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FINAL GUIDANCE: AB 1266, TRANSGENDER AND GENDER NONCONFORMING STUDENTS, PRIVACY, PROGRAMS, ACTIVITIES & FACILITIES

In September 2013, CSBA published its “Interim Guidance Regarding Transgender Students, Privacy & Facilities.” Now that the AB 1266 referendum has failed to qualify for the ballot, CSBA has updated and expanded its guidance to help school districts and county offices of education navigate these issues.

State and federal law and its application require districts¹ to treat all students equally based on their gender identity. AB 1266 makes it clear that this rule applies to gender-segregated facilities, programs, and activities. Although a very simple statement of law, the practical implications are complex.

BACKGROUND

The Role of the Board

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

State Law including AB 1266

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. (Educ. Code, §§ 220, 221.5.) AB 1266 adds 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.”

California Interscholastic Federation

The CIF has issued revised 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 also published guidelines for an appeals process in a situation where a transgender or gender nonconforming student’s request is denied.

Federal Law

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. These obligations are imposed independently of and in addition to state law. It was federal law

¹ This guidance has been prepared to assist the governance teams at districts and county offices of education.

that the U.S. Department of Education’s Office for Civil Rights 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 the end, 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.

RECOMMENDED GUIDANCE

CSBA’s *Interim Guidance Regarding Transgender Students, Privacy & Facilities* provided recommendations on responding to a request from a transgender or gender nonconforming student to use a gender-segregated facility or participate in a gender-segregated program in a manner consistent with the student’s gender identity. This final guidance reaffirms those recommendations and provides guidance on related issues.

Requests to Use Facilities or Participate in Programs and Activities

Districts are advised to handle, on a case-by-case basis, a request from a transgender or gender nonconforming student to use a gender-segregated facility or participate in a gender-segregated program or activity in a manner consistent with the student’s gender identity. Districts 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 guidance is offered:

- *Upon request*, districts should allow any student wanting privacy to use an alternate facility (e.g., restroom, locker room) not used or occupied by other students.
- *Upon request*, districts should allow a student to use the gender-specific facility consistent with his or her gender identity.
- *Upon request*, districts should ensure that staff uses the name and pronoun preferred by a transgender or gender nonconforming student.
- *Upon request*, districts should prepare data systems to list a transgender or gender nonconforming student by his or her preferred name and gender.
- *Upon request*, districts should allow students to participate in athletics according to their gender identity in a manner that is consistent with the CIF bylaws.

HELPFUL DEFINITIONS

- ◆ “Gender” refers to a person’s sex and includes his/her 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.
- ◆ “Gender identity” refers to a person’s gender-related identity, appearance or behavior, whether that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex 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 or gender expression is different from that traditionally associated with their assigned sex at birth.

These definitions are from CSBA’s policy brief, “Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender -Nonconforming Students.”

Gender Identity Determination

As stated in CSBA's *Interim Guidance*, a district should take seriously any manner or method by which a student chooses to notify staff of his or her new gender identity. Additionally, a district should accept the student's assertion unless staff has a credible basis for believing that a student's gender identity is being asserted for an improper purpose. If district personnel have a credible basis for believing that a student's gender identity is being asserted for an improper purpose, this basis should be documented and a written response should be provided to the student. This protects the district from making an undocumented decision and ensures that the student understands the reason for the denial. CSBA recommends against requiring a medical or mental health diagnosis or treatment in order for a student to have his or her gender identity recognized by the district.

Privacy Rights of Transgender or Gender Nonconforming Student

A student's decision to inform the district that his or her gender identity differs from his or her biological gender is extremely personal and private. In addition, transgender and gender nonconforming students may face bullying and harassment as a result of other students or staff not understanding or tolerating the public representations of their gender identity. 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, districts are still legally responsible to maintain a student's privacy according to the student's wishes. Therefore, as with a request to use facilities or participate in programs or activities, it is recommended that a district address each situation on a case-by-case basis. This will allow the district to understand the student's privacy needs and to identify potential challenges the district may face in meeting those needs. It will also provide the student with an opportunity to understand the implications of his or her request and the impact it may have on the student's privacy.

Privacy and Religious Rights of Other Students

It is not just transgender and gender nonconforming students for whom privacy may be an issue. Other students may feel that their privacy rights are violated if, for example, they were to change in the same locker room as a member of the opposite biological gender because their religious beliefs and/or practices may forbid dressing with students of the opposite biological gender. To address the needs of these students, it is recommended – in addition to the annual notice described below – that the district follow a process similar to the one recommended to meet the needs of transgender and gender nonconforming students. That is, the district should address each situation on a case-by-case basis, which will allow the district the opportunity to determine the needs of these students and to work out the practical details of addressing those needs.

Annual Notice

Because of these privacy and religious rights, CSBA recommends that a district provide an annual notice to all students of the rights of transgender and gender nonconforming students so that students may notify the district/COE in advance if they believe their privacy or religious beliefs and/or practices would be violated if they were to use the same

facilities as a member of the opposite biological gender.

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 – and the new district agrees – to permit the student to use facilities, including the boys’ bathrooms, consistent with the student’s gender identity and to not reveal that the student is biologically female. 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 regarding his or her gender identity). At the same time, the district is potentially liable if another student were to feel that his or her privacy or religious rights were being violated.

To address this potential scenario, it is recommended that the district include in its annual notice the following: (i) a statement that it is the law and district policy to allow 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 a student (or the student’s parents or guardians) believes that this presents a possible violation of the student’s right to privacy or religious expression, the student (or parents or guardians) must notify the district in writing to discuss how, in the event this or another scenario arises, to accommodate the student. 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 students and parents/guardians, as this may unintentionally identify the student.

Professional Development and Education

Regardless of whether a district knows that it has a transgender or gender nonconforming student or whether it has received requests from such a student, a district should consider providing professional development to teachers 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 the educational activities is to encourage understanding of gender identity, gender expression, and related issues.

ADDITIONAL RESOURCES

- ◆ *Sample BP and AR 5145.3 - Nondiscrimination/Harassment, updated to reflect AB 1266 and the latest legal requirements, are available to Policy Services clients on Gamut Online.*
- ◆ *CSBA’s recent policy brief entitled, “Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender Nonconforming Students” is also available on the Gamut Online homepage and www.csba.org/PNB.aspx.*
- ◆ *The CIF bylaws are available at www.cifstate.org/images/PDF/State_Constitution_and_Bylaws/300_Series.pdf.*
- ◆ *The CIF guidelines are available at www.cifstate.org/images/PDF/State_Constitution_and_Bylaws/guidelines_for_gender_identity_participation.pdf.*
- ◆ *The Arcadia USD resolution agreement is available at www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.*
- ◆ *For additional guidance, contact CSBA’s Office of the General Counsel at 800-266-3382.*