



Updated Legal Guidance

Protecting Transgender and Gender Nonconforming
Students Against Sex Discrimination

This legal guidance incorporates the May 13, 2016 Dear Colleague Letter jointly issued by the U.S. Department of Education (ED) and U.S. Department of Justice (DOJ) to help school districts and county offices of education in providing a safe, welcoming, and nondiscriminatory school environment for transgender and gender nonconforming students. The guidance updates CSBA's "Interim Guidance Regarding Transgender Students, Privacy & Facilities" released in September 2013 to reflect AB 1266 and its "Final Guidance: Transgender and Gender Nonconforming Students, Privacy, Programs, & Facilities" issued in March 2014.

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. The most recent such guidance was jointly issued by the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) in May 2016, in the form of a "Dear Colleague Letter." In the letter, the agencies clarified that, for the purpose of sex discrimination prohibited by Title IX, the definition of "sex" encompasses a student's gender identity and transgender status.

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. (Educ. Code, § 234.1.)

State Law

State law generally protects students from school-related discrimination based on gender, gender identity, and gender expression; specifically, gender-based discrimination is prohibited 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." (Educ. 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. As explained in ED and DOJ's May 2016 Dear Colleague Letter, a student's gender identity is treated as the student's sex for the purposes of Title IX. Furthermore, ED and DOJ clarify that a student's gender identity is

the gender that he/she asserts as his/her gender and that a student's asserted gender may be different from the gender he/she was assigned at birth. When that is the case, the district is required pursuant to Title IX to treat the student in the same manner as it would treat any other student with the same gender identity.

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. A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires the school to provide transgender and gender nonconforming students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns.

A word of caution: According to ED and DOJ in the May 2016 Dear Colleague Letter, "the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students."

CSBA's sample BP and AR 5145.3, Nondiscrimination/Harassment are currently being reviewed to ensure that they are consistent with additional guidance provided by ED and DOJ in the May 2016 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. In the May 2016 Dear Colleague Letter, ED and DOJ explain that Title IX contains no medical diagnosis or treatment requirement as a prerequisite for a district to treat a student consistent with his/her asserted gender. They further explain that requiring transgender students to provide proof of their gender identity, such as by submitting identification documents, may violate Title IX when doing so has the practical effect of limiting or denying the students equal access to an educational program or activity.

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” and those provided in ED and DOJ’s May 2016 “Dear Colleague Letter.”

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.
- 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.

**According to ED and DOJ in the May 2016 Dear Colleague Letter, “A school may maintain a “gender neutral” restroom, “individual use facility” or private changing area to be used by any student who desires increased privacy, but the school cannot compel a student to use such a restroom or changing area. Specifically, schools cannot require a transgender or gender nonconforming student to use alternative “gender-neutral facilities.”*

- 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 these students and to work out the practical details of addressing those needs.

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 nondiscrimi-

nation 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

Under Title IX a school must 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. 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, updated to reflect the May 13, 2016 “Dear Colleague” letter from the U.S. Department of Education and Department of Justice 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 http://www.cifstate.org/governance/constitution/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 <http://bit.ly/1MIRcsG>.
- The U.S. Department of Education’s Examples of Policies and Emerging Practices for Supporting Transgender Students is available at <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.
- The U.S. Department of Education’s May 13, 2016 “Dear Colleague” letter is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.
- For additional guidance, contact CSBA’s Office of the General Counsel at 800-266-3382.