

September 27, 2013



INTERIM GUIDANCE REGARDING TRANSGENDER STUDENTS, PRIVACY, AND FACILITIES

In an effort to assist school districts with implementing and responding to AB 1266 and other legal and policy changes regarding transgender student privacy, facility use, and participation in athletic competitions, CSBA offers this interim guidance for immediate use. CSBA anticipates releasing updated guidance as well as model policies and policy briefs in December 2013. It is advised that districts consult with legal counsel when the issues covered in this interim guidance arise.

BACKGROUND

Non-Discrimination

A fundamental role of a school board is governance, which includes the responsibility to set the direction of the district as it relates to creating a welcoming and non-discriminatory environment for all students. State law generally prohibits discrimination of students based on gender, gender identity, and gender expression. (Educ. Code, § 220.) State law specifically prohibits discrimination on the basis of gender in enrollment, counseling, and the availability of physical education, athletic activities, and sports. (Educ. Code, § 221.5.) Districts also must adopt policies prohibiting discrimination, harassment, and bullying based on gender, gender identity, and gender expression and must intervene whenever they witness such an act. (Educ. Code, § 234.1.) Federal law, specifically Title IX of the Education Amendments of 1972 and Title IV of the Civil Rights Act of 1964, also prohibits discrimination on the basis of gender. As is discussed below, federal law imposes these obligations independent of and in addition to state law.

Assembly Bill 1266

This new law requires districts to permit transgender students to participate in gender-segregated school programs and activities – including athletic teams, sports competitions, and field trips – consistent with their gender identity and to use facilities consistent with their gender identity. The bill does not directly address the issue of privacy for transgender and non-transgender students. While AB 1266 is scheduled to take effect on January 1, 2014, there is uncertainty over whether this will actually occur. There is currently an effort to repeal AB 1266 by placing it on the ballot via a referendum. If the referendum is placed on the ballot, then AB 1266's effective date will be postponed until the day after the November 2014 election assuming that it is approved by the voters at that time.

Civil Rights Complaint

On July 24, 2013, the U.S. Department of Education's Office for Civil Rights and U.S. Department of Justice's Civil Rights Division resolved a federal civil rights complaint against Arcadia USD regarding a transgender student's ability to use facilities and to participate in activities consistent with the student's gender identity. (See www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.) Arcadia agreed to allow the transgender student to use facilities and to participate in activities consistent with the student's gender identity, and to adopt corresponding policies and administrative regulations. The Agreement addressed but did not resolve the issue of privacy for transgender and non-transgender students. As the Agreement is based on federal law, it sets a precedent for filing civil rights complaints against other districts regardless of whether and when AB 1266 goes into effect.

California Interscholastic Federation

The CIF has issued new bylaws that provide that all students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity. (See www.cifstate.org/images/PDF/FederatedC/FC_Portfolio_February_2013.pdf.) The new CIF bylaws exist regardless of whether and when AB 1266 goes into effect.

RECOMMENDED GUIDANCE

When a request is received from a transgender student or a non-transgender student that concerns privacy issues, facility use, or participation in athletic competitions, it should be considered regardless of the form or manner in which it is presented. Districts are advised to handle each request on a case-by-case basis so that the unique needs of each student can be met. When a request is made, districts should first attempt to meet with the student and, if appropriate, the student's family. This will enable the student and the district to raise, discuss, and address the issue of privacy as well as other student needs. In addition, the following guidance is offered:

- *Upon request*, districts should allow all students who need or desire privacy to use an alternative facility (e.g., restroom, locker room) besides the regular facility used by other students. Districts should inquire into the underlying reason for the request *only* to the extent it helps determine how best to accommodate the student.
- *Upon request*, districts should allow all students to use the gender-specific facility that is consistent with their gender identity.
- *Upon request*, districts should train and prepare staff to address and refer to a transgender student by the student's preferred name and pronoun.
- *Upon request*, districts should prepare data systems and records to list and identify a transgender student by the student's preferred name and gender.
- *Upon request*, districts should allow all students to participate in interscholastic sports according to their gender identity in a manner that is consistent with the CIF bylaws.

Independent of whether such requests are received, districts should consider providing professional development to teachers and staff as well as offering educational activities and forums for students and the larger community to dispel stereotypes of transgender students and to encourage understanding of gender identity and related issues.

ADDITIONAL ISSUES

In responding to requests, districts should also consider the following potential issues:

- Charter schools – Charter schools are under the same legal obligations as schools and school districts.
- Determination of transgender status – One approach is to require that a student's gender identity be "consistently," "exclusively," and/or "uniformly" asserted at school; another approach is to accept a student's gender identity without question and without requiring any proof.

Helpful Definitions

"Transgender" describes an individual whose gender identity is different from the individual's assigned sex. . . . An individual can express or assert a transgender gender identity in a variety of ways, which may but do not always include specific medical treatments or procedures. Medical treatments or procedures are not considered a prerequisite for one's recognition as transgender. For purposes of [the] Agreement [in Arcadia], a "transgender student" is a student who consistently and uniformly asserts a gender identity different from the student's assigned sex, or for which there is documented legal or medical evidence that the gender identity is sincerely held as part of the student's core identity.

"Gender identity" refers to one's internal sense of gender, which may be different from one's assigned sex, and which is consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the student's core identity.

"Gender expression" refers to external cues that one uses to represent or communicate one's gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics.

The above definitions are from the Arcadia Resolution Agreement. The American Psychological Association has also published similar definitions.