OSBA Summer Board Conference
Title IX – LGBT

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History of Federal Guidance on Transgender Issues

- OCR “Dear colleague” letters TIX
- Guidance documents
  - Disparate treatment “on the basis of sex”
  - “gender based harassment”
  - “sex or sex-stereotyping”
- Definitions, breadth of coverage
- Notice
  - Title VII prohibits employment discrimination on basis of sex
LGBT Discrimination

Minnesota district ‘gag policy’
- Staff not to comment on LGBT issues
- 7 LGBT suicides in 1 yr
- Pattern of indifference to known bullying and harassment;

Southern Poverty Law Center, OCR, DOJ, USDOE
- Letter
- Lawsuit
- Consent decree
- New Gloucester Case: OCR has authority to interpret rules; guidance
Transgender Students

Acadia SD case

- OCR defines terms
- OCR TIX, DOJ TIV
  - Gender ‘assigned at birth’
  - Identifies as...
  - Sex specific facilities

Guidance

- Treat the student at [identified gender] “in all respects”
- Access to gender specific facilities: concerns related to safety and privacy of all students
- Provide access to sex specific facilities, accommodate request for access to private facilities
- Confidentiality
LGBT

- Students/Families identifying at early ages
- No lawsuits by advocacy groups; but release of conservative physicians group with medical position

- New OCR Transgender guidance detailed and explicit; ODE guidance in alignment but has additional information
Appropriate Terminology

- Use appropriate terminology to demonstrate understanding of the current legal status for transgender individuals.
  - Gender based discrimination: a form of sex discrimination, refers to the differential treatment or harassment of a person based on the sex, gender identity, gender expression or nonconformity with gender stereotypes that results in the denial or limitation of education services, benefits, or opportunities.
Definitions: LGBT

The US Office of Civil Rights includes “LGBT” individuals under the protections of Title IX.

- **Lesbian**: homosexual woman
- **Gay**: exhibiting sexual desire or behavior directed toward a person or persons of one's own sex; homosexual
- **Bisexual**: personal sexually attracted to both males and females
- **Transgender**: A person whose gender identity does not conform to their biological gender, often referred to as the “biological sex assigned at birth.”
- **Queer**: “umbrella term” for non-heterosexuals or non-traditional gender identities, may also be associated with cultural or political identity; also Q – “questioning”
- **Intersex**: individuals who have some biological and/or physiological characteristics of each gender
US DOE/DOJ Terminology

- “Assigned sex” refers to the sex designation recorded on an infant’s birth certificate should such a record be provided at birth.

- “Gender identity” refers to an individual’s internal sense of gender. A person’s gender may be different from or the same as the person’s sex assigned at birth.

- “Transgender” describes those individuals whose gender identity is different from the sex they were assigned at birth. A “transgender male” is someone who identifies as male but was assigned the sex of female at birth; a “transgender female” is someone who identifies as female but was assigned the sex of male at birth.
“Gender transition” refers to the process in which transgender individual begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.
One’s gender identity is an innate characteristic of each individual’s personality that is generally declared by a child at an early age.¹

- “Cisgender” – A term used to describe people who, for the most part, identify with the sex they were assigned at birth.
- “Gender binary” – The assumption that there are only two genders (male and female), rather than more than two genders or gender fluidity.

¹ Gender Identity Development in Children, American Academy of Pediatrics (updated 11/21/15)
“Sexual orientation” – Means a person’s physical, romantic, emotional, aesthetic, or other form of attraction to others. Sexual orientation and gender identity are not the same. Although, the Oregon Legislature adopted a broader definition of “sexual orientation” for purposes of all Oregon statutes to “mean an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.”

ORS 174.100
Each public entity is required to have a Title IX Compliance Officer. That person should be trained and have resources to address all Title IX issues, including but not limited to harassment, discrimination, access to the educational environment, and reports of sexual violence. It is a key component to legal compliance to ensure your Title IX Compliance Officer has the training and resources necessary. The Officer should be up to date on the significant changes in the legal guidance over the last four years. Make sure that you have adequate notice for employees, students and families on how to contact the Title IX Compliance Officer.
How Do You Know?

- “Gender Identity” is one’s internal sense of gender, which may be different from assigned sex, and which is consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the student’s core identity.

Important note: There is no requirement that medical procedures or any physical steps need to be taken toward a physical/biological gender change. However, the student does need to demonstrate that the sense of gender is consistently and uniformly asserted, and the identity is sincere. This does allow for districts to address students who may not sincerely be identifying as transgender, but the district should be cautious in engaging in communication regarding the sincerity. Many students have ‘identified’ but do not feel comfortable in the ‘expression’
Core Element: Individual Measures

- Student request should be handled on a case-by-case basis, determining **individual measures** for each student.

- Develop based on communication with the district, student and parents regarding key factors such as:
  - requests by student
  - requests by parents
  - access to the educational environment
  - safety issues
  - privacy issues
  - confidentiality issues
  - records
Response

- Identify and base on actual issues, concerns
- Individualized approach
- Family communication
- Community communication
- Consider reasonable alternative arrangements
- Identify/train for in-school resources, identify contacts

Resources

- Consult attorney
- Review OCR Guidance
- Update policies
- ODE training
District Policies

- The district should take into consideration what it would typically do, by policy or practice, to ensure non-discriminatory practices with transgender students.

- Policies should be compliant based on the current legal guidance to ensure there is no discrimination based on sex.

- **Exceptions to policies may be required if the enforcement of the policy results in discriminatory treatment.**
District Policies (cont’d)

- **Policies**: All district policies should be updated to address current legal guidance on TIX and sexual violence issues. This includes lesbian, gay, bisexual and transgender students as part of the protected class under TIX, especially policies regarding harassment.

- US DOJ/DOE has guidance and examples for policies
Student Support

- Treat the student as the [identified gender] “in all respects:”
- School staff and contractors “will use pronouns and names consistent with a transgender student’s gender identity”
  - Example: Joanne is now identifying as a male, and the school should accommodate that identification. The school should refer to Joanne as “him” and allow him to be called by a different name.
Student Support (cont’d)

- Take an individualized approach. Communicate and problem solve with the family and student regarding their requests and concerns.
- Identify and base decisions on actual issues, concerns.
- Consider reasonable alternative arrangements.
- Community communication plan. Consider how questions or issues raised by students, families or community members will be addressed in cooperation with student and parents.
Student Support (cont’d)

- Support: The school, parents, and student should develop a team on behalf of the student.
- Access district staff as resources
- Develop a specific support plan for the student designed to provide safe and equitable access to all school and district facilities and activities, and to address any particular issues.
- Designate staff for the student to contact to use for support, especially to let the adult know if they are being treated inappropriately by staff or students, or feel harassed. They can also use the staff person to let them know when an issue has come up they need to problem solve.
Create a process for problem solving. Does the student handle low level issues with Title IX coordinator or counselor? Are parents involved, at what level, and how? Do other staff need to be involved, at what level, and how?

Title IX coordinator remains apprised of issues involving access to education, bullying, harassment, etc.
Student Records

- Confidentiality: School records that contain the name on the birth record (if different from student’s used name), the assigned gender should be kept confidential.
- School employees should be reminded that under FERPA they cannot disclose student information to any person who does not have a legitimate educational interest.
- Do not “out” the student or otherwise make the student a target.
Student Records (cont’d)

- The district is not obligated to, and should not, alter official legal documents to change a name or gender identification unless it has court documentation of an official name change.

- Most documents used in school are not “official” records. The student ID system documents are part of state system of accounting and are linked to SID, not name.

- Based on parent request, these school documents should generally be in conformance with the gender identity and preferred name of the student: roll, attendance, IEP documents, student work, etc.
ODE has indicated that if a district cannot change student records in the system, ODE has developed a process to do so.

In class: make best efforts to use preferred name and gender terms appropriate to the expressed gender; don’t overreact if there are unintentional errors.

Inform other adults working with student confidentiality of use of new name and gender.
Transgender students have the right to use the same sex facilities for their gender identity.

Individual measures still apply:

- Discuss student and parent requests, options, and issues, including safety issues
- Allow access to same sex facilities: do not discourage or prevent
Facilities: Bathrooms, Locker Rooms (cont’d)

Individual measures (cont’d):

- Address concerns related to safety and privacy of all students, parent concerns, and issues of religious rights of other students.
- “A school may make individual-user options available to all students who voluntarily seek additional privacy”
- Communication to families on transgender use of facilities: consider carefully
Facilities: Housing and Overnight Accommodations

- Title IX allows a school to provide separate housing on the basis of sex. But a school must allow transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student’s voluntary request for single-occupancy accommodations if it so chooses.

3 20 USC § 1686; 34 CFR § 106.32.
4 See, e.g., Resolution Agreement, In re Arcadia Unified Sch. Dist., CA, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70 (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/aracdiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students’ gender identity, but allowing students to request access to private facilities.)
Other Sex-Specific Activities and Rules

- Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (e.g., in yearbook photographs, at school dances, or at graduation ceremonies).

5 See 34 CFR §§ 106.31(a), 106.31(b)(4). See also, In re Downey Unified Sch. Dist., CA, supra n. 9; In re Cent. Piedmont Cmty. Coll., NC, supra n. 11.
Parent Disagreement Issues

- There will be parents who refuse to accept the student’s transgender identity.
- There is no legal guidance or case law which indicates what rights the parents has if they do not want their student to identify as transgender, or which rights the student has. At this time, each of those cases should be treated very cautiously.
Best informal guidance and information on student rights and parent rights when not in agreement:

- Student maintains the right to be addressed consistently with the transgender status, use of preferred name and gender. Indicate this is a school decision, the school maintains an appropriate educational environment. Disagreement between parents and student can be addressed at home.
- The parent maintains rights regarding official records. School officials should indicate that no official records can be changed without parent or adult student permission.
- Unofficial records: document parent requests on name/gender on records and review carefully before responding, check with counsel.
Dress Code

- The school should enforce its dress code uniformly, regardless of which clothing any student wears. Students who wear a dress, or athletic gear, or any item that appears to be specific to a gender are still held to the dress code. The District does not need to, and would be in violation of Title IX, if its policies or practices were applied differently to males or females, transgender or not.

- The conversation with the parents would be that the school policy is enforced, the District does not enforce a family dress code or choice, and that is a family discussion or decision.
Outside Resources

- School employees should not engage in providing outside resources or counseling, or referrals to advocacy groups to students or parents regarding their transgender status.

- Just as you should not or would not counsel a student who was questioning religion, or refer them to a church, or hand out pamphlets, this is not an area of expertise or right that schools have.

- There are many advocacy groups, and a wide spectrum of positions on these issues. In this era, families or students can easily identify resources on their own that meet their needs.
Athletics

- OSAA Regulated: See OSAA rules
  - Generally, must have some physical/chemical change toward gender
  - Have not been updated since 2013, OCR may disagree with position
- Schools are permitted “to operate or sponsor sex-segregated athletics teams when selection for such teams is abased upon competitive skill or when the activity involved is a contact sport.”
- May not have requirements which rely on broad generalizations or stereotypes based on sex
Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.  

A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.

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6 34 CFR § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

7 34 CFR § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school’s obligations regarding transgender athletics apply with equal force to the association.
Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.⁸

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⁸ The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled On the Team: Equal Opportunity for Transgender Student Athletes (2010) by Dr. Pat Griffin & Helen J. Carroll (On the Team), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. See NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing On the Team). The On the Team report noted that policies that may be appropriate at the college level may “be unfair and too complicated for [the high school] level of competition.” On the Team at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.
Federal Standards of Harassment

- Does not have to include intent to harm, be directed at a specific target, or involve repeated incidents
- Creates a “hostile environment” when the conduct is sufficiently severe pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school
Federal Standards of Harassment

- School districts must address harassment incidents about which it knows or reasonably should have known
  - May be a single incident of misconduct or
  - Signs sufficient to put the school on notice
Duties are based on knowledge of harassment, not on complaint or request for action.

Must take prompt, effective steps reasonably calculated to:

- End harassment
- Eliminate hostile environment and its effects
- Prevent recurrence
- Policies to protect from retaliation
- Don’t penalize target of harassment
Sexual Violence

- Sexual harassment includes “acts of sexual violence” and is a form of sex discrimination prohibited under TIX
  - Sexual violence: physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent
  - Includes rape, sexual assault, sexual battery, sexual abuse, and sexual coercion
  - Can be carried out by school employees, other students, or third parties.
OCR Obligations

- Knows or reasonably should know of possible sexual violence – “immediate and appropriate steps”
- **Investigate** or otherwise determine what occurred
- If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps:
  - reasonably calculated to end the sexual violence
  - eliminate the hostile environment
  - prevent its recurrence, and,
  - as appropriate, remedy
TIX Requirements

- Notice of non-discrimination rights

- TIX Coordinator designated:
  - Must have knowledge of all TIX complaints, reports and oversee responses
  - Identify/address patterns or systemic problems
  - Confidentiality issues

- Grievance procedures
  - Can be the same as other disciplinary procedures IF meets TIX standards
  - Investigation now required?
State Bullying, Harassment, Cyberbullying Requirements

- ORS 339.356
- Requires a school employee to report an act of harassment, intimidation, bullying, cyberbullying to identified official
- Requires school to have process to allow student or volunteer to anonymously report
- Must “encourage” reporting of “reliable information” by student or volunteer
- Districts must incorporate information on policies in trainings
Oregon State Law

Definitions of Bullying and Harassment
ORS 339.351

- Harassment, intimidation or bullying means any act that substantially interferes with a student’s educational benefits, opportunities or performance
- Cyberbullying is the use of any electronic device to harass, intimidate or bully
Definitions

- Location: takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop.

- More clear than federal law standard which examines “free speech,” which has focused on effect of school and not where it occurs.
Sexual Harassment  
ORS 342.704

- Prohibits sexual harassment, requires policy and posting of policy
- Sexual harassment of students includes:
  - A demand for sexual favors in exchange for benefits;
  - Unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with a student’s educational performance or that creates an intimidating, offensive or hostile educational environment
  - By staff or students
State Definitions for Harassment, Discrimination

- Protected class: Group of persons distinguished or perceived to be distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, familial status, source of income, or disability.

- Sexual orientation: an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth. ORS 174.100(6)
Prohibits any act “that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on age, disability, national origin, race, color, marital status, religion, sex or sexual orientation”
Sexual Harassment Policy
Requirements OAR 581-021-0038

- All staff and students
- States definition, quoting law
- Requires complaint investigation
- Notification of student and parents that initiated complaint after investigation
- Posting in all grade 6 through 12 schools
- No retaliation
- Encouraged to address?:
  - Name and position of employee to report to and how to contact

ODE will assist with training and technical assistance
References

- USDOJ’s Dear Colleague Letter on Transgender Students
  [Link](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf)

- USDOE’s Examples of Policies and Emerging Practices for Supporting Transgender Students
  [Link](http://www2.ed.gov/about/offices/list/oese/osh/eh/ev/emergingpractices.pdf)

- ODE’s Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students – May 6, 2016
  [Link](http://www.ode.state.or.us/policy/federal/civilrights/transgender-student-guidance-5-5-16.pdf)