

Douglas R. Nelson
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June 1, 2022

Superintendent Luke Schroeder
Kimberly School District
via email: lschroeder@kimberly.edu

RE: Gender Identity and Sexual Orientation Policy

Dear Superintendent Schroeder:

I am writing in response to your request that our office review a draft of a proposed District policy relating to gender identify and sexual orientation and be available to consult during a board of trustee's work session presently scheduled for Tuesday, June 7th. at 7p.m.. We have preliminarily reviewed the material which you forwarded to the attention of Abigail French on May 13, 2022 and augmented on May 30th.

Pursuant to your request, I am attaching a summary of the Education Law services which our office provides to a number of public school districts, charter schools and educational law advisors, primarily in eastern Idaho. I regularly provide education law consultation along with my partner, Abigail French, who is former Idaho educator. While we regularly handle a variety of due process hearings we are not currently offering litigation services relating to contested claims.

Most of the school districts we represent currently have in place one or more policies that address issues relating to gender identity, sexual orientation, harassment and bullying matters. We also consult with other legal counsel who possess particular expertise in education law and compliance matters. Amy White is a respected education law advisor and I have reviewed the material you provided which Amy has authored. On matters relating to Title IX policy and training we have also consulted with attorney Courtney Bullard who founded and leads an education law firm, "Institutional Compliance Solutions". Cortney's telephone number is (423) 667-1838. She may be able to direct your board to additional relevant model policies.

Compliance with the various statutes, regulations, and court rulings is inherently complex. In relation to gender and sexual orientation policy and procedure, the complexity is currently heightened as we await publication of new regulations from the U S Department of Education. Various legal proceedings are also currently being monitored in order to gain additional guidance on these issues. There are also a number of highly organized advocacy groups influencing policy in this area.

The legal environment is currently "fluid" as to many issues arising in this area of the law. As a result several of the districts that our office represents have determined to delay further revision of their current policies at least until the expected revisions to USDOE policy have been published. However, I understand that your District does not have a currently published policy relating to gender identity and sexual orientation. It is our experience that the OCR, if it opens an investigation relating to a district, will first seek a resolution agreement that requires policy development and training. The OCR has also issued a Notice of Interpretation explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include discrimination based on sexual orientation and gender identity.

You specifically solicited my opinion regarding the "timing" of engaging parents and guardians of a LGBTQ+ student who has informed staff of concerns relating to sexual orientation or gender identity. In that regard, I recommend the following:

(1) Any policy should foster an educational environment that is safe and free of discrimination for all students, regardless of sexual orientation, gender identity or gender expression. A trained administrator should be available for referral to guide families and students who express such concerns in order to avoid conflicting or "confused" response from various teachers or staff.

(2) Staff, including school counselors, should abide by applicable rules relating to confidentiality. Nevertheless, I recommend that a counselor be candid with a student and indicate that such matters may need to be shared with other persons (and possibly parents) on a "need to know" basis, in order to protect the student help meet the student's needs. Otherwise, such information should not be shared unless the student has authorized such disclosure.

(3) Courts have frequently held that a student has a legally recognized privacy interest in the student's sexual orientation. No staff should "out" the student absent a "compelling interest" that requires such disclosure. A compelling interest may include a student disciplinary matter and the right of the student or parent to contest the discipline, particularly where suspension or expulsion is considered. Other considerations might include:

- a. allegations of sexual abuse, but particularly when such allegations present a possible criminal prosecution of the perpetrator; or,
- b. concern for the health, welfare and safety from a legitimate threat of physical harm; or,
- c. suicidal ideation; or,
- d. law enforcement and/or Department of Health and Welfare investigations relating to abuse, abandonment or neglect; or,
- e. a requested change in the student's official educational records that are lawfully available to parents/guardians and including birth certificates, gender notations, and names changes. (In this regard, counseling notes kept personally by a school counselor in furtherance of the counseling relationship and which are

not included in the official student records file may reasonably be withheld from parents unless such note records a credible and imminent threat of harm).

(4) Generally, communication of confidential information should only be provided to parents with the knowledge and consent of the student or when "compelling interests" require otherwise. Consideration may be given for the age of the student. The method of communication should insure privacy and contemporaneously be documented.

Generally speaking, a staff member who is informed on a "need to know basis" but is not a licensed counselor, may nevertheless be considered a counselor and subject to ethical requirements of non-disclosure which uniquely govern school counselors. In addition, it should be noted that the Code of Ethics for Professional Educators, Principle VII, addresses confidentiality by requiring that "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".

You also inquired regarding changing names and pronouns on school records. Our general recommendation has been:

(1) The **official records** of a student, such as a student's permanent record, diploma, and standardized test scores should reflect the student's legal name and gender, which is the name and gender listed on the student's birth certificate or as changed by court order.

(2) Parents or students (usually those attending middle or high school) may ask for accommodations regarding the student's **unofficial records**, such as:

- a. changing a student's unofficial record to reflect the student's preferred name, such as in school yearbooks, ID cards and on daily school assignments;
- b. changing a student's unofficial record to reflect the student's preferred pronoun and identified gender; and/or
- c. addressing a student by the student's preferred name and consistent with preferred pronouns.

We look forward to attending by Zoom connection the board's upcoming work session.

Best regards,

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cc: Abigail F. French

NELSON HALL PARRY TUCKER , PLLC

EDUCATION LAW SERVICES

Nelson Hall Parry Tucker, PLLC is an eastern Idaho law firm with experience representing school districts, charter schools and trustees. Our representation regularly includes the following services:

- **Education Law Hotline:** Direct line, twenty-four/seven for educational emergencies.
- **Due Process Hearings:** Employment suspension and termination; student discipline; grievances and IDEA/OCR audit reviews.
- **District Operations:** Review and drafting of policy and procedure manuals; contracts for goods and services; charter school issues; school financing; real property acquisition and sale; special education services; student suspension, expulsion and due process hearings; employee grievances; certificated employee discipline; non re-employment, termination, and reduction in force (RIF) policies, procedures and issues; personnel files.
- **Employment Issues:** Master Agreement negotiation; classified employee grievances; individual contracts of employment; drug and alcohol testing; employment of the disabled ; Family Medical Leave Act; free speech by public school employees; re-employment rights of military personnel; sexual harassment issues; suspension and termination of certificated and classified employees.

School Administrator, Board and Teacher Training: We regularly speak at seminars and provide in-service training. Recent topics have included:

"Open Meeting Requirements and Compliance"
"Employee Reference and the Defamation Trap"
"School Counselors: legal, confidentiality and ethical issues "
"Student Surveys and the Right of Privacy"
"Contract Negotiation, Impasse, Mediation and Fact Finding"
"Labor and Employment Issues in Public Education"
"First Amendment and Constitutional Issues"
"Student Admission and Expulsion"
"Purchase , Procurement and Performance Contracting"
"Teacher Contract Renewal and Termination: the role of administration, board and legal counsel".
"Law in the Classroom"

G **Records Management:** FERPA; public records requests; court and administrative subpoenas.

@ **Construction and Finance:** AIA and construction management contracts, property acquisition and financing arrangements. Annual due diligence reviews and audit opinion letters.