AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**
Date: **June 2022**
From: **A. Eric Johnston**
RE: **VCAP Contested in Court**

Immediately after the Alabama Vulnerable Child compassion and Protection Act ("VCAP") was signed into law by Governor Kay Ivey, a lawsuit was filed by four transgender minors, their parents, a child psychologist, a pediatrician, and a minister. Later, the U.S. Justice Department moved to intervene on behalf of the United States as a plaintiff.

The Plaintiffs requested a preliminary injunction. A preliminary injunction has the intent of keeping things *status quo* until there can be a more complete evidentiary hearing on the merits. The court conducted a preliminary hearing with limited evidence and issued an order on May 13, 2022, preliminarily enjoining VCAP. He said he would likely have a hearing on the merits within six months. Until then, VCAP is not completely operational.

The order said that "(1) Parents have a fundamental right to direct the medical care of their children subject to accepted medical standards; (2) Discrimination based on gender-nonconformity equates to sex discrimination…." Based on this the order enjoined those provisions that prohibited the giving of transgender related medications, but did not enjoin (1) sex altering surgeries on minors, (2) prohibiting school officials from keeping gender-identity information secret from parents, and (3) prohibiting school officials from encouraging or compelling students to keep such information secret from their parents. The Plaintiffs did not request those provisions to be enjoined. This is a partial victory at this point.

While the court recognized that medications come with risk, he did not believe the transitioning medications rose to the standard of being "experimental" and therefore their use would not be enjoined. The Plaintiffs pointed out that twenty-two major medical associations endorsed the guidelines for treating gender dysphoria in minors. The judge was impressed by this and referred to these major medical associations three different times in his opinion. What he apparently fails to realize is virtually all major medical groups are supportive of the LBGTQ+ agenda. Other professional groups, such as the American Bar Association are supportive. The fact that these professional associations are politically correct should not have been a factor in the Judge's decision. Frankly, their opinions are not trustworthy.

The Plaintiffs called three medical doctors, while the state called one psychologist. There were other non-medical witnesses. The court relied heavily on the Plaintiffs' medical testimony, but did not find the state's testimony credible. The court's finding of credible medical evidence in support of treating gender dysphoria in minors established the evidentiary base. The court then turned to the legal arguments.

To receive a preliminary injunction, a party must show that (1) he or she has a substantial likelihood of success on the merits, (2) will suffer irreversible injury, (3) the threatened injury outweighs whatever damage the proposed injunction may cause the state, and (4) the injunction is not averse to the public interest. The most important factor is whether the court believes the Plaintiffs will likely succeed on the merits.

For the Plaintiffs to prove their case, they argued that the parent plaintiffs have a constitutional right to direct the medical care of their children under the Fourteenth Amendments due process clause. The minor plaintiffs argued VCAP discriminates against them based on their sex in violation of the Equal Protection Clause in the Fourteenth Amendment.

The court said "a parents right 'to make decisions concerning the care, custody, and control of their children' is one of 'the oldest of the fundamental liberty interests….'" Throughout the legislative process, proponents of VCAP did not argue against parent's rights to make important decisions for their children. We have argued for parents' rights more often than not on many issues involving education, religious rights, healthcare, *etcetera*. However, we argued in support of VCAP that the right is not limitless. The state has a duty under it's "police power" to regulate healthcare. There are scores of statutes and hundreds of regulations regulating health care, many concerning minors. Additionally, parents cannot by law give their children alcohol, tobacco, unlawful drugs, *etcetera.* The state has limited parent's rights in the abortion context.

Unfortunately, the state was not able to carry its burden to prove the experimental nature of gender dysphoria medicine. Without having a "compelling interest" achieved in the "least restrictive" way, the state cannot prevail on a claim to restrict a fundamental right. The court did not believe the state offered credible evidence that would restrict the parent's right to make a decision for their children to have sex altering procedures. Again, the court referred to the twenty-two medical associations and found they "endorsed transitioning medications as well–established, evidenced-based treatment for gender dysphoria in minors."

The second important decision by the court is based on the minor's sex discrimination claim. In 2020, SCOTUS Justice Neil Gorsuch opined joined by a majority of Justices in *Bostock* v *Clayton County*, 140 S. Ct. 731 (2020), that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Therefore, "sex" includes other aberrant definitions, in addition to the biological sex with which one is born. The case interpreted the federal Title VII statute which prohibits discrimination based on sex, among other things.

We addressed the problems with the *Bostock* opinion in our August 2020 Educational Update. We opined that opinion would clearly create problems in the future, which it now has. The *Bostock* opinion from Justice Gorsuch was so unusual that the Wall Street Journal stated in it's opinion page that at the time he wrote it he must have been inhabited by an alien spirit. The history of Title VII supported evidence that nothing other than biological sex is "sex" within the meaning of law. However, SCOTUS said otherwise and now we are reaping the produce of that errant opinion.

As a result, the VCAP Judge said, "the act therefore constitutes a sex-based classification for purposes of the Fourteenth Amendment." Sex based discrimination receives intermediate judicial scrutiny. To satisfy this standard, "sex-based" classification must substantially relate to an important governmental interest. The state argues the dysphoria treatments are experimental, though the court found that "the states puts on no evidence to show that the transitioning medications are 'experimental'." Consequently, the court did not believe protecting children from sex change procedures is an important governmental interest. Again, the court referenced twenty-two major medical associations as his guiding light.

Between now and the hearing on the merits, the state must prepare compelling medical evidence supporting VCAP. We believe that evidence exists. It was presented to the Alabama Legislature, who recognized and agreed with the need for VCAP. While we agree with the judge that parent's rights are fundamental, we do not believe the evidence supports the need for parents to be hoodwinked into questionable medical treatment. As one of our witnesses pointed out time and time again during legislative hearings, this is a new phenomenon and there is no data to support why all of the sudden there are so many "transitioning children."

A preliminary injunction forbodes difficulties for a defendant. The burden becomes heavier, but it is not insurmountable. The state must be prepared to put on a very detailed medical explanation for the uniqueness of this transitional medicine. The court must see this is a popular cultural issue, but not a true medical one. With that evidence there is not an appropriate basis for supporting a constitutional challenge.

The second real problem is the *Bostock* view of "sex". That opinion may be limited by subsequence SCOTUS opinions in various contexts. This trial court judge can rule the *Bostock* opinion applies only to Title VII. By doing so, he avoids the minor's sex discrimination claims. Legal arguments must be made to attempt to change his view of the law. We believe it is myopic, but his vision can be expanded. Otherwise, VCAP may need to go through the appellate courts with a final decision recognizing the difference between what is actual real physical biological sex, as opposed to whatever whim we choose to determine our sex.

We are grateful to the Attorney General's office for courageously defending VCAP. We are thankful for an Attorney General who understands the vicissitudes and the vulgarities of woke culture and its challenges. Those who supported VCAP during the legislative process are glad to support his office with as much technical and other information as possible. The ultimate burden must be carried by the state.