



**Texas Bandmasters Association
Convention/Clinic July 20-22, 2023**

Legal Update for Music Educators

**CLINICIAN:
Holly Wardell**



Legal Update for Music Educators

Presented by:
Holly Boyd Wardell
July 20, 2023

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Holly Boyd Wardell



Holly is a shareholder in our Austin office. She is licensed to practice law in all Texas state courts; the United States District Courts for the Northern, Eastern, Southern, and Western Districts of Texas; the United States Court of Appeals for the Fifth Circuit; and the United States Supreme Court.

Holly is a member of the Austin Bar Association, National School Boards Association Council of School Attorneys; School Law, Litigation, Administrative and Public Law, and Labor and Employment Law sections of the Texas Bar, Texas Council of School Attorneys, and the Texas Association of Defense Counsel. Holly has also served on the State Bar's Disabilities Issues Committee and the Texas Education Agency's State Supervision Committee & Complaints Management System. Holly graduated cum laude from Texas Wesleyan University in 1992 and earned her Juris Doctorate from The University of Texas School of Law in 1996.

Holly has an impressive litigation background in whistleblower cases and civil rights cases including gender, race, and national origin, and disability discrimination claims. Her work on position statements, motions, and briefs has resulted in numerous victories for school districts at every level conceivable. Additionally, she regularly attends ARD and Section 504 Committee meetings and represents clients at due process hearings.

Holly's outgoing personality, enthusiasm, and thoroughness combine to make her a popular lecturer. She is a frequent guest speaker for school districts, regional education service centers, special education cooperatives, state organizations, and universities on a variety of topics related to school law, including special education, Section 504, education records, sexual harassment, student discipline, and search and seizure. Holly has published numerous articles for state and firm publications on special education and other issues.

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LEGAL UPDATE FOR MUSIC EDUCATORS

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HOT TOPICS



New Legislation


Gender Issues

First Amendment

Special Education

Intellectual Property Issues

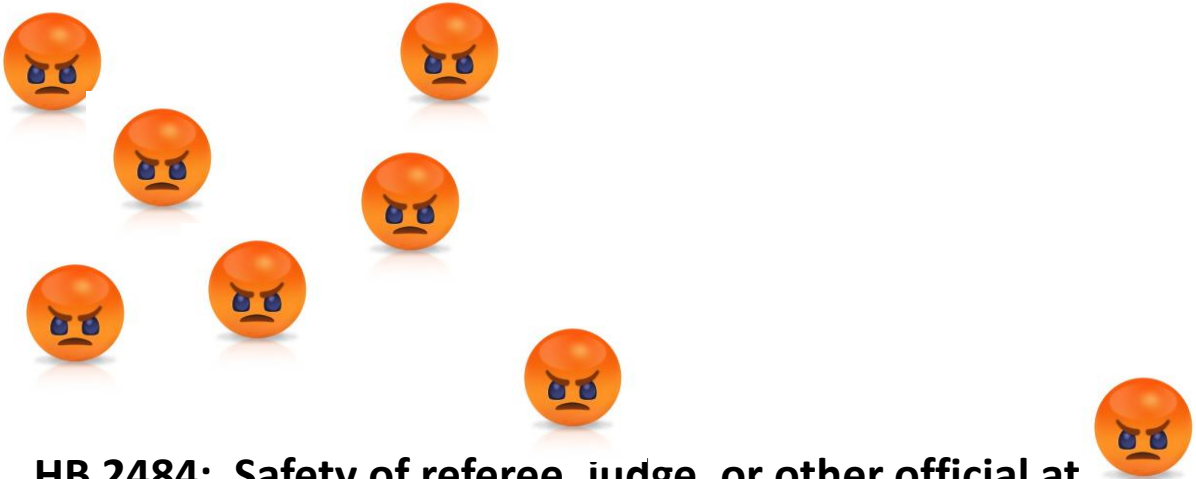
Personnel Issues





HB 3829

- Would have established a fine arts allotment for school funding purposes
- Left pending in committee 4/25/23



HB 2484: Safety of referee, judge, or other official at extracurricular activity and prohibiting certain conduct by a spectator related to those officials' safety.

A district shall prohibit a spectator of an extracurricular athletic activity or competition, including a parent/guardian of a participant, from attending any *future* activity sponsored or sanctioned by the district or UIL if:

- the spectator engages in conduct that intentionally, knowingly, or recklessly causes **bodily injury** to a person serving as referee, **judge, or other official** of an activity in retaliation for or as a result of the person's actions taken in performing the duties of a referee, judge, or other official of the activity; or
- The district reasonably **suspects that an incident may occur.**



HB 2484



HB 699

When assigning league classification to a public school based on student enrollment, UIL must use the same student enrollment calculation formula for a school that allows a non-enrolled student to participate in a league activity as the formula used to determine the student enrollment of a school that does not allow a non-enrolled student to participate in the league activity (i.e., not use the current **UIL 1.2 multiplier** for schools that allow **homeschool** students to participate).

S.B. 294 allows school personnel and school volunteers who are authorized and trained to administer **medication for respiratory distress**. By expanding who can administer the medication, it can help prevent a serious incident from occurring because it keeps school administration prepared during an unexpected respiratory distress episode, **including asthma**. S.B. 294 highlights the importance of administering respiratory distress medication, because it has the ability to save some students' lives.



Gender Issues: Title IX

- School musical roles – OCR investigating under Title IX
- Pronoun/Name Changing Directives

“Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual's sex.’”

Bostock v. Clayton County, Georgia,
140 S. Ct. 1731 (2020)

EEOC: TITLE VII SEX DISCRIMINATION

Employment decisions made on the basis of sexual orientation, transgender status, failure to conform to gender norms or stereotypes

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EMPLOYMENT DECISIONS

- Hiring
- Firing, furloughs, or reductions in force
- Promotion
- Demotions
- Discipline
- Training
- Work assignments
- Pay, overtime, or other compensation
- Fringe benefits
- Other terms, conditions, and privileges of employment.
- Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity

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BATHROOMS, LOCKER ROOMS, SHOWERS

The EEOC has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

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PRONOUNS AND NAMES

According to the EEOC, unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the EEOC explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

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STUDENTS

- January 21, 2021, President Biden
- Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- *Bostock's* reasoning will apply to other discrimination laws, including Title IX
- 100-day review by each federal agency

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STUDENTS

- June 15, 2022, President Biden
- Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals
- Secretary of Educ – develop sample policies for supporting students within 200 days



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Circuit Courts: Bathroom Cases

- Third, Fourth, Sixth, Seventh, Ninth, Eleventh Circuits have all ruled in favor of transgender students.
- Fifth Circuit has not yet ruled on this issue.

John M. Kluge v. Brownsburg Community School Corp., 548 F.Supp.3d. 814 (S.D. IN. 2021).

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Kluge v. Brownsburg Community School Corp.

- John Kluge was a teacher for BCSC
- Forced to resign after refusing to refer to transgender students by their preferred names due to his religious objections to affirming transgenderism.
- Pursuant to Title VII, Kluge asserted two claims against BCSC related to the end of his employment: (1) discrimination based on failure to accommodate his religious beliefs; and (2) retaliation.
- Mr. Kluge filed a Motion for Partial Summary Judgment, seeking judgment in his favor on his failure to accommodate claim. BCSC filed a Cross-Motion for Summary Judgment, seeking judgment in its favor on both claims.

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FACTUAL BACKGROUND - Teacher

- Hired by BCSC in August 2014 to serve as a Music and Orchestra Teacher at BHS.
- Employed in that capacity until the end of the 2017-2018 academic year.
- Kluge taught beginning, intermediate, and advanced orchestra, beginning music theory, and advanced placement music theory, and was the only teacher who taught any sections of those classes during his time at BHS, which is the only high school in BCSC. Mr. Kluge also assisted the middle school orchestra teacher in teaching classes at the middle school.

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FACTUAL BACKGROUND – Christian/Church Elder

- Kluge identifies as a Christian and is a member of Clearnote Church, which is part of the Evangel Presbytery.
- Church elder, meaning he is a member of the board of elders, which "exercise[s] spiritual oversight over the church" and is "part of the government of [the] church."
- Serves as head of the youth group ministries, head of the Owana Program (a discipleship program for children), and a worship group leader.
- Religious beliefs "are drawn from the Bible," and his "Christian faith governs the way he thinks about human nature, marriage, gender, sexuality, morality, politics, and social issues."

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FACTUAL BACKGROUND – Religious Beliefs

"Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." He also believes that "he cannot affirm as true ideas and concepts that he deems untrue and sinful." As a result of these principles, Mr. Kluge believes that "it is sinful to promote gender dysphoria." In addition, according to Mr. Kluge, transgenderism "is a boringly old sin that has been repented for thousands of years," and because being transgender is a sin, it is sinful for him to "encourage[] students in transgenderism."

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FACTUAL BACKGROUND – Faculty Mtg/Request

- 2016-17 school year, BHS staff members approached the H.S. Principal seeking direction about how to address transgender students.
- January 2017, faculty members gave a presentation to teachers on what it means to be transgender and how teachers can encourage and support transgender students.
- May 2017, Mr. Kluge and three other teachers requested meeting with the Principal, during which they presented a signed letter expressing their religious objections to transgenderism and other information supporting their position that BHS should not "promote transgenderism."
- The letter specifically asked that BCSC staff not be required to refer to transgender students using their preferred pronouns and that transgender students not be permitted to use the restrooms and locker rooms of their choice.

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FACTUAL BACKGROUND – Name Policy

- In response to competing concerns, BCSC implemented a policy ("the Name Policy"), which took effect in May 2017 and required all staff to address students by the name that appears in PowerSchool, a database that BCSC uses to record and store student information, including grades, attendance, and discipline.
- Transgender students could change their first names in PowerSchool if they presented a letter from a parent and a letter from a healthcare professional regarding the need for a name change.
- Through the same process, students could also change their gender marker and the pronouns used to refer to them.

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FACTUAL BACKGROUND – Restrooms, Dress Codes

- In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, including wearing school-related uniforms associated with the gender with which they identified.
- The three other teachers who initially expressed objections to "promot[ing] transgenderism" accepted the Name Policy, while Mr. Kluge did not.
- BCSC's practices regarding transgender students were based on BCSC's administrators' ultimate conclusion that "transgender students face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying" and that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being."

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FACTUAL BACKGROUND – Three Options

In July 2017, Mr. Kluge informed the Principal that he could not follow the Name Policy because he had a religious objection to referring to students using names and pronouns corresponding to the gender with which they identify, rather than the biological sex that they were assigned at birth. The Principal called a meeting with Mr. Kluge and the Superintendent to discuss the situation. At the meeting, the Principal gave Mr. Kluge three options: (1) comply with the Name Policy; (2) resign; or (3) be suspended pending termination. Mr. Kluge refused to either follow the Name Policy or resign, so he was suspended.

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FACTUAL BACKGROUND – Last Names Only Accom.

The following week, on July 31, 2017, another meeting was held between the Superintendent, Director of Human Resources, and Mr. Kluge. Mr. Kluge proposed that he be permitted to address all students by their last names only, similar to a sports coach ("the last names only accommodation"), and the administrators agreed.

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FACTUAL BACKGROUND – Last Names Only Accom.

Mr. Kluge signed a document that stated the following, including a handwritten notation initialed by the Director of HR:

You are directed to recognize and treat students in a manner using the identity indicated in PowerSchool. This directive is based on the status of a current court decision applicable to Indiana. We agree that John may use last names only to address students. You are also directed not to attempt to counsel or advise students on his/her lifestyle choices.

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FACTUAL BACKGROUND – Equity Alliance Club

- After Mr. Kluge began referring to students by last names, some students and faculty members complained that this was dehumanizing.
- Mr. Kluge became a frequent topic of the student Equality Alliance Club.
- At least one student claimed that sometimes, Mr. Kluge would use honorifics like “Mr.” or “Miss” when referring to cisgender students.

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FACTUAL BACKGROUND – Ending the Accommodation

- January 2018, the Principal asked Kluge to resign effective at the end of the year, because he was continuing to receive complaints from students and did not like the tense situation.
- February, Kluge was informed that after the 2017-18 school year, he would no longer be allowed the “last names only accommodation.” The Director of HR stated that this accommodation was not reasonable.
- March, Mr. Kluge was told her could either comply with the Name Policy, resign, or be terminated.

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FACTUAL BACKGROUND – Kluge Resigns

April 2018

I'm writing you to formally resign from my position as a teacher, effective at the end of the 2017-2018 school year when my contract is finished, i.e., early August 2018. I'm resigning my position because [BCSC] has directed its employees to call transgender students by a name and sex not matching their legal name and sex. BCSC has directed employees to call these students by a name that encourages the destructive lifestyle and psychological disorder known as gender dysphoria. BCSC has allowed me the accommodation of referring to students by last name only starting in August 2017 so I could maintain a "neutral" position on the issue. Per our conversation on 3/15/18, [BCSC] is no longer allowing this accommodation. BCSC will require me to refer to transgender students by their "preferred" name as well as by their "preferred" pronoun that does not match their legal name and sex. BCSC will require this beginning in the 2018-2019 school year. Because my Christian conscience does not allow me to call transgender students by their "preferred" name and pronoun, you have said I am required to send you a resignation letter by May 1, 2018 or I will be terminated at that time...

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LEGAL ISSUES – Title VII – Religious Accoms

1. Whether District was required to offer other accommodations
2. Whether Kluge’s religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet
3. Whether the last-names-only accommodation was an undue hardship

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LEGAL ISSUES – Religious Accoms

1. Whether District was required to offer other accommodations

Court: The court ruled that BCSC’s failure to propose an alternative accommodation, or to engage in further discussions regarding a potential accommodation, did not violate Title VII.

“Title VII merely requires an employer to ‘show, as a matter of law, that any and all accommodations would have imposed an undue hardship.’”

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LEGAL ISSUES – Sincerely Held

2. Whether Kluge's religious beliefs were sincerely held in light of his occasional use of honorifics for cisgender students and use of preferred names at an EOY honors banquet

Court: Perfection is not required. "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?"

The court also noted that the sincerity of an individual's religious belief is a question of fact that is generally not appropriate for a court to determine at summary judgment. The court assumed without deciding that Mr. Kluge's religious beliefs against referring to transgender students by their preferred names and pronouns were sincerely held.



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LEGAL ISSUES – Undue Hardship

3. Whether the last-names-only accommodation was an undue hardship

Court: Kluge established a prima facie case of discrimination based on failure to accommodate, so the burden shifted to BCSC to demonstrate that it could not provide a reasonable accommodation "without undue hardship on the conduct of [its] business."

In the Seventh Circuit, requiring an employer "to bear more than a de minimis cost" or incur more than a "slight burden" constitutes an undue hardship. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

"The relevant costs may include not only monetary costs but also the employer's burden in conducting its business." *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001).



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LEGAL ISSUES – Undue Hardship

3. Whether the last-names-only accommodation was an undue hardship

Court: BCBS argued that Kluge's failure to address transgender students by the names and pronouns reflected in PowerSchool created undue hardship related to interference with its mission to educate students. BCSC argued that the last names only arrangement created an undue hardship by placing it on "the razor's edge of liability" by exposing it to potential lawsuits by transgender students alleging discrimination. The court ruled that the undisputed evidence in this case demonstrated that the last names only accommodation resulted in undue hardship to BCSC as that term is defined by relevant authority in the Seventh Circuit.

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LEGAL ISSUES – Heckler's Veto

3. Whether the last-names-only accommodation was an undue hardship

Court: The court pointed to the declarations of two transgender students to show that Mr. Kluge's use of last names only made them feel targeted and uncomfortable. One student dreaded going to orchestra class and did not feel comfortable speaking to Kluge directly. Other students and teachers complained that Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable. One student quit orchestra entirely. "Certainly, this evidence shows that Mr. Kluge's use of the last names only accommodation burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students. BCSC was not required to allow an accommodation that unduly burdened its "business" in this manner."

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LEGAL ISSUES – Most Students Excelled

3. Whether the last-names-only accommodation was an undue hardship

Court: In an attempt to show that his interference with BCSC's business did not rise above the *de minimis* level, Kluge repeatedly emphasized that many of his orchestra students were successful during the 2017-2018 school year in that they participated in extracurricular activities and won awards for their musical performances. He also submitted declarations from students and another teacher stating that they did not perceive any problems in his classes resulting from the use of last names only. The court noted that these facts may well be true, and were accepted as such, but they were deemed neither dispositive of nor relevant to the undue hardship question.

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HOLDING

“BCSC is a public-school corporation and as such has an obligation to meet the needs of all of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only.” BCSC presented evidence that two specific students were affected by Kluge's conduct and that other students and teachers complained.

**This decision was affirmed by the 7th
Circuit in 2023.**

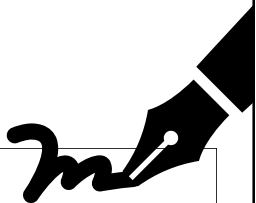
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What continues to be the number 1 area of student litigation for public schools?

Special Education



Parents, students can sue special educators and prevail

Some states are seeing an increase in civil cases brought against special education teachers and teachers' aides related to how they respond to the behavior of students with disabilities. For example, in March, parents filed a lawsuit in Illinois claiming that a teacher mentally and physically abused the students with special needs in her elementary classroom with the support and knowledge of the principal.

These lawsuits against educators are related to, but different from, state complaints or due process complaints filed against districts for not properly implementing a student's IEP or behavior intervention plan. For example, if a student with a behavioral intervention plan is removed from her classroom and placed in in-school suspension or isolated, the parent may file a due process complaint or a state complaint against the district for not properly implementing the BIP and failing to provide FAPE for the student.

Intellectual Property Issues

- Unauthorized use of artists' works
- AWF v. Goldsmith



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