

**From:** HILDEBRANDT Katherine \* ODE  
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Please find attached comments from the Oregon Department of Education on the May 2020 Title IX regulations and on discrimination on the basis of sexual orientation and gender identity.

For further inquiries please contact:

Kate Hildebrandt  
Civil Rights Specialist and Title IX Coordinator  
Oregon Department of Education  
255 Capitol St NE  
Salem, OR 97310-0203  
503-551-5713  
katherine.hildebrandt@ode.state.or.us



[Kate Hildebrandt](#)

Civil Rights and Title IX Specialist

*pronouns: she/her*

Government and Legal Affairs | Office of the Director

desk: (503) 947-5667 | cell: (503) 551-5713

[katherine.hildebrandt@ode.state.or.us](mailto:katherine.hildebrandt@ode.state.or.us) |

[www.oregon.gov/ode](http://www.oregon.gov/ode)

June 11, 2021

*Delivered electronically to [T9PublicHearing@ed.gov](mailto:T9PublicHearing@ed.gov)*

Susan B. Goldberg  
Acting Assistant Secretary for Civil Rights  
Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

Re: Written Comment: Title IX Public Hearing Sexual Harassment Regulations and Discrimination on the Basis of Sexual Orientation and Gender Identity

Assistant Secretary Goldberg and the Office of Civil Rights:

Thank you for the opportunity to comment on the May 2020 Title IX regulations and the protections needed for students based on gender identity and sexual orientation.

The Oregon Department of Education (ODE) provides support to Oregon's approximately 200 K-12 school districts across the state, serving more than 580,000 students. Two Civil Rights Specialists specifically provide support to districts regarding civil rights protections for Oregon students, including both federal and state civil rights protections. Oregon's discrimination laws prohibit discrimination based on nine protected classes and include protection from discrimination based on sex, sexual orientation, and gender identity. Consequently, ODE hears from educators, administrators, students, and parents across the state on these issues. ODE also accepts complaints about these issues on appeal from students and their families who initially reported to their home district and who allege that the district did not respond appropriately. ODE processes these appeals according to state law, and uses Title IX as a lens when processing complaints of sex discrimination.

The Oregon Department of Education's comments include both comments on the May 2020 Title IX regulations, as well as the need to protect students from discrimination based on gender identity and sexual orientation. These comments are drawn from our conversations with Title IX Coordinators, school district staff, students who experience civil rights violations and their families, and community partners across the state.

### **Comments on the May 2020 Title IX Regulations Regarding Sexual Harassment**

Since May 2020, the Oregon Department of Education has been supporting districts in understanding and implementing the new Title IX regulations related to sexual harassment. Through offering trainings and one-on-one technical assistance, the Oregon Department of Education has worked to make sure that Oregon's 197 school districts are aware of their responsibilities to comply with the Title IX regulations. Throughout the past year, ODE has

- facilitated approximately 25 professional trainings for over 400 individuals across Oregon who serve as Title IX Coordinators, investigators, and decision-makers;

- responded to more than 100 phone calls and emails from district Title IX Coordinators and Superintendents regarding Title IX compliance;
- engaged with students who experience discrimination and their families to help them understand their Title IX rights through the new processes.

Through these processes, we've heard feedback from districts and individuals on the successes and challenges they've faced in navigating the May 2020 Title IX regulations.

In addition to the duties they have under Title IX, Oregon law also requires schools to address sexual harassment<sup>1</sup>. The Oregon required sexual harassment policies and procedures align more closely with previous sexual harassment guidance, including the *2001 Sexual Harassment Guidance*, *2011 Dear Colleague Letter*, and *2014 Q&A*. One of ODE's primary support roles related to the 2020 sexual harassment regulations has been to help districts understand their overlapping responsibilities of Title IX and Oregon law. These conversations and trainings have helped ODE understand the successes and struggles that K-12 schools have with the May 2020 regulations.

### Definition of Sexual Harassment

Districts expressed many challenges in adapting to the new definition of sexual harassment defined under the May 2020 Title IX regulations. Because the new definition of sexual harassment narrowed in the types of conduct that districts were required to respond to under Title IX, many districts reported that they received reports from students that no longer fell under Title IX. However Oregon's sexual harassment education law requires that schools address a broader definition of sexual harassment, which allowed schools to support students who fell into those gaps. Oregon law defines sexual harassment in the educational context as:

- (i) A demand or a request for sexual favors in exchange for benefits.
- (ii) Unwelcome conduct of a sexual nature that is physical, verbal, or nonverbal and that:
  - (I) Interferes with a student's educational activity or program;
  - (II) Interferes with a school or district staff member's ability to perform their job; or
  - (III) Creates an intimidating, offensive, or hostile environment.
- (iii) Assault, when sexual contact occurs without a person's consent because the person is:
  - (I) Under the influence of drugs or alcohol;
  - (II) Unconscious; or
  - (III) Pressured through physical force, coercion or explicit or implied threats.

Without this law, many students who experienced harassment that affected their educational experiences would not have been required to receive support from their school.

Two gaps identified by educators and community partners in the Title IX definition were the lack of hostile environment harassment within the definition, and the inability to address harassment that initially occurred outside of the school's programs but subsequently impacted the student while at school. ODE has received a number of requests for technical assistance regarding these types of sexual harassment reports, and has processed several appeals in the last several years that would currently fall into this gap. In one instance, a school district received reports that five high school students has been sexually harassed or sexually assaulted by the same student over

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<sup>1</sup> ORS 342.700 and OAR 581-021-0038

the course of a year. Several of these students reported disruptions to their education, safety, and mental health at school. However, under the current regulations, the school would not be allowed to address this under Title IX because these incidents occurred in the students homes, at businesses, or at events that were not a part of the school's educational programs. But though the incidents themselves occurred off campus, a hostile environment was created for these students at school. If this incident were to happen today, these students would be left unprotected by Title IX.

K-12 students would be best served by returning to the previous definition of sexual harassment issued in the *2001 Sexual Harassment Guidance* and the *2011 Dear Colleague Letter*. Schools must address hostile environment sexual harassment, and must return to addressing harassment that is severe, pervasive, OR objectively offensive. The return to the former definition will bring Title IX back in line with other discrimination and civil rights laws such as Title VII. This definition served K-12 schools well for nearly two decades and allowed countless students to seek relief from harassment and focus back on their educational goals.

### Knowledge of Sexual Harassment

The current requirement for all K-12 employees to report any sexual harassment of which they become aware serves students well. Students in elementary and secondary schools should be able to tell a teacher, coach, counselor, administrator, or anyone else about sexual harassment, and should reasonably expect to be supported by the school once they have done so. However, the current policy does not address the role of volunteers. Any student in a K-12 school could reasonably believe that they had made a report by telling volunteer serving as a field trip chaperone, volunteer coach, or any other number of volunteer roles.

### Interim Measures

The May 2020 Title IX regulations removed ability for schools to utilize interim measures, only allowing supportive measures and interim removal from the educational program. Interim measures are a key component of ensuring student safety and educational access in cases of severe sexual harassment, especially in the K-12 environment. At many elementary and secondary schools, small class sizes and structured environments make it difficult to ensure the safety of students who report harassment. In some cases supportive measures or emergency removal may suffice, but in other cases students may be faced with the hard choice to compromise either their safety or their education during the month or more it takes for a school to follow the Title IX process. Interim measures, such as allowing a school to temporarily bar a respondent from attending a club or athletic practice, can make a huge difference for the safety of a complainant while only minimally and temporarily impacting the respondent. Allowing schools to utilize interim measures when severe circumstances require would allow K-12 schools to add another option to their toolkit so that they may flexibly address unique situations as they arise.

## Evidentiary Standard

Using one consistent evidentiary standard across all educational institutions would benefit students. The majority of schools and districts that we have worked with are already utilizing the same standard: preponderance of the evidence. As they told ODE, this is the standard that they have been using for years in investigating both sexual harassment and other forms of discrimination. Most Title IX Coordinators and investigators had been trained using this standard, and it aligned best with their policies. Requiring all schools to use the preponderance of the evidence standard would create consistency and fairness both across and within districts.

## Complaint Processes and Procedures

The investigation and adjudication process laid out in the May 2020 Title IX regulations is overly complex and too akin to a courtroom legal process for the K-12 setting. Sex discrimination and sexual harassment are serious issues, and complainants and respondents both deserve serious legal protections. However, it is unnecessary to emulate the criminal justice system to achieve this goal. K-12 educators appreciated that the regulations gave them discretion to avoid using a live, in-person hearing; the educators we've talked with believe that in the vast majority of cases a live hearing with cross-examination would be unnecessary and inappropriate for elementary and secondary students. If revised, the whole of any guidance issued should be centered around the goals of Title IX: to create a safe educational environment.

## Specific Challenges in K-12 Based on Student Age

Any sexual harassment regulations and guidance must take into account the age differences of students served by the rules. Many K-12 educators we've spoken with do not feel that the May 2020 regulations prescribe an appropriate process for most elementary- and secondary-aged students. The assumed level of student agency, comprehension, and participation, for example, is not appropriate for very young children. Even when parents are acting on behalf of their child, they are still required to receive specific communication documents and may even be subject to a hearing at the discretion of the school. Any prescribed Title IX process must be written with younger students in mind.

If changes are made to the regulations, the broad age range of students in the K-12 school system must be considered. Even if parents act on behalf of their child, the process still needs to be flexible enough to apply to a kindergarten student just as easily as an 11<sup>th</sup> grader. We suggest considering a return to many of the tenants in the *2001 Sexual Harassment Guidance*, as it clearly spoke to the K-12 context and considered how the age of the student might impact a school's process and findings. It may conversely be appropriate to prescribe different processes for the K-12 and higher education environments, given the differences in student ages, autonomy, and comprehension in these settings.

## Specific Challenges in K-12 for Small and Rural School Districts

Implementing the May 2020 Title IX regulations has been especially challenging for small and rural K-12 school districts. Of Oregon's 197 school districts, approximately 40% of districts

enroll less than 500 students, while 14% of districts enroll less than 100 students<sup>2</sup>. The small size of these districts presents a variety of challenges in the context of the May 2020 sexual harassment regulations. For example, small school and class sizes may make it difficult to maintain student privacy and safety throughout the Title IX process. Small school districts may be forced to limit the educational opportunities of the complainant severely since they are unable to utilize interim measures as they were previously.

It can also be difficult to identify and train the personnel needed to fulfil all of the roles identified in the regulations. Even once trained and identified, the small number of staff and students in these districts means that personnel are much more likely to experience bias or a conflict of interest and have to recuse themselves from the process. In attempting to avoid these biases, these school must often turn outside contractors – and the fees for some contractors can carve large dents in the budget of a small district. The Oregon Department of Education agrees that personnel roles in Title IX cases must be filled by competent, trained professionals, and that OCR should continue to require specific training for these individuals. However, we also hear from many small districts that this has been particularly challenging for them,

If OCR issues any new guidance or regulations, we suggest that they intentionally survey small and rural K-12 schools to learn about challenges they experience. Many schools have been able to utilize creative solutions to their problems, such as using online learning modules to extend supportive measure options. We also suggest that any guidance or discussion documents issued alongside regulations provide intentional suggestions for smaller and rural schools. Cross-district partnerships to fulfill personnel roles, for example, may be an option for districts; however, rural districts may need flexibility even in utilizing this as an option. It is crucial to consider these districts in promulgating new guidance or regulations so that students in small and rural school districts are not left with inadequate civil rights options and support.

### Sexual Violence Prevention Programs

A core component missing from the May 2020 regulations was sexual harassment/sexual violence prevention. It is not enough to respond to harassment that has already occurred in the educational setting; to truly create a safe environment for all students free from harassment, schools must engage in prevention efforts that help reduce the frequency of harassment. Research has shown that violence prevention programming can reduce both experiences of sexual harassment/assault and perpetration of harassment/assault. Prevention may especially be useful as a potential remedy when a pattern of harassment has been identified.

We suggest that any new guidance or regulations consider, at a minimum, encouraging schools to adopt prevention programs. We also suggest they consider prevention as a suggested remedy that could be used if an investigation finds that sexual harassment happened, especially if the harassment resulted in a hostile environment within the school. We also suggest that climate surveys be encouraged for all schools and suggested as a potential remedy, especially when a school identifies potential patterns or receives multiple reports of harassment in one year.

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<sup>2</sup> Fall 2020 Membership Report, available at <https://www.oregon.gov/ode/reports-and-data/students/Pages/Student-Enrollment-Reports.aspx>

## Comments on Discrimination Based on Sexual Orientation and Gender Identity in K-12 Schools

In Oregon, discrimination based on sexual orientation and gender identity has been prohibited in state-funded K-12 education programs since 2007<sup>3</sup>. The Oregon Department of Education believes that supporting our LGBTQ2SIA+<sup>4</sup> students and prohibiting discrimination based on gender identity or sexual orientation is crucial to reach Oregon’s educational goals. To aid in reaching these goals, Oregon released *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* in May 2016<sup>5</sup>, and our *LGBTQ2SIA+ Student Success Plan*<sup>6</sup> in June 2020.

### The importance of addressing discrimination based on gender identity and sexual orientation.

LGBTQ2SIA+ students make up a significant portion of students in our schools. In Oregon, a 2019 survey<sup>7</sup> found that approximately 1 in 10 students identified as gay, lesbian, or bisexual, and that more than 1 in 20 students identified as transgender, gender nonconforming, gender-fluid/genderqueer, agender, or something similar. These students face significant challenges at school. According to the Oregon LGBTQ2SIA+ Student Success Plan, “[t]he day-to-day experiences of discrimination, bias, and erasure that many LGBTQ2SIA+ students face creates conditions that challenges their wellbeing and academic success.”<sup>8</sup>

The Oregon Healthy Teens Survey, which the Oregon Health Authority uses to survey 8<sup>th</sup> and 11<sup>th</sup> grade students every two years, found that trans/nonbinary<sup>9</sup> students in particular experience extreme challenges at school. The 2019 survey found, for example, that 48% of trans/nonbinary 8<sup>th</sup> grade students reported experiencing bullying at school in the past 30 days for any reason, compared to 35% of female students and 22% of male students<sup>10</sup>. Trans/nonbinary students in 8<sup>th</sup> grade also reported that they experienced higher rates of

- unwanted sexual comments and attention in the last 30 days (15.3% trans/nonbinary, 10.7% female, 2.4% male);

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<sup>3</sup> ORS 659.150 and OAR 581-021-0045

<sup>4</sup> This acronym addresses the wide spectrum of individuals who identify across this spectrum, including lesbian, gay, bisexual, transgender/non-binary, queer/questioning, 2/two-spirit, intersex, and asexual individuals. The + recognized that there a myriad of ways to describe gender identities and sexual orientations. (taken from the ODE LGBTQ2SIA+ Student Success Plan)

<sup>5</sup> Available at <https://www.oregon.gov/ode/students-and-family/equity/civilrights/Documents/TransgenderStudentGuidance.pdf>

<sup>6</sup> Available at <https://www.oregon.gov/ode/students-and-family/equity/Documents/LGBTQ2SIA+%20Student%20Success%20Plan.pdf>

<sup>7</sup> Oregon Healthy Teens Survey, available at <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Pages/2019.aspx>

<sup>8</sup> Oregon Department of Education, *LGBTQ2SIA+ Student Success Plan*, <https://www.oregon.gov/ode/students-and-family/equity/Documents/LGBTQ2SIA+%20Student%20Success%20Plan.pdf>, pg. 21

<sup>9</sup> The category included students who identified as transgender, trans female or male, gender nonconforming, gender fluid, genderqueer, agender, or something else.

<sup>10</sup> Oregon Healthy Teens Survey Data by Gender, <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/SURVEYS/OREGONHEALTHYTEENS/Pages/2019.aspx>

- being threatened with a weapon in the last 12 months (20.1% trans/nonbinary, 8.7% female, 10.9% male); and
- suicide attempts<sup>11</sup> (26.3% trans/nonbinary, 12.6% female, 5.2% male).

Trans/nonbinary students in 11<sup>th</sup> grade reported that they experienced disproportionately high rates of

- bullying in the past 30 days (33.6% trans/nonbinary, 23.8% female, 1/6% male);
- being threatened with a weapon in the last 12 months (10% trans/nonbinary, 5% female, 7% male);
- ever being physically forced to have sex (11% trans/nonbinary, 9.9% female, 1.7% male); and
- experiencing physical abuse from a partner in the last 12 months (7.2% trans/nonbinary, 3.4% female, 3.9% male).

The combined effect of this bias, discrimination, and harm led 16.2% of trans/nonbinary 8<sup>th</sup> graders and 10.5% of trans/nonbinary 11<sup>th</sup> graders to report that they had missed school in the past 30 days because they felt that would be unsafe at school or on their way to or from school.

The experiences of our students tell us that they cannot learn safety and effectively if they are continually subject to discrimination, harassment, and bullying. It is imperative that schools take action to address these dynamics so that our schools may be safe places for all students to learn.

#### Common areas of concern for LGBTQ2SIA+ students/families and possible areas of guidance/enforcement.

Because Oregon has prohibited discrimination based on gender identity and sexual orientation in schools for years, one of the Oregon Department of Education's roles has been to assist schools in understanding and implementing these obligations. We also assist students and families who experience discrimination in proactively resolving issues with their districts or in filing complaints with their district or ODE. Supporting districts through technical assistance and supporting students in accessing their rights has made the Oregon Department of Education aware of common areas of concern across Oregon districts. We suggest that the Office of Civil Rights address the following areas of concern in any guidance issued.

#### Gender Identity

Any guidance issued by OCR pertaining to discrimination based on gender identity must address a broad range of student identities. Students who identify as trans make up only a portion of the community of students who identify outside of the cisgender binary. It is especially important to take into account identities that exist outside of historical concepts of gender, such as students who identify as nonbinary, agender, two-spirit, or gender fluid.

It is also important to take into account the wide spectrum of experiences that students may have throughout elementary and secondary school. In Oregon, we've seen that students can begin

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<sup>11</sup> One or more attempts in the last 12 months.

asserting a different gender identity than the one they were assigned at birth as early as kindergarten or as late as just prior to graduation. Some students are ready to assert their gender identity all at once, while others may go through a transition period of wanting to be out in some situations but not others. Likewise, students may experience fluidity in their gender identity, either because they identify more fluidly or because they go through a period of discovering their own identity. It is important that any guidance issued by OCR take this spectrum of experiences into account, and address potential transition periods and fluidity students may experience.

### Names, Pronouns, and Gender Identity on Records

It is important that students be able to assert their name, pronouns, and gender identity, regardless of what is reflected on their original registration or school records. Students and families should not be required to prove legal document change or medical diagnosis in order to have their asserted name, pronouns, or gender identity used at school. Oregon's *Guidance to School Districts* document does not require that students present any legal or medical documents for a change to be reflected in their records; the student and/or their parent asserting the student's new name and identity is enough<sup>12</sup>. We have found that this practice is affirming and relieving for students and families, and that school districts can be easily trained to make these changes in their systems. Where documents do require the student's legal name (transcripts, diplomas, etc), we suggest to schools that they print two copies – one reflecting the student's legal name, and one reflecting their asserted name.

### Restroom and Locker Room Access

Students must be allowed to use the restrooms and locker rooms that align with their gender identity. The Oregon Department of Education's *Guidance to School Districts* directs schools to allow students to use the restrooms, locker rooms, and showers that align with their gender identity<sup>13</sup>. Schools may offer alternate accommodations, such as a single-stall restroom or alternate changing room, but should not require students to use them instead of the facilities that align with their gender identity. This policy has been effectively implemented in elementary, middle, and high schools all across Oregon.

From 2017 to 2020, an Oregon school district was the subject of a court case related to restroom access for a trans student. The Ninth Circuit Court opinion<sup>14</sup>, issued in February 2020, affirmed that the district had not infringed on the rights of other students by allowing the student to use the restroom that aligned with their gender identity. School administrators from across Oregon report to us that this type of plan works effectively at the majority of schools. We have also seen that while many schools worry about parental or community backlash, there is often less than expected. Oregon's implementation of this policy shows that it can effectively work in K-12 schools across a variety of urban and rural communities.

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<sup>12</sup> *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students*, p. 4 <https://www.oregon.gov/ode/students-and-family/equity/civilrights/Documents/TransgenderStudentGuidance.pdf>

<sup>13</sup> *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students*, p. 10 <https://www.oregon.gov/ode/students-and-family/equity/civilrights/Documents/TransgenderStudentGuidance.pdf>

<sup>14</sup> United State Court of Appeals for the Ninth Circuit, No. 18-35708 <http://cdn.ca9.uscourts.gov/datastore/opinions/2020/02/12/18-35708.pdf>

## Athletics

All students should have to option to access athletics as a part of their K-12 school experience. Trans, nonbinary, two-spirit, intersex, and gender fluid students should not be kept out of these experiences due to their gender identity. In Oregon, students are able to participate in sports consistent with their gender identity. The Oregon School Activities Association’s rule handbook notes that “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.<sup>15</sup>” The policy also states that nonbinary or gender fluid students

“...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.<sup>16</sup>”

OCR should directly address the rights of students to be free from gender identity and sexual orientation discrimination in athletics. The Oregon Department of Education believes that students benefit when they are allowed to access athletics in a way that affirms their gender identity. It would be helpful if guidance from OCR specifically addressed the rights of nonbinary, two-spirit, intersex, and other students who do not identify closely with the traditional gender binary. It would also be helpful to specifically consider gender fluid students specifically, and to give K-12 schools close guidance on how to best support students who experience gender fluidity over the course of a semester or year.

## Harassment and Bullying

LBGTQ2SIA+ students experience significant bullying and harassment based on their identity in the school environment. Study after study, including Oregon’s own data, affirms that LBGTQ2SIA+ students are teased, harassed, assaulted, and sexually harassed at higher rates than heterosexual or cisgender students, and that these experiences prevent them from fully learning. Discrimination based on sexual orientation and gender identity, including harassment and bullying, must be addressed in any guidance issued by OCR. Title IX Coordinators are well positioned to respond to this kind of discrimination, since they already have training on responding to other sex discrimination. Responding through stopping the harassment and remedying any effects on the student’s educational environment will improve the lives of LBGTQ2SIA+ students.

## “Fair in Form but Discriminatory in Operation” Discrimination

Oregon’s definition of discrimination within educational programs includes discrimination that is “fair in form but discriminatory in operation.” This prevents schools and districts from enacting

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<sup>15</sup> Oregon School Activities Association, *2021-2021 Handbook*, pg. 76  
<https://www.osaa.org/docs/handbooks/osaahandbook.pdf>

<sup>16</sup> Oregon School Activities Association, *2021-2021 Handbook*, pg. 77  
<https://www.osaa.org/docs/handbooks/osaahandbook.pdf>

rules, policies or procedures that result in discrimination to one group, even if the rule, policy or procedure is evenly applied to all students or in all settings. We have seen that this kind of discrimination can disproportionately impact LGBTQ2SIA+ students in schools. For example, a student in one district faced potential “fair in form but discriminatory in operation” discrimination when he sought to create an LGBTQ2SIA+ student organization. When he filed the paperwork, the school district created a new rule that required all students to get parental permission before joining any school club. The permission slip listed all the available clubs, and parents had to mark the clubs they approved the student to join and sign the form. Students reported that while the permission forms were not checked in most clubs, they were always checked in the LGBTQ2SIA+ student organization. Because the community was fairly conservative, this new rule had a disparate impact on students in the newly formed LGBTQ2SIA+ student organization.

When districts create special rules in response to student organizations like GSAs (Gay-Straight Alliance, and Gender and Sexuality Alliance) or other LGBTQ2SIA+ organizations, it subjects LGBTQ2SIA+ students to discrimination. Even though this policy was applied to all student organizations, it did not impact student organizations evenly and was not applied evenly. Research by GLSEN has demonstrated the importance of GSAs and other similar organizations: students who attended a school that had a GSA reported a safer, more positive experience at school, and were less likely to hear biased remarks about LGBTQ2SIA+ students<sup>17</sup>. For these reasons, it is important to direct schools to prohibit this type of discrimination based on gender identity and sexual orientation.

### Student Privacy

Any guidance issued by OCR should take into account the rights of minor students in the K-12 environment. When a student is ready to assert their gender identity or sexual orientation, they alone should decide how widely those identities are shared. The Oregon Department of Education believes that “the person best situated to determine a student’s gender identity is the individual student<sup>18</sup>.” In many cases, the student is supported by their parent in asserting their name, pronouns, and identity. However, there may be some cases where a student is not yet ready for their parents to know about their gender identity. Guidance should address the intersections of parent rights and student privacy in these cases, and should prohibit schools from revealing confidential personal information in any way that violates that student’s privacy rights<sup>19</sup>.

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<sup>17</sup> *GLSEN 2019 School Climate Survey*, p. 70 [https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web\\_0.pdf](https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf)

<sup>18</sup> *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students*, p. 4 <https://www.oregon.gov/ode/students-and-family/equity/civilrights/Documents/TransgenderStudentGuidance.pdf>

<sup>19</sup> In August 2020, the ACLU issued an open letter to schools stating that “[s]tudents have the constitutional right to share or withhold information about their sexual orientation or gender identity from their parents, teachers, and other parties, and it is against the law for school officials to disclose, or compel students to disclose, that information.” Available at <https://www.aclu.org/letter/open-letter-schools-about-lgbt-student-privacy>

## Educator/Administrator Training

One of the focus group findings that informed ODE's *LGBTQ2SIA+ Success Plan* was that while many students were aware that discrimination was prohibited, they did not trust that educators and administrators would actually follow through on their duties to address incidents<sup>20</sup>. This led the plan to recommend that school staff receive training, coaching, and other professional support to understand their legal obligations as well as best practice<sup>21</sup>. It is clear that merely issuing guidance or enacting policy is not enough; educators must receive training on those policies and on their roles in enacting them.

Any application of Title IX to discrimination based on gender identity and sexual orientation must include a requirement for staff to report discrimination about which they become aware. This means that staff will need to receive training on what constitutes discrimination, and where they should report it once they are aware of it. However, to truly intervene on discrimination, training must go further. Youth need to see that educators are willing to intervene immediately to stop discrimination and harassment when they see it. They also must be able to trust schools to actually act to stop discrimination, and to repair any harm the discrimination has done to their educational environment. For most school environments, this will mean intentionally implementing broader trainings such as anti-bias and bystander intervention education for staff so that they can learn how to intervene in discrimination based on gender identity and sexual orientation.

To parallel best practices in Title IX related to sexual harassment, we suggest requiring an initial training for all staff that goes in-depth into discrimination based on gender identity and sexual orientation, as well as where to report it. We suggest that OCR make clear what is required for schools to meet these training requirements, and provide resources that schools can use to meet these goals. We also believe that these training requirements will be achievable and accessible for all K-12 schools, as long as those goals are supported by OCR and state departments of education. Many national and local organizations across the country already offer free or affordable services that may help schools meet their goals. The expansion of online training during the past year also provides numerous opportunities for even very rural schools to access high-quality training opportunities at affordable rates. State Departments of Education may also be able to assist schools by providing training directly; ODE already provides free training and educational services for school districts around Oregon's anti-discrimination laws that protect LGBTQ2SIA+ students, as well as in best practices in supporting LGBTQ2SIA+ students.

## Initial Climate Assessment

Because responding to discrimination based on sexual orientation and gender identity as a part of Title IX would be new to many schools, it would benefit districts to gain an initial understanding of this kind of discrimination by engaging in a climate assessment. Climate surveys are already

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<sup>20</sup> "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." *ODE LGBTQ2SIA+ Student Success Plan*, pg. 13.

<sup>21</sup> "Strategy #1: School staff receive the training, coaching, and professional support needed to understand Oregon laws regarding bias and discrimination on all protected classes and in using trauma-informed practices to support LGBTQ2SIA+ students and students of color." *ODE LGBTQ2SIA+ Student Success Plan*, pg. 36.

an accepted best practice to learn about the prevalence and dynamics of discrimination in school environments. Climate surveys have long been advocated for use regarding sex discrimination and sexual harassment<sup>22</sup>, and were even encouraged under former Title IX guidance<sup>23</sup>. School climate surveys could give Title IX Coordinators an idea of the prevalence of LGBTQ2SIA+ discrimination and harassment, and what specific forms that discrimination took within different parts of the school or district. The results of these surveys could help Title IX Coordinators craft targeted interventions and devise staff and student trainings that would meet the specific needs of their communities.

Because requiring a climate survey would add to the duties of a Title IX Coordinator, OCR must provide resources and support for schools throughout this process. First, schools must be provided an adequate amount of time to collect data. K-12 school districts may need a full calendar year or more to plan and collect enough data to analyze. Second, schools should be provided with flexibility and options in how they conduct their climate assessments. Common practices such as surveys and focus groups may be appropriate in some school contexts but present challenges for others. For example, while in larger school districts a survey may be a safe and anonymous way to present feedback, it may not be in other smaller districts. Third, schools must be provided with optional resources they can use to develop school- and district-specific climate assessments. Some resources may already be available to schools, such as GLSEN's School Climate Survey tool<sup>24</sup>. OCR could make available a list of potential resources to support schools in this process.

### **For Further Information**

If you have any questions about the above, please reach out to ODE Civil Rights and Title IX Specialist Kate Hildebrandt at [Katherine.hildebrandt@ode.state.or.us](mailto:Katherine.hildebrandt@ode.state.or.us) or at 503-551-5713.

Thank you again for the opportunity to provide comments.

Kate Hildebrandt  
Civil Rights Specialist and Title IX Coordinator  
Oregon Department of Education  
255 Capitol St NE  
Salem, OR 97310-0203  
503-551-5713  
[katherine.hildebrandt@ode.state.or.us](mailto:katherine.hildebrandt@ode.state.or.us)

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<sup>22</sup> <https://www.justice.gov/archives/ovw/blog/best-practices-campus-climate-surveys>

<sup>23</sup> *2011 Dear College Letter*, p. 18; *2014 Questions & Answers*, p. 20 and p. 36

<sup>24</sup> <https://localsurvey.glsen.org/>