

ADMINISTRATIVE MEMORANDUM

| | |
|------------------------------------|---|
| Transmittal: | ADM #2023-01 |
| To: | Executive Directors of Voluntary Provider Agencies Developmental Disabilities Regional Office Directors Developmental Disabilities State Operations Office Directors Executive Directors of Coordination Organizations (CCO) |
| Issuing OPWDD Office: | Counsel's Office |
| Date: | June 15, 2023 |
| Subject: | Gender Identity and Sexual Orientation |
| Suggested Distribution: | Care Managers Regional Office Front Door Staff Central Office Leadership Team Direct Support Staff |
| Contact: | |
| Attachments: | |

| Related ADMs | Releases Cancelled | Regulatory Authority | MHL & Other Statutory Authority | Records Retention |
|----------------------------------|-----------------------|-------------------------|------------------------------------|-------------------|
| Overarching ADM Sexuality ADM | | 14 NYCRR Part 633.4 | MHL §§ 13.07, 13.09, and 16.00 | |

Purpose

This Administrative Directive Memorandum (ADM) describes the rights of individuals related to their gender identity and sexual orientation. These rights apply to all individuals, regardless of their service provider or services they receive.

Definitions

- **Agender**: An umbrella term that includes many different genders of people who identify as having no gender and/or having a gender that they describe as neutral. Many agender people also identify as transgender.
- **Asexual**: A person who experiences little or no sexual attraction.
- **Bisexual**: A person who is romantically and/or sexually attracted to both males and females, or more than one gender.
- **Cisgender**: A term used to describe a person whose gender identity aligns with what is expected of them in their culture based on the sex assigned to them at birth. The prefix cis- means “on the side of” or “not across.”
- **Discrimination**: When a person experiences negative treatment or impact, intentional or not, because of their gender identity, gender expression, sexual orientation, or perceived sexual orientation, gender identity, or gender expression.
- **Gay**: A person who is emotionally, romantically, or sexually attracted to members of the same gender. People of all genders may use this term to describe themselves
- **Gender binary**: A system in which gender is constructed into two strict categories of male or female. Within this system, gender identity is expected to align with the sex assigned at birth and gender expressions and roles are supposed to fit traditional expectations.
- **Gender expression**: External appearance of one's gender identity, usually expressed through behavior, clothing, body characteristics or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.
- **Gender-fluid**: A person that does not identify with a single fixed gender or has a fluid or unfixed gender identity.
- **Gender identity**: One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.
- **Gender non-conforming**: A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category. While many also identify as transgender, not all gender non-conforming people do.
- **Lesbian**: A woman who is emotionally, romantically, or sexually attracted to other women. Women and non-binary people may use this term to describe themselves.
- **LGBTQ+**: An acronym for “lesbian, gay, bisexual, transgender and queer” with a “+” sign to recognize the limitless sexual orientations and gender identities used by members of the LGBTQ+ community.

- Non-binary: An adjective describing a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories. While many also identify as transgender, not all non-binary people do. Non-binary can also be used as an umbrella term encompassing identities such as agender, bigender, genderqueer or gender-fluid.
- Outing: Exposing someone's sexual orientation or gender identity to others without their permission. Outing someone can have serious repercussions on employment, economic stability, personal safety or religious or family situations.
- Pansexual: A person who is not limited in sexual choice with regard to another person's sex assigned at birth or gender identify.
- Polyamorous: A person who engages in intimate relationships with more than one partner with the consent of all partners.
- Pronouns: Used in place of a proper noun (like someone's name). We use pronouns most often when referring to someone without using their name. (Example: he/him/his; she/her/hers; they/them/theirs). You cannot tell a person's pronouns by looking at them; it is best to ask for someone's pronouns or offer yours as a way of introduction.
- Sex assigned at birth: The sex, male, female or intersex, that a doctor or midwife uses to describe a child at birth based on their external anatomy.
- Sexual orientation: An inherent or immutable enduring emotional, romantic, or sexual attraction to other people; a person's sexual and emotional attraction to another person and the behaviors and/or social affiliation that may result from this attraction. An individual's sexual orientation is independent of their gender identity.
- Straight (heterosexual): Someone who is sexually or romantically attracted to people of a different sex or gender.
- Transgender: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.
- Two Spirit: Two Spirit is an umbrella term that encompasses different sexualities and genders in Indigenous Native American communities. This is a cultural term that is reserved for those who identify as an Indigenous Native American.

Discussion

The Office for People With Developmental Disabilities (OPWDD) recognizes that individuals can identify with a range of different gender identities and sexual orientations, and that gender identity may or may not be associated with their sex assigned at birth. OPWDD regulations 14 NYCRR 633.4 protects the rights of individuals to be free from discrimination related to a variety of factors, including their gender identity or expression, sex assigned at birth, or their sexual orientation.

A. Gender Identity

Everyone has the right to define their own gender identity. Individuals must be recognized

by their gender identity. Individuals may change their gender identity over time. There are a range of genders, and all must be respected. This includes but is not limited to: agender; man, woman, gender-fluid; non-binary; gender non-conforming; and two spirit.

Transgender, gender non-conforming, and non-binary people should be recognized and treated in accordance with their gender identity, regardless of their medical history, appearance, or sex or gender marker on their identity documents. Regardless of gender identity, individuals may choose to express themselves in ways that may include, but is not limited to, having hairstyles, clothing, accessory, or make-up use that differs from the way society has traditionally expected individuals in a specific gender to behave.

B. Sexual Orientation

An individual's sexual orientation must be respected. There are a wide range of sexual orientations, including but not limited to: asexual, gay, lesbian, bisexual, straight, and pansexual. Assumptions should not be made about anyone's sexual orientation. People's sexual orientation may be fluid or change over time. Individuals may communicate their sexual orientation at any time, and some people may not choose to share their sexual orientation at all.

C. Confidentiality

If an individual shares their sexual orientation, this information should only be communicated to others to the extent expressed by the individual or as determined by the treatment team based on assessment of the need to share for the purposes of providing adequate support to the individual.

To share someone's LGBTQ+ sexual orientation without their consent (except when determined necessary by a treatment team for the purpose of providing adequate support to the individual) is to "out" someone (see "outing" in definitions). This includes sharing information with peers, friends, staff, parents, families, and others the individual interacts with. Outing someone can be upsetting or even traumatizing to that person or can result in them experiencing violence or other dangerous situations. If someone gives you consent to share their LGBTQ+ status, then it's not considered outing. However, much like sexual consent, someone can consent to share their LGBTQ+ status in one situation and not give consent to share in another one. Individuals can also change their mind and either give or revoke consent to disclose their LGBTQ+ status over time.

D. Sexual Activity

OPWDD understands that an individual's capacity to consent to sexual activity with other people may be limited. However, these concerns should be addressed by the individual's clinical team and circle of support. Many individuals who are found not capable of consenting to sexual contact with another person may develop capacity over time with

appropriate education and supports. All individuals have the right to pursue sexual release, independent of ability to consent to sexual activity with another person, though some individuals may require support and/or education with identifying appropriate locations, activities, partners, and other related considerations. An individual's capacity to consent to sex is different from their sexual orientation. Regardless of any restrictions related to sex and sexual behavior the individual may have, their sexual orientation must be respected.

E. Names and Pronouns

Individuals may choose to go by the name and pronouns they were assigned at birth, or they may choose to go by names and pronouns that more accurately represent their gender identity. Individuals may use their requested name and pronouns regardless of their age or disability.

An individual's legal name and/or pronouns may differ from those they use in their everyday lives. The individual's requested name and pronouns must be used to the greatest extent possible except where it's legally unable to do so (e.g., must use legal name for Medicaid billing).

F. Appearance and Self-Expression

Individuals have the right to make choices about their appearance and self-expression, including how they choose to dress and/or groom. These choices must be allowed, regardless of whether they conform to traditional gender stereotypes, except where clothing/grooming must be regulated for the individual's medical and/or behavioral needs (e.g., trimmed nails due to potential self-injury). Providers cannot impose appearance standards based on gender.

G. Restroom and Locker-room Accessibility

Individuals must be allowed to use restrooms, locker-rooms, and other similar facilities that correspond with their gender identity. It is also best-practice for larger facilities, such as day-habilitation sites, to designate at least one bathroom and/or changing room as gender-neutral whenever possible.

H. Gender Segregation in Other Areas

Some OPWDD certified programs and services are segregated by gender (e.g., Individualized Residential Alternatives). In cases where the individual receives services that are segregated by gender, they should be provided the service with the gender with which they identify.

I. Staff Training and Professional Development

Staff and supervisors must be trained on OPWDD regulations 14 NYCRR § 633.4 and the content outlined in this ADM to ensure that the rights of individuals are known to and understood by staff. Failure to adhere to OPWDD regulations may result in adverse action by OPWDD.

J. Individual Education

Individuals have the right to education related to gender identity, sexual orientation, sex, and family planning. Such training must include the information covered in this ADM. Individuals must be made aware of their right to education on such topics, and education must be offered periodically and on an as-needed basis (ex: individual expresses an interest in sex).

K. Medical Care

Individuals have the right to access gender affirming medical care. This should be considered, when applicable, by the individual, their clinical team, and circle of support.

L. Right Limitations

In some cases, there may be legitimate behavioral (such as inappropriate sexual activity or sexual activity that infringes on the rights of others) or medical needs of the individual that requires a limitation of their rights as specified above. In these cases, providers must adhere to the rights limitation regulations in 14 NYCRR 633.16. If someone has a rights limitation related to sexual activity, their program planning team must develop a fading plan that incorporates appropriate treatment, education and/or training in an effort to build the individual's capacity in order to remove the rights limitation.

M. Complaints

If the individual has any complaints about their services, or treatment they receive that is not in accordance with this ADM and other applicable OPWDD regulations, they should contact their Care Manager for assistance. Any disputes related to the individual's care, including goals and/or services related to their gender identity, sexuality, or sexual expression should be disputed via the Life Plan dispute resolution process described in ADM #2018-06R.

For any other information, you may also contact your local DDRO.