

Policy Brief

Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students

A safe, nondiscriminatory school environment—where students are not distracted by fear nor disengaged from learning because of nonacceptance by their peers or staff—is essential to student achievement. Governing boards play a critical role in ensuring that the schools in their community are free of discrimination, harassment, intimidation and bullying.

This policy brief focuses on efforts to prevent discrimination against transgender and other gender-nonconforming students, although the strategies may be applied to other types of discrimination as well. Both state and federal law protect transgender and gender-nonconforming students from discrimination. As described in the section “Legal Requirements” below, new state law (AB 1266, Ch. 85, 2013) attempts to clarify how nondiscrimination laws apply to sex-segregated programs, activities and facilities. Although the status of the new law is uncertain at the time of this writing due to a petition to place a referendum on the ballot to overturn the law, its fate does not affect the responsibility of districts and county offices of education (COEs) to ensure the safety and well-being of such students at school.

Because of societal prejudice and lack of awareness or understanding, transgender students and gender-nonconforming students may experience ongoing rejection, criticism or bullying, affecting their emotional health and academic achievement.¹ Therefore, along with ensuring compliance with nondiscrimination laws, districts/COEs are encouraged to develop strategies to minimize social stigmatization for such students and maximize opportunities for social integration so that all students have an equal opportunity to attend school, be engaged and achieve academic success.

Definitions

Education Code 210.7 defines “gender” and “gender expression” as follows:

- » “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 or not stereotypically associated with the person’s assigned sex at birth.

Although not defined in law, the following are generally accepted definitions of other related terms:^{2,3}

- » “Gender identity” refers to a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.
- » “Transgender” describes people whose gender identity or gender expression is different from that traditionally associated with their 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.
- » “Sexual orientation” refers to a person’s emotional and sexual attraction to other people based on the gender of the other person. Sexual orientation is not the same as gender identity. Not all transgender youth identify as gay, lesbian or bisexual, and not all gay, lesbian and bisexual youth display gender-nonconforming characteristics.

Harassment based on gender identity and nonconformity

Studies on bullying tend to reveal that the behaviors of harassers “reinforce expected cultural norms for boys and girls and punish students who don’t fit the ideals of traditional gender roles.”⁴

Insults that refer to perceptions of gender roles or sexuality are common among students. Students whose behavior is perceived to be different in some way can often be isolated and harassed. It is more frequently gender stereotyping, not sexual orientation, that is largely responsible for the frequency and severity of bullying directed at students who identify as gay or lesbian.

In a national study of students in grades 6-12, the majority reported hearing homophobic remarks frequently or often: 85 percent frequently or often heard “gay” used in a negative way, 71 percent heard other homophobic remarks and 61 percent heard negative remarks about students not acting “masculine enough” or “feminine enough.”⁵

The personal effects of harassment can be traumatic and enduring. One study found that “the damage to the victims of bullying may be physical, emotional and psychological and the resulting trauma can last a lifetime.”⁶ This study also found that students who have experienced harassment at school because of their gender are twice as likely as their peers to report having carried a gun to school or to report attempting suicide.

Furthermore, when students feel unsafe, they are more likely to be truant or to be academically disengaged. A California Safe Schools Coalition survey found that nearly 109,000 school absences at the middle and high school levels in California each year are due to harassment based on actual or perceived sexual orientation, costing California districts at least \$39.9 million each year.⁷

Other studies of lesbian, gay, bisexual and transgender (LGBT) students reveal that 31 percent report having missed at least one day of school in the previous month because they did not feel safe at school. In fact, LGBT students are four times more likely to skip school out of safety concerns.⁸

Although it is difficult to find research showing a direct causal relationship between harassment of LGBT students and negative impact on student achievement, it is reasonable to expect that lower school attendance and a negative school climate would result in lower levels of achievement. The findings of a national study suggest that students who have higher grade point av-

erages are those who feel safer in their school environment (mean GPA of 3.2 with lower victimization based on sexual orientation or gender expression compared to a mean GPA of 2.9 with higher victimization) and that students who feel safe in their schools are more likely to plan to go to college.⁹

Research shows that the extent to which LGBT students feel safe in school can be improved by the availability of resources and supports in schools. For example, in schools with comprehensive anti-harassment policies that specify sexual orientation or gender expression, students report that they hear biased remarks less frequently and experience significantly lower severities of victimization related to their sexual orientation and gender expression. They are also more likely to report any victimization to school staff and to believe that reporting to school staff was effective.¹⁰

Legal requirements

State and federal law prohibits discrimination of students based on their actual or perceived sex, gender, sexual orientation, gender identity or expression, race, color, ancestry, national origin, ethnic group identification, age, religion, marital or parental status, physical or mental disability or genetic information (Education Code 220; 42 USC 2000d-2000e-17, 2000h-2000h-6).

In addition, Education Code 234.1, as amended by AB 9 (Ch. 728, Statutes of 2011), mandates that districts adopt policy prohibiting discrimination, harassment, intimidation and bullying based on the above categories at school or in any school activity related to school attendance or under the authority of the district. Education Code 234.1 further requires districts to adopt a process requiring school personnel to immediately intervene, when it is safe to do so, whenever they witness acts of discrimination, harassment, intimidation or bullying based on the characteristics specified in Education Code 220 or 234.1 or Penal Code 422.55, including gender identity.

Education Code 221.5 specifically prohibits discrimination on the basis of sex with regards to enrollment in classes or courses, career counseling and availability of physical education activities or sports to both sexes.

In 2013, AB 1266 amended Education Code 221.5 to clarify that 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, regardless of the gender listed in their student records. As of this

writing, the status of AB 1266 is uncertain due to a referendum effort challenging its enactment. Regardless of the eventual outcome of this referendum effort, it is still prudent to follow the guidance set forth in this brief given existing state and federal nondiscrimination law. For instance, prior to the passage of AB 1266, the U.S. Department of Education's Office for Civil Rights and U.S. Department of Justice's Civil Rights Division reached a resolution agreement with the Arcadia Unified School District in which the district agreed to provide transgender and gender-nonconforming students with equal access to district facilities, programs and activities consistent with their gender identity (<http://1.usa.gov/1aQcKVe>).

Recommendations for implementing these nondiscrimination laws are discussed below in the sections "Policy Considerations" and "Other Board Actions."

Policy considerations

It is recommended that districts/COEs adopt policies and administrative regulations that prohibit harassment and discrimination against transgender and gender-nonconforming students, address appropriate accommodations, establish consequences for those who harass or discriminate against students and set a tone that allows students to feel safe to report harassment. Proactive adoption of such materials provides a consistent districtwide plan and an opportunity to develop an understanding among staff, students, parents/guardians and the community regarding legal requirements and actions being taken to ensure student privacy.

CSBA provides a sample board policy, BP 5145.3 - Nondiscrimination/Harassment, which addresses the nondiscrimination and harassment of students on the basis of sex, gender, gender identity, gender expression, sexual orientation and other prohibited categories of discrimination. In January 2014, CSBA updated BP 5145.3 and added a new sample administrative regulation AR 5145.3 to include best practices designed to ensure nondiscrimination with respect to transgender and gender-nonconforming students. At the same time, CSBA updated BP 0410 - Nondiscrimination in District Programs and Activities and AR 6145.2 - Athletic Competition to address related concepts.

Other policies and administrative regulations may also be used to support the board's priority on providing safe school environments for all students and should be aligned, such as BP/AR 0450 - Comprehensive Safety Plan, BP/AR 5131 - Conduct, BP 5131.2 - Bullying, BP 5137 - Positive School Climate, BP/AR 5145.7 - Sexual Harassment and BP 5145.9 - Hate-Motivated Behavior.

Issues that boards and superintendents should consider addressing in policy or administrative regulation include, but are not limited to:

- » **Determination of a student's gender identity.** The district/COE should accept a student's assertion of his/her gender identity and not require any particular substantiating evidence. However, if district/COE personnel have a credible basis for believing that a student's gender-related identity is being asserted for an improper purpose, this basis should be documented and a written response should be provided to the student and, if appropriate, his/her parents/guardians.
- » **Preferred names and pronouns.** State regulations (5 CCR 432) require districts/COEs to maintain a mandatory permanent student record for each student which includes the legal name of the student and the student's sex. If a student provides documentation of a legal name or gender change, then the official student record must be changed to reflect this. However, students should be allowed to be addressed by their preferred name and the pronoun that corresponds to their gender identity without being required to obtain a court-ordered name or gender change or to change their official records. A school employee's intentional and persistent refusal to respect a student's gender identity is considered discriminatory.
- » **Access to sex-segregated facilities.** Although schools may maintain separate restrooms, locker rooms or other facilities for males and females, students must be allowed to use the facility that corresponds to their gender identity upon request. Where available, a "gender-neutral" restroom or changing area may be offered to any student who desires increased privacy, regardless of the underlying reason. Other options to address privacy concerns include a bathroom stall with a door, an area in the locker room separated by a curtain or screen, access to a staff member's office, or use of the locker room before or after the other students. However, no student who is entitled to use a facility consistent with his/her gender identity can be required to use an alternative arrangement. Any alternative arrangement should be used only at the request of the student and, if applicable, in a manner that keeps the student's gender identity confidential.
- » **Physical education and interscholastic athletic activities.** Whenever the school provides sex-segregated physical education classes or athletic activities, students must be allowed to participate

in a manner consistent with their gender identity. For schools participating in interscholastic athletic competitions, bylaws of the California Interscholastic Federation (CIF) also provide that all students should have the opportunity to participate in CIF activities consistent with their gender identity.

- » **Dress.** Students should have the right to dress in accordance with their gender identity, within the constraints of district and school dress codes or school uniform policies.
- » **Privacy for transgender students.** Students must be able to decide when, with whom and how much highly personal information they want to share about themselves with others. This includes the right to control dissemination of highly personal and private information such as one's gender identity, transgender status or sexual orientation. District/COE personnel should not disclose a student's actual or perceived sexual orientation, gender identity or gender expression to others, including other students, parents/guardians or other school personnel, unless required to do so by law or unless the student has agreed in writing. However, certain requests (e.g., a name and pronoun change) cannot be kept private. Therefore, school personnel are strongly encouraged to be in regular contact with a transgender student to ensure that issues of privacy can be discussed and addressed.
- » **Privacy for nontransgender students.** There may be a student who feels that participating in sex-segregated school programs and activities or being in sex-segregated facilities (e.g., a restroom or a locker room where students undress) with another student of the opposite biological sex is a violation of his/her right to privacy or his/her religious tenets. It is recommended that all students and parents/guardians be notified of the possibility before one arises. However, sending out a notification—such as to a physical education class—that a student is transitioning from one gender to another would violate the transgender student's privacy. Therefore, in order to balance these potentially competing rights, the annual notices sent to students and parents/guardians at the beginning of each school year could include a disclosure stating that the district allows students, consistent with their gender identity, to use facilities and to participate in sex-segregated school programs and activities, including athletic teams and competitions. The disclosure should also mention that a student for whom this presents a potential violation of his/her right to privacy or religious expression should notify school personnel, who will work with the student and, if appropriate, the

parents/guardians to find an acceptable arrangement (see "Access to sex-segregated facilities" above).

It is important to make the nondiscrimination policy and related complaint procedures readily accessible to students and parents/guardians through the policy manual, student handbook, district/COE or school website, school offices and other appropriate venues. By making the policy widely known and distributing information, students who are bullied may be less likely to fear reporting discrimination or harassment.

When a student requests any accommodations consistent with his/her gender identity, it is recommended that site or district administrators meet with the transgender student and, if appropriate, the student's parents/guardians to develop a plan to accommodate the student's needs and requests. Similarly, if a nontransgender student requests any accommodations for privacy or religious reasons, it is recommended that administrators meet with the student and, if appropriate, the student's parents/guardians to develop a plan to accommodate the student's needs and requests. As needed, the district/COE should also consult with legal counsel in responding to all such requests.

Other board actions

The board, working with the superintendent, can promote a culture free from discrimination and harassment throughout its major areas of responsibility:

- » **Setting direction for the community's schools.** As the governance team establishes a long-term vision, goals and priorities, it should consider specific statements related to ensuring that all students are safe at school and that harassment is not tolerated. The board has an opportunity to foster an understanding among the governance team about the importance of establishing a safe school environment and its link to student attendance, engagement, learning and academic achievement.
- » **Establishing an effective structure for the district/COE.** As noted in the section "Policy Considerations" above, the adoption of board policies and administrative regulations is one of the primary tools of the district/COE to ensure compliance with the law. The governance team also establishes structure for the district/COE through its decisions related to the budget, facilities and curriculum, all of which can be aligned with the prioritization of student safety and promotion of a positive school climate.
- » **Providing support to district/COE staff as they carry out the board's direction.** Once the policy of nondiscrimination is adopted, it is important that

district/COE personnel appropriately and consistently implement the policy. The superintendent or designee should develop administrative regulations as appropriate to assist in policy implementation. Staff should be notified of the policy and regulations and provided with information and staff development as needed to ensure they understand the right of all students to a safe environment, the law and district/COE expectations regarding accommodations for transgender and gender-nonconforming students, the law requiring staff to immediately intervene when they observe acts of bullying and disciplinary consequences for staff and students who engage in discrimination or harassment. School staff might also consider how the use of gender to divide groups of students (e.g., dividing boys and girls into separate lines to exit or enter the classroom) can subject transgender and gender-nonconforming students to teasing and ridicule.

- » **Ensuring accountability to the public.** The governance team has a responsibility to monitor and evaluate the effectiveness of efforts to prevent and reduce harassment. The board and superintendent should agree on the data that will be collected (e.g., incidence of hate-related violence, graffiti, suspensions or expulsions; student surveys of school climate; accommodations or strategies that have been implemented to prevent harassment) and how often such data will be reported to the board. The data should be used to recommend policy revisions, if necessary.
- » **Acting as community leaders.** The governance team has a responsibility to explain to parents/guardians, students, staff and the community the obligations of the district/COE under state and federal nondiscrimination laws. The governance team should also work with parents/guardians, community partners, community agencies, law enforcement and other stakeholders in efforts that promote a culture of safe schools for all students. Such stakeholders might be involved in developing goals, policy or specific strategies related to nondiscrimination; providing counseling or other services to assist at-risk students; and/or assisting in program evaluation.

Through these actions, the board can clearly declare its opposition to any form of discrimination or harassment. By publicizing its efforts and providing clear steps for how issues will be resolved, the district/COE can encourage students to feel safe in reporting issues of harassment. Prohibition of harassment based on gender identity or gender nonconformity will be one part of a broader effort to create a safe school environment so that all students have

an equal opportunity to attend school, be engaged in the classroom and ultimately to achieve academic success.

Questions to consider

As the governance team discusses and determines how it will address issues of discrimination and harassment based on gender identity and gender nonconformity and how it will work to protect the safety of all students, it might consider the following questions:

- » What policy direction can the board provide to ensure that school climates are safe, that students have confidence that complaints will be investigated appropriately and that there will not be retaliation for reporting incidents of discrimination, harassment, intimidation and bullying?
- » Do students and staff understand how to access the complaint procedures should an alleged incident of discrimination or harassment occur?
- » How will the governance team ensure that there is consistent implementation of policies prohibiting discrimination and harassment on the basis of gender identity and gender nonconformity across all grade levels and school sites?
- » What methods can be used to communicate with students, parents/guardians and staff regarding legal requirements and board policy related to nondiscrimination?
- » How might issues of privacy be impacted by any accommodations granted to transgender students? Are there additional actions that can be taken to ensure student privacy?
- » How might policies about dress code and student appearance be impacted by the nondiscrimination policy?
- » Do school personnel understand the requirements regarding the use of student names and pronouns?
- » Is professional development needed to ensure that all staff understand the law and board expectations regarding nondiscrimination, harassment, intimidation and bullying?
- » What types of data should the district/COE gather and analyze in order to determine the effectiveness of its nondiscrimination/harassment policy and practices?

Resources

California School Boards Association provides sample board policies, policy briefs, publications and other resources on a variety of topics related to school safety, including *Interim Guidance Regarding Transgender Students, Privacy, and Facilities* (September 27, 2013). www.csba.org

American Civil Liberties Union provides information about protecting the rights of lesbian, gay, bisexual and transgender people, including *Q & A: Adding Sexual Orientation and Gender Identity to Discrimination and Harassment Policies in Schools*. www.aclu.org

California Safe Schools Coalition is a statewide partnership of organizations and individuals dedicated to eliminating discrimination and harassment on the basis of actual or perceived sexual orientation and gender identity in California schools. www.casafeschools.org

Gay, Lesbian and Straight Education Network is a national education organization focused on ensuring safe schools for all students, regardless of their sexual orientation, gender identity or gender expression. www.glsen.org

Gay-Straight Alliance Network is a national youth leadership organization connecting gay-straight alliances to each other and community resources. www.gsanetwork.org

Suicide Prevention Resource Center promotes a public health approach to suicide prevention. Resources include *Suicide Risk and Prevention for Lesbian, Gay, Bisexual and Transgender Youth*. www.sprc.org

Transgender Law Center is a civil rights organization advocating for transgender communities, connecting transgender people and their families to technically sound and culturally competent legal services. Publications include *Transgender and Gender Non-Conforming Youth—Recommendations for Schools*. www.transgenderlawcenter.org

In addition to the above organizations, the following journal articles may be useful:

Espelage, D., Aragon, S., Birkett, M., & Koenig, B. (2008, June). Homophobic teasing, psychological outcomes, and sexual orientation among high school students: What influence do parents and schools have? *School Psychology Review*, 37(2), 202-216. Available at <http://bit.ly/19TfRZn>

Fisher, E., Komosa-Hawkins, K., Saldana, E., Thomas, G., Hsiao, C., Rauld, M., & Miller, D. (2008). Promoting school success for lesbian, gay, bisexual, transgendered and questioning students: Primary, secondary, and tertiary prevention and intervention strategies. *California School Psychologist*, 13, 79-91. Available at <http://bit.ly/1I7C0I9>

Van Wormer, K., & McKinney, R. (2003, Fall). What schools can do to help gay/lesbian/bisexual youth: A harm reduction approach. *Adolescence*, 38(151), 409-420. Available at www.uni.edu/vanworme/articles/gayyouth.pdf

Endnotes

1 Clarke, T.J., & Russell, S.T. (2009). *School Safety and Academic Achievement*. (Safe Schools Research Brief No. 7). San Francisco: California Safe Schools Coalition. Available at www.casafeschools.org/getfacts.html

2 California Safe Schools Coalition. Model School District Policy Regarding Transgender and Gender Nonconforming Students. San Francisco: California Safe Schools Coalition. Available at <http://bit.ly/1hUOCzC>

3 Gay-Straight Alliance Network/Tides Center, Transgender Law Center and National Center for Lesbian Rights. (2004). *Beyond the Binary: A Tool Kit for Gender Identity Activism in Schools*. San Francisco, CA: GSA Network. Available at <http://bit.ly/LSN5ge>

4 Higdon, M.J. (2010). *To Lynch a Child: Bullying and Gender Non-Conformity in Our Nation's Schools*. University of Tennessee Legal Studies Research Paper No. 102. Available at <http://ssrn.com/abstract=1558135>

5 Kosciw, J.G., Greytak, E.A., Bartkiewicz, M.J., Boesen, M.J., & Palmer, N.A. (2012). *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*. New York: Gay, Lesbian and Straight Education Network. Available at <http://bit.ly/1ekZRv9>

6 Russell, S.T., McGuire, J.K., Laub, C., Manke, E., O'Shaughnessy, M., Heck, K., & Calhoun, C. (2006). *Harassment in School Based on Actual or Perceived Sexual Orientation: Prevalence and Consequences*. (Safe Schools Research Brief No. 2). San Francisco: California Safe Schools Coalition. Available at <http://bit.ly/1dVZdcC>

7 Russell, S.T., Talmage, C., Laub, C., & Manke, E. (2009). *The Economic Costs of Bullying at School*. (Safe Schools Research Brief No. 5). San Francisco, CA: California Safe Schools Coalition. Available at www.casafeschools.org/getfacts.html

8 Kosciw, J.G., & Diaz, E.M. (2008). *Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in Our Nation's K-12 Schools*. New York: Gay, Lesbian and Straight Education Network. Available at <http://bit.ly/KSNwLE>

9 Kosciw, J.G., et al. (2012).

10 Kosciw, J.G., et al. (2012).