

# LGBTQ+ Students in School

*What School Administrators and Employees Must  
Do to Facilitate a Welcoming Educational  
Environment for All Students*

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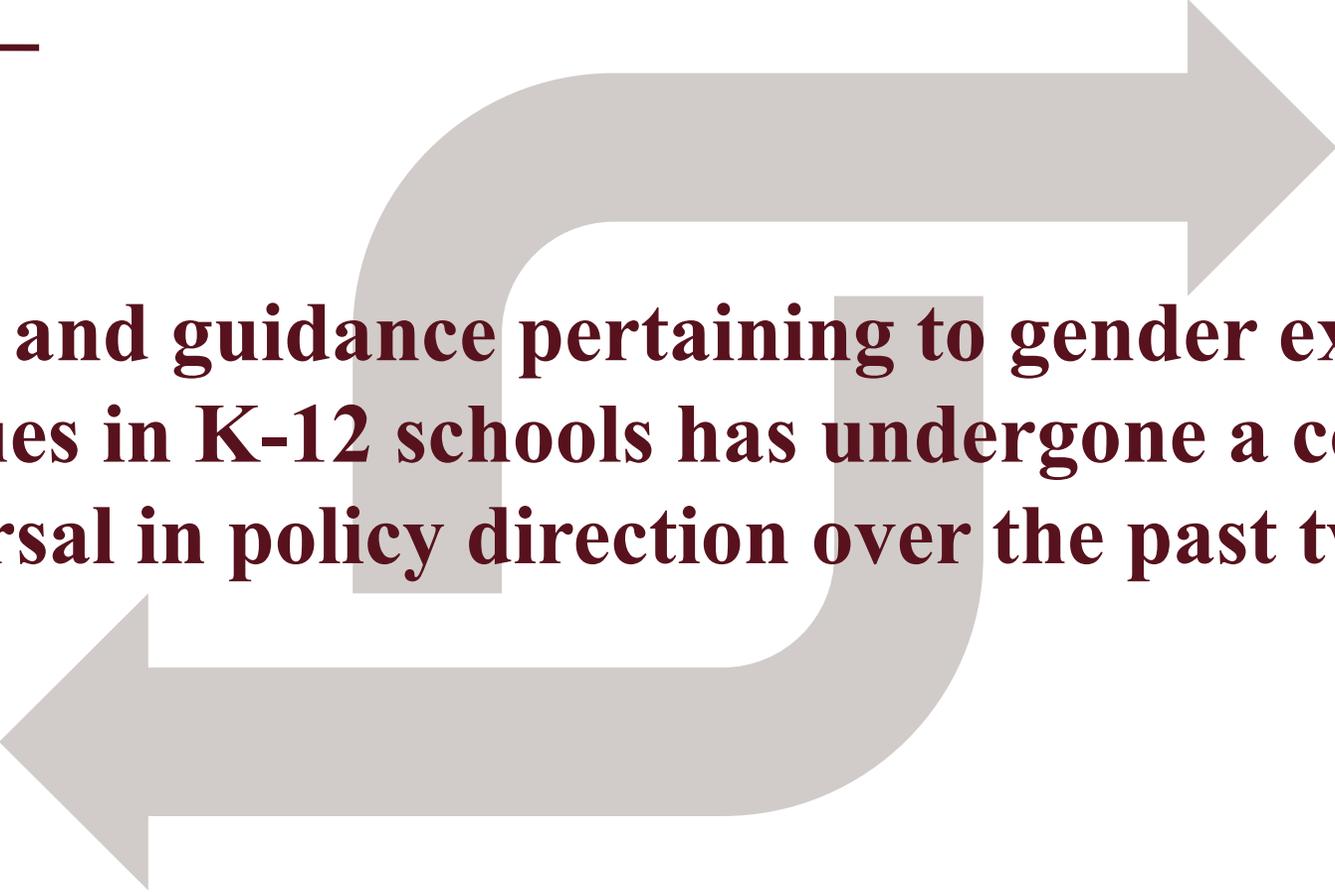
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# Overview

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**Law and guidance pertaining to gender expression issues in K-12 schools has undergone a complete reversal in policy direction over the past two years.**

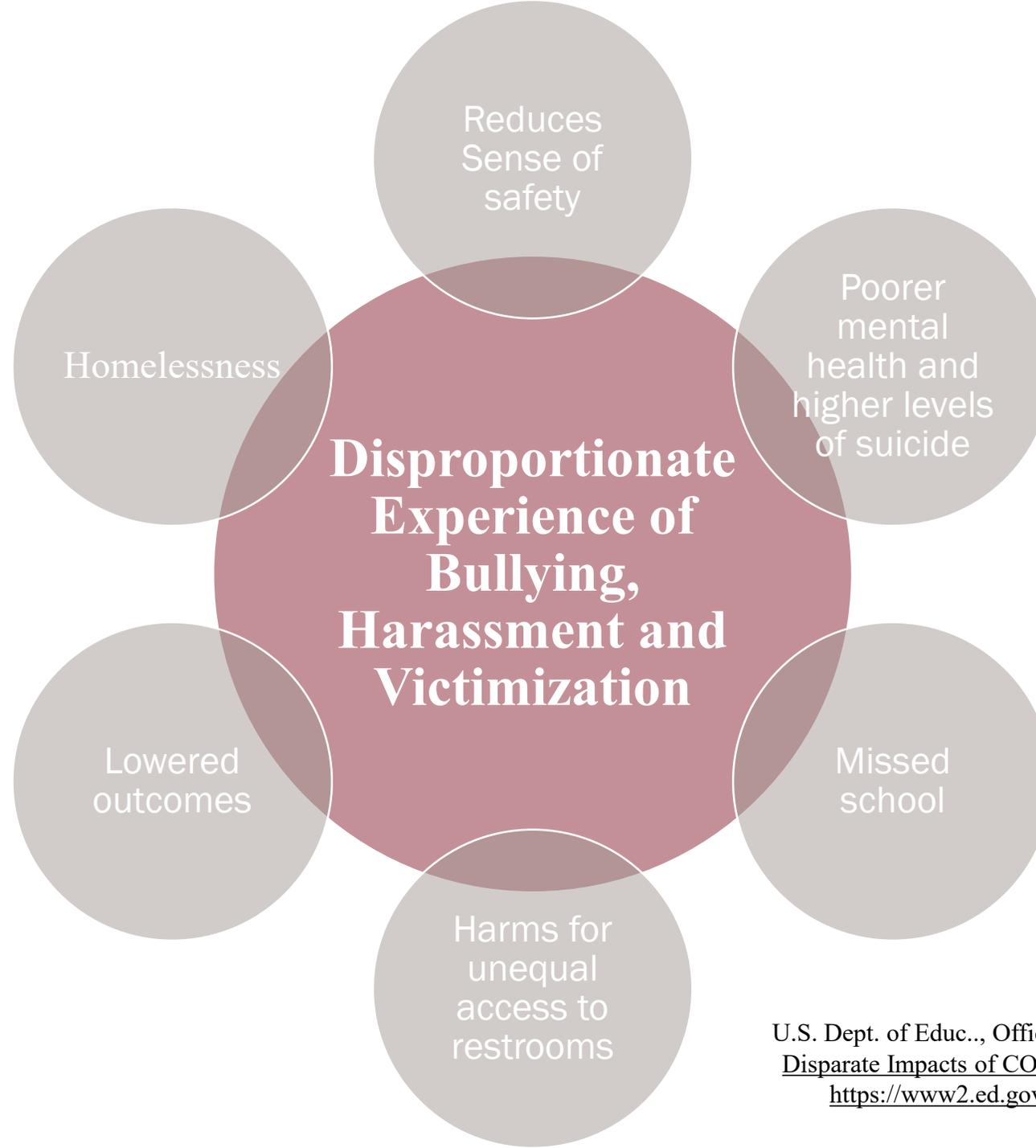
# Gender Identity

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*Gender identity* is an innate, largely inflexible characteristic of an individual's personality

- An individual's personality is generally established by age four
- However, the age at which an individual comes to understand/express their gender identity may vary based on social and familial development

bisexual  
questioning  
genderqueer transgender  
asexual misgendering homophobia  
gender identity coming out  
LGBTQ+ gender-expansive cisgender  
pansexual gender expression gender  
gender non-conforming ally  
outing same-gender loving intersex  
sex assigned at birth gay  
gender-fluid gender dysphoria  
biphobia gender binary queer  
sexual orientation  
non-binary lesbian  
transitioning



U.S. Dept. of Educ., Office for Civil Rights, Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students(2015), available at <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

# Sources of Authority - Transgender Students

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- **State and Federal Statutes**
- **State and Federal Agency Guidance**
- **Cases interpreting state/federal law pertaining to transgender students**

# Federal Nondiscrimination Statute Title IX of the Education Amendments of 1973

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- Title IX of the Education Amendments of 1973.
- Prohibits educational institutions from excluding participation in, denying the benefits of, or discriminating *on the basis of sex* in any *educational program receiving federal funding*.

# New York Nondiscrimination Statute Dignity for All Students Act

- DASA expressly prohibits bullying, discrimination and harassment on school property/at a school function *on the basis of gender identity or expression*.
- Requires every district to create policies, procedures and guidelines that create a school environment under which students could sue a school district.

# New York Nondiscrimination Statute

## State Human Rights Law

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- New York State amended the State Human Rights Law in 2019 to include *gender identity or expression as a protected class* in all areas of jurisdiction, including educational institutions.
- Unlawful discrimination on the basis of gender identity or expression can include:
  - Denying the use of restrooms consistent with a person's gender identity;
  - Asking a transgender person to use a single-occupancy restroom because of someone else's concern;
  - Requiring individuals to show medical/other documentation in order to use facilities consistent with their gender identity;
  - Utilizing grooming, uniform appearance standards based on sex stereotypes;
  - Refusing to use an individual's requested name or pronouns;
  - Subjecting an individual to harassment at school.

# Federal Nondiscrimination Statute

## Title VII of the Civil Rights Act of 1964

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- Federal law that prohibits discrimination on the basis of various protected characteristics, including sex, in employment practices.
- Not a direct source of student rights
- Applicable to actions taken against employees based upon conduct with transgender students

# **Federal and State Statutes Regulating Student Records and Information**

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## **Family Education Rights and Privacy Act (FERPA)**

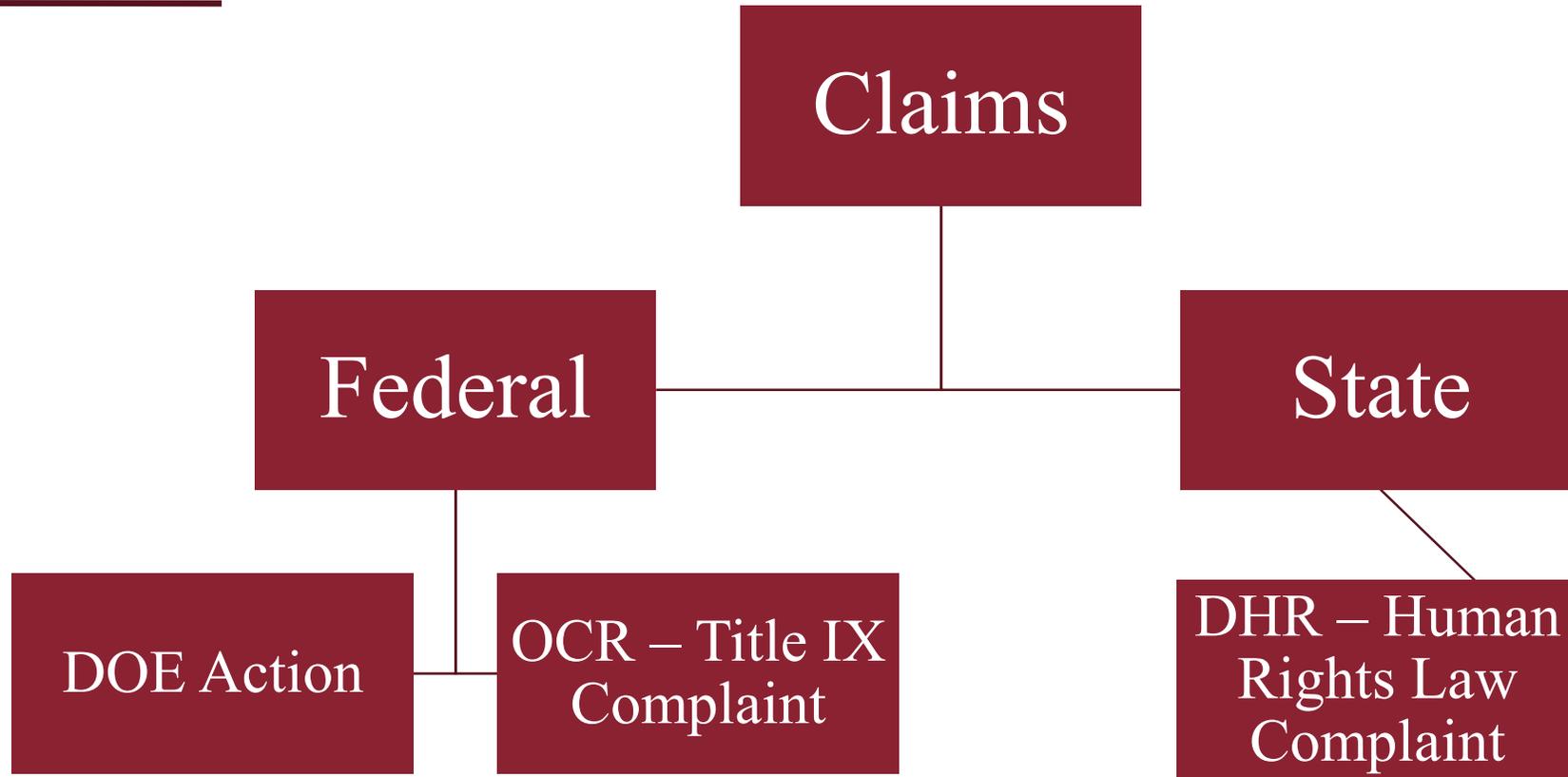
- Federal law regulating the distribution and disclosure of records and information about students.

## **New York Education Law 2-D**

- Prohibits unauthorized release of personally identifiable information.
- Requires educational institutions to protect students' personally identifiable information by ensuring that the use and disclosure of such information benefits students.
- Also prohibits the inclusion of such information in public reports or other public documents.

# Enforcement

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# NYSED Guidance

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Promulgated in 2015, NYSED’s guidance on handling of transgender student issues remains in effect today, proclaiming that NYSED “is committed to providing all public school students, including transgender nonconforming...students, with an environment free from discrimination and harassment, to fostering civility in public schools, and to ensuring that every student has equal access to educational programs and activities.”

- Use welcoming and inclusive language in school mission statements
- Ensure school policies clearly affirm students’ right to be free from discrimination based on sexual orientation or gender identity in all aspects of school
- Adopt policies that respect all students’ gender identity, and implement policies to safeguard students’ privacy
- Adopt policies or model plans to guide school staff on how to support students and community with families
- Facilitate opportunities for students to find support with peers, teachers, faculty and staff
- Provide educational programs aimed at staff, students, families and other community members

# Federal Policy and Guidance

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- Very volatile with political change
- Executive Order 14021 – March 2021
- U.S. Department of Education Office of Civil Rights (OCR) Guidance - June 2021
- Similar in substance to NYSED Guidance
- Updated guidance forthcoming from OCR?

See,

Bostock v. Clayton  
County, Georgia, 140  
S.Ct. 1731 (2020).

1

Adopting a “last name only” policy, which allows school community members to address students by their last names only and avoid addressing students by the names with which they identify.

2

Requiring students with a different gender identity to use the bathrooms that match their sex assigned at birth.

3

Requiring students with a different gender identity than the one assigned at birth to use single-user bathrooms.

4

Not allowing students to participate on sports teams of the gender with which they identify.

5

Not allowing a student with a different gender identity than the one assigned at birth to wear the graduation gown color of the gender with which they identify.

**POSSIBLE DISCRIMINATION?**

Names and Pronouns

Privacy, Confidentiality  
and Student Records

Activities, Rules,  
Policies and Practices

# Names and Pronouns

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- Rely on a student's (or their parents' or guardians') expression of their gender identity, including names.
- No threshold medical or mental health diagnosis or treatment requirement that any student must meet.
- If there is no reason to believe the request was based on anything other than a *sincerely held belief*, accommodation is recommended.
- **Adopt a flexible approach.**

See,

Kluge v. Brownsburg Community School Corporation, 548 F.Supp.3d. 814 (S.D. Indiana July 12, 2021).

But see,

Meriweather v. Hartop, 992 F.3d 492 (6th Cir. March 2021).

# Privacy, Confidentiality and Student Records

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- Generally protected by federal and state law.
- Revealing a student's gender status, birth name, sex assigned at birth or medical history to classmates, their parents, teachers and others may be unlawful.

But see,

Ricard v. USD 475 Geary  
County, Kansas School Board,  
2022 WL 1471372 (D. Kansas,  
May 9, 2022).

# Privacy, Confidentiality and Student Records

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- Potential conflict between agency guidance and case law
- How to handle when student requests that parents not be told of student's gender identity/name preferences?
- General principle to honor student requests prevails . . .
- Until it runs into parent requests under FERPA that require school to disclose records to parents
- Very delicate subject – call your school attorney!

# Privacy, Confidentiality and Student Records

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- Must use name/pronouns a student chooses and implement policies to safeguard their privacy, such as maintaining confidentiality of a student's birth name or sex assigned at birth, if the student wishes to keep information private.
- School records, including attendance records, transcripts and Individualized Education Programs should be updated with the student's chosen name/information. Every effort should be made to immediately update student education records.
- A school may still maintain records containing student's birth name or sex assigned at birth, but such records should be kept confidential.

# Privacy, Confidentiality and Student Records

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With respect to **student medical records**: nurses/other licensed professionals need accurate and reliable information to confirm a student's identity in order to ensure the student receives appropriate care and to enable them to coordinate care with other healthcare providers/licensed professionals, as well as to file health insurance claims, if necessary.

*A school nurse should use the student's chosen name and use the student's birth name only when necessary to ensure the student receives appropriate care, etc.*

# **NYSED Guidance on Gender-Based Activities, Rules, Policies and Practices**

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*Schools are required to treat students according to their gender identity, including making sure students have access to facilities/procedures that align/support their gender identity.*

# Gender-Based Activities, Rules, Policies and Practices

## Restrooms/Locker Rooms

- Students have the right to use restrooms and locker rooms that match their gender identity. A school cannot force a student who identifies with a certain gender to use facilities that do not match their gender identity or segregate them into separate (e.g., single-user) facilities, regardless of objections from anyone else. In fact, having a student use a single-user facility (rather than a bathroom reserved for the gender with which they identify) is a form of discrimination. However, those who want additional privacy can ask their school for an alternative.

See,

Grimm v. Gloucester County School Board,  
972 F.3d 586 (4th Cir. 2020), as amended  
(Aug. 28, 2020), en banc rehearing denied,  
976 F.3d 399 (4th Cir. 2020), cert. denied,  
141 S. Ct. 2878 (June 28, 2021).

# Gender-Based Activities, Rules, Policies and Practices

## Dress Codes

- Students have the right to dress in a way that matches their gender identity within the dress code. A school cannot enforce a dress code more strictly against a gender non-conforming student.

# Gender-Based Activities, Rules, Policies and Practices

## School IDs, Databases, etc.

- Students should be treated according to their chosen gender identity (they should not be forced to change their gender marker on IDs or student databases or show evidence of medical treatment in order to be treated respectfully).

# Gender-Based Activities, Rules, Policies and Practices

## PE/Athletics

- School administrators confronted with a student seeking to participate in interscholastic sports on a team consistent with the student's stated gender identity should generally follow the Transgender Guidelines outlined in the NYSPHSAA Handbook.
- Under NYSPHSAA's guidelines for competitive athletics, the student and parent/guardian must notify the superintendent or designee (e.g., athletic director) that the student would like the opportunity to participate in interscholastic athletics consistent with the gender with which they identify. The school then determines the eligibility of the student seeking to participate. Confirmation can be based on documentation from the parent/guardian, a guidance counselor, a doctor, a psychologist or other medical professional. Once eligibility is confirmed, it is granted for the duration of the student's participation in interscholastic sports. The athletic director should then notify NYSHPSAA if any accommodations are needed.

See,

B.J.P. v. West Virginia State Board of Education, 550 F. Supp.3d. 347 (S.D. W.Va. July 21, 2021).

But see,

Dimas v. Pecos Independent School District Board of Education, 2022 WL 816501 (D. New Mexico) (March 29, 2022).

# Conclusions

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- Schools should generally accept a student's assertion of their own gender identity.
- NYSED encourages schools to provide guidance and other resources for the community, such as trainings and information sessions to ensure the community understands the importance of safe and supportive school environments.
- Schools can contact DOE-funded Equity Assistance Centers to request technical assistance, including teacher training, in equity matters, related to serving LGBTQ+ students in their schools.

**Thank you.**  
*Questions?*



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