TRANSITIONING DISTRICTS:
UNDERSTANDING TRANSGENDER ISSUES IN OUR SCHOOLS
2017 NMSBA INSTITUTE
GENO ZAMORA, ESQ.
TONY F. ORTIZ, ESQ.
GABRIELA M. STEWART, ESQ.
TOPICS

• Non-Discrimination and the Courts
• U.S Department of Education – Office of Civil Rights
• Students, Facilities and Programs
• Terminology
IMPORTANT COURT DECISIONS

• Noted Discrimination Cases:
    • Ended racial segregation of students in schools
    • “[Education] is a principal instrument in awakening the child to cultural values, in preparing [the child] for later professional training, and in helping [the child] to adjust normally to [her/his] environment.”
    • “[Educational] opportunity ... is a right which must be available to all on equal terms.”
    • Ended language-based segregation in schools
    • “[English language deficiencies] do not justify the general and continuous segregation in separate schools of the children of Mexican ancestry from the rest of the elementary school population.”
  – Doe v. Regional School Unit 26 (Sup.Ct. Maine 2014)
    • Ended State of Maine transgender student segregated use of facilities
    • State Human Rights Act violation to treat a student differently based on transgender status
May 12, 2016 Dear Colleague Letter: Title IX prohibits “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status”

- Safe and non-discriminatory environment
- Use names and pronouns consistent with gender identity
- Access to sex-segregated activities and facilities (restrooms, classes, clubs, athletics, overnight accommodations)
- Privacy and educational records – FERPA protects disclosure of status
- Amendment/correction of Education Records

April 29, 2014 Q&A on Title IX and Sexual Violence

- Title IX prohibits sex discrimination based on gender identity and sexual orientation
- Context: bullying and harassment
UPDATE – 2/22/17 OCR-DOJ LETTER

• February 22, 2017 Dear Colleague Letter:

  – DOJ and DoEd “withdrawing the statements of policy and guidance” in May 12, 2016 letter and January 7, 2015 letter (restroom access), but not April 12, 2014 Q&A

  – “Withdrawal ... does not leave students without protections from discrimination, bullying or harassment”

  – “All Schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment”

  – OCR “will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms”

  – Does not create any prohibitions

  – Agencies defer to states and school districts
CURRENT CASE PENDING

• **G.G. ex rel. Grimm v. Gloucester County School Board (Virginia)**
  – Mother of transgender teen sued under Title IX and Equal Protection Clause of the U.S. Constitution
  – School Board Policy: requiring students to use restroom consistent with birth-assigned sex
  – U.S. District Court: dismissed case
  – U.S. Court of Appeals (4th Circuit 2006): Department of Ed interpretation of its own regulations governs, Title IX prohibits gender identity discrimination
  – U.S. Supreme Court: Accepted the Case for hearing in 2017

• **Trump Administration**: Indicating change of interpretation to a State issue, not a Federal mandate

• **New Mexico Constitution**: “Equality of rights under law shall not be denied on account of the sex of any person.”
STUDENTS

• Goal: Cultivate a safe and positive learning environment for all students

• School Board Policies – Non-Discrimination
  – Courts/OCR - Gender identity protected under sex discrimination

• School Board Policies – Bullying, harassment and hazing
  – OCR – includes bullying, harassment, hazing, or intimidating based on gender identification

• Gender identification/transgender discrimination concerns:
  – Preferred name and proper pronoun use – including student records and diplomas
  – Access to facilities - consistent with gender identity, with gender neutral options for all students
  – Site staff training - add to current sex discrimination training

2/25/2017
FACILITIES AND PROGRAMS

• General Rule: Equal access to facilities and programs
• Facilities: Equal Alternatives (not “separate but equal”)
  – Bathrooms: single user, multiple user, nurse’s office
  – Changing rooms/locker rooms: same or alternate schedules
  – New construction and renovations
    • Partitions, separate shower stalls, more single user restrooms
• Programs including athletics
  – NMAA
  – NCAA
  – Travel
UNDERSTANDING TERMINOLOGY

- **Gender identity**: one’s internal sense of gender, consistently asserted, which may differ from sex assigned at birth
  - **Sex assigned at birth**: gender listed on one’s original birth certificate
- **Gender expression**: External cues communicating one’s gender to others (e.g. clothing, behavior, mannerisms)
- **Gender transition**: the duration of the experience of moving from living as one’s assigned sex to living and identifying consistent with one’s gender identity
- **Transgender**: describes a person whose gender identity is different from the individual’s sex assigned at birth
  - Transgender male: assigned female at birth, has male gender identity
  - Transgender female: assigned male at birth, has female gender identity
- **Gender non-conforming**: expression, characteristics, and/or identity do not conform to gender stereotypes
- **Intersex**: a person born with reproductive or sexual anatomy and/or a chromosome pattern that can’t be classified as typically male or female

**Terms not dependent on completion of medical treatments or procedures**
MORE TERMINOLOGY

• **Preferred name**: the requested name that corresponds with one’s gender identity

• **Pronouns**: the pronouns corresponding to one’s gender identity (she/her/hers or he/him/his)

• **Official governmental records**: reflect the legal name of the individual (birth certificates, social security cards, some school records) either from birth or as name and/or gender is legally changed (typically court orders or other government documentation)
OTHER RESOURCES

• Students: US Dept. of Ed. Office of Safe and Healthy Students
  – May 2016 – Examples of Policies and Emerging practices for supporting transgender students
    http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf

• Students: US Dept. of Ed. Office for Civil Rights
  – Resources for Transgender and Gender-Nonconforming Students
    http://www2.ed.gov/about/offices/list/ocr/lgbt.html

• Employees:
  – 2015 EEOC ruling Lusardi v. McHugh: disparate treatment and harassment to deny common restroom access and misuse pronouns
TRANSGENDER ISSUES - OTHER
QUESTIONS?

• Non-Discrimination Laws/Rulings
• Students, Facilities, Programs
• Terminology

Geno Zamora – geno@ortiz-zamora.com
Tony Ortiz – tony@ortiz-zamora.com
Gabriela Stewart – gabriela@ortiz-zamora.com
(505) 986-2900