attorney General's office.

Conclusion:

School boards should refer to the letter provided by the U.S Department of Education for guidance on their obligations under Title IX and the *Bostock* decision. School boards should use caution when reviewing the ACLU's letter because the legal analysis has shortcomings in providing clear answers on changing dress code policies to include "sexual orientation" and "gender identity" and at times the analysis is clearly wrong. Lastly, school boards should consider the motives and credibility of TASB when making serious policy decisions. While TASB may appear to some to be a useful resource at times, no school board should feel obligated to adopt TASB's policy suggestions. **In fact, we have enclosed a one-page document entitled "Common Inaccuracies and Inconsistencies with TASB Local Policy Update 115" for your use at school board meetings.**

Please do not hesitate to contact our office if we can help in any way.

Sincerely,

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[6] https://www.tasb.org/about-tasb.aspx
[7] https://www.tasb.org/about-tasb.aspx

Common Inaccuracies and Inconsistencies with TASB Local Policy Update 115

- **Section DIA (LOCAL) Employee Welfare Freedom From Discrimination, Harassment, and Retaliation, p. 5 of pdf**
    - Issue: Define discrimination on the basis of sex as biological sex, gender identity, sexual orientation, and gender stereotypes. "Gender stereotypes" is not a protected class.
    - Reasoning: "gender stereotypes" was not discussed in *Bostock v. Clayton Cty. Georgia.* The U.S. Supreme Court held in *Price Waterhouse v. Hopkins* that there is no independent cause for sex stereotyping.
- **Section DIA (LOCAL) Freedom From Discrimination, Harassment, and Retaliation, p. 6 of pdf**
    - Issue: "sex-based harassment is now sexual harassment for purposes of Title IX"
    - Reasoning: This statement applies language and concept of *Bostock* to Title IX where it does not belong.
- **Section FFH (LOCAL) Student Welfare Freedom From Discrimination, Harassment, and Retaliation , p. 24 and p. 28 of pdf**
    - Issue: gender-based harassment is now handled under Title IX.
    - Reasoning: "Gender" is not a protected class. Gender was not discussed in *Bostock*, and has no protection in state or federal law.
    - The purpose of sexual harassment under Title IX is protect against dating violence, stop stalking, and create safer campuses for women and is not about comments related to gender perception or gender identity.
- **Explanatory Notes TASB Localized Policy Manual Update 115, paragraph labeled DIA Local, p. 53 of pdf.**
    - Issue: The explanation for adding the terms sexual orientation and gender identity is that *Bostock* held that discrimination on the basis of sex now includes discrimination on the basis of biological sex, gender identity, gender stereotypes, or any other grounds related to sex".
    - Reasoning: This interpretation of *Bostock* is wrong. *Bostock* did not create special protections for sexual orientation and gender identity; the case held that if you treat an employee differently on the basis on sexual orientation or gender identity, then you have treated that employee differently on the basis of sex as well.
    - Additionally, *Bostock* says nothing about biological sex or gender stereotypes.
- **Vantage Points, paragraph on Discrimination, Harassment, and Retaliation, p. 65 pf pdf**
    - Issue: The explanation for adding the terms sexual orientation and gender identity is that *Bostock* held that discrimination on the basis of sex now includes discrimination on the basis of "homosexuality" and "transgender status".
    - Reasoning: This interpretation of *Bostock* is wrong. *Bostock* did not create special protections for homosexuality or transgender status; the case held that if you treat an employee differently on the basis on sexual orientation or gender identity, then you have treated that employee differently on the basis of sex as well.
    - Gender stereotype was not mentioned in *Bostock* and the U.S. Supreme Court has held that gender stereotype is not an independent cause for discrimination.