

CALIFORNIA LEADS THE WAY

I. Introduction.

On August 12, 2013, California Governor Brown signed into law an amendment to Section 221.5 of the California Education Code that requires public schools to permit transgender students the right to participate in athletics and use facilities in accordance with the child's gender identity. California is not alone in addressing the needs of transgender students, because the Kansas Public Schools has enacted a policy that delineates the rights of its transgender students. Accordingly, the following is a comparison of the California Law and the KCPS policy, along with a review of other policies and laws that may impact transgender students.

II. California Statute.

In the preamble to Section 221.5 of the Education Code of California, the Legislature said that schools must allow students to participate in sex-segregated programs, including but not limited to, athletics and use facilities consistent with the child's gender identity. In addition, the preamble says that the child's choice of gender identity prevails over the gender listed upon the child's official school records. Further, the California Legislature wanted schools to understand that discrimination on the basis of a child's characteristics, including but not limited to gender identity or gender expression, was illegal. Section 221.5 of the California Education Code, therefore, provides detailed guidance for California public schools to follow so that all children are treated equally and provided equal opportunities, no matter their gender identification.

To illustrate, Section 221.5 of the Education Code says:

1. That all classes, including electives and non-academic courses, are to be taught without regard to the sex of the enrolled student.
2. With limited exceptions, students cannot be precluded from enrolling in any class based upon the sex of the child.
3. Schools cannot require students to enroll only in classes open to both genders.
4. School career counselors must affirmatively explore with students career choices that are non-traditional for that student's gender.
5. Must provide parents with advance notice that their child will receive career counseling and the right to participate in the counseling session.
6. Before the child enters the 7th grade, and for each grade thereafter, notify a child's parents of when staff will discuss course selection for their child and the right to participate in the course selection process.
7. Schools may not offer any child different counseling based upon the child's sex.
8. Schools may not offer vocational or school guidance to a child of one sex that is different from that offered to a child of the opposite sex.
9. If students are required to participate in a physical education activity or sport, do not deny the student participation in a specific activity because of their gender.
10. "A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and

use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records." (Section 221.5 (f) of the Education Code)

Because California is the first state to enact this type of law, it has taken the lead in the state wide protection of transgender student education rights.

III. Kansas City Public Schools Policy

The Kansas City Missouri Public Schools has put into place a policy that prohibits discrimination on the basis of gender identity and sexual orientation. This is in addition to the KCPS's policy prohibiting race, sexual, and disability discrimination. The highlights:

1. The Policy defines "Gender Identity" as: "A person's deeply held sense or psychological knowledge of his or her own gender, regardless of the gender he or she was assigned at birth."
2. The Policy defines "Transgender" as: "People whose transgender identity is different from the gender assigned to them at birth."
3. The Policy also has definitions for Gender Expression and Gender Nonconforming.
4. A student is not obligated to discuss the child's gender status with others.
5. A child's transgender status or gender identify will only be disclosed to the staff that have a need to know, unless the child permits others to have access to the information.
6. Unless the law requires disclosure, a student's transgender status will not be disclosed to that child's parents without prior approval from the child.

7. Although the District must maintain an “Official” pupil record that includes the child’s “legal name” and “legal gender”, the District is not required to list the child’s legal name or legal gender on any other District documents.
8. If the District receives a court order changing the child’s legal name or legal gender, it will amend the child’s official record.
9. Staff and other students will address the child by the name and pronoun selected by the child. Intentional or persistent failure to comply with the child’s request is a violation of school policy and will be dealt with accordingly. In addition, the child’s choice of name and pronoun does not require a court order.
10. In classes that are segregated by gender, such as health classes, the child will be included in the classes that corresponds to the child’s gender identity.
11. The child will be allowed to use the restroom that corresponds to the child’s gender identity.
12. If any student desires increased privacy when using the restroom, the child will either be allowed access to a single stall restroom or, if none is available, to the single stall bathroom in the school nurses office. In making this request, the child is not required to disclose the reason.
13. Transgender students are not required to use the locker room that conflicts with the student’s gender identity.
14. Regarding the use of locker rooms by transgender students: “The goal of KCPS is to maximize the child’s social integration and equal opportunity to participate in physical education classes and sports while protecting the child from stigmatization. If a student desires more privacy when using the locker room to

dress out for an activity, offer an alternative changing area to the student. But this alternative changing area must be provided in such a way so that the status of the transgender student remains confidential.”

15. Transgender students must be permitted to participate in the gym classes and intramural sports consistent with the child’s gender identity.
16. Transgender students are permitted to dress in a manner consistent with their gender identity or gender expression.
17. Transgender students will be permitted to compete in interscholastic athletics in a manner consistent with their gender identity or expression, to the extent permitted by interscholastic rules and regulations.

IV. Comparing the KCPS Policy and the California Statute

A. Similarities

The goal for the KCPS and California is to provide equal protection and opportunities for transgender students. Both prohibit discrimination based upon a child’s gender identity or gender expression. Both are cutting edge. Thus, California and KCPS have taken the lead in protecting transgender students.

B. Differences

The California Statute requires school career counselors to provide gender neutral advice to all students. In addition, the California Statute requires parental involvement when discussing their child’s career choices and, starting in the seventh grade, course selection. The KCPS Policy does not address either of these situations.

On the other hand, the KCPS policy provides details discussing bathroom use, locker room use, and the name and pronoun the child requires staff and other students to use when addressing the child. The California Statute does not address the selection of name or pronoun used when addressing the child. And the California Statute does not go into as much detail as the KCPS policy does regarding bathroom and locker room usage.

V. Athletic Associations' Transgender Policies.

The National Collegiate Athletic Association has adopted a transgender inclusion policy. The NCAA Policy “will allow a transgender athlete to participate in sex-separated sports activities as long as the athlete’s use of hormone therapy is consistent with the NCAA policies and current medical standards.” In the February 9, 2014 Kansas City Star, it was reported that Missouri has a similar policy. In addition, the Kansas State High School Athletic Association has adopted a “Policy for Transgender Student Participation.”

Under the Kansas Policy, if a student or the child’s parents contact either the school principal or the school’s athletic director of the child’s desire to participate in an athletic activity consistent with the child’s gender identity, the request is approved if it is “a bona fide request” and not done to obtain an “unfair competitive advantage.” Once the school grants the request, it must notify the KSHSAA that a student is permitted to participate in an athletic activity that is not consistent with the child’s birth gender. Further, if there is a dispute regarding the participation, the KSHSAA will determine approval. Thus Kansas and Missouri schools have directives regarding participation of transgender students in athletic activities even when a school does not have a specific transgender policy.

VI. On the Horizon.

A. Maine

On January 30, 2014 the Maine Supreme Court ruled that a school district had discriminated against a transgender student when it would not allow the child to use a bathroom consistent with the child's female gender identity. (*John Doe et al. v. Regional School Unit 26*, (Maine Supreme Court, January 30, 2014)) In *Doe*, the student's school allowed the child to use the bathroom consistent with her gender identity until the parents of other students complained. The school then did not allow the child to use the girl's bathroom. In upholding the child's right to use the girl's bathroom, the Court ruled that the school was a place of public accommodation and that under Maine Law, the school could not deny the use of facilities within the public accommodation based upon gender orientation. Because the school denied the use of the girl's bathroom to a child who identified herself as female, the Court ruled that the school discriminated against the child based upon her gender orientation.

The Court also said that its opinion was not to serve as a mandate for approval of all transgender student bathroom requests. Rather, the Court said, that "each school is left with the responsibility of creating its own policies concerning how public accommodations are to be used." Further the Court said that a school need not allow access to a specific bathroom based "solely on a self-declaration of gender identity..." Unlike California and KCPS, each school is free to determine when it will allow a transgender student bathroom use consistent with the child's gender identity.

B. Missouri State Senate Bill Number 560

On December 1, 2013, the Missouri Senate introduced Senate Bill No. 560. If this Bill passes and is signed into law, it would amend the state's mandated anti-bullying policies. This

Bill would expand the definition of bullying to include those acts reasonably perceived to be “motivated by actual or perceived...gender, (or) sexual orientation as defined in section 557.035...” (Senate Bill No. 560, Section A. 160.775 RSMo 3.) Section 557.035.4(2) RSMo., Missouri’s Hate Crime, statute says: “**Sexual orientation**”, male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, or having a self-image or identity not traditionally associated with one’s gender.” Thus Senate Bill 560 would protect transgender students from bullying in public schools.

VII. Conclusion

California remains the only state that has passed a law that provides comprehensive protection for transgender public school student. Although the Maine Supreme Court, in a recent ruling, found in favor of a transgender student’s claim of discrimination against her school district, the Court said not to construe its ruling as a mandate. In Missouri, KCPS appears to lead in protecting transgender students by adopting a comprehensive policy that provides details on what to do to insure the safety and equality of transgender students attending schools in the KCPS District. It is not alone: in 2012 the Portland Public Schools published a memorandum supporting its transgender students.

In addition, pending in the Missouri Legislature is a Bill that if passed, would expand protection from bullying to transgender students. As of February 1, 2014 the Missouri Senate has not approved the Bill. Thus the landscape has changed, and in some cases has been broadened, so that transgender students can enjoy the same rights as all other public school students.