

Best Practices and Legal Considerations for Supporting LGBTQ2SIA+ Students

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COSA Equity Conference, September 2022

Overview

- We are CONNECTED! All of us, All the time, Always...NOW!
 - Who's are we?
- Why are we here
- Legal framework
- Group discussion on hot topics

Federal Law – *Grimm v. Gloucester Sch. Bd.*

- On June 8, 2021, the U.S. Supreme Court declined to hear *Grimm v. Gloucester County School Board*, the long-running case involving the right of transgender students to use the facilities aligned with their identified gender.
- This means that the Supreme Court let stand rulings by the Fourth Circuit and other circuits that held that laws requiring students to use bathrooms different than their identified gender violated Title IX and the Equal Protection Clause of the Constitution.

Federal Law – *Grimm v. Gloucester Sch. Bd.*

- The Fourth Circuit decision was based on the U.S. Supreme Court's 2020 ruling in *Bostock v. Clayton County*, which held that Title VII's prohibition on discrimination on the basis of sex in employment also prohibits discrimination on the basis of sexual orientation and gender identity.
- While *Bostock* applied to Title VII, which prohibits sex discrimination in employment, the reasoning equally applies to Title IX, which prohibits sex discrimination in education.

Federal Law – *Parents for Privacy v. Barr*

- This 2020 Ninth Circuit case involved parents challenging the Dallas School District policy allowing students to use the facilities that aligned with their identified gender.
- The Ninth Circuit held that there is no constitutional privacy right “to avoid all risk of intimate exposure to or by a transgender person.”
 - Students wishing to avoid this exposure could use single stall options.
- The court also held that parents do not have the right to determine the bathroom policies of a public school.

Federal Law – Title IX

“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.”

Federal Law – Biden Administration/OCR

- Significant support for LGBTQI+ student rights
 - Dear Educator Letter, June 23, 2021, affirming the applicability of Title IX protections to sexual orientation and gender identity.
<https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf>
 - Fact-Sheet on LGBTQI+ Harassment in Schools
<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>
 - Notice of Interpretation, Federal Register, June 22, 2021 applying *Bostock* reasoning to Title IX <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>

Oregon Law - ORS 659.850

- “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 659.850(2).

Oregon Law – ORS 659.850

- “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.” ORS 659.850(1).
- HB 3041 (2021) amended the law to specifically add “gender identity” and defines “gender identity” as “an individual’s gender-related identity, appearance, expression or behavior, regardless of whether the identity, appearance, expression or behavior differs from that associated with the gender assigned to the individual at birth.”

Oregon Law – OAR 581-021-0045

- In providing programs or services to students, a school district shall not, on a discriminatory basis as defined in subsection (1)(a) of this rule:
 - (a) Treat one person differently from another in determining whether such person satisfies any requirement of condition for the provision of such aid, benefit, or service;
 - (b) Provide different aid, benefits, or services; or provide aids, benefits, or services in a different manner;
 - (c) Deny any person such aid, benefit, or service;
 - (d) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
 - (e) Aid or perpetuate discrimination by joining or remaining a member of any agency or organization which discriminates in providing any aid, benefit, or service to students or employees;
 - (f) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

OAR 581-021-0045

Parental Rights

- “Once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished and they do not have a fundamental right generally to direct how a public school teaches their child.”
- “Due process does not give parents the right to interfere with a public school's operations because issues such as school discipline, the content of examinations, and dress code are issues of public education generally committed to the control of state and local authorities.”
- *Gunter v. N. Wasco Cty. Sch. Dist. Bd. of Educ.*, 2021 WL 6063672 (D. Or. Dec. 22, 2021)

ODE Resources

- June 2020 LGBTQ2SIA+ Student Success Plan

<https://www.oregon.gov/ode/students-and-family/equity/Documents/LGBTQ2SIA+%20Student%20Success%20Plan.pdf>

- 2016 Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students

<https://www.oregon.gov/ode/students-and-family/equity/civilrights/Documents/TransgenderStudentGuidance.pdf>

Success Plan - Youth Insights

- Youth Insight #1: Supportive educators are crucial for students to feel safe and included.
- Youth Insight #2: Curriculum, coursework, and afterschool activities are engaging when they are relevant to students' interests and lived experiences.
- Youth Insight #3: Access to gender-neutral restrooms (also known as all-user restrooms) is important for students to feel physically safe and included.
- Youth Insight #4: Students generally know how to report instances of bullying or harassment, but few trust that adults will respond with action if reports are made.
- Youth Insight #5: More mental health supports are needed.

Problems of Practice

- What is on your mind?

Practical Issue – Bathrooms/Locker Rooms

- Based on case law discussed above, a policy that denies students the right to use the facilities of their identified gender violates Title IX and likely Oregon law.
- It is best practice to provide options to students who are uncomfortable with this policy.
- Discussion

Practical Issue -- Pronouns

- There is a growing legal basis that refusal to use a person's preferred pronouns is discriminatory.
- ODE guidance (2016) supports the use of preferred pronouns.
- Parental objections should be considered on a case-by-case basis.
- A student request to not notify parents should be considered on a case-by-case basis.
 - Note that parents have FERPA rights to education records.
- Discussion

Practical Issue – Bullying and Safety

- Schools have a duty to respond to concerns about student safety and can face significant liability for failure to address safety issues.
- Students should be encouraged to report safety concerns immediately.
- Also note that OCR has determined that sexual harassment on the basis of sexual orientation or gender identity is prohibited under the new Title IX regulations regarding sexual harassment.
- Discussion

Practical Issue – Confidentiality

- Student requests to not disclose gender identity to parents are challenging and must be evaluated on a case-by-case basis.
- Consider age of student, safety concerns, likelihood that parents will find out.
- Again, parents have rights to education records under FERPA.
- Be very careful about “guaranteeing” to students that parents won’t be informed.
- Make decisions in conjunction with administrators and maintain documentation.
- Discussion

Practical Issue – OSAA

- “Once a transgender student has notified the student's school of their gender identity, the student shall be consistently treated as that gender for purposes of eligibility for athletics and activities, provided that if the student has tried out or participated in an activity, the student may not participate during that same season on a team of the other gender.”
- “Once a nonbinary or intersex student has notified the student’s school of their gender identity, the student shall be treated as either gender for purposes of eligibility for athletics and activities that are gender-segregated or gender-specific, provided that If the student has tried out or participated in athletics or an activity that is gender-specific or gender-segregated, the student may not participate during that same season on a team of the other gender.”
- OSAA: <https://www.osaa.org/docs/handbooks/GenderIdentityParticipationBP.pdf>

Practical Issue – Gender Fluid & Non-Binary Students

- Evolving issue regarding facility use, pronouns, and other supports.
- Discussion

Thank You

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