

PACE TRANSGENDER HANDOUT

Questions concerning transgender individuals have arisen as part of a national issue over the past year: Bruce Jenner made a very public transition to become Caitlyn; a Multnomah County Court recognized “non-binary” as an official alternative to male or female; and so-called bathroom bills have been considered and passed in individual states. Schools have been caught in the middle, struggling to balance the rights of transgender individuals with the privacy interests of all students and staff — often without a lot of clear guidance.

While questions still remain, comprehensive guidance documents released by the National School Boards Association (NSBA), the Oregon Department of Education (ODE) and the U.S. Departments of Education and Justice (OSDOE and OSDODJ) have provided specific instruction to help support transgender students throughout the country. Additionally, the U.S. Equal Opportunity Employment Commission and the U.S. Occupational Safety and Health Administration have provided guidance for transgender employees. Numerous court cases continue to work their way through the system, helping to clarify the law along the way.

Oregon can look to two separate sets of law for guidance. First the federal law. Title IX prohibits discrimination “on the basis of sex.” Multiple federal agencies, including the Office of Civil Rights (OCR), USDOE and USDOJ, have interpreted this law to prohibit discrimination on the basis of gender identity, as evidenced in the federal guidance released in May 2016 and numerous previous OCR releases. The only federal court of appeals to weigh in on this issue is the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, West Virginia), which held that a school district’s policy that prohibited transgender students from using the restroom consistent with their gender identity violated Title IX. This case has been appealed to the U.S. Supreme Court, which recently granted a stay in the case. The stay allows the school district to enforce its policy until the Supreme Court chooses not to hear the case, or makes a final decision on it. Many states disagree with the federal guidance, prompting at least 22 of them to challenge the U.S. government in court. Oregon has not joined in any of these suits.

Regardless of the outcome related to Title IX, Oregon has state law that provides protection for transgender individuals. Oregon law prohibits discrimination “which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability” in “any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program...” ORS 659.850. Oregon law also defines sexual orientation as “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(7). Under Oregon law, a school cannot discriminate against an individual because of their gender identity. As the ODE May 2016 guidance states:

“It is recommended that school districts accept a student’s assertion of his/her/their own gender identity. A student who says she is a girl and wishes to be regarded that way throughout the school day should be respected and treated like any other girl. So too with a student who says he is a boy and wishes to be affirmed that way throughout the school day. Such a student should be respected and treated like any other boy.”

There certainly are additional questions to be answered as the law evolves. In the meantime, PACE staff developed this handout in August 2016 to help school administrators and board members to stay up-to-date on their responsibilities as they provide for the education and safety of all students.

DEFINITIONS

Assigned sex – Sex recorded at birth, usually on the basis of external genitalia.

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.

Gender expression - How people express their gender externally based on mannerisms, dress, etc. A person's gender expression/presentation may not always match their gender identity.

Gender identity - A person's internal sense of being male, female or some other gender, regardless of whether the individual's appearance, expression or behavior differs from that traditionally associated with the individual's sex assigned at birth.

Genderqueer – A person whose gender identity cannot be categorized as solely male or female. The term is not a synonym for transgender and should only be used if someone self-identifies as genderqueer.

Intersex – An umbrella term used for people born with reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit the typical definition of male or female.

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.

Transgender – An umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth.

Transgender female -This is a person whose assigned sex at birth is male but identifies and lives as a female.

Transgender male - This is a person whose assigned sex at birth is female but identifies and lives as a male.

Transition - The time when a person begins living as the gender with which they identify rather than the gender they were assigned at birth, which often includes changing one's first name and dressing and grooming differently. Transition may or may not also include medical and legal aspects, including taking hormones, having surgery, or changing identity documents (e.g. driver's license, Social Security record) to reflect one's gender identity.

Transsexual – An outmoded term that refers to a person who has permanently changed – or seeks to change – their bodies through medical interventions (including but not limited to hormones and/or surgeries). Unlike transgender, transsexual is not an umbrella or popular term.

All definitions from ODE's guidance:

[Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students](#), Oregon Department of Education, May 5, 2016

DOCUMENTATION. A transgender student or staff member does not need to provide any documentation regarding their name or gender. ODE has repeatedly said “There is no need for the student to prove their new gender. The student’s declaration of their gender is acceptable.”¹

PRONOUNS. Use the pronoun that corresponds with the individual’s gender identity. If a student asks that a certain pronoun be used, that request should be granted by both students and staff. Occasional, unintentional usage or the incorrect are understandable, but intentional usage of the incorrect pronoun is inappropriate and may be considered harassment. Some transgender individuals prefer a different pronoun (zhe) or the plural form (they).

NAMES. The school should use the name that the student requests, just like any student requesting the use of a nickname. This name should be used on school documents and efforts should be made to not reveal a student’s transgender status by using a student’s official name on documents.

RECORDS. ODE has provided guidance on changing names and gender on official documents. This information can be found in ODE’s May 2016 guidance. Additional questions regarding records should be directed to ODE.

CONFIDENTIALITY. A school must be careful not to release information related to a student’s or staff member’s transgender status. Some transgender individuals prefer to be open regarding their status, others keep it private; it is not the school’s place to make that decision for an individual. Employees that have a legitimate educational interest may be told.

BATHROOMS AND LOCKER ROOMS. Students and staff should be allowed to use the bathroom and locker room that corresponds with their gender identity. An alternative bathroom or changing facility (often a single-stall unisex bathroom) can be made available to any student or staff member who desires additional privacy, but a transgender individual should not be required to use the alternative bathroom. Schools should determine whether current bathroom and locker room conditions provide adequate privacy and safety for all students. Additional stalls, curtains and supervision may be added to ensure privacy and safety for all users.

SPORTS. OSAA has had guidelines in place for several years regarding transgender athletes. Transgender athletes are allowed to compete on the team that corresponds with their gender identity, but treatment is required in some situations.

For non-OSAA athletics (including middle school), districts should review their eligibility requirements and weigh their options as well as consult with legal counsel.

DRESS CODE. Generally, schools should not have separate male and female dress codes. To the extent that requirements apply differently, transgender students and staff should be subject to the standards consistent with their gender identities. This also applies to special events, such as school pictures, prom and graduation.

SEX-SEGREGATED CLASSES. Separating students by sex in classes is generally prohibited under Title IX, but in the instance where schools are separating by gender, students should be treated consistent with their gender identity.

OVERNIGHT TRAVEL. A transgender student who participates in overnight travel with the district should be treated according to their gender identity. This includes sleeping arrangements. School officials can meet with the student ahead of time and offer the student more private accommodations (such as a single-occupancy

¹ Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students, Issued May 5, 2016, p. 7.

room), but cannot require the student to use separate facilities. Schools should be careful to not to reveal a student's transgender status.

BULLYING AND HARASSMENT. Transgender students report a higher rate of bullying and harassment. Districts should follow their policies and procedures regarding bullying and harassment. See policies GBN/JBA, GBNA and JFCF. District officials must promptly investigate any claim or report of bullying or harassment.

RESOURCES.

[Dear Colleague Letter](#), U.S. Departments of Justice and Education, May 13, 2016, [Examples of Policies and Emerging Practices for Supporting Transgender Students](#)

[Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964](#), U.S. Equal Employment Opportunity Commission, accessed Aug. 3, 2016

[Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students](#), Oregon Department of Education, May 5, 2016

[Resources for Transgender and Gender-Nonconforming Students](#), Office for Civil Rights, accessed Aug. 3, 2016

[Transgender Frequently Asked Questions](#), Oregon School Boards Association, July 2016

[Transgender Students in Schools](#), National School Boards Association, April 2016

LEGAL REFERENCES

FEDERAL LAW

20 U.S. Code § 1681 (a) Prohibition Against Discrimination; Exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

OREGON LAW

ORS 659.850 Discrimination in education prohibited; rules. (1) As used in this section, "discrimination" means 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 race, color, religion, sex, sexual orientation, national origin, marital status, age or disability...

(2) A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.

ORS 174.100 (7) "Sexual orientation" means 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.

WHAT DO I DO IF...

A student attending my school requests access to the opposite bathroom?

Meet with the student and parents to discuss the student's transition and what supports the school has in place to help them. You can review any current procedures, offer alternative facilities and discuss what students should do if they have concerns or are harassed.

A parent does not support a student's transition?

Try to keep communications open and positive, and consult with legal counsel. You have the responsibility to keep the child safe, but the parents have the right to raise their child. These cases should be handled on a case-by-case basis depending on the situation and the age of the child.

A staff member is very public about his/her transition?

Support that staff member during and after their transition and provide training for other staff and possibly students. Information shared with students should always be age and situation appropriate. If something is appropriate for a cisgender staff member to discuss (name selection, relationships, familial status or medical issues), it would also be permissible for a transgender staff member to do the same.

A new student shows up and tells the office staff that s/he is transgender?

Treat that student consistent with his or her gender identity, just like any other student. This information should be kept confidential, except for staff members who have a legitimate educational interest. Follow the guidelines for records distributed by ODE and offer supports and resources as available and needed.

We don't currently have any transgender students?

Just because you may not have any transgender students or staff members that you know of does not mean that you shouldn't do anything. You may have transgender students or staff that you are unaware of, and you may have transgender community members who attend school events. Developing procedures, including prohibitions on bullying and harassment, ahead of time can be extremely helpful. Training students, staff and the community is also an important component that can lead to valuable conversations.

Non-transgender students and their parents oppose transgender use of common bathrooms and locker rooms, insisting that they have a right to privacy?

Privacy is a concern for all staff and students. If a district is able, providing an alternative facility (bathroom or locker room) to anyone, transgender or cisgender, is a good idea. The district can also look at its facilities and increase privacy within the current facilities. This may include curtains and replacing doors and locks on stalls.

We have a student who is gender fluid or gender queer?

There is little guidance regarding gender fluid and gender queer individuals. Just like other transgender students, the school should meet with the student and parents to discuss what concerns the student has and what supports the school can offer. This will often include offering an alternative bathroom and locker room facility and discussing names and pronouns. Any specific questions that come up should be referred to legal counsel.

I don't believe in this?

Oregon law prohibits discrimination against individuals on the basis of gender identity. Regardless of your personal beliefs, you are required to follow the law.

Staff members don't want to use the preferred pronouns?

Using preferred names and pronouns is not optional. This may include pronouns that are new (zir), while others may prefer the plural pronouns (they). Repeated and intentional failure to use the requested pronouns can be considered harassment and/or bullying and may have legal or disciplinary repercussions.