

# Parental and student rights in relation to transgender and gender nonconforming students

Following the passage of Assembly Bill 1266 in the fall of 2013, CSBA released its first legal guidance related to the rights of transgender students. As the law on the topic has evolved, CSBA has updated and revised that legal guidance to keep it current and accurate. Most recently, the guidance was updated in fall 2022. This newest version, now titled “[Legal Guidance on Rights of Transgender and Gender Nonconforming Students in Schools](#),” includes background information on state and federal law, along with guidance on the adoption of board policies, student rights, student records, and professional development and training for staff and the community.

Since the publication of this latest guidance in October 2022, the extent of transgender students’ rights as compared to parental rights has been the subject of serious contention before school boards throughout the country. Many new questions have been raised related to the implementation and intricacies of the anti-discrimination and privacy laws and of regulatory agencies’ interpretation of the laws as they apply to students, parents, teachers and community members. While CSBA’s Legal Guidance is still accurate as recommended guidance, it was not drafted to address the law in such detail. Therefore, this Recently Asked Questions (RAQ) has been prepared to respond to some of the newly raised issues as well as to address some of the existing issues in more detail.

**1) Can a school district or county office of education, also known as a local educational agency (LEA), treat a student differently on the basis of gender, gender identity or gender expression?**

No, both state and federal law prohibit discrimination, which includes harassment, based on gender, gender identity or gender expression.

**Federal law**

Title IX prohibits discrimination on the basis of sex by public educational institutions that accept federal funding. Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>1</sup> Discrimination includes treating one person differently from another for provision of aids, benefits or services; denying aids, benefits or services; subjecting a person to different rules of behavior, sanctions or other treatment; or otherwise limiting any person from the enjoyment of any right, privilege, advantage or opportunity in an educational institution that receives federal funding.<sup>2</sup> The United States Department of Education’s Office for Civil Rights (OCR) has interpreted the protected class of “sex” to include gender identity and gender expression. On June 22, 2021, OCR issued a notice of interpretation titled “Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of

**For an increased understanding of this very dynamic and evolving area of the law, we recommend reviewing both the [Legal Guidance](#) and this RAQ.**

*Bostock v. Clayton County.*<sup>3</sup> This Notice of Interpretation concluded that the principles in *Bostock*<sup>4</sup>, which held that Title VII’s employment discrimination protections on the basis of sex protect employees against discrimination because they are gay or transgender, also apply to sexual orientation and gender identity under Title IX. Thus, OCR has determined that Title IX protects students from discrimination and harassment on the basis of their status as transgender.

**State law**

Education Code section 200 expressly states that it is the policy of the state of California to afford all persons equal rights and opportunities in the educational institutions of the state, without regard to protected classifications including, specifically, gender identity and expression.<sup>5</sup> Section 220 similarly provides that no person shall be subject to discrimination on the basis of a protected classification, including gender, gender identity and gender expression, in any program or activity conducted by an

educational institution that receives state financial assistance. Further, all students have the right to participate fully in the educational process, free from discrimination and harassment.<sup>6</sup> California Department of Education (CDE) regulations also prohibit discrimination and harassment on these bases.<sup>7</sup> LEAs must adopt a policy that requires school personnel to intervene when they witness an act of discrimination, harassment, intimidation or bullying, if safe to do so.<sup>8</sup> Further, students must be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity, irrespective of the gender listed on their records.<sup>9</sup>

### **Examples of discrimination**

Both the U.S. Department of Education and CDE have set forth examples of discrimination on the basis of gender, gender identity and gender expression. (Note: Discrimination includes harassment.) Examples include:

- ▶ Deliberately referring to a student by the name and/or pronouns associated with a student's assigned sex at birth rather than the student's preferred name and/or pronouns.<sup>10</sup>
- ▶ Bullying based on a transgender student's appearance, sex or voice, or for failing to conform to sex stereotypes.<sup>11</sup>
- ▶ Using transphobic slurs.<sup>12</sup>
- ▶ Using violence against a student or destroying their property because of their transgender status.<sup>13</sup>
- ▶ Failure to allow transgender students to use the restroom, locker room or other facilities that correspond with their gender identity or expression.<sup>14</sup>
- ▶ Failure to allow a student to participate in sex-segregated activities, such as athletics, that correspond with their gender identity or expression.<sup>15</sup>
- ▶ Applying policies differently to transgender students than non-transgender students, such as allowing female students to wear skirts and dresses, but not allowing transgender female students to wear skirts and dresses.<sup>16</sup>
- ▶ Failure to provide transgender students with services or opportunities afforded to non-transgender students.
- ▶ Violating a transgender student's right to privacy, including disclosing the student's transgender status, to members of the school community without the student's consent.<sup>17</sup>
- ▶ Failure to address transgender students' claims of harassment or discrimination.

## **2) Does CSBA have a sample board policy that addresses discrimination against students based on their gender, gender identity and gender expression?**

Yes, several CSBA sample policies address this. Board Policy 0410 - Nondiscrimination in District/COE Programs and Activities, sets forth LEAs' obligations under state and federal law to provide equal opportunity for all individuals in district programs and activities and to ensure that their programs and activities are free from unlawful discrimination, including on the basis of gender, gender identity and gender expression. The policy also includes the requirements for LEAs to provide certain notices regarding procedures for discrimination complaints. In addition to Board Policy/Administrative Regulation (BP/AR) 5145.3, which contains a specific section regarding the issues involving transgender and gender nonconforming students, CSBA also developed and maintains sample board policies and administrative regulations regarding Sexual Harassment (BP/AR R5145.7), Title IX Sexual Harassment Procedures (BP 5145.71) and Hate-Motivated Behavior (BP 5145.9).

CSBA sample policies are a compendium of case law, statutory law and guidance from regulatory oversight agencies like CDE and OCR.<sup>18</sup> They are not intended to be a substitute for legal advice, but instead are intended to provide LEAs with a framework for understanding and enforcing their obligations under the law.

## **3) When school employees receive requests from students related to a change to their gender identity, must the LEA honor such requests?**

Yes. Students are entitled to go by their preferred name and pronouns at school, even if different from those given or assigned at birth. Failure to use a student's preferred name and pronouns may constitute discrimination against the student.<sup>19</sup> Also, AB 1266 specifically allows a student to "participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity, irrespective of the gender listed on the pupil's records."<sup>20</sup>

## **4) Do parents have a constitutional right to receive information from LEA employees about requests their child makes regarding their gender identity?**

No. Currently, there is no federal constitutional right held by parents that requires school employees to inform parents of their child's name and pronoun preferences or of their child's request to use facilities or participate in activities that correspond with their gender identity. It may be the case in other states that parents have a right to receive this information from school employees, but in California, there is no law that requires school employees to provide this information to anyone, including parents, without the student's consent.



In 1923, the U.S. Supreme Court recognized the parental right to “bring up children.”<sup>21</sup> Two years later, the Court added to the right to bring up children when it found that a state could not require parents to enroll their children in only public schools because requiring public school attendance unreasonably interfered with the “liberty” interest of parents “to direct the upbringing and education of children under their control.”<sup>22</sup> Since *Pierce*, Supreme Court decisions have further established the rights of parents to make decisions “concerning the care, custody, and control of their children.”<sup>23</sup> However, the Court has not issued an opinion directly addressing parental control over their children in the school context for more than 50 years.<sup>24</sup>

While parents have a constitutional right to raise their children, the details and contours of that right are currently being considered by Congress and state legislatures as well as by state and federal courts. For example, the U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over California, has, in part, limited parental rights in a school context to deciding what school their children will attend.<sup>25</sup> As for parental rights in relation to student privacy, so far, federal courts differ on the extent of information that parents may receive from schools without students’ consent. As things stand now, the defined federal constitutional parental right does not include an explicit right of parents to receive information from schools about their child’s gender identity or expression, including the use of preferred name and pronouns, facilities or activities, without the student’s consent. Recently, a federal district court in California held that schools are not required to inform parents of their child’s gender identity or to obtain parents’ consent before using their child’s “alternative names and pronouns.”<sup>26</sup> However, this issue has not been litigated before a federal circuit court of appeals or the U.S. Supreme Court.

Despite this split of authority about the extent of parental rights at the federal level, in California, a student’s personal information is protected by the right to privacy specifically included in the State Constitution.<sup>27</sup> The California Supreme Court has made it clear that, in addition to adults, minors possess the constitutional right to privacy.<sup>28</sup> This right to privacy includes “informational privacy.”<sup>29</sup> In *Nguon v. Wolf* ((2007) 517 F. Supp. 2d 1177), a student’s sexual orientation was deemed protected by the student’s right to informational privacy, and the court found that the student had a reasonable expectation of privacy in her sexual orientation in her home. Because there is a close connection between a student’s sexual orientation and gender identity, the right to informational privacy likely encompasses a student’s gender identity. Therefore, disclosure of a transgender student’s name and pronouns without the student’s consent, when and after balancing the student’s express privacy right in the state constitution with the limited parental rights in California, would likely be found unconstitutional by a court. (See Question 8 for information regarding access to student records, specifically.)

## 5) Do parents have a constitutional right to prohibit LEA employees from calling their child by a new name or pronoun?

No. In other states, it may be the case that parents have a legal right to prohibit LEA employees from calling students by the names and pronouns requested by the student. In California, however, parents have not been extended this right. Based on the parental rights explained in Question 4, parents do have a right to raise their children and make decisions related to the care, custody and control of their children. However, there is currently no federal or California law, whether statutory or case law, that suggests this parental right includes the right to limit the ways in which LEA employees refer to a parent’s child at school.<sup>30</sup>

California’s Education Code protects students from discrimination in schools. Education Code sections 200 and 220 provide that all persons have the right to pursue education opportunities and no person should be subjected to discrimination based on a series of characteristics, including gender and gender identity. CDE has also stated in a legal advisory that deliberately failing to use a student’s preferred name or pronoun would constitute discrimination.<sup>31</sup> (See Question 1 for additional information about, and examples of, discrimination.) By refusing to call a student by the name and pronouns they request, schools may be subject to discrimination lawsuits.

LEAs also likely do not have an obligation to allow employees to refuse to call students by their preferred names or pronouns. For example, in *Kluge v. Brownsburg Community School Corporation* (7th Cir. 2023) 64 F.4th 861, a teacher’s religious accommodation to use last names for all students in his classrooms instead of student-requested names and pronouns, was, along with his resignation, legally rescinded by the school board because it created discord among teachers and caused harm to students, thus creating an undue hardship for the district.<sup>32</sup>

To the extent a parent requests that an LEA prohibit a student from using facilities or participating in sex-segregated activities that correspond to their gender identity, LEAs may not grant such a request because AB 1266 specifically provides students these rights.

## 6) Can an LEA employee tell a parent about their child’s new name and pronouns without the student’s consent? Further, can an LEA employee tell anyone about a student’s requested name and pronouns without the student’s consent?

No, not in California. Whether an LEA employee can tell a parent about a child’s name and pronouns used at school depends on the state in which the employee works. In some states, it may be legal to do this. In California, however, this would violate a student’s rights to privacy and protection from discrimination.<sup>33</sup> Disclosing a student’s name and pronouns used at school, if different from the name given and gender assigned to them at birth, regardless of their age, would violate a student’s constitutional right to informational privacy by making their sensitive



information public. If a student consents to the disclosure of the information to their parents, their privacy rights are not being violated.

In addition, students may be subject to discrimination in school and/or rejected at home as a result of the disclosure. For example, discrimination at school may result if a parent learns of the information from a school employee without the student's consent and shares the disclosed information with other school community members, and the student is then treated differently as a result of their gender identity. The answers to Questions 4 and 5 explain parental and students' rights in more detail, and the answer to Question 1 includes greater detail on discrimination and what it entails.

In all circumstances, LEAs should make efforts to ensure that students' gender identities are not improperly disclosed. This includes disclosures to parents, as well as to the broader school community. It may be the case that parents are aware of a student's social transition, but members of the school community are not. In this circumstance, protection of the student's private information, including gender identity and social transition, is also important for the protection of the student's rights. (Please see Question 8 for information regarding access to student records, specifically.)

To avoid improper disclosures and resulting harm to students, teachers and other school staff may have to refer to the student by the name given and pronouns assigned to them at birth or otherwise used before their social transition when talking about the student to others, including their parents. Teachers and school staff should discuss with the student if there is anyone that the student believes should know about the student's social transition and gender identity.

## **7) Can a student change their name or pronouns in their student records without parental consent?**

It depends on the type of record. Per 5 CCR 430-432, schools are required to maintain certain official records (also referred to as "mandatory permanent" student records) for each of their students, including the student's legal name, date of birth, sex, etc. Because information in official records is usually initially acquired by a district with parental knowledge and/or consent, the district cannot change the information in official records without parental consent and/or appropriate documentation. However, schools also maintain unofficial records that are not required to be maintained. (These are also referred to as "permitted" student records.)<sup>34</sup> Unofficial records do not require the formalities to which official records are subject. As such, when a student asks, without a parent's consent, to change their name, pronouns or gender in unofficial records, which may include attendance sheets, identification cards and diplomas, the district must honor the student's request to the extent possible to comply with the legislative purposes of ensuring equal rights and opportunities to the student, as required by Education Code sections 200 and 201.

## **8) Can a parent request and receive student records, including unofficial records, even if the records would reflect that a student changed their name and pronouns?**

Yes. Education Code section 49069.7 and 5 CCR 431 give parents the absolute right to access almost all student records and Education Code section 49063 requires districts to notify parents of their rights related to their student's records. Federal law, the Family Educational Rights and Privacy Act (FERPA), also affords parents the right to request and receive student records.<sup>35</sup> Also, per 5 CCR 431(g), "Neither the pupil record, nor any part thereof, shall be withheld from the parent or eligible pupil requesting access." Student records are "any item of information directly related to an identifiable pupil...that is maintained by the school district...whether recorded by handwriting, print, tapes, film, microfilm, or other means."<sup>36</sup>

This parental right to access records includes any change by a student made in their unofficial records, as described in the CDE FAQ regarding AB 1266, see Question 3, which in California is tempered by the student's constitutional right of privacy.<sup>37</sup> In balancing these rights, if a student wishes to change their name or pronouns in their unofficial records but has not notified their parents of their desire to do so, the following may be considered:

- ▶ Encouraging the student to tell their parents and other family members about the change to their name and pronouns and other information about their gender identity as described in AR 5145.3. Studies show that supportive family often lead to better outcomes for transgender and gender nonconforming students, and schools can assist students with these conversations.
- ▶ Informing the student that the Education Code and FERPA provide parents an absolute right of access to those unofficial records, which could result in disclosure of the student's changed name and pronouns.
- ▶ Minors in California have a constitutional right to privacy in information about them that collides with parents' state and federal statutory right of access to student records. Because courts have not yet addressed this potential conflict, there is an outstanding legal issue as to whether providing a parent with access to a transgender student's unofficial records may violate the student's right to privacy.

## **9) Does CSBA have a sample board policy and administrative regulation addressing the situation when a student requests to change their name and pronouns?**

Yes. BP and AR 5145.3 reflect public policy to ensure equal access and opportunities for all students and to prohibit unlawful discrimination in relation to school activities and school attendance. BP 5145.3 defines unlawful discrimination, details the protected characteristics, and provides direction to the superintendent and board members, and guidance to the school





community. AR 5145.3 designates the Compliance Officer/Title IX Coordinator who is responsible for coordinating the district's efforts to comply with applicable state and federal laws. AR 5145.3 also includes specific measures to facilitate the purposes of BP 5145.3, such as preventing discrimination, implementing district anti-discrimination policies, filing a complaint, and addressing nondiscrimination-related issues that are unique to transgender and gender nonconforming students.

BP/AR 5145.3 are based on the following legal citations: Federal law – 20 USC 1681-1688; 34 CFR 106.8, 106.9. State law – Ed. Code 200, 201, 220, 221.5, 234.1; 5 CCR 4600-4670, 4900-4965.

## 10) What could be the consequences if an employee intentionally tells a parent about their student's name and pronoun change?

### **LEA liability**

Pursuant to Education Code section 260, the governing board of a school district has primary responsibility for ensuring that school district programs and activities are free from discrimination. (Ed. Code 260.) In addition, students may bring a lawsuit for money damages to enforce the anti-discrimination and anti-harassment provisions of the Education Code (see Questions 1 and 2).<sup>38</sup> Similarly, plaintiffs have a private right of action for allegations of discrimination on the basis of sex under Title IX.<sup>39</sup> A student may also state a claim for violation of their privacy rights under the California Constitution.<sup>40</sup>

In addition, a student could file a Uniform Complaint alleging discrimination or harassment. CDE has authority to investigate and take corrective action to address violations of anti-discrimination statutes upon appeal of a Uniform Complaint.<sup>41</sup> This may include "withholding all or part of the local agency's relevant state or federal fiscal support..." if compliance cannot be secured with other means.<sup>42</sup> The State Superintendent of Public Instruction is further responsible for providing leadership to local agencies to ensure that the requirements of non-discrimination laws and their related regulations are met in educational programs that receive or benefit from state or federal financial assistance, including Education Code sections 200 through 253, which prohibit discrimination and harassment in schools, including on the basis of gender identity or gender expression.<sup>43</sup>

OCR also has authority to investigate and resolve complaints of discrimination.<sup>44</sup> If OCR makes findings against an LEA, it will typically enter into a resolution agreement with the LEA to resolve the dispute.<sup>45</sup> If OCR is unable to negotiate a resolution agreement or if the LEA fails to comply with the terms of the agreement, it may either initiate an administrative proceeding to suspend, terminate or refuse to grant or continue federal funding or refer the case to the U.S. Department of Justice for judicial proceedings (i.e., a lawsuit) to enforce its rights.<sup>46</sup>

As to federal claims, LEAs are immune from liability for damages under the 11th Amendment but are still potentially liable for injunctive or declaratory relief.<sup>47</sup>

### **Personal liability**

Public employees in California are generally not personally liable for acts or omissions where the act or omission "was the result of the exercise of discretion vested in" them.<sup>48</sup> Not all acts that require a public employee to choose among alternatives entail the use of discretion.<sup>49</sup> The question that arises is whether intentionally telling a parent about a student's name and pronoun change is a discretionary act for purposes of determining whether liability attaches. In *C.N. v. Wolf* (C.D. Cal. 2005) 410 F. Supp. 894, the U.S. District Court for the Central District of California found that a student had properly stated a claim against school district employees where she alleged she was treated differently than other students because she was gay. (The student alleged she received disciplinary action for engaging in public displays of affection with a same-sex partner, while students with opposite-sex partners were allowed to engage in the same conduct.) The same court has also held that an action is not "discretionary" and the employee is not entitled to immunity when the alleged action is discrimination against a student.<sup>50</sup>

### **Qualified immunity**

Unlike LEAs, public employees are not immune from suit for federal claims when sued in their individual capacities.<sup>51</sup> However, the doctrine of qualified immunity protects government officials performing discretionary functions from monetary damages liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>52</sup> If reasonable persons could disagree on the issue of whether a particular act is constitutional, then qualified immunity will apply.<sup>53</sup>

The issue of whether an LEA employee may inform a student's parents about their name and pronouns change is currently being litigated. Therefore, a court might find qualified immunity applies to individual defendants. However, it is important to note that the U.S. District Court in the *C.N.* case did not find qualified immunity for individual defendants where a student's claim that a district employee disclosed her sexual orientation to her parents implicated her constitutional right to privacy. The court noted that the constitutional right to privacy (as well as the constitutional rights to equal protection and freedom of expression implicated by other allegations in the complaint) were "clearly established rights." Thus, it is possible that a claim that a district employee disclosed a student's transgender status would not be subject to qualified immunity. It is also important to note that, even if there is qualified immunity, it only applies to monetary damages. Injunctive and declaratory relief actions are still available to plaintiffs against individual employees even if the basis for liability was not "clearly established" at the time of the actions that gave rise to the claim.



**11) What could be the consequences if a governing board in California adopted a new policy or regulation, or changed an existing policy or regulation, to require employees to tell parents of the student's request to change their name or pronouns?**

Education Code section 35161 permits a school board to exercise powers delegated to it by law and to discharge duties imposed by law upon it or the school district. In performing its duties, a school board also has discretion pursuant to Education Code section 35160 to initiate and carry on any program, activity or act in any manner that is not in conflict or inconsistent with any law and/or any purposes for which school districts are established. When the law governing an issue mandates the adoption of policy and/or procedures in relation to the issue, any board policy and/or administrative regulation must comply with the requirements of that law. If governing boards are not mandated but otherwise act based on their discretion pursuant to Section 35160, any such action must be consistent with the law or in the absence of any law, with the purposes for which they are established.

A monitoring, complaint and enforcement mechanism may be provided to further the implementation of a law. For example, in relation to federal and state anti-discrimination laws, Education Code section 234.1 requires CDE to monitor school districts' compliance through its federal program monitoring process. In the event of a complaint filed against a district, a review of the district's policies and an audit of its processes might be conducted by CDE for consistency with the law.<sup>54</sup> Findings of noncompliance in such cases typically result in costly remedial measures. In exceptional cases, federal or state funding for affected programs may be withheld. Board members could also, in exceptional cases, be held personally liable for intentional violations of the law.<sup>55</sup> Boards should also consider that if adoption of a policy that is found to be unlawful, the LEA and the employees who have been required to implement and enforce such a policy may be subject to liability.

In addition to CDE, the California Attorney General may take enforcement action to ensure that the laws governing LEAs in California are "uniformly and adequately enforced."<sup>56</sup>

**12) Is the issue of telling parents about their student's request to change their name and pronouns at school being litigated?**

Yes. The issue is being litigated in California and across the country. The various lawsuits involve wide-ranging circumstances, such as parents challenging school policies related to transgender students without having a transgender student, parents challenging policies after learning that their student uses a different name and pronouns at school, and parents challenging policies after their request to be informed of their child's transgender status by the school was denied. The following is a sample of some of the cases currently being considered by courts.

*Regino v. Staley* – California

In the case of *Regino v. Staley*, a mother sued her child's school district after she learned that her daughter began using a different name and pronouns at school. This began after a meeting with a school counselor, when the fifth-grade student stated that she felt like a boy. Based on the school anti-discrimination policy, the counselor did not inform the student's mother of the new name or pronouns.

On July 10, 2023, the U.S. District Court for the Eastern District of California granted the school district's motion to dismiss. In its order granting the motion, the court noted that plaintiff's proposed expansion of parental rights to include being informed of their child's gender identity and requiring parental consent before employees may refer to a student by their preferred name and pronouns was not supported by precedent in federal case law or by any other controlling legal authority. The court went on to say that the policy relied on by the school properly balanced students' rights and the role of the school, and that by requiring student consent prior to notification, the district demonstrated a legitimate state interest in creating a zone of protection for transgender students and for students questioning their identity from adverse, hostile reactions. The case may be appealed to the U.S. Court of Appeals for the Ninth Circuit.

*John and Jane Parents 1 v. Montgomery County Board of Education* – Maryland

In this case, three parents of students sued to challenge school policies related to the disclosure of information about students' gender. The plaintiff parents argued that the "Guidelines for Student Gender Identity in Montgomery County Public Schools" inappropriately instruct school officials to withhold information from parents regarding their child's gender.

Upon review, the U.S. District Court for the District of Maryland granted Montgomery County Board of Education's (MCBE) motion to dismiss. The court sided with the MCBE's argument that the guidelines advance the state's goal of protecting students' safety and privacy and found that there is no fundamental right for a parent to be promptly notified when their child's gender identity changes. The court concluded that the guidelines are noncoercive, encourage creating a support system for students and apply on a case-by-case basis. The plaintiff parents appealed to the U.S. Court of Appeals for the Fourth Circuit.

Based on a lack of standing, the Fourth Circuit vacated the district court's order and remanded the case back to the district court to be dismissed. Because the parents do not have a child that relies on MCBE's policy, is transgender, or considering their gender identity the court summarized that the parent plaintiffs "have alleged neither a current injury, nor an impending injury or a substantial risk of a future injury." As a result, the court states that "these parents have failed to establish an injury that permits this Court to act."

*Foote v. Ludlow School Committee* – Massachusetts

In this case, two sibling students began using different names and pronouns at school and asked that staff not inform their



parents of the transition until the students were ready. Upon learning about their children's use of different names and pronouns, the parents sued, saying that their fundamental parental rights to direct the education and upbringing of their children, their right to direct the medical and mental health decision making for their children, and their right to family integrity, were violated.

The U.S. District Court granted the district's motion to dismiss and ruled that the school officials did not violate the parents' civil rights when they supported the students. The court found that there were insufficient facts for the court to conclude that the conduct at issue constituted mental health treatment and when, considered with the government interest, there was no "conscience-shocking conduct" adequate to show that a substantive due process violation occurred. The parents appealed to the U.S. Court of Appeals for the First Circuit.

### ***Doe v. Manchester School District – New Hampshire***

In *Doe v. Manchester School District*, a student requested that they be addressed by a different name at school because they identified with a different gender. The student's parent did not know of the student's transition and was not informed by the school. When the parent spoke with the school about the student's transition, the school informed the parent that school policy required the school not to inform the parent if the student does not give permission for disclosure. Further, the policy required the school to use the name requested by the student over a parent's request.

At the state lower court, the district's motion to dismiss was granted, and the court found that the district's policy did not violate the parent's fundamental rights provided in the state and federal constitutions. Further, the court found that the district did not have a legally enforceable duty to inform parents when students used a different name or gender identity at school. The case was appealed to the New Hampshire Supreme Court, where it was argued on April 27, 2023.

### **13) Is the issue of telling parents about their student's request to change their name and pronoun being addressed by legislation?**

Yes. Bills have been proposed in both the California Legislature and Congress that aim to regulate the information parents receive when students request to change their name and pronouns.

AB 1314 (Essayli, R-Riverside) was introduced in the California Assembly in February 2023. AB 1314 would have required parental notification by school employees within three days of their knowledge that a student was 1) identifying at school as a gender that did not align with the child's sex on their birth certificate, other official records or sex assigned at birth; 2) using sex-segregated school programs and activities, including athletic teams and competitions; or 3) using facilities that do not align with the child's sex on their birth certificate, other

official records or sex assigned at birth. The bill died in April 2023 after the Education Committee did not set a hearing date to consider the bill.

House Resolution 1585 (LaMalfa, R-Richvale), also known as the "Prohibiting Parental Secrecy Policies in Schools Act of 2023," was introduced in the U.S. House of Representatives in March 2023. The bill aims to require states that receive federal funds "to prohibit a school employee from conducting certain social gender transition interventions." This would include prohibiting school employees from 1) using pronouns for a student that do not align with their sex at birth, 2) providing or promoting the use of devices such as binders or padding, and 3) any other action designed to assist a minor in a social transition. The bill was referred to the House Committee on Education and the Workforce in March but has not proceeded from there as of July.

## **Endnotes**

- 1 See also 34 CFR 106.31, subd. (a).
- 2 34 CFR 106.31, subd. (b).
- 3 **86 FR 32637**. (Note: Due to a federal court order, this Notice of Interpretation is not enforceable in certain states, but it is enforceable in California).
- 4 *Bostock v. Clayton County* (2020) 590 U.S. \_\_\_\_.
- 5 "Gender" means sex and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. (Ed. Code 210.7; see also 5 CCR 4910.) This includes the perception that a person is a member of a protected classification. (Ed. Code 210.2).
- 6 Ed. Code 201, subd (a).
- 7 5 CCR 4900 et seq.
- 8 Ed. Code 234.1, subd. (b)(1).
- 9 Ed. Code 221.5, subd. (f) (Assembly Bill 1266).
- 10 [CDE Legal Advisory](#) regarding application of California's antidiscrimination statutes to transgender youth in schools (last reviewed March 21, 2023).
- 11 Resolution between the Office of Civil Rights and Tamalpais Union High School District (June 23, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09181466-b.pdf> and <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09181466-a.pdf>; CDE Legal Advisory regarding application of California's antidiscrimination statutes to transgender youth in schools (last reviewed March 21, 2023).
- 12 [Confronting Anti-LGBTQ+ Harassment in Schools](#), Office of Civil Rights (June 2021).
- 13 [CDE Legal Advisory regarding application of California's antidiscrimination statutes to transgender youth in schools](#) (last reviewed March 21, 2023).
- 14 Ed. Code 221.5, subd. (f); [Confronting Anti-LGBTQ+ Harassment in Schools](#), Office of Civil Rights (June 2021).
- 15 Ed. Code 221.5, subd. (f).
- 16 *C.N. v. Wolf* (C.D. Cal. 2005) 410 F. Supp. 894 (applying disciplinary action against homosexual student for public displays of affection when not disciplining heterosexual students for the same behavior states a claim against the school district and individual defendants).
- 17 [Confronting Anti-LGBTQ+ Harassment in Schools](#), Office of Civil Rights (June 2021); [CDE School Success and Opportunity Act \(Assembly Bill 1266\) Frequently Asked Questions](#).



- 18 Guidance from CDE to LEAs may be based directly or indirectly on statutes, regulations or both, as well as on guidance from the federal agency overseeing the expenditure of federal funds. Guidance documents such as FAQs, “are entitled to consideration and respect by the courts”, but unlike statutes or regulations, “do not have the effect and force of law.” (*Yamaha Corp. of America v. State Bd. Of Equalization*, (1998) 19 Cal. 4th 1, 7; *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 97 (2015).) Nonetheless, the FAQ’s, together with CDE’s Legal Advisory may not only be persuasive in court, but also provide LEA’s with how CDE may evaluate compliance with any legal obligations that are subject to review and penalties for noncompliance as part of CDE’s federal program monitoring. (Education Code 234.1; Government Code 11136; 5 CCR 4960 et seq.).
- 19 [CDE Legal Advisory regarding application of California’s antidiscrimination statutes to transgender youth in schools](#) (last reviewed March 21, 2023); [Confronting Anti-LGBTQ+ Harassment in Schools](#), Office of Civil Rights (June 2021).
- 20 Ed. Code 221.5, subd (f).
- 21 *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, 402.
- 22 *Pierce v. Society of Sisters* (1925) 268 U.S. 510.
- 23 *Troxel v. Granville* (2000) 530 U.S. 57, 66.
- 24 *Wisconsin v. Yoder* (1972) 406 U.S. 205, 232.
- 25 *Fields v. Palmdale Sch. Dist.* (9th Cir. 2005) 427 F.3d 1197, 1206; *California Parents for the Equalization of Educ. Materials v. Torlakson* (9th Cir. 2020)973 F.3d 1010, 1020.
- 26 *Regino v. Staley* (ED. Cal. 2023) 2023 WL 4464845.
- 27 CA. Const. Art.1, Sec. 1.
- 28 *American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 334, 940 P.2d 797, 814.
- 29 *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 35.
- 30 See *Regino v. Staley* (ED. Cal. 2023) 2023 WL 4464845, where the federal district court held that a parent did not have the right to consent to school employees using the preferred name and pronouns requested by the student.
- 31 CDE Legal Advisory (last reviewed March 21, 2023)
- 32 In federal court, two teachers in California are challenging the district’s policies which require a student’s consent before telling parents of their gender transition, as violating their rights of free speech and the free exercise of religion under the First Amendment. (*Mirabelli v. Olson, et al.*, Federal Dist. Court, Southern District of California, Case No. 3: 23-cv-0768-BEN-WVG (2023).) A similar civil rights complaint was filed in May by a teacher who is challenging her dismissal for refusing to follow the district’s policy of requiring consent of the student before telling parents of their social transition. (*Tapia v. Jurupa USD et al.*, Federal Dist. Court, Central District of California, Case No. 5:23-cv-00789-SP (2023)).
- 33 [CDE School Success and Opportunity Act \(Assembly Bill 1266\) Frequently Asked Questions](#).
- 34 5 CCR 431.
- 35 20 U.S.C. 1232g.
- 36 Ed. Code 49061, subd. (b); Please note that, per Education Code section 49076, a district may provide access to student records only with parental consent, except in certain cases, giving students a privacy right in their student records from parties other than their parents.
- 37 Informal notes related to a pupil compiled by a school employee that remain in that employee’s sole possession and are not accessible or revealed to others do not constitute student records subject to this rule. (Ed. Code 49061, subd. (b)).
- 38 Ed. Code 262.4; *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 579-581
- 39 *Cannon v. University of Chicago* (1979) 444 U.S. 677.
- 40 *Hill v. Natl Collegiate Athletic Assn* (1994) 7 Cal. 4th 1; see *C.N. v. Wolf*, 517 F. Supp. 2d 1177 (finding that a student plaintiff stated a claim for a violation of her privacy rights under the California Constitution against a school district employee whom she alleged disclosed her sexual orientation to her parents).
- 41 Ed. Code 33315, subd. (a)(6); 5 CCR 4670.
- 42 5 CCR 4670, subds. (a)(1) and (b).
- 43 5 CCR 4902.
- 44 45 CFR 88.7.
- 45 OCR has recently entered into resolution agreements on these topics in two cases. (See Resolution between the Office of Civil Rights and Tamalpais Unified School District (June 23, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09181466-b.pdf> and <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09181466-a.pdf>, and Resolution between the Office of Civil Rights and Rhinelander School District (July 6, 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05221029-a.pdf> and <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05221029-b.pdf?>
- 46 45 CFR 88.7; see also, [OCR Case Processing Manual](#), Article VI.
- 47 See *C.N. v. Wolf* (CD. Cal. 2005) 410 F. Supp. 894, 898.
- 48 Gov. Code 820.2.
- 49 *Barner v. Leeds* (2000) 24 Cal.4th 676, 684-85.
- 50 *Massey v. Banning Unified School Dist.* (C.D. Cal. 2003) 256 F. Supp. 2d 1090; On the other hand, failure to properly address discrimination and harassment by others, as opposed to perpetrating harassment or discrimination themselves, are discretionary actions entitling individuals to immunity under the Government Code. (See *Nicole M. By and Through Jacqueline M. v. Martinez Unified School District* (N.D. Cal. 1997) 964 F. Supp. 1369; *Doe By and Through Doe v. Petaluma City School Dist.* (N. D. Cal. 1993) 830 F. Supp 1560.)
- 51 See *C.N. v. Wolf* (C.D. Cal. 2005) 410 F. Supp. 894, 898-899.
- 52 *Id.* citing *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.
- 53 *Malley v. Briggs* (1986) 475 U.S. 335, 341.
- 54 5 CCR 4961.
- 55 Gov. Code 815.3, 820.2.
- 56 California Constitution Article V, Section 13.