

#### HEIDI J. ALDER LEAR & LEAR, OF COUNSEL EDUCATION LAW SECTION

## How diverse is Nebo School District?

#### Raise your hand and keep them up if you have:

• White students, born and raised in Utah, who are members of the Church of Jesus Christ of Latter Day Saints (LDS faith) and who speak English as their primary language and who live with both mom and dad

#### Put your hand down if you have:

- Students who are not born and raised in Utah
- Students who are 1<sup>st</sup> generation immigrants
- Students who are 2d generation immigrants
- Students who are not LDS
- Students who are gay
- Students who are transgender
- Students who are black
- Students who are Hispanic/Latino
- Students who do not speak English as their primary language
- Student who live with mom OR dad OR grandparents OR aunt/uncle





The Office - Diversity Day (Episode Highlight).mp4



## Diversity Tips 1-10

**Tip #1:** Recognize that we all have biases.

- Go to <u>implicit.harvard.edu/implicit/selectatest.html</u>
- Chose one of the following tests to take:
  - o Disability IAT
  - Race IAT
  - o Sexuality IAT
  - Religion IAT
  - o Weapons IAT

## **Implicit Bias**

- Refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner and can cause us to have feelings or attitudes about other people based on characteristics such as race, ethnicity, age, and appearance
- Activated involuntarily and without an individual's awareness or intentional control
- In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.

## A Few Key Characteristics of Implicit Biases

- Implicit biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- The implicit associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.
- Implicit biases are malleable. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.

# **Tip #2:** Acknowledge that left unchecked, biases turn into stereotypes turn into prejudices and discrimination



**Tip #3:** Research and take classes, professional development, or continuing education courses on how to implement a curriculum that is multicultural and focused on equity and inclusion.



## **Tip #4**: Understand your legal obligations to ensure discrimination does not occur in your schools.



## Our Legal Responsibility

#### Sex/Gender

Race/Color/ Nat'l Origin/Religion

#### Disability

Title IX of the Education Amendments Act of 1972 Titles IV and VI of the Civil Rights Act of 1964 Section 504 of the Rehabilitation of 1973

Americans with Disabilities Act (ADA)

Individual with Disabilities Education Act (IDEA)

## What Does the Law Say Exactly?

- Title IX, Title VI, and Section 504 all have the same language:
  - Title IX: "No person in the United States shall, on the basis of sex...
  - Title VI: "No person in the United States shall, on the ground of race, color, national origin...
  - Section 504: No otherwise qualified individual with a disability... shall, solely by reason of her or his disability ...

be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any [education] program or activity receiving Federal financial assistance

## So What IS Our Legal Responsibility?

## Under Section 504/ADA/IDEA?

 →To make sure our disabled students are not discriminated against and ensure they have equal access to education as our non-disabled students

## • Under Titles IV and VI?

• →To make sure no student feels discriminated against on the basis of his race, national origin, or skin color or religion or sex

## • Under Title IX?

- →To make sure no student feels discriminated against on the basis of that person's sex
- Or sexual orientation
- Or gender identity

## Examples of Discrimination Complaints in Utah

- Complaint that a district discriminates on the basis of race and color by assigning less qualified teachers to teach in West side schools and by failing to provide appropriate bussing for West side students.
- Complaint that a basketball coach used the "n" word and the term "monkey boy" when referring to students of color
- Complaint against school district for lack of correction and prevention of alleged bullying targeted at a gay student who later committed suicide.
- Complaint about clothing (t-shirts) with messages that may be considered offensive to others based on race, gender, color, religion or national origin
- Complaint from parent of transgender male (born as girl, transitioned to boy) student wanted to have yearbook picture taken wearing what the boys wore, when school refused.
- Complaint that a district discriminated on the basis of race by subjecting students of color to disproportionate disciplinary measures, including ISS and suspensions of greater than 10 days, and to disproportionate contact with law enforcement

**Tip #5:** Be an equal opportunity disciplinarian

- A large number of civil rights complaint involve the disparity in discipline between white and non-white students for the same offense.
- Research supports that this is happening in schools across the country.
- Be aware of the inadvertent tendency for personnel to discipline minority students (particularly black students) harsher than white students and be vigilant about ensuring ALL students get the same treatment for the same or similar offenses

## BUT...

• Recognize that some students acting out may have a reason for their behavior.

- For example, an autistic student who argues with a teacher loudly and seemingly belligerently, about a point the student believes the teacher got wrong.
- A student with ADHD who can't sit still and constantly bothers other students
- A student with Tourette Syndrome who blurts out inappropriate comments in the middle of class
- A student with ED or BD or any other disability that affects the student's behavior.
- Before launching into stern discipline for these students, consider the student's disability and how their conduct may be driven by their disability.
- (This doesn't mean you have to excuse the behavior; just rethink the disciplinary approach.)

#### **Tip #6:** Know your district's policies on nondiscrimination

### QUIZ TIME!

• Q: What is your district's policy on non-discrimination?

- A: Policy JDC: Student Discrimination and Harassment
- Q: Who is Nebo's Title IX Coordinator? (1.2)
- A: Coordinator of Student Services

## Digression: District Policy Quiz, Cont.

- Q: True/False: The District will only investigate written complaints of discrimination (3.5)
- A: False! The District will promptly investigate all verbal and written complaints
- Q: What are three examples of discrimination on the basis of race, color, religion, sex, national origin, or disability, according to Section 5?
- A: Lot of answers
- Q: What are three examples of sexual harassment, according to Section 6?
- A: Lots of answers
- Q: A student who feels harassed or discriminated against should describe what happened on what form? (8.1.2.1)
- A: Upon receiving a complaint of discrimination from a student, who must the Building Administrator contact?

**Tip #7:** Recognize when other students' teasing/bullying is tied to a race, national origin, sex, or disability.

FOR EXAMPLE

- Use of the "N" word, "wetback", or other derogatory terms for a student's race or national origin
- Use of the term "retarded" and/or making fun of students' disabilities (even if a student is not disabled, comparing a non-disabled student to a disabled student in a disparaging way)
- Terms that suggest sexual promiscuity or impropriety: "whore" "slut", spreading rumors about a student's sexual proclivities
- Sending nude or semi-nude images of a student without the student's permission; soliciting through pressure or blackmail images of nude or semi-nude images of a student

## **Tip #8:** Recognize that the term "sex" in Title IX has been interpreted to include "sexual orientation", "gender identity", and gender-nonconforming by OCR and some courts.

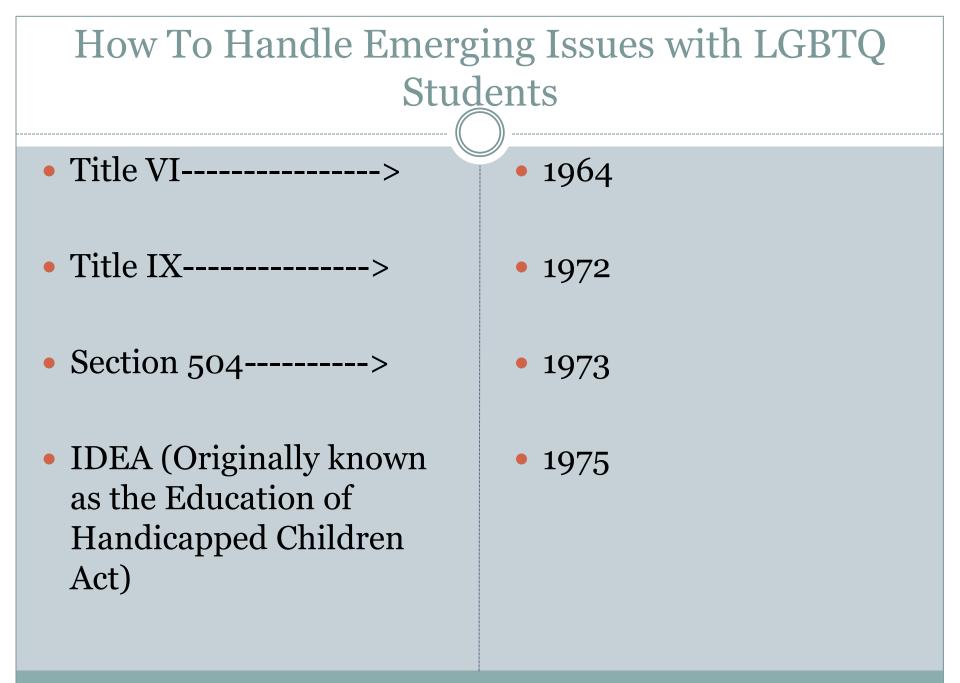


**Tip #9:** Put aside whatever personal thoughts/feelings/beliefs from whatever source they come and treat LGBTQ students with the same love and care you show for all other students.



## Stats on LGBTQ Youth

- LGBTQ students are 3 times more likely to experience harsh disciplinary treatment than their straight counterparts (47% LGBTQ had experienced suspension vs. 30% non-LGBTQ --usually when these kids stand up for themselves)
- LGBTQ youth are 120% more likely to experience homelessness than their non-LGTBQ peers (40% of homeless youth are LGBTQ)
- LGBTQ youth Only 27% of LGBTQ youth can "definitely" be themselves in school as an LGBTQ person (including sexual identity)
- 13% of LGBTQ of youth report hearing positive messages about being LGBTQ in school
- Only 26% of LGBTQ youth report that they always feel safe in the classroom
- 40-50% of LGBTQ attempt suicide when they are <u>**not**</u> supported or affirmed; when supported or affirmed, number drops to 4% (the average for population of non-transgender persons



## Legal History Re: Transgender Students in Schools

- No Utah law or court case with regard to accommodating transgender students.
- In September, 2015, a federal district court in Virginia upheld a school district's resolution that restrooms must be used according to a student's sex, not gender. G.C., a student born as female but who identified as male, had challenged the resolution as discriminatory under Title IX and the Equal Protection Clause
- On March 23, 2016, North Carolina passed a law, H.B. 2, requiring individuals to use only restrooms and changing facilities that correspond to the sex on their birth certificates when in government buildings (including schools)
- In April, 2016, the 4<sup>th</sup> Circuit overturned the district court's determination, holding that the school board's resolution was in fact discriminatory.
- On May 9, 2016, the Department of Justice sued North Carolina over H.B. 2, claiming it is discriminatory against transgender individuals in violation of Title VII and Title IX.

## Legal History, cont.

- On May 13, 2016, the Department of Education and the Department of Justice jointly issued a "Dear Colleague Letter" stating federal funds may be withheld if schools do not:
  - Treat students consistent with their gender identity even if their education records of identification documents indicate a different sex, using pronouns and names consistent with a student's gender identity
  - Allow transgender students to use restrooms and locker rooms and participate in athletics consistent with their gender identity
  - Protect transgender students' privacy rights by maintaining school records with the student's birth name or sex assigned at birth confidential
- On May 25, 2016, 11 states, including Utah, filed a lawsuit challenging the "Dear Colleague Letter", claiming the guidance "has no basis in law" and could cause "seismic changes in the operations of the nation's school districts." 10 more states filed suit on July 8, 2016
- On August 3, 2016, the Supreme Court issued a "stay" on the 4<sup>th</sup> Circuit's grant of a preliminary injunction which would have allowed the student to use the boys' bathroom in the Virginia case
- In February, 2017, Trump administration withdrew May 25 DCL
- The Supreme Court sent the Virginia case back to the 4<sup>th</sup> Circuit to be considered in light of Trump's rescission of the DCL.
- June, 2017, the student in the Virginia case graduated and withdrew his lawsuit (filed an amended one in district court, where the case is now)
- TO DATE: Approximately, almost 2 dozen lawsuits have been filed around the country over transgender issues, namely use of restrooms.

## In the meantime...

So, what are schools to do while the courts fight it out?



- **1.** Educate ourselves
- 2. Be aware of the issues and best practice tips
- 3. Ensure a practice of non-discrimination across the board, for all students

## Step 1. Education

- Listen to the stories of transgender persons. Hear their experience and the experience of those who love them.
  - For some insight from a mother of a trans child, watch: <u>https://www.youtube.com/watch?v=9LTaBGDrw4M</u>
- Listen to students and parents who are expressing concern and worry to you about school safety.
- Listen, before responding with a definitive answer.

## Education, cont.

- <u>Biological sex at birth</u>: objectively measureable organs a child is born with. Also referred to "birth assigned gender" or "gender assigned at birth"
- <u>Gender identity</u>: how people think of themselves and which gender they feel they are. In other words, gender identity is an emotional, rather than a physical characteristic. It is generally believed that gender identity is formed by about the age of four (although an individual may not realize it until later) and it very rarely changes after that.
- <u>Gender expression</u>: how people demonstrate their gender to the outside world through things like dress, speech, and behavior. Gender expression may change depending on circumstances.

\*NOTE: Sexual attraction is not a factor in determining gender identity or gender expression. Often, gender identity is defined long before a person is sexually attracted to anyone.

## Terminology

- <u>Transgender person</u>: a person whose gender identity does not match his/her biological sex at birth. Importantly, a person's status as transgender does not depend upon whether that person has undergone (or even intends to undergo) any medical treatment for gender reassignment, nor does it depend on who a person is sexually attracted to.
- <u>Transgender female</u>: a person whose assigned sex at birth is male but identifies and lives as a female. Also referred to as MTF, or male-to-female.
- <u>Transgender male</u>: a person whose assigned sex at birth is female but identifies and lives as a male. Female-to-male, or FTM

## Terminology, cont.

• <u>Transition</u>: the process a transgender individual goes through to live as their self-identified gender. Although it may include medical intervention, no such treatment is required for a person to transition.

#### <u>Social transition</u>

- Use a different name
- Use of a different pronouns
  - × He, she, her
  - × They, zey
- Surface transformations of physical appearance (hair cut, earrings,--expression side)
- Use of bathrooms that suits the person's gender more accurately

#### • <u>Medical transition</u> (any combination)

- Use of a medical interventions to block natal puberty
- Use of cross-sex hormones
- Gender Confirmation Surgery (vs. sex reassignment or sex change—not changing anything, just confirming)
- Use of a bathroom that suits the person's gender more accurately

## Step 2. Beware of the Issues and Best Practices Issue #1: Names and Pronouns

- Recognize that this is often the first step in transitioning from one gender to another. When a request to refer to a student by a different name comes to your attention, consider asking the student if he/she would like to schedule a meeting with parents to discuss other issues that may arise and to ensure there is a plan in place to help the student feel safe.
- Transgender students, *like all students*, should be addressed in informal verbal and written communication by the preferred name and/or pronoun.
  - If you require parental permission to call students something different than what is on the roll or not, you must apply the requirement to all students, even-handedly.

• Policies that require "proof" or a formal evaluation or diagnosis of a student's gender identity are looked down upon, however, districts across the country do ask for "more than a casual declaration of gender identity or expression."



## *Issue #2: Telling Parents*

- Note that the ACLU is very protective of a student's right to privacy in his/her sexuality.
- If a school employee believes that "a situation exists which presents a serious threat to the well-being of a student," the employee must notify parents without delay. (Utah Code 53A-13-302(6)(b)(i)). Other than a threatening situation, volunteering known information about a student's sexuality/gender identity with parents is not advised. Consider the following factors in making a determination about talking to parents:
  - Age of students
  - Whether student is being bullied based on sexuality or gender identity
  - Student requests
  - Knowledge of parents' relationship with students
- What if a student asks to be called a preferred name/pronoun and parents object? Unless the student is 18, parents' requests should govern.

## Issue #3: School Records

- In Utah, official school records must include information found on the student's birth certificate. This includes name and gender. (R277-419-10(2)(b): "The direct transcription of student names from birth certificates or other reliable proof of student identity and age shall be the student's legal name for purposes of maintaining school records.")
- Under FERPA, a parent may request a school to amend a student's records, including the name on official records, but it is ultimately up to the school whether the request will be granted. If an amendment to a record is denied, parents have the right to insert a statement in the record setting forth his or her views.
- A court order changing the birth certificate is the only way a student's name and gender is changed on official school records.

• What constitutes an official school record?

- Classroom seating chart? (Probably not)
- A roll? (Probably not)
- Notes to parents about the student? (Probably not)
- Student homework? (Probably not)
- Transcripts? (Probably)
- Yearbook? (Probably not)



## Issue #4: School bathrooms/locker rooms

> No court in Utah has taken a position on this issue.

- Of the courts around the country that have addressed this issue, most have been settled out of court or voluntarily dismissed; many are pending, and a few have granted a preliminary injunction level. Only 1 denied a preliminary injunction for the transgender student.
- Many schools provide a uni-sex bathroom to any student desiring to use the bathrooms. Make sure the uni-sex bathroom is not so inconveniently located that a student may claim unequal access.
- Access should not be controlled by other students' or parents' comfort level regarding the access. Advise parents that concerned about privacy
- Long term solution? Closed stalls in all locker rooms and all bathrooms for use by any or all students.
- ➤ In the meantime, BEST PRACTICE: Review on a case by case basis and work with parents to ensure students do not feel discriminated against. Consider age of student, age of transition, physical nature of facilities, location/proximity of faculty or single sex bathrooms, and student's desire. Consult with district officials.

## Issue #5: School Overnight Trips

- When it's an elementary school field trip, my advice is reconsider those. For so many reasons!
- Review on a case-by-case basis.
- Work with district officials.
- Work with transgender student and family.



- Consider:
  - Providing a single room for the student, *if the student is okay with this*. Forcing the student to be in a single room where all other students get to share a room could be problematic.
  - Putting 2 kids in a 2 bed room, rather than 4.
  - Putting the student with a close friend—male or female—also going on the trip.
- May be okay to say, "Nebo will not permit students who do not share the same anatomy to share intimate spaces overnight."
- BUT do not jump to this answer. Remember Step 1: Listen.

## Issue #6: Student-on-Student Harassment/Bullying

- Schools have a legal duty to protect ALL STUDENTS from harassment by adults and other students. The Supreme Court in *Davis v. Monroe* (1998) has stated that school officials may be liable if they are "deliberately indifferent" to student-on-student harassment that is persistent, pervasive, and severe.
- Licensed school employees have a professional responsibility under 277-515 both not to harass students and to protect students from harassment by other students.
- If you are receive a complaint that other students are harassing/bullying a student based on his gender identity—even if you don't believe it's happening—document, investigate, document your investigation, follow-up with parents, and put a safety plan in place if necessary. DO NOT DO NOTHING!

## Issue #7: Communication and Confidentiality

- **Soliciting information** about a student's sexual behavior, orientation, or attitudes is prohibited under Utah Code 53G-9-203(1)(c). Resist the urge to play therapist!
- Once information has been obtained—regardless of how— **respect the student's privacy rights**. For many students, being 'outed' is their biggest fear. A transgender female who has transitioned may not want anyone to know she was born male. Respect that desire!
- **Keep confidential** information about students discussed with administrators and with other faculty.\*
  - \*Discussions about students with other faculty should only be on a needs-to-know basis.
- **Official school records** that identify the student's legal name and gender as they appear on the birth certificate are considered "records" under **FERPA** and may not be shared with anyone outside of the exceptions under the law.

# Issue #8: Dress Code

- gender neutral.
- Ensure your school dress code is gender neutral.
- If a transgender boy is wearing a dress and he is not doing anything to harm anyone else, even if it is causing disruption, address the disruption, not the dress.
- Dance attire: Think twice before punishing a transgender female (born male, identifies as female) from wearing a dress to Prom. Especially if she has been elected Prom Queen.
- Graduation attire: if you have gender-specific graduation attire, consider getting rid of it or allowing transgender students to wear the attire of the gender they identify with.
- Recognize that some students do not identify with either gender, or consider themselves gender fluid—moving back and forth between male and female. For this reason, it is problematic to require any kind of "proof" that the student is transgender before allowing him/her to wear attire of the gender they identify with.

*Issue #9: Sports* 

UHSAA Interpretation and Guidelines 1.1.4: Transgender Participation:

"A student shall be permitted to participate on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes. In making a determination of eligibility, the UHSAA will first refer to the confirmation of the student and his or her local school regarding gender identification. The UHSAA will require that <u>member school</u> <u>districts and schools make a determination of a</u> <u>student's eligibility to participate in gender specific</u> <u>sports</u> team for a particular season based on the gender identification of that student (1) in current school records, and, (2) daily life activities in the school and community at the time that sports eligibility is determined." Factors School Can Rely on To Make an Eligibility Determination for Transgender Athletes

- 1. Documentation from individuals such as, but not limited to, parents /legal guardians appointed by a court of competent jurisdiction, friends and/or teachers, which affirm that the actions, attitudes, dress and manner demonstrate the student's consistent gender identification and expression;
- 2. A complete list of all the student's prescribed, non-prescribed or over the counter, treatments or medications;
- 3. Written verification from an appropriate health-care professional (doctor, psychiatrist, or psychologist) of the student's consistent gender identification and expression; and
- 4. Any other pertinent documentation or information which the student or parent(s)/legal guardian(s) appointed by a court of competent jurisdiction believe relevant and appropriate.

### *Issue #10: Parents' Involvement*

Because of the many issues that can arise when working with transgender students, parental involvement at the outset is key. Work with the parents to establish a plan for:

- What name to call the student,
- What pronoun to use
- o Bathroom/locker room accommodations
- Overnight field trips
- o Athletic team participation
- Preventing bullying/harassment

FOR THIS REASON, HELP THE STUDENT UNDERSTAND THE VALUE OF INFORMING PARENTS. KEEP IN MIND, AGE MATTERS. A 17 YEAR OLD TRANS STUDENT MAY BE ABLE TO NAVIGATE THE WORLD OF TRANSITIONING BETTER THAN A 12 YEAR OLD WITHOUT PARENTAL INVOLVEMENT.

#### Scenario #1:

John has been in your 7<sup>th</sup> grade class for an entire semester. He is a good student-does his homework and his never disruptive. Near the end of the semester, John approaches you and asks if he can talk to you. You are busy entering grades and without much thought, say, "Sure, what's up?" John says, "I'm struggling with my gender identity. I've never felt like myself; I feel awkward as a boy; I think I should have been born a girl." That gets your attention and you look up. He continues, "I haven't really talked to anyone about this; my parents don't know and I'm not sure how they'd take it if I told them. I'd appreciate it if you didn't tell anyone."

WHAT DO YOU DO???

# Do you:

- A. Tell John, "Wow, tell me more!"
- B. Keep it to yourself
- C. Call John's parents right away
- D. Run next door to your colleague's classroom and report to her but make her promise not to tell anyone
- E. Contact your administrator
- **F.** Tell John, "I respect your desire to keep this private but I think you might feel better talking about it to someone who is trained to have these conversations" and encourage him to talk to the school counselor.
- G. Other ideas?

## Scenario #2

Tina, a 16 year old girl in your class, raises her hand one day in the middle of class and says, "Mr./Ms. Teacher, I'd like you to start calling me Troy. And use "he" whenever you refer to me please."

#### Do you:

- A. Say, "That's ridiculous. You're a girl. We'll call you Tina until you get a sex change."
- B. Send Tina/Troy to the office to be disciplined for getting the class off topic?
- C. Say, "Sure. Everybody hear that? Tina is now to be called Troy." And leave it at that.
- D. Get the class back on task and talk to Tina/Troy privately about talking to the school counselor so the staff can have a better understanding of Tina/Troy's transition and so the counselor can communicate with parents about necessary accommodations for Tina/Troy.
- **E.** Other ideas?

## Scenario #3

The parents of a 17 year old transgender student call you regarding their child who was born male but identifies female. The student played basketball on the boys' team all through junior high but was recently cut from the team, and the parents are now asking you to allow the student to try out for the girl's team. What is your response?

- A. "If you think I'm that stupid, you're stupid!"
- B. "I'm sorry but we can't allow a boy to try out for a girl's team just because he got cut from the boy's team. It wouldn't be fair to the girls."
- C. "I didn't realize your child was transgender. I'm not exactly sure what the district's policy on this matter is, but let me do some research and get back to you. Also, I'd love to sit down with you and your student and discuss further your student's gender identity and how we can assist you and your student with a transition, including name changes, pronoun changes, dress code, bathroom/locker-room use, etc."
- D. "Of course your student can try out for girl's basketball. Not a problem."

# Ways to Prevent Gender Discrimination In School and In the Classroom

- Educate staff and selves to understand the complexities of gender as well as specific methods to stop gender based harassment ,bullying and hurtful teasing
- Provide training for all school personnel—from teachers, aides, counselors to administrative staff, bus drives, recess aides, and cafeteria workers
- Use inclusive phrases to address your class—students, children, or scholars
- Group students in ways that do not rely on gender—instead of "boys over here, girls over there"—table groups, letters in their names, colors of their clothes.
- Ensure privacy for transgender students. Clarify who has access to records.
- Immediately intervene when student gender stereotype in a derogatory way.
- Putting up pride flag in classroom? Not necessary if you demonstrate love and care for **all** kids. Students know a safe place when they feel it.

# **Back To Diversity Tips 1-10**

# **Tip #10:** Be nice. To EVERYONE.

- As educators, we have moral responsibility to ensure schools are free from discrimination and that ALL students feel safe
- Be an ally for students. Stand up for them.
- Role model inclusion. Show kids how to treat others by including all.
- Ensure there is good supervision of hallways, playgrounds, and cafeterias to increase a sense of safety
- Interrupt student comments based on stereotypes or identity. Always. Make it a teachable moment.
- Stop hurtful teasing and bullying based on gender put-downs, racial slurs, insults based on disability, etc. Immediately!

# Remember Why You Do What You Do

- Take a step back from all the political agendas and remind yourself why you went into education.
- You love kids.\* You inspire kids.
- Love them ALL the same. Inspire them all the same.
- Find the good in every child and drag it out.



Inspirational Video- Be a Mr. Jensen- MUST WATCH!!.mp4

\*If you don't, get out of education!