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Transgender Students in Schools

Presented by

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Transgender Students The Basics

Definitions

- Transgender – a person whose gender identity does not conform to social or conventional norms associated with male or female gender; gender association does not match the assigned sex. This is independent of sexual orientation (*internal experience*).
- Gender nonconforming – a person who does not follow other people's ideas or stereotypes about how they should look or act based on the female or male gender assigned at birth.
- Genderqueer – a person who does not subscribe to conventional gender distinctions but identifies with neither, both, or a combination of both genders.

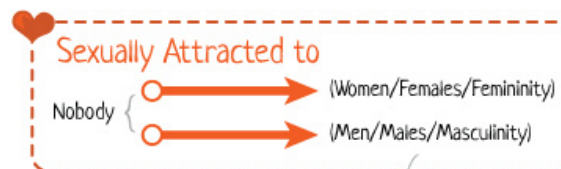
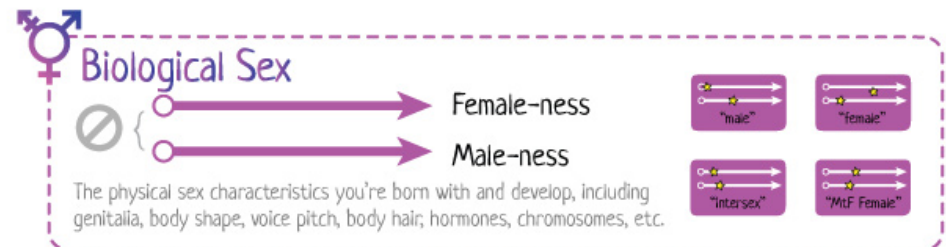
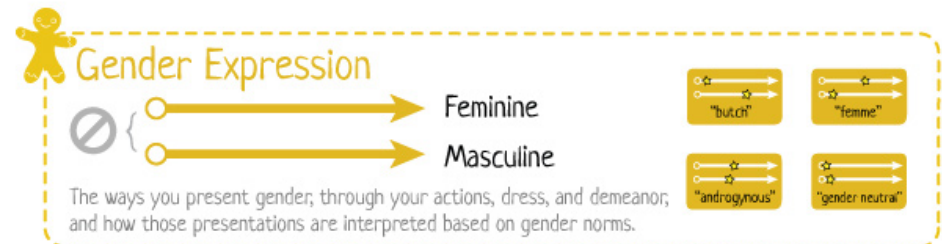
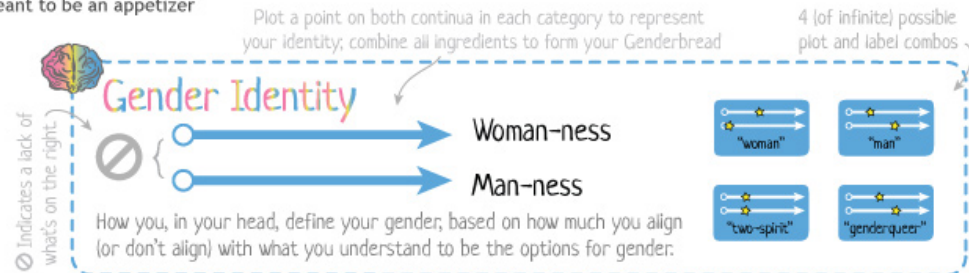
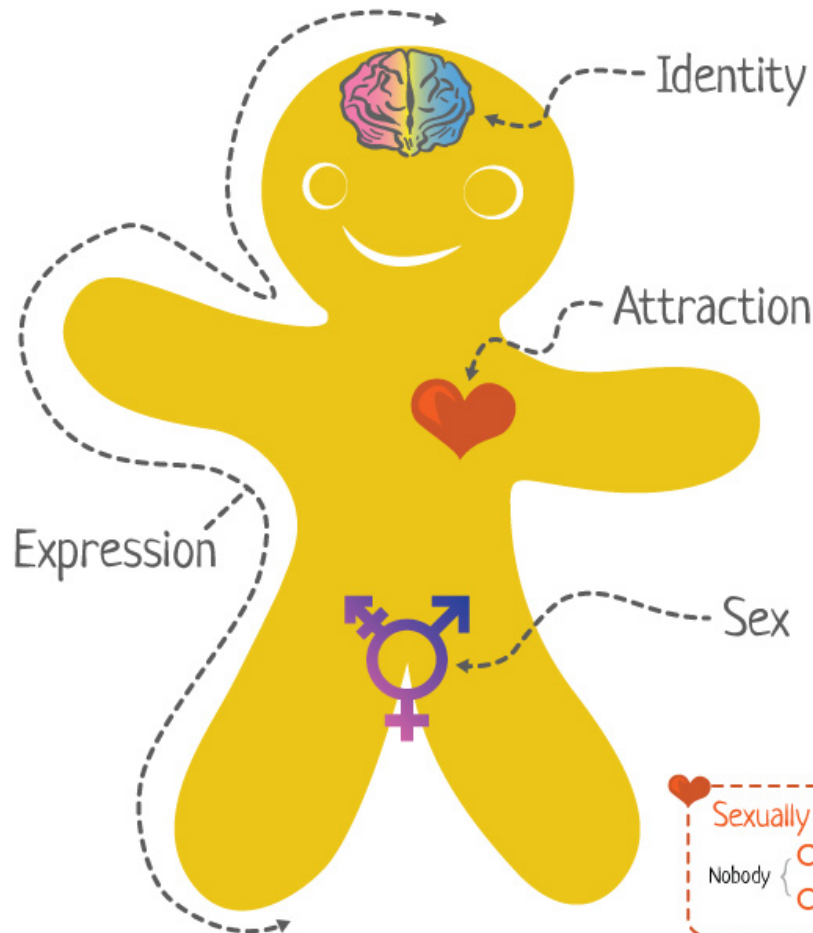
Definitions

- Cisgender – a person who identifies with the gender they are assigned at birth.
- Gender dysphoria – a formal diagnosis by a medical professional of a person whose emotional and psychological identity is the opposite of his/her biological sex (FKA gender identity disorder).
- Transition – the process through which a person's gender identity becomes known to others, becomes established through legal documentation, and/or through medical interventions.
 - Three types: social, legal, and medical

The Genderbread Person v3.3

Gender is one of those things everyone thinks they understand, but most people don't. Like *Inception*. Gender isn't binary. It's not either/or. In many cases it's both/and. A bit of this, a dash of that. This tasty little guide is meant to be an appetizer for gender understanding. It's okay if you're hungry for more. In fact, that's the idea.

by its pronounced **METRO**sexual.com



In each grouping, circle all that apply to you and plot a point, depicting the aspects of gender toward which you experience attraction.

For a bigger bite, read more at <http://bit.ly/genderbread>

Where are we in transition?

- Social transition – coming out and creating a personal environment in which a person's gender identity is known and, ideally, respected by others.
- Medical transition – using hormonal and/or surgical interventions to more closely align one's body with one's gender identity.
- Legal transition – changing identity documents to have a name and/or gender marker that reflects one's current identity.
- Many transgender people never transition for a variety of reasons.
 - They do not desire a physical change.
 - They are content to have the world see them in a way that differs from how they identify internally.
 - They cannot transition due to work, school, family, health, or financial reasons.
 - Some simply ease into a more neutral or gender non-conforming presentation without undergoing a full transition.



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What is the status of the law?

Legal Protections

- Ohio does not have laws that clearly prohibit discrimination against students based on transgender status.
- Federal laws trump the lack of state protections.

OCR and Transgender Issues

- If a student has a claim against a school district for discrimination, the Office for Civil Rights (OCR) will analyze:
 - Did the district discriminate against the student based on "sex"?
 - Did the district exclude or **deny the student benefits of or subject the student to discrimination** under any education program?

U.S. Department of Education Guidance

- 2014: DOE – Responsibilities of colleges, universities, and public schools to address sexual violence and other forms of sex discrimination, including acts taken against transgender students, in accordance with Title IX.
- 2014: EEOC "Employment Protections for LGBT Persons under Federal Sex Discrimination Laws" – Discrimination in the workplace against gay, lesbian, and transgender individuals violates state and federal civil rights laws.
- 2015: OSHA "Best Practices: A Guide to Restroom Access for Transgender Workers" – Employees should be able to use the restroom facilities that correspond to the gender they identify with.



2016 Guidance from U.S. Department of Education

- Provide transgender students equal access to educational programs and activities
- Provide a safe and nondiscriminatory environment for all students
- Allow transgender students access to restrooms and locker rooms consistent with their gender identity

2016 Guidance from U.S. Department of Education continued...

- This May 13, 2016, letter stated that as a condition of receiving federal funds, a school would agree to the terms of the letter, such as the following:
 - Not exclude, separate, deny benefits to, or otherwise treat differently any student on the basis of sex
 - Not treat a transgender student differently from other students of the same gender identity
 - Not require a medical diagnosis or treatment from the student
 - Provide transgender students equal access to educational programs and activities
 - Provide a safe and nondiscriminatory environment for all students
 - Allow transgender students access to restrooms and locker rooms consistent with their gender identity
 - Not require transgender students to use individual restrooms and locker rooms but may make individual facilities available to all students who seek additional privacy
 - May have sex-segregated athletic teams when based upon competitive skill or for contact sports
 - Not discipline students or exclude them from participating in activities for appearing or behaving in a manner consistent with their gender identity
 - Not disclose students' personally identifiable information

U.S. Department of Education Enforced Its Guidance

- OCR: An Illinois district discriminated against a transgender student when it refused to offer her the same access to the girls' locker room that other female students have.
 - The district allowed her to change inside the girls' locker room, but only behind a private curtain.
- The student participates on a girls' sports team but was required to change and shower separately from teammates. The student has identified as a female from a young age and is referred to as "she" by school staff. She is also referred to by a female name, has received a passport as a female, and is undergoing hormone therapy.

Recent Cases – Illinois U.S. DOE Complaint

- ACLU filed a complaint on behalf of the student in 2013.
 - Although the student indicated that she would probably use the curtain, the ACLU argued that she should be allowed to make the decision voluntarily.
- OCR found that the school district's action was a violation of the student's rights under Title IX, which prohibits sex discrimination.

Fallout from the Illinois School District Decision

- A group of families sued the U.S. Department of Education, U.S. Department of Justice, and Illinois school district for allowing a transgender student access to the girls' bathroom and locker room. (May 2016)
- ACLU stepped in to defend the student, who was not a named party to the lawsuit. Judge granted the ACLU's request to intervene in the case.
 - This means that the transgender students will have a voice in the case, which seeks to revoke a transgender student's access to the girls' bathroom and locker room.

Virginia Transgender Case: G.G.

- Virginia student G.G.
 - Diagnosed with gender dysphoria
 - Challenged board policy for students to use restrooms and locker rooms consistent with their biological gender
 - Alleged that policy violates the Equal Protection Clause of the Fourteenth Amendment and Title IX
- Trial court dismissed the Title IX claim and held:
 - G.G. did not prove that the board's resolution excludes him from participation in an educational program.
 - Section 106.33 regulations allow a school to "provide separate toilet, locker room, and shower facilities on the basis of sex" as long as the facilities are comparable for both genders. Court held that this allows separate restrooms on the basis of sex even if the regulations do not provide governance for gender identity.

G.G. ex rel. Grimm v. Gloucester County School Board, --- F.Supp.3d --- (2015).

Virginia Transgender Case: G.G.

- G.G. appealed on Equal Protection claims. Fourth Circuit Court of Appeals:
 - Reversed the decision of the Virginia district court
 - Ordered the lower court to consider allowing the transgender student to use the bathroom of his gender identity during the lawsuit
 - Said the lower court was inappropriate in ignoring DOE guidance and interpretation of Title IX
- District court issued injunction ordering school district to allow student to choose which bathroom to use.
- This is in line with DOE guidance. But now ...

G.G. ex rel. Grimm v. Gloucester County School Board, --- F.Supp.3d --- (2015).

Virginia Transgender Case: G.G.

What does the injunction mean?

- The U.S. Supreme Court blocked the injunction, which means the Virginia school district may refuse to allow the transgender male student access to the male restroom during the pendency of the underlying case.
- Can my school district now refuse to accommodate based on the U.S. Supreme Court's order?

Complications are Adding Up...

- Twenty-four states have filed three complaints against the federal government over U.S. DOE rules directing public schools to accommodate transgender students in bathrooms and locker rooms.
 - Ohio joined a suit originally brought by the Nebraska attorney general in July.
- Twelve states and the District of Columbia filed an amicus brief in support of the U.S. DOE position.

Ruling from Texas Federal District Court

- August 21, 2016, a judge in Texas granted a temporary injunction in the action brought by Texas against the federal government's executive order.
 - 12 other states joined the case against the U.S. Department of Education and U.S. Department of Justice – Ohio is NOT one of those 12.
- The injunction attempts to prohibit the federal government from threatening or attempting to withhold federal funds from school districts in reliance on the U.S. DOE guidance.

Ruling from Texas Federal District Court (cont'd)

- This preliminary order did **not** decide the issue of whether transgender students are permitted to use the restroom and changing facilities that match their gender identity.
- In this preliminary order the judge decided that the U.S. Departments of Education and Justice did not follow the appropriate legal procedures before issuing the guidelines in May 2016.
 - The Departments should have either:
 - Issued a notice of the proposed changes, with required comment process, or
 - Waited until Congress acted to redefine “sex” under Title IX

Ruling from Texas Federal District Court (cont'd)

- The problem with the preliminary injunction from Texas is that the judge decided that the injunction “should apply nationwide.”
 - Does a Texas federal judge have the power/authority to issue such a nationwide prohibition against the U.S. Departments of Education and Justice?
 - What about states that were not parties to the lawsuit in Texas? Ohio is a party to the Nebraska lawsuit.
- Remember: the order out of Texas is **preliminary**. This is a temporary order until the merits of the underlying case are heard in full and decided.

Ohio Federal Judge Rules for Transgender Student

- Transgender female student at Highland Elementary School
- School did not allow her to use girls' restroom
- School filed lawsuit against US Department of Education and Department of Justice
- OCR investigation found that the school impermissibly discriminated against her on the basis of sex
- Judge granted preliminary injunction for the student, ordering the school to allow her to use the girls' restroom and otherwise treat her as a female

Where do we go from here?

- Are school districts still required to follow the advice and guidance from the U.S. Departments of Education and Justice?
- What court do we follow?
 - Ohio and Texas Courts clearly disagree.
 - What happens if Nebraska weighs in on this issue?
- Can we face litigation if we provide accommodations to transgender students?
 - Can our school district now decide to revoke a student's accommodations if they are a transgender student?



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What does this look like in schools?

Recommended Best Practice

- When a student/parent contacts the district, schedule a meeting to discuss the student's needs.
 - Treat it similar to a 504. A student may qualify for a 504 based on a possible gender dysphoria diagnosis, but a 504 plan is not required for a student to be eligible for accommodations.
 - Schedule a meeting!
 - Develop a plan.
- School districts may not discriminate against a student based on transgender status – neither in curricular setting or in extracurricular activities.

Best Practice (cont'd)

- What would the meeting look like?
 - **Participants:** parents? doctor? school psychologist? principal?
 - **Discuss:**
 - **Accommodations** – restrooms, locker rooms, changing areas, school-related activities
 - **EMIS records** – where will **unchanged EMIS records** impact a student throughout the year/day? testing booklets, report cards, progress reports, IEPs, etc.
 - **Process** – to deal with changes in the plan set up with the student (and parent?)
 - **Concerns** – of **all** participants involved
 - Student: privacy, confidentiality, safety
- Document this meeting and the resulting plan. Revisit the plan yearly – it will morph over time.

What are the in-school implications?

- Privacy
- Official records
- EMIS
- Testing booklets
- School IDs
- Day-to-day references
- Pronouns
- Bathrooms
- Athletics
- Changing rooms
- Overnight trips
- Extracurricular activities
- Dances
- Dress code policy
- Bullying / harassment

Privacy and Records

- Privacy
 - FERPA protections
 - Students have a privacy interest in their sexual orientation or gender identity, even if the information is known in some situations and not others.
 - *Nguon v. Wolf*, 517 F.Supp.2d 1177 (C.D. Cal 2007)
 - Does a student have a privacy interest in his/her sexual orientation or gender identity, so much so that s/he can refuse to allow the district to inform the student's parents?
 - Is the information that would reveal a student's gender identity necessary to carry out the administrator's responsibilities? Are there ways to disclose the information that would safeguard against future/unintended disclosures?

Privacy and Records (cont'd)

- Official student records
 - FERPA
 - Allows parents and eligible students to review their educational records and change inaccurate/misleading information
 - Does not prevent or compel school districts to change student records with no “inaccuracy” but leaves this decision for the local school districts
 - Ohio Revised Code
 - Legal obligation to maintain true and accurate records
 - Seemingly requires districts to use the student’s legal sex and name and appropriate corresponding pronouns on official records
 - Legal name can change through the courts **but** gender designation may not change on birth certificates
 - So if we don’t have to, what should we do?

Privacy and Records (cont'd)

- Distinguish between official records and day-to-day references to the student.
 - Allow students to choose their name and preferred pronoun based on their consistently asserted gender identity.
 - Using the chosen name and pronoun is important to the individual.
 - There is no requirement for a court-ordered name and/or gender change in order to be referred by the name and pronouns they have chosen.
- Student personal records do not need to be changed, but the student should be issued an ID card with the name that reflects their gender identity.
 - What about EMIS?
- The name and pronouns reflecting the gender identity that is consistently asserted at school might not be the ones that are used at home.



EMIS Records

- Do we need to change our district's official records for a student?
 - Name
 - If there is a place for a change in nickname, then we can make that change the same way we would for any other student.
 - The official/legal name is changed only when a court order legally changes the student's name.

EMIS Records (cont'd)

- Do we need to change our district's official records for a student?
 - Gender marker
 - O.R.C. – no guidance on updating gender marker on birth certificate.
 - Ohio Office of Vital Statistics – can issue amended birth certificate with court order of gender change. However, courts are reticent to do so based on an old Ohio court decision that courts do not have the authority to issue such orders. Therefore, Ohio students likely will not be able to have their gender marker changed on their birth certificate.
 - Federally – medical documentation can be submitted to U.S. State Department for a change in gender marker on passport.
 - If we have a change in the gender marker on a passport but not on a birth certificate, should we change the EMIS gender marker?

Diplomas

- Diplomas should be based on the legal name of the student that is entered in EMIS.
 - If a district permits nicknames on diplomas, then the district will need to do so for all students, including transgender students.
- How do we treat graduated students who now come back years after graduation seeking an amended diploma because they are transgender and want a diploma to reflect their now legal name?

Facilities and Equal Access

- It's always about the bathroom.
 - Greatest concern to the student
 - Greatest challenge to the school district
- Because the use of facilities incorporates the recognition of a student's identity as well as privacy, comfort, and safety, this issue requires schools to consider numerous factors:
 - Transgender student's preference
 - Protecting student privacy
 - Maximizing social integration of the transgender student
 - Minimizing stigmatization of the student
 - Ensuring equal opportunity to participate
 - The student's age
 - Protecting the safety of the students involved

Facilities and Equal Access (cont'd)

- A transgender student who expresses a need or desire for reasonable alternative arrangements should be accommodated.
- Alternative arrangements may include:
 - Private area
 - Separate changing schedule
 - Single-stall restroom or unisex restroom
- Any alternative arrangement should be provided in a way that protects the confidentiality of the student's transgender status.
- Students who are forced into alternative arrangements may experience feelings of alienation, isolation, humiliation, and depression.

Facilities and Equal Access (cont'd)

- Students have the right to dress in accordance with their gender identity that is consistently asserted at school.
 - Must still follow school dress codes
- Transgender students should be provided the same opportunities to participate in physical education as other students.
 - Students should be permitted to participate based on the gender identity that is consistently asserted at school.
 - However, competitive athletic events and contact sports should be looked at on a case-by-case basis.
- A student should not be required to use a locker room or restroom that conflicts with their gender identity.
- In other circumstances that separate students by gender (e.g., overnight field trips), students should be permitted to participate based on their gender identity consistently asserted at school.

Camps / Overnight Trips

- What do we need to do when transgender students are trying to room with other students?
 - What if it is with their assigned gender?
 - What about their identified gender?
- Can we alert the other students and their parents to the gender identity of this student?

Dress Codes and Bullying/Harassment

- Dress codes
 - Do not require students to choose between male and female clothing.
 - Enforce the dress codes consistently and fairly across the entire student body.
- Bullying and harassment
 - Transgender students may be at a higher risk for being bullied and harassment.
 - Your current policies will protect students under the prohibitions against discrimination on the basis of sex.

Athletics

- The Ohio High School Athletic Association adopted a transgender policy in November 2014 setting forth eligibility rules.
 - <http://www.ohsaa.org/eligibility/TransgenderPolicy.pdf>
- Notice to the School: The student and/or parents shall contact the school administrator or athletic director indicating that the student has a consistent gender identity different than the gender listed on the student's school registration records or state birth record, and that the student desires to participate in activities in a manner consistent with his/her gender identity.
- Notice to the Commissioner's Office of the OHSA: Upon receipt of notice from a transgender student and/or parent of a transgender student wishing to participate in interscholastic sports in a manner consistent with his/her gender identity, the school administrator or athletic director shall notify the OHSA of the student's interest in participating.
- Clearance by Commissioner's Office. Upon receipt of notice from a member school that a transgender student athlete wishes to participate in OHSA sponsored sports in a manner consistent with his/her gender identity, the Commissioner's Office shall take action

Athletics (cont'd)

- A transgender female (male-to-female) student athlete who is taking medically prescribed hormone treatment related to gender transition may participate on a boy's team at any time.
 - However, before a transgender female can compete in a girl's sport or on a girl's team, the transgender female must either
 - have completed a minimum of one year of hormone treatment related to gender or
 - demonstrate to the Commissioner's Office by way of sound medical evidence that the transgender female student athlete does not possess physical (bone structure, muscle mass, testosterone, hormonal, etc.) or physiological advantages over genetic females of the same age group.

Athletics (cont'd)

- A transgender male (female-to-male) student athlete who has not yet begun medically prescribed testosterone treatment for purposes of gender transition may compete on a boy's team.
 - If, however, the transgender male student athlete is taking medically prescribed testosterone treatment, medical evidence must be submitted to the Commissioner's Office that certifies that
 - the muscle mass developed as a result of this testosterone treatment does not exceed the muscle mass that is typical of an adolescent genetic boy;
 - the student has not started any hormone treatment (or that the testosterone treatment does not cause hormone levels to exceed normal levels); and
 - the student's hormone levels are monitored by a licensed physician every three to six months.
- When a student athlete is taking hormone treatment related to gender transition, that treatment must be monitored by a physician, and the Commissioner's Office must receive regular reports about the athlete's eligibility.

What should we do for our buildings?

- Ensure students, parents, administrators, board members, teachers, and staff are trained about what gender identity is, and what it means to be a transgender student.
 - Consider the reaction your residents and other parents will have.
- Ensure *counselors* are able to provide culturally competent counseling to all students.

(OCR's *Questions and Answers on Title IX and Sexual Violence*, April 2014)

 - They may **not** encourage the parents and students toward the church/religion.
 - Keep open lines of communication. Often the counselors or school nurse have lunch with these students daily and permit them to use their private restrooms. These are often your first communicators.

Recommended Best Practice

- When a student/parent contacts the district, schedule a meeting to discuss the student's needs.
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