Presenters

- **Karen A. Bingert**, Executive Director, NJPSA
- **Donna McInerney, Ed.D.**, CEO, FEA
- **David Nash, Esq.**, Director of Legal Education and National Outreach, FEA
- **Kristina Donovan, Ph.D.**, Director, School Counseling Program, Georgian Court University
- **Christian Fuscarino**, Executive Director, Garden State Equality
- **Anthony Scotto**, Director of Curriculum and Instruction, Hamilton Township Public Schools
Disclaimer

This presentation is intended as a summary of law only, and is not meant as legal advice. Please consult your attorney to obtain legal advice.
Key Topics

● Overview of Current Legal Requirements related to Gender Identity
● Review of Key Terms and Concepts
● Responding to Potential Scenarios
● Q & A
● Resources & Next Steps
C.18A:35-4.36a Curriculum to include instruction on diversity and inclusion.

1. a. Beginning in the 2021-2022 school year, each school district shall incorporate instruction on diversity and inclusion in an appropriate place in the curriculum of students in grades kindergarten through 12 as part of the district’s implementation of the New Jersey Student Learning Standards.

b. The instruction shall:
   (1) highlight and promote diversity, including economic diversity, equity, inclusion, tolerance, and belonging in connection with gender and sexual orientation, race and ethnicity, disabilities, and religious tolerance;
   (2) examine the impact that unconscious bias and economic disparities have at both an individual level and on society as a whole; and
   (3) encourage safe, welcoming, and inclusive environments for all students regardless of race or ethnicity, sexual and gender identities, mental and physical disabilities, and religious beliefs.

c. The Commissioner of Education shall provide school districts with sample learning activities and resources designed to promote diversity and inclusion.

2. This act shall take effect immediately. Approved March 1, 2021
Related Curriculum Requirements

P.L. 2019, C.6 (1/31/19) - Requires inclusion of instructional materials on the political, economic, and social contributions of persons with disabilities and lesbian, gay, bisexual, and transgender people, in an appropriate place in the curriculum of middle school and high school students as part of the district’s implementation of the New Jersey Student Learning Standards.

Board Member Reaction to New Law - Hackensack School Board Trustee allegedly sent emails to the acting Superintendent indicating that she was “disgusted and appalled” by the January 31, 2019, law requiring public schools to teach LGBTQ History.

"I find it repugnant that someone's sexual preferences have anything to do with their contributions or achievements in society."

"Everywhere I turn, this alternate lifestyle narrative is being shoved (down) our children's throats. Where does it end???

Emails were obtained through Open Public Records Act request.
NJDOE Guidance on Transgender Student Rights

- NJDOE Guidance and Resources Regarding Transgender Students
- Definitions
- Student Gender Identity – Parent consent, court order name change not required; parent notification
- Name and pronoun use, student ID, student dress code
- Safe and Supportive Environment – staff training, equal access, HIB, social and emotional learning
- Confidentiality and Privacy
- Student Records – Gender Identity v. Birth Name
- Student Activities
- Restrooms and locker rooms
Related Legal Requirements

● New Jersey Law Against Discrimination
  ○ Includes protections for individuals based on gender identity and expression
  ○ Specifically addresses rights to access locker rooms, restrooms based on gender identity

● Title IX
  ○ Current federal administration recognizes that Title IX protections extend to protect individuals from discrimination based on gender identity or expression
Foreseeable Legal Issues Related to Implementing Ch. 32/Gender Identity

- Students accidentally “outing” their peers
- Parental objections, attempt to opt out
- Teacher/staff objections to implementing curriculum on religious/moral grounds
- Teacher/staff failing to honor student’s gender identity and/or expression
- Ill-conceived teacher assignments that cause harm for students
- Insensitive student comments linked to gender identity, other characteristics
- Students sharing personal experiences and information regarding peers related to acts of discrimination
- Board member objections, attempts to block implementation of curriculum
- Increased risk for suicidal ideation, other adverse outcomes for transgender students, which could be exacerbated if curriculum not properly implemented
The Facts – The Trevor Project (2021)

The Trevor Project’s 2021 National Survey on LGBTQ Youth Mental Health sheds light on many of these challenges by capturing the experiences of nearly 35,000 LGBTQ youth ages 13–24 across the United States.

Among some of the key findings of the survey:

42% of LGBTQ youth seriously considered attempting suicide in the past year, including more than half of transgender and nonbinary youth.

12% of white youth attempted suicide compared to 31% of Native/Indigenous youth, 21% of Black youth, 21% of multiracial youth, 18% of Latinx youth, and 12% of Asian/Pacific Islander youth.

94% of LGBTQ youth reported that recent politics negatively impacted their mental health.

More than 80% of LGBTQ youth stated that COVID-19 made their living situation more stressful — and only 1 in 3 LGBTQ youth found their home to be LGBTQ-affirming.

70% of LGBTQ youth stated that their mental health was "poor" most of the time or always during COVID-19.

48% of LGBTQ youth reported they wanted counseling from a mental health professional but were unable to receive it in the past year.

30% of LGBTQ youth experienced food insecurity in the past month, including half of all Native/Indigenous LGBTQ youth.
75% of LGBTQ youth reported that they had experienced discrimination based on their sexual orientation or gender identity at least once in their lifetime.

Half of all LGBTQ youth of color reported discrimination based on their race/ethnicity in the past year, including 67% of Black LGBTQ youth and 60% of Asian/Pacific Islander LGBTQ youth.

13% of LGBTQ youth reported being subjected to conversion therapy, with 83% reporting it occurred when they were under age 18.

Transgender and nonbinary youth who reported having pronouns respected by all of the people they lived with attempted suicide at half the rate of those who did not have their pronouns respected by anyone with whom they lived.

Transgender and nonbinary youth who were able to change their name and/or gender marker on legal documents, such as driver’s licenses and birth certificates, reported lower rates of attempting suicide.

LGBTQ youth who had access to spaces that affirmed their sexual orientation and gender identity reported lower rates of attempting suicide.

An overwhelming majority of LGBTQ youth said that social media has both positive (96%) and negative (88%) impacts on their mental health and well-being.
First Amendment Rights

Students - Focus on whether speech results in substantial disruption to the school environment - *Tinker v. Des Moines*. No protection for hate speech or speech that is threatening, lewd or vulgar, or promotes activities that are illegal or violation of district policy.

Staff Speech Key Questions - *Pickering*

- Did the statement concern a matter of general public concern?
- Was the employee speaking as a private citizen or during the course of his duties?
- Was the statement likely to disrupt a close working relationship?
Case Law / Potential Legal Ramifications

- **L.W. v. Toms River** - Harassment of students based on sexual orientation is a violation of NJLAD, and districts must take measures reasonably calculated to end the harassment; not enough to just apply existing code of conduct if harassment continues

- **L.K. and T.K. o/b/o A.K.** - Possible for second grade student to engage in HIB towards a classmate based on gender identity, but need to consider what we expect 2nd grade student to know and understand and need reliable evidence to support claim

- **Melnyk** - No First Amendment rights for teacher to alter required curriculum

- **Gina Priano-Keyser Tenure Charges** - “Can of Squirms” case, failure to monitor lesson plans
Legal Duty of Care

- Promote a school environment conducive to learning for ALL students
- Protect students from foreseeable harm
- Ensure staff are properly trained to understand and implement requirements
- Engage in progressive supervision as needed to ensure safety of students and other stakeholders and implement legal requirements and best practices
- Ensure that all key stakeholders have necessary information to respond to issues that may occur during implementation
- Ensure that the due process rights of all staff members are protected while carrying out their responsibilities
- See Gender Spectrum model plans - Gender Support Plan and Gender Communications Plan
Review of Key Terms

Gender Identity/Expression

Implicit Bias
Sexual Orientation
Explicit Bias
LGBTQ
Transition
Equity
Gender Nonconforming
Transgender
Gender Assigned at Birth
Non-Binary
Cisgender
Using Appropriate Terminology

● Language is constantly evolving

● Important to work with student on use of terminology with which that student is comfortable

● NJDOE guidance provides one source, but important to continuously review and update as needed
NJDOE Guidance on Terminology

- **Gender Identity** means a person’s internal, deeply held sense of gender. All people have a gender identity, not just transgender people. For transgender people, the individual’s internal gender identity is not the same as the gender assigned at birth.

- **Gender Expression** means external manifestations of gender, expressed through a person's name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture.

- **Assigned Sex at Birth** (ASAB) refers to the biological sex designation recorded on a person’s birth certificate upon the initial issuance of that certificate, should such a record be provided at birth.

- **Gender Assigned at Birth** refers to the gender a child is assigned at birth or assumed to be, based on their biological sex assigned at birth.

- **Sexual Orientation** describes a person’s enduring physical, romantic, and/or emotional attraction to another person. Gender identity and sexual orientation are not the same. A transgender person may be straight, lesbian, gay, bisexual, or asexual. For example, a person who transitions from male to female and is attracted solely to men may identify as a straight woman.

- **Transgender** is a term for an individual whose gender identity and/or gender expression differs from those typically associated with the sex and gender assigned at birth.
NJDOE Guidance on Terminology

- **Transition** is the process by which a transgender person recognizes that their authentic gender identity is not the same as the gender assigned at birth, and develops a more affirming gender expression that feels authentic. Some individuals socially transition, for example, through dress, use of names and/or pronouns. Some individuals may undergo a physical transition, which might include hormone treatments and surgery. School district personnel should avoid the phrase “sex change,” as it is an inaccurate description of the transition process; the process is more accurately described as “gender-confirming.”

- **LGBTQ** is an acronym for “lesbian, gay, bisexual, transgender, and queer/questioning.”

- **Gender nonconforming** describes a person whose gender expression does not conform to the gender expectations of their family or community. Gender nonconformity is not necessarily an indication that a youth is transgender; many non-transgender youth do not conform to stereotypical expectations.

- **Gender Expansive/Gender Diverse/Gender Fluid/Gender Non-Binary/Agender/Gender Queer** are terms that convey a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system. For example, students who identify as gender queer or gender fluid might not identify as boys or girls; for these students, the non-binary gender identity functions as the student’s gender identity.

- **Cisgender** refers to individuals whose gender identity, expression, or behavior conforms with those typically associated with their sex assigned at birth.
Garden State Equality - Pilot Curriculum

Garden State Equality [website on pilot curriculum]

Structure

Participating Districts

Key Findings

Lessons Learned

Next Steps
Potential Scenarios and How to Respond

Scenario 1

Ms. Walker is a second-grade teacher. She has a lesson plan that she implements on Monday morning to review the concept of gender identity. On Tuesday morning at 7 am, Ms. Daniels, a parent of Jenny, a second grader, is waiting in the school parking lot when the principal arrives. She demands to know why her child is being “indoctrinated” by her teacher. She demands to know how you could approve Ms. Walker’s “crazy lesson plan.” The principal promises to look into the matter and get back to the parent. A follow up meeting with the parent is scheduled for the next day.

The principal reviews the lesson plan after Ms. Daniels leaves. The lesson plan asks students to share their ideas on what gender means to them. Ms. Daniels said that her daughter Jenny came home from class and said that all the students in class were talking about their “private parts.” She also says that her daughter Jenny was reprimanded by Ms. Walker for asking Maria, the second-grade student who used to be known as Mark, why he keeps “pretending to be a girl” and then told Mark to “go away” when “he tried to play with the girls during recess.”

What does the principal do?
Scenarios (cont’d)

Scenario 2

A student comes to the principal and expresses concern that a girl is using the boys’ lavatory, making him uncomfortable. He says he has also seen the girl using the girls’ lavatory. He comments that the student looks like a girl one day and a boy the next, and that none of this makes sense. He wants the student to be forced to use one lavatory (the girls’). He reports that he just doesn’t understand why the student can’t just “be herself” and “be a girl.” He also says that he knows that there are other transgender students in school who clearly identify as one gender, and he’s fine with that, even in the lavatory. “This situation, though, and the back and forth leaves me feeling really uncomfortable, especially when the student walks in while I’m using the bathroom.”

How should the principal respond?
Scenarios (cont’d)

Scenario 3
You are a school counselor. You have a student, Tommy, who asks to see you. Tommy is very upset. He says that “everyone thinks I am a freak.” He says that he just spoke with his best friend, Marco, and told Marco that he is transgender and is really a girl. Tommy says that Marco “freaked out” and asked Tommy if he is crazy. Marco told Tommy never to say that again or “some other kids here will kill you.” Tommy says to you, “I can’t keep hiding who I am. But if Marco doesn’t get it nobody will. I can’t do this anymore.”

What do you do? What information needs to be gathered?

You ask Tommy what name and pronoun Tommy would prefer moving forward. Tommy says “I don’t know… I was thinking keep it simple. Tammy. But that’s just a fantasy. I don’t know how that will ever happen. I know I can talk to you and the principal about this. You’re both cool. But no one else will get it. I wish I could just tell everyone.” You ask about Tammy’s parents. Tammy says, “I tried. They went nuts. Dad threatened to throw me out of the house.”

What do you do now? What information is shared with school staff? With Marco? With other students? With Tammy’s parents?
Scenario Takeaways/Best Practices

- Appropriate for teachers to express factual assertions, such as transgender status not being a lifestyle choice
- Critical for BOE members to understand Code of Ethics, not engage in negative discussion of staff or students at board meetings
- There is no option to opt out of c.32 curriculum requirement, and it is appropriate to guide students through age appropriate conversations regarding gender identity and expression that may at times be difficult, even uncomfortable
- Students have First Amendment rights to engage in political speech even if others disagree, as long as not hate speech, lewd or vulgar, does not cause substantial disruption; “heckler’s veto” is frowned upon by courts
- Importance of comprehensive and ongoing professional learning for all stakeholders
- Critical for school administrators to review lesson plans to ensure they are aligned with curriculum and incorporate properly vetted, age-appropriate resources
Scenario Takeaways/Best Practices

- High-quality curriculum requires diverse content reflective of the population and the world
- Open lines of communication and transparency essential at all levels (Students, parents, teachers, school/district leaders, BOE, community)
- Courage (dare to be brave) is needed at all levels (Board, superintendent, central office, building administrators, supervisors and curriculum teams, student representatives)
- Given complexity of addressing issues of gender identity and expression, critical to rely on and partner with experts in the field
- Common language and common messaging is vital so that everyone says/hears the same thing, no matter the source
Talking Points

When confronted on an issue without having all information - “Thank you for bringing this issue to my attention. I want to make sure I have all the information necessary to respond to your concern. I will talk to those involved and gather more information and get back to you as soon as possible.”

When accused of promoting a political agenda or ideology - “Please know that I am committed to making sure we implement the state instructional requirements without any political ideology. I am happy to review any specific questions you may have with our curriculum or how it is being implemented.”

When challenged about whether concepts of gender identity should be taught at the elementary level - “Our curriculum is consistent with state law and includes well vetted and factual information that addresses issues of gender identity in an age appropriate manner. If you have questions about any specific aspects of this curriculum, I am happy to review those and get back to you.”
Talking Points

When a parents requests to have their child “opt out” of the curriculum required under Chapter 32 - “As with many other aspects of state mandated curriculum, the New Jersey Legislature has not provided an option to opt out of the requirements under P.L. 2001, c. 32. Rest assured that we are implementing this curriculum in a way that is consistent with state law, that addresses universal principles such as respect and dignity for all, and that does not promote any political ideology. If you have specific questions about aspects of the curriculum, I am happy to review those concerns and get back to you.”

When parents indicate it is their job to teach their child about sexual issues - School districts are the appropriate forum to convey, through the curriculum, factual information regarding issues such as gender identity, gender expression and sexual orientation and the need to understand and be supportive of our diverse student population. This includes addressing in the curriculum the political, economic and social contributions of LGBTQ+ persons. Given the increased risk of serious and lasting social, emotional and physical harm for transgender students who do not have a strong support system, it is critical that school officials proactively work to ensure a safe and supportive learning environment for such students.
Resources

- **Resources for Incorporating Instruction on Diversity and Inclusion in K-12 Curricula**
- **NJDOE Guidance/Resources on Gender Identity**
- **Garden State Equality Pilot Curriculum**
- **Learning for Justice (formerly Teaching Tolerance) Gender and Sexual Identity Resources**
- **Gender Spectrum model plans - Gender Support Plan and Gender Communications Plan**
HOW CAN FEA SUPPORT YOUR DISTRICT’S DIVERSITY & EQUITY GOALS?
Equity in Action Leadership Academy

Dare to be BOLD: From Equity Aspirations to Equity in Operation

A four session academy focused on strengthening the knowledge and skills of all leaders to enhance a district’s or school’s ability to systemically respond to issues of equity and diversity for students, families and educators. Consider bringing a team of leaders who want to engage in deep learning and apply that learning through a problem of practice you are currently experiencing in your district.

**Cohort 2**
- Session 1: Dec. 13, 2021
- Session 2: Jan. 18, 2022
- Session 3: Feb. 8, 2022
- Session 4: Mar. 30, 2022

**Cohort 3**
- Session 1: Jan. 28, 2022
- Session 2: Feb. 13, 2022
- Session 3: Mar. 14, 2022
- Session 4: May 20, 2022

*All sessions are virtual and run from 9:00 a.m. to 12:00 p.m.*
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● Signs Matter
● Coming Soon - Establishing Student Mental Health Protocols
● Coming Soon - Affirmative Action Officer Online Certificate Program
● The LEGAL ONE Podcast - http://njpsa.org/the-legal-one-podcast/
Conclusion

- If you have any questions about this presentation or suggestions for future seminars, please send an email to David Nash, Esq., LEGAL ONE Director at dnash@njpsa.org or Donna McInerney, Ed.D., FEA Chief Executive Officer at dmcinerney@njpsa.org.

- If you would like to talk with an NJPSA/FEA staff member, call (609) 860-1200.