



Legal Guidance

on Rights of Transgender and
Gender Nonconforming Students in Schools

In October 2013, CSBA issued an interim legal guidance on laws affecting transgender students in response to then-Gov. Jerry Brown signing Assembly Bill 1266. In March 2014, CSBA published “Final Guidance: Transgender and Gender Nonconforming Students, Privacy, Programs, & Facilities,” and then in July 2016, CSBA updated its legal guidance to reflect the rights of transgender students under federal law after the U.S. Department of Education and U.S. Department of Justice jointly issued a “Dear Colleague” letter on May 13, 2016, informing states that a student’s gender identity is to be treated as the student’s sex for the purposes of Title IX. On Feb. 22, 2017, with the change in administration, the U.S. Department of Education and U.S. Department of Justice jointly issued another “Dear Colleague” letter, rescinding the statements of policy and guidance reflected in the May 13, 2016 “Dear Colleague” letter. The departments wrote in their 2017 letter that the interpretation of Title IX under the 2016 “Dear Colleague” letter did not “contain extensive legal analysis” and “has given rise to significant litigation regarding school restrooms and locker rooms.” In addition, the Departments advised that “there must be due regard for the primary role of the States and local school LEAs [local educational agencies] in establishing educational policy”. In response to that letter, in March 2017, CSBA again updated its legal guidance to reflect the new position of the federal government and re-emphasize the consistency of California law, including the rights of transgender and gender nonconforming students.

Since the last update to this guidance in March 2017, the law detailing the rights of transgender and gender nonconforming students has continued to evolve. While California has remained consistent in providing for the rights of transgender and gender nonconforming people, court rulings at the federal level have gradually advanced those rights for the nation. In 2018, the California Legislature passed Senate Bill 179, which enacted the Gender Recognition Act, adding to the rights of transgender and gender nonconforming Californians by including “nonbinary” as a gender designation that may be recorded on California identification documents. In response, the California Department of Education (CDE) issued California Longitudinal Achievement Data System (CALPADS) Update Flash #158 to describe the responsibilities of LEAs when designating a student’s gender in the CALPADS.

At the federal level, the U.S. Court of Appeals for the Ninth Circuit in 2020 considered privacy rights of cisgender students (person whose gender identity corresponds with their sex assigned at birth) in *Parents for Privacy v. Barr*. The court ruled that there is no Fourteenth Amendment protection not to share a bathroom with transgender students. In the 2020 U.S. Supreme Court decision of *Bostock v. Clayton County*, the Court ruled that firing an individual because of their sexual orientation or transgender status violates Title VII, which, like Title IX, prohibits discrimination based on sex. Additionally, in 2021, after a ruling from a lower court in favor of a transgender student, the U.S. Supreme Court denied a petition for certiorari in *G.G. v. Gloucester County School Board*. By denying the request, the Court rejected further consideration of the challenge to a Virginia LEA’s board policy on which bathrooms transgender students can use. All of these rulings provided support for the rights of transgender and gender nonconforming students at the federal level, bringing the national law closer to California law.

Recently, CDE and the Office of Civil Rights (OCR) within the U.S. Department of Education issued guidance on the rights of transgender and gender nonconforming students. CDE’s September 2021 legal advisory describes that “State and federal law generally prohibits discrimination, harassment, intimidation and bullying of students based on their actual or perceived [...] gender identity or expression.” Also in 2021, OCR issued a “Notice of Interpretation” related to Title IX, the federal civil rights law that protects against sex discrimination in educational institutions that receive federal funding. The notice explained that based on the ruling in *Bostock*, Title IX’s protections against sex discrimination include discrimination based on gender identity. Thereafter, OCR issued a “Notice of Proposed Rulemaking” in July 2022 related to Title IX, which in part incorporate the Notice of Interpretation into the federal regulations by explicitly stating that discrimination based on gender identity is illegal under Title IX. The public comment period for the proposed rule concluded in September 2022, close in time to the publication of this guidance. After reviewing the comments, OCR will determine its next steps, which will likely include drafting the final rule.

A final rule will take effect no earlier than 30 days after it is published in the Federal Register. However, even if the proposed rule does not become a final rule/regulation, OCR's 2021 interpretation of "sex" to include gender identity will still apply to schools that receive federal funding.

With this history of legal events in mind, the remainder of this guidance is meant to describe the implications of the law supporting the rights of transgender and gender nonconforming students in schools. The guidance is not meant to act as legal advice and therefore LEAs should contact their legal counsel for assistance when needed.

State and federal law and regulations require LEAs to treat all students equally based on gender identity. Although a very simple statement of law, the complex practical implications have engendered clarifying guidance from state and federal regulatory agencies from time to time.

BACKGROUND

The role of the board

A fundamental role of a governing board is governance, including setting direction for the LEA as it relates to creating a safe, welcoming and nondiscriminatory environment for all students. LEAs are required to adopt policies protecting students from discrimination, harassment, intimidation and bullying based on gender, gender identity and gender expression and providing for employees to intervene whenever they witness such an act. (Ed. Code, § 234.1.)

State law

State law generally prohibits discrimination of students based on gender, gender identity and gender expression, and specifically prohibits discrimination on the basis of gender in enrollment, counseling, physical education and athletics. In 2013, AB 1266 added the requirement that a student must be "permitted to participate in sex-segregated school programs and activities ... and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records." (Ed. Code, §§ 220, 221.5.)

All public employees are required by law to take the oath contained in the California Constitution, Article 20, Section 3. This oath includes an affirmation that the employee supports the U.S. Constitution, the California Constitution, and all federal and state laws. Referenced throughout this guidance is the way in which LEA employees are critical to ensuring that these laws are upheld.

Federal law

Federal law, specifically Title IX of the Education Amendments of 1972 and Title IV of the Civil Rights Act of 1964, also prohibit discrimination on the basis of sex. These obligations are imposed independently of and in addition to state law. It was federal law that OCR and U.S. Department of Justice's Civil Rights Division followed in investigating a federal civil rights complaint against Arcadia Unified School District by a transgender student. In 2013, Arcadia USD agreed to allow the transgender student to use facilities and to participate in school programs and activities consistent with the student's gender identity.

Even though Title IX regulations do not directly address the application of its prohibition on sex discrimination to sexual orientation or gender identity, OCR recognizes that Title IX prohibits discrimination based on gender identity. In 2021, OCR published a Notice of Interpretation in the Federal Register that states explicitly that Title IX's prohibition on sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity, consistent with the Supreme Court's ruling in *Bostock v. Clayton County*. (140 S. Ct. 1731.)

In *Bostock*, the U.S. Supreme Court ruled that Title VII of the Civil Rights Act of 1964 (Title VII) protects gay and transgender workers from workplace discrimination "because of" sex. The 6-3 decision, issued on June 15, 2020, and authored by Justice Neil Gorsuch, held that an employer who fires an individual merely because that individual is gay or transgender violates Title VII because "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." Because of the textual similarities between Title VII's prohibition on discrimination "because of" sex and Title IX's prohibition of discrimination "on the basis of" sex, and because Title VII is often relied upon by the courts in interpreting the scope of Title IX, the Supreme Court's decision in *Bostock* finding a violation of Title VII related to an individual on the basis of gender identity and sexual orientation was found applicable to Title IX by OCR.

Thus, Title IX prohibits sexual harassment and discrimination based on gender or sex. Additionally, federal courts around the country have held that harassment and other discrimination against transgender and gender nonconforming people constitutes sex discrimination.

Implication of laws for LEAs

California and federal law require schools to afford students equal opportunity and access to the school's facilities, activities and programs, in a manner that is consistent with each student's gender identity, irrespective of whether the student's gender identity matches the student's assigned sex at birth. These state and federal laws create additional responsibilities for LEAs in diverse ways, and the remainder of this guidance provides recommendations for addressing some of the most significant among them.

RECOMMENDED GUIDANCE

Adoption of board policy

In accordance with law, the governing board must establish policies that clearly spell out the LEA's responsibility to provide all students a safe, welcoming school environment that is free from discrimination and practices that ensure effective staff implementation of those policies. As such, LEAs need to review their policies and regulations to ensure that they reflect current law. CSBA updated its sample Board Policy and Administrative Regulation 5145.3 - Nondiscrimination/ Harassment in September 2016 and again in December of 2021. An update was also issued for AR 5145.3, which included: 1) adding the definitions of "intersex" and "nonbinary" and applying the AR to intersex and nonbinary students, 2) updating information on a student's right to privacy regarding their gender identity and recommended actions for LEAs to protect that privacy and 3) updating guidance regarding revising student records to reflect changes to a student's legal name or gender in both official and unofficial records.

Gender identity and expression

An LEA should accept a student's asserted gender and treat the student in a manner consistent with that student's gender identity, especially where the student either (1) expresses that identity at school or (2) where there is other evidence that this is a sincerely held part of the student's core identity. If either criteria is met, then a school may not question the student's asserted gender identity except in the rare circumstance where school personnel have a credible basis for believing that the student is making that assertion for some improper purpose. Schools cannot require a student to provide any particular type of diagnosis, proof of medical treatment or meet an age requirement as a condition to receiving the protections afforded under California's antidiscrimination statutes.

Student rights to participate in educational activities consistent with their gender identity/expression

A transgender or gender nonconforming student's desire to use a gender-specific facility or participate in a gender-segregated program or activity in a manner consistent with the student's gender identity and by law must be adhered to and, at the student's option, result in a meeting with an appropriate administrator to coordinate resources and supportive measures. LEAs

HELPFUL DEFINITIONS

- » "Gender" refers to a person's sex and includes gender identity and gender expression.
- » "Gender expression" means a person's gender-related appearance and behavior, whether stereotypically associated with the person's assigned sex at birth or not.
- » "Gender identity" refers to a person's internal sense of their gender, and may be different or the same as the sex assigned at birth.
- » "Gender nonconforming" describes a person whose gender expression differs from stereotypical expectations, such as "feminine" boys, "masculine" girls and those who are perceived as androgynous.
- » "Transgender" describes people whose gender identity is different from their assigned sex at birth.
- » "Intersex" describes people with natural bodily variations in anatomy, hormones, chromosomes, and other traits that differ from expectations generally associated with female and male bodies.
- » "Nonbinary" describes people whose gender identity falls outside of the traditional conception of strictly either male or female.

should first attempt to meet with the student and, if appropriate, the student's family, to determine the details of how best to accommodate the student. In addition, the following "best practices" offer recommendations for ensuring that the rights of transgender or gender nonconforming students are adhered to:

- » LEA should allow a student to use the gender-specific facility consistent with his or her gender identity.
- » LEA should allow a student wanting privacy to use an alternate facility (e.g., restroom, locker room). A transgender student should not be required to use an alternate facility unless other students are required to do so when they desire privacy.
- » LEA should ensure that staff use the name and pronoun preferred by a transgender or gender nonconforming student during conversations and on unofficial documents, without the necessity of legal documentation or a change to the student's official LEA record.
- » LEA should prepare data systems to list a transgender or gender nonconforming student by their preferred name and gender, even without documentation supporting a legal name or gender change. (See Student records, below.)
- » LEA should allow students to participate in athletics consistent with their gender identity, irrespective of the gender listed on a student's record, per the California Interscholastic Federation (CIF) bylaws.*
- » LEAs should allow students to dress in a manner consistent with the student's gender identity, subject to any dress code adopted on a school site.

*The CIF has issued bylaws that provide that all students should have the opportunity to participate in CIF programs in a manner that is consistent with their gender identity. CIF has also published guidelines for an appeals process in a situation where a transgender or gender nonconforming student's request is denied.

Privacy rights of transgender or gender nonconforming students

A student's decision to inform the LEA that their gender identity differs from their assigned sex at birth is extremely personal and private. At the same time, the decision may potentially involve very public components if, for example, the student starts to go by a different name. Despite this potential for public awareness, LEAs are required to, with rare exceptions, respect the limitations that a student places on the disclosure of the student's transgender status and consider the student's privacy rights and safety associated with this information, including not sharing that information with the student's parents except with the student's authorization. In addition, LEAs have an obligation to protect transgender and gender nonconforming students from bullying and harassment by other students or staff who may have knowledge of a transgender student's gender identity. Schools should consult with transgender students to determine who can or will be informed of the student's gender identity, which will allow the LEA to understand the student's privacy needs and to identify potential challenges the LEA may face in meeting those needs. It will also provide the student with an opportunity to understand the implications of the request and the impact it may have on the student's privacy.

Nonconsensual disclosure of personally identifiable information, such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender and gender nonconforming students and, to the extent disclosed to those who do not have right information or to inspect student records, may also violate the Family Educational Rights and Privacy Act (FERPA). Thus, LEAs should develop strategies to prevent unauthorized disclosure of students' personally identifiable information. A school may maintain records with information such as a student's birth name and sex assigned at birth, but such records should be kept strictly confidential and disclosed only to school officials who have a legitimate educational interest in the information.

Student records

Upon student enrollment, the LEA is required to maintain a mandatory permanent record that includes the student's gender and legal name. A student's legal name as entered on the mandatory student record may only be changed with proper documentation. When an LEA receives documentation of a change to a student's legal name, the LEA must update the student's official school records accordingly. The necessary documentation for a student name change includes paperwork indicating that the student's name is legally different. For any change to a student's gender, documentation of a gender change is not required, but the school must receive written parental authorization for the records to reflect a gender change. If the LEA has not received documentation supporting a student's legal name change or written parental authorization for gender change, the school should nonetheless update all unofficial school records (e.g., attendance sheets, school IDs, report cards) to reflect the student's name and gender, consistent with the student's gender identity, to ensure that the student's transgender status is not unintentionally revealed by school records. If LEA personnel have a credible and supportable basis for believing that a student's gender identity is being asserted for an improper purpose, that basis should be documented, and a written response should be provided to the student.

Privacy concerns and religious beliefs of other students

It is not just transgender and gender nonconforming students for whom privacy, safety or other concerns may be an issue. For example, other students may be uncomfortable with having to change clothes in the same locker room as and in the presence of a member of the opposite biological gender. While there is no specific legal right that allows students not to share a locker room or restroom with a transgender student, to address the concerns of such students, it is recommended — in addition to the annual notice described below — that the LEA follow a process similar to the one recommended to meet the needs of transgender and gender nonconforming students. That is, any student may be provided access to an alternative private changing area, such as a gender-neutral or single-use restroom or changing area, a bathroom stall with a door, an area in the locker room separated by a curtain or screen, or use of the locker room before or after the other students, regardless of the underlying reason. This allows the LEA to accommodate students who may be uncomfortable using the same bathroom or locker room with transgender and gender nonconforming students without denying equal access to any student. LEAs should note, however, that another student's discomfort is not a reason to deny access to a transgender student, and schools cannot require a transgender student, in any instance, to use alternative locker rooms or bathrooms.

Annual notice of students' rights

Honoring a transgender or gender nonconforming student's requests may sometimes generate privacy, safety or other concerns for the student and for other students. To address such concerns, CSBA recommends that LEAs provide an annual notice to all students of the LEA's legal responsibility to provide a safe, nondiscriminatory school environment for all students, including transgender and gender nonconforming students. The notice should specify that students may notify the LEA in advance if they have concerns about privacy, safety or the sanctity of their religious beliefs may be affected by the LEA's implementation of its nondiscrimination policies, including the LEA's responsibility to treat transgender and gender nonconforming students in a manner consistent with their gender identity.

Consider the following scenario: A transgender male student enrolls in a new school district after being bullied and harassed in a prior district. The student requests to use facilities, including the boys' bathrooms, that are consistent with the student's gender identity and to not reveal that the student was assigned the gender female at birth. The district is properly fulfilling its legal obligations because it cannot discuss or disclose the fact that a student is transgender or gender nonconforming without that student's permission (although, as previously noted, a student's gender identity may become public without district action depending on how open the student is about his or her gender identity). At the same time, the district should be proactive in addressing a situation where another student may become aware of the student's transgender status.

To address this potential scenario, it is recommended that the district include in its annual notice the following: (i) a statement that by law, the district is required to permit students to participate in gender-segregated programs, including athletic teams and competitions, and to use gender-segregated facilities consistent with their gender identity, and (ii) a statement that if

any student (or any student's parent or guardian) desires increased privacy in school restrooms or locker rooms (as discussed above), the principal should be notified. It is recommended that a district not wait until a transgender or gender nonconforming student enrolls in the district or identifies themselves to staff to notify all students and parents/guardians through the annual notice, as this may unintentionally identify the student.

Professional development and educational and antidiscrimination training

Regardless of whether an LEA knows that it has a transgender or gender nonconforming student or whether it has received requests from such a student, an LEA should consider providing professional development to teachers, school nurses, counselors and other staff as well as offering educational activities and forums for students, parents, guardians and the community. The purpose of the professional development and educational activities would be to increase the entire school community's awareness of the LEA's legal responsibilities related to the provision of a safe, nondiscriminatory school environment for all students, including transgender and gender nonconforming students.

In addition, CSBA recommends that LEAs provide periodic training and/or information to all segments of the school community, including teachers, students and other adults on campus, to raise awareness about the law and LEA policy prohibiting discrimination.

ADDITIONAL RESOURCES

- » Sample BP/AR 5145.3 - Nondiscrimination/Harassment is available to GAMUT Policy clients.
- » California Department of Education's CALPADS Update Flash #158: www.cde.ca.gov/ds/sp/cl/calpadsupdf158.asp.
- » CDE's Legal Advisory regarding application of California's antidiscrimination statutes to transgender youth in schools (Reviewed Sept. 16, 2021): www.cde.ca.gov/re/di/eo/legaladvisory.asp.
- » Office of Civil Rights Notice of Interpretation: www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf.
- » CSBA's policy brief "Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender Nonconforming Students": bit.ly/3MDaQcp.
- » Arcadia USD resolution: www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf.
- » CIF Bylaws: www.cifstate.org/governance/constitution/index.
- » CDE's Frequently Asked Questions, AB 1266 bit.ly/3MDaQcp: www.cde.ca.gov/re/di/eo/faqs.asp. (last updated Sept. 16, 2021)
- » For additional guidance, contact CSBA's Office of the General Counsel at 800-266-3382.