



Updated Legal Guidance

March 2017

Protecting Transgender and Gender Nonconforming
Students Against Discrimination

This legal guidance is intended to provide clarity regarding existing state and federal laws that serve to protect transgender and gender nonconforming students against discrimination on the basis of sex, and the responsibilities of district and county office governing boards under these laws.

In October 2013, CSBA issued an interim legal guidance on laws affecting transgender students in response to Governor Brown signing AB 1266. In March 2014, CSBA published a “Final Guidance: Transgender and Gender Nonconforming Students, Privacy, Programs, & Facilities,” and then in July 2016, CSBA updated its legal guidance to reflect the protections for 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 February 22, 2017, the U.S. Department of Education and U.S. Department of Justice jointly issued another “Dear Colleague” letter, withdrawing and 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 districts in establishing educational policy.”

Please note: The Departments’ withdrawal of the 2016 “Dear Colleague” letter does not roll back protections for California students, as state laws protecting transgender and gender nonconforming students remain in place. This legal guidance reflects current state and federal law, and is intended to help school districts and county offices of education in providing a safe and nondiscriminatory school environment for transgender and gender nonconforming students.

On March 6, 2017, the U.S. Supreme Court in response to the Trump administration’s new “Dear Colleague” letter, remanded a case to the federal appellate court that it had been expected to rule on this June. That case, *G.G. v. Gloucester County School Board*, is a challenge to a Virginia school district’s board policy on which bathrooms transgender students can use, and could well affect federal laws impacting transgender students. However, any decision likely will not impact California students. CSBA will still continue to monitor changes in federal law that affect any California students.

State and federal law and regulations require districts to treat all students equally based on their 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 district as it relates to creating a safe, welcoming and nondiscriminatory environment for all students. Districts 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.)

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

Implication of Laws for Districts

These state and federal laws create responsibilities for districts in diverse ways and the remainder of this guidance provides recommendations for addressing some of the most significant among them.

RECOMMENDED GUIDANCE

Adoption of Policy

In accordance with law, the governing board must establish policies that clearly spell out the district'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, districts need to review their policies and regulations to ensure that they reflect current law. CSBA updated its sample BP and AR 5145.3, Nondiscrimination/Harassment, in September 2016 to account for the significant federal guidance released in May 2016, and is currently reviewing BP and AR 5145.3 again to ensure they are consistent with the 2017 "Dear Colleague" letter.

Gender Identity Determination

A district should accept a student's assertion of his/her gender and treat the student in a manner consistent with that student's gender identity, unless staff has a credible and supportable basis for believing that the student's gender identity is being asserted for an improper purpose. Although no longer a policy supported by federal law, but still a credible approach under state law, no medical diagnosis or treatment should be required before treating a student consistent with his/her asserted gender.

Student Requests

A transgender or gender nonconforming student's request 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 should be handled on a case-by-case basis. 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 "best practices" offer recommendations for ensuring that the rights of transgender or gender nonconforming students are protected:

- » Upon request, districts should allow a student to use the gender-specific facility consistent with his or her gender identity.

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 internal sense of his/her own gender, and may be different or the same as his/her 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 is different from 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."

- » Upon request, districts 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.
- » 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 consistent with their gender identity and according to the California Interscholastic Federation (CIF) bylaws.

*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.

Privacy Rights of Transgender or Gender Nonconforming Students

A student's decision to inform the district that his or her gender identity differs from his or her 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, districts are still legally responsible to maintain a student's privacy according to the student's wishes. In addition, districts 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. 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.

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 may also violate the Family Educational Rights and Privacy Act (FERPA). 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.

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 their clothing in the same locker room as and in the presence of a member of the opposite biological gender. To address the concerns of such 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 students who may be uncomfortable using the same bathroom or locker room with transgender and gender nonconforming students and to work out the practical details of addressing those needs. Districts 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 and Antidiscrimination Training

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 a district provide an annual notice to all students of the district'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 district/COE in advance if they have concerns that their privacy or safety or the sanctity of their religious beliefs may be affected by the district's implementation of its nondiscrimination policies, including the district'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 – 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 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, 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 students and parents/guardians, as this may unintentionally identify the student.

In addition, CSBA recommends that districts 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 district policy prohibiting discrimination.

Student Records

A school should respond to a request to amend information related to a transgender or gender nonconforming student's status consistent with its general practices for amending other students' records. When a school district receives documentation of a student's legal name change or gender identity, the district must update the student's school records accordingly. If the school district has not received documentation supporting a student's legal name or 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 district 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.

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, 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 district's legal responsibilities related to the provision of a safe, nondiscriminatory school environment for all students, including transgender and gender nonconforming students.

ADDITIONAL RESOURCES

- » Sample BP and AR 5145.3 - Nondiscrimination/Harassment, 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 http://www.cifstate.org/governance/constitution/Constitution_and_Bylaws.pdf.
- » The Arcadia USD resolution agreement is available at www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.
- » The U.S. Department of Education and U.S. Department of Justice's 2017 "Dear Colleague" letter that withdrew and rescinded the earlier-issued significant guidance "Dear Colleague" letter is available at <https://www.justice.gov/opa/press-release/file/941551/download>. The U.S. Department of Education's since-rescinded May 13, 2016 "Dear Colleague" letter is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.
- » The California Department of Education's Frequently Asked Questions page about Assembly Bill 1266 is available at <http://www.cde.ca.gov/re/di/eo/faqs.asp>.
- » For additional guidance, contact CSBA's Office of the General Counsel at 800-266-3382.