

# STARTING THOUGHTS

- Separate is not equal
- We are talking about child issues/student issues.
  - Adult considerations are certainly impacted -- - but Idaho school districts are charged with the health, welfare and safety of every student.
- Public School District v. Private School
- Students have Civil Rights
- Personal feelings v Legal Requirements
- Just as not every student is the same and has the same wants and needs – so too the LGBTQ student – Individuality of planning and implementation.
  - Legal Requirements
  - Honoring and Exploring needs of individual student

# OFFICE OF CIVIL RIGHTS - USDOE

## Title IX – USDOE and Transgender Students

June 16, 2021 USDOE OCR – issued a Notice of Interpretation explaining that it will enforce Title IX’s prohibition on discrimination on the basis of sex to include:

1. Discrimination based on sexual orientation; and
2. Discrimination based on gender identity.

Based on US Supreme Court – *Bostock v. Clayton County GA*– June 2020 – in which Supreme Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person on the basis of sex in a Title VII case.

# OFFICE OF CIVIL RIGHTS, USDOE

- **What is OCR?**
  - Branch of the federal government that enforces anti-discrimination laws in the school setting.
  - Charge includes enforcement and investigation of Title IX
- **As of March 30, 2022, OCR had 54 open pending school discrimination cases under investigation solely related to claims of transgender student discrimination.**
  - Other cases/claims associated with other provisions of LGBTQ
  - At least one of those discrimination investigations involves an Idaho School District and claims involving facilities access for a transgender student.
- **Policy is the first question raised by OCR relating to Idaho claim and was a matter addressed in the three cases OCR resolved across US earlier this year.**

# OFFICE OF CIVIL RIGHTS - USDOE

- Investigate a school district/charter school
- Enter into resolution agreements
  - Policy development
  - Required training
- Bring suits against a district
- Seek to have the school denied federal funding
  
- This is in addition to the individual student who can also pursue litigation against a district.

# TITLE IX

Title IX of the Amendments of 1972 – prohibits discrimination on the basis of sex in any educational program or activity offered by the recipient of federal funds.

**\*\* Last 3 administrations have changed Title IX regs – get more complicated with each version.**

- Trump Admin – Very complex process and due process issues
- New Regulations forthcoming – they include specific LGBTQ content

■ On the basis of sex

- OCR standard
- OCR charged with enforcing
- Bostock Case

# TITLE IX

- Applies to all recipients of federal funding
  - Every public school in the US – includes charter schools
  - Some private schools
- Overrides any conflicting state laws.
  - HB 2 out of North Carolina Legislature – addressed restroom access matching birth assigned gender – determination under Title IX that it is not enforceable as a law because federal law trumps state laws when there is a conflict.

# TRANSGENDER ACCESS AND FACILITIES

## *G.G. v. Gloucester County School District (Virginia)*

June 28, 2021 – USCS left in place a decision that allowed a transgender student to use the bathroom corresponding to his gender identity. 4<sup>th</sup> Circuit Court of Appeals

- Case addresses the scope of Title IX that prohibits schools from discriminating “on the basis of sex”.
  - 14<sup>th</sup> Amendment – Equal Protection.
  - Cannot force a student to use a restroom that does not correspond to their gender identity.
- 
- The student, a transgender male and then high-school student, challenged his school’s 2015 decision regarding restroom access.
    - District had a policy of requiring all students with “gender identity issues” to use private, single-stall restrooms as being gender neutral and prohibited all students from using opposite –sex restrooms (as identified by gender identification at birth).
    - District considered this to be a student with gender identity issues being provided an alternative appropriate private facility.

# TRANSGENDER – ACCESS AND FACILITIES

- Legally binding on any district in 4<sup>th</sup> circuit, 7<sup>th</sup> circuit and 11<sup>th</sup> circuit. It is vaguely conceivable that another circuit court case could work its way back to the US Supreme Court . . . .
  - HOWEVER, USDOE and OCR – consistent determinations with this ruling
  - 9<sup>th</sup> Circuit court of Appeals – consistent with its application of Title VII cases.
- This was held up for a number of years associated with going back and forth in appellate courts associated with USDOE OCR regulations between Obama and Trump Administration.
  - Ultimately allowed a Title VII to get ahead of it and impact the outcome of the case.



# TRANSGENDER STATUS

## TAKE AWAY ACTIONS

- Don't force a transgender student to use a unisex bathroom or the bathroom of their birth assignment.
  - They can be available and an option – but not forced.
  - If agreement – document in writing.
- Privacy for all students in use of bathrooms and restrooms
  - Retrofit designs/ remodel/ contraction thoughts
  - Chicago HS OCR case.
- Plan process from initial request through to graduation – recognizing it will evolve.

# ATHLETICS

## Transgender Student Participants and Athletics

- Idaho and multiple other states legislation addressing participation.
- US 9<sup>th</sup> Circuit Court of Appeal – May 3, 2021. Oral Argument
  - Idaho case had some technicalities issues with the identified plaintiffs – student no longer at BSU and student in HS level has fear of tests to prove “gender” and whether or not they have standing to sue.
- Idaho District Court – blocked the law from taking effect because it is discriminatory.
- Title IX right in the middle of this case and situation.
- 14<sup>th</sup> Amendment – equal protection clause due to its discriminatory nature.
- 4<sup>th</sup> Amendment – invasion of privacy because the tests required should an athlete’s gender be challenged or need to be proven.
- Case stay has been lifted and we should have better guidance in the coming year.

# PRIVACY RIGHTS OF STUDENTS

- **Moving Target** – many cases pending and they are now pending both directions.
- **US Supreme Court has not specifically ruled on this issue**
  - 9<sup>th</sup> Circuit Court of Appeals has not yet ruled on this issue
- **Three underlying seminal cases**
  - Zones of privacy in relating to sexuality and the requirement of a compelling state interest to impede into that zone of privacy – started in 1965 with US Supreme Court in *Griswold v. Connecticut*.
  - Expansion of privacy rights in *Whalen v. Roe* by USSC in 1977 – addressing two independent interests – autonomy interest in making important decisions independent of government influence and the confidentiality interest in avoiding disclosure of personal matters.
    - Minors
    - Schools
- **Standard/test that is applicable**
  - If developing a policy – this is the important part of the discussion when you do not yet have controlling case authority

# PRIVACY RIGHTS OF STUDENTS

Sterling v. Borough of Minersville – 2000 – 3<sup>rd</sup> Circuit Ct App.

- Law enforcement case involving the privacy of a minor.
- 17 y.o. – taken to the police department as part of an investigation.
- Officer to minor
  - The bible forbids homosexual activity and threatened to divulge sexual orientation of the minor to the minor's family.
  - Did not actually disclosed to family.
- Minor commits suicide – mother sues police department claiming the police violated the child's right to privacy by threatened disclosure or threat to “out” the minor to family.

# PRIVACY RIGHTS OF STUDENTS

## Sterling v. Borough of Minersville - continued

- Court found for mother:
  - Court held that the minor's sexual orientation was an intimate aspect of his personality entitled to privacy protections.
  - "It is difficult to imagine a more private matter than one's sexuality and a less likely probability that a government would have a legitimate interest in disclosure of sexual identity."
  - The threat alone of disclosure constituted a violation of a privacy right
  - Sterling concluded that sexuality is a private matter.

# PRIVACY RIGHTS OF STUDENTS

## Nguon v. Wolf (2007) - C.D. California

- School case
- Minor
- School “outed” a student to her mother as part of a disciplinary situation – was being suspended for PDA with her girlfriend.
- Mom did not know daughter’s sexual orientation.
- Never said she was gay or a lesbian – just gave facts of the disciplinary situation
  - Caught kissing her girlfriend

# PRIVACY RIGHTS OF STUDENTS

## Nguon v. Wolf cont.

- Court held that a student has a legally recognized privacy interest in the student's sexual orientation.
- 3 part test
  - Does a reasonable expectation of privacy exist?
    - Court found that “coming out” to be unique to each individual and a personal choice that must be respected, even in the setting of a minor student.

# PRIVACY RIGHTS OF STUDENTS

- **Whether there was an actual disclosure**
  - Court held – even though they never used the actual term “gay” or “lesbian” the simple act of indicting that she was caught kissing another girl easily allowed for the inference of sexual orientation and the court held that the disclosure of same sex conduct was tantamount to disclosure of status as a homosexual.
- **Whether there is a compelling state interest in making the disclosure**
  - Highest constitutional standard- strict scrutiny
  - Hardest standard to meet in addressing a constitutional review
- Court discussed that in this situation the disclosure was the basis for a disciplinary action and that there was a statutory duty to provide parents of noticed of the suspension and in order for the due process protections in the right to contest the discipline, the parent needed facts beyond an abstract description.
- Therefore a compelling state interest in order to meet the disciplinary due process rights of the student.



# PRIVACY RIGHTS OF STUDENTS

## Dicta in Nguon

- Has it not been a disciplinary area with due process and statutory implications, the school could not have gratuitously told the students parent that she was gay or engaging in displays of affection, within appropriate bounds, with another girl.
- Cannot just randomly disclose – it needs to meet that compelling state interest test.

# THREE PART TEST

- If there is going to be an intrusion into the privacy right of a student relating to sexual identity or orientation, going to need to fulfill three part test:

1. Does a reasonable expectation of privacy exist?
2. Whether there was an actual disclosure?
3. Whether there is a compelling state interest in making the disclosure?
  - gratuitously telling isn't going to meet this standard
  - a teacher's personal opinion on the issue d/n meet this standard

## Possible considerations for meeting standard:

- Health, Welfare, Safety – legitimate physical harm
- Suicidal Ideation
- Abuse, Abandonment, Neglect- Law Enforcement/DHW
- Bullying, Harassment, Intimidation \*\*
- Intimately involved in due process for disciplinary actions

# PRIVACY RIGHTS – DISTRICT RESPONSIBILITY

Wyatt v. Kilgore Independent School District – (2013) – 5<sup>th</sup> Circ

- Softball coach “outed” a player to her mother.
- Would not let her play until they could tell her mother that she was in a sexual relationship with a woman
- Woman at issue allegedly 18 year old female
- Issue with rumor about this 18 year old being ex-girlfriend of softball coach.
- Sued the coaches and the school district
  - Brought a 1983 claim alleging violating her constitutional privacy rights.
- Mom had not previously known her child’s sexual orientation.

# PRIVACY RIGHTS – DISTRICT RESPONSIBILITY

## Wyatt v. Kilgore Independent School District Cont.

### Federal District Court

- MSJ by school district – court held that there was a constitutional right to prevent unauthorized disclosure of ones sexual orientation.
- Government actors cannot disclose private facts about governmental citizens in matters which the government does not have a legitimate interest.
- Court engaged in an extensive discussion as to its rationale. Discussed prior US supreme court cases (Lawrence) granting individuals the right to make decisions about intimate personal relationships. Discussed Sterling case.
- Coaches argued a legitimate governmental interest to disclose because there was a question of whether this was an illegal relationship between a minor and adult.
  - District court disagreed because they had no personal knowledge and the question of whether the report was retaliation for the rumor about the coach and the adult being ex-relationship status.

# PRIVACY RIGHTS – DISTRICT RESPONSIBILITY

Wyatt v. Kilgore Independent School District Cont.

Appeal – 5<sup>th</sup> Circuit

- Reversed the issue with regard to the coaches – provided application of qualified immunity – because at the time the coaches took their action it was not yet widely known that there was a clearly defined privacy right in the non-disclosure of sexual orientation, especially in a school setting.
  - Because courts have distinguished Sterling as not being in a school setting.

**BUT**

# PRIVACY RIGHTS – DISTRICT RESPONSIBILITY

- Held the school district could potentially be held liable under two theories:
  - It had enforced an unconstitutional policy of requiring educators to disclose sexual orientation to parents.
    - Indicated that this policy need not be in writing but could be a single event or a course of practice
  - It had failed to train its employees on how to treat LGBTQ students.
    - Training on policies was inadequate.
    - Did the district show deliberate indifference in adopting training and policies
    - Was there a pattern of violation of student privacy rights relating to sexual orientation.
    - Staff confusion on how to approach LGBTQ Students in the school's setting.

# GENERAL LEGAL PRINCIPLES FOR CONSIDERATION

- **Federal Law is going to trump state law.**
  - **To the extent possible you want to read them consistently.**
  - **Title IX**
  - **Discrimination Laws**
  - **Parental Rights**
- **Troxell v. Granville – US Supreme Court (2000)**
  - **Parental rights are compelling, but not absolute.**
  - **Discussion about the fundamental rights of parents in the upbringing of their child and the petitioning of visitation rights by third parties, over parental objections, infringed on the right of the parent.**
  - **Custody case – relating to third party visitation (grandparents) of children and examining Washington State Law. The decision was a plurality decision – with concurrences, dissents and where multiple justices involved in the decision are not longer on our US Supreme Court**

# PARENTAL RIGHTS IN EDUCATION

## Education Code -Title 33 -Parental Rights in Education

**33-6001. PARENTAL RIGHTS.** (1) A student's parent or guardian has the right to reasonable academic accommodation from the child's public school. "Reasonable accommodation" means the school shall make its best effort to enable a parent or guardian to exercise their rights without substantial impact to staff and resources, including employee working conditions, safety and supervision on school premises for school activities and the efficient allocation of expenditures, while balancing the parental rights of parents and guardians, the educational needs of other students, the academic and behavioral impacts to a classroom, a teacher's workload and the assurance of the safe and efficient operations of the school.

(2) School districts and the boards of directors of public charter schools, in consultation with parents, teachers and administrators, shall develop and adopt a policy to promote the involvement of parents and guardians of children enrolled in the schools within the school district or the charter school, including:

(a) A plan for parent participation in the schools that is designed to improve parent and teacher cooperation in such areas as homework, attendance and discipline;

(b) A process by which parents may learn about the course of study for their children and review learning materials, including the source of any supplemental educational materials; and

(c) A process by which parents who object to any learning material or activity on the basis that it harms the child or impairs the parents' firmly held beliefs, values or principles may withdraw their child from the activity, class or program in which the material is used.



# PARENTAL RIGHTS IN DOMESTIC RELATIONS

## Domestic Relations – Title 32 Parent and Child

32-1010. IDAHO PARENTAL RIGHTS ACT. (1) This section through section [32-1014](#), Idaho Code, shall be known and may be cited as the "Idaho Parental Rights Act."

(2) The interests and role of parents in the care, custody and control of their children are both implicit in the concept of ordered liberty and deeply rooted in our nation's history and tradition. They are also among the unalienable rights retained by the people under the ninth amendment to the constitution of the United States.

(3) The interests of the parents include the high duty and right to nurture and direct their children's destiny, including their upbringing and education.

(4) The state of Idaho has independent authority to protect its parents' fundamental right to nurture and direct their children's destiny, upbringing and education.

(5) The protections and rights recognized in sections [32-1011](#) through [32-1014](#), Idaho Code, are rooted in the due process of law guaranteed pursuant to section 13, article I, of the constitution of the state of Idaho.

(6) Governmental efforts that restrict or interfere with these fundamental rights are only permitted if that restriction or interference satisfies the strict scrutiny standard provided in section [32-1013](#), Idaho Code.

(7) Nothing in this act shall be construed as altering the established presumption in favor of the constitutionality of statutes and regulations.

(8) The provisions of the Idaho parental rights act are hereby declared to be severable, and if any provision of the act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of the act.

# IDAHO CODE 33-138

**33-138. DIGNITY AND NONDISCRIMINATION IN PUBLIC EDUCATION. (1)** It is the intent of the legislature that administrators, faculty members, other employees, **and students at public schools**, including public charter schools and institutions of higher education, **respect the dignity of others**, acknowledge the right of others to express differing opinions, and foster and defend intellectual honesty, freedom of inquiry and instruction, and freedom of speech and association.

(2) The Idaho legislature finds that tenets outlined in subsection (3)(a) of this section, often found in "critical race theory," undermine the objectives outlined in subsection (1) of this section and exacerbate and inflame divisions **on the basis of sex**, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens.

# IDAHO CODE 33-138

(3) In accordance with section 6, Article IX of the constitution of the state of Idaho and section [67-5909](#), Idaho Code:

(a) No public institution of higher education, school district, or public school, including a public charter school, shall direct or otherwise compel students to personally affirm, adopt, or adhere to any of the following tenets:

- (i) That any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior;
- (ii) That individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin; or
- (iii) That individuals, by virtue of sex, race, ethnicity, religion, color, or national origin, are inherently responsible for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin.

(b) No distinction or classification of students shall be made on account of race or color

(c) No course of instruction or unit of study directing or otherwise compelling students to personally affirm, adopt, or adhere to any of the tenets identified in paragraph (a) of this subsection shall be used or introduced in any institution of higher education, any school district, or any public school, including a public charter school.

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# CODE OF ETHICS FOR PROFESSIONAL EDUCATORS

## Aspirations and Commitments

**01.C** – The professional educator, recognizing that students need role models, will act, speak and teach in such a manner as to exemplify nondiscriminatory behavior and encourage respect for others cultures and beliefs

**Principle II – Educator/Student Relationship.** A professional educator maintains a professional relationship with all students, both inside and outside the physical and virtual classroom. Unethical conduct includes:

- d. Committing any act of harassment as defined by district policy.
- . . .
- j. Conduct that is detrimental to the health and welfare of students.

# CODE OF ETHICS

**Principle VII. Confidentiality.** A professional educator complies with state and federal laws and local school board policies relating to confidentiality of student and employee records, unless disclosure is required or permitted by law.

a. Sharing confidential information concerning student academic and disciplinary records, personal confidences, health and medical information, family status or income, and assessment or testing results, with inappropriate individuals or entities.

# FERPA

- **Family Educational Rights and Protection Act**
- FERPA does give access and certain rights to individuals, including parents, to permanent educational records and official educational records of a student.
  - Includes right to amend
  - Birth Certificate
  - Gender Notation
  - Name
  - Changes
  - Parent access
- Parents have a right to access/request information from a student's official school records.
  - Some analysis of the USD OE guidance indicates that schools need to deal with this on a case by case basis with regard to information in such a file that might "out" a student.

# WHAT I SEE IN APPLICATION AROUND STATE

- Growing issues.
- 20+ years – becoming more common in rural community
- Most students /families have been very cooperative
- Individual plans and situations
- Work Collaboratively with family
- Rare a student does not agree to parental involvement
  - Small communities – public knowledge
  - Schools strongly encourage and revisit issue with students
- Very small population of Idaho students.
  - Less than .5% of total population and we are only addressing 5=18/21
- Rarely have we experienced something we could not resolve/
- Employees want and need guidance/direction
  - Recognize that some personnel may have personal philosophical issues and we work to address and educate.

## ■ Merriweather v. Shawnee State University

- Appellate court ruling was to return to state court to examine the facts as to the issue of First Amendment Rights, specifically issue of religious rights of the educator in relation to the privacy rights of a student.
  - It was a settlement in the end - there is no final holding in this case relating to the specific religious rights of Merriweather.
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- Numerous k-12 schools across the state have this model policy or a version of this existing model policy
  - Safe and Supportive School Environment
  - School – student centered or parent centered