

Transgender Students: Rights and Legal Compliance



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Transgender Discrimination/Harassment

• Historical Perspective

- Transgender persons generally exempt from state and federal laws prohibiting unlawful discrimination
- Reasonable accommodation was required if there was a diagnosed psychological condition, namely Gender Dysphoria
- 2001-2011: Changes made to the legal definitions of “gender” and “sex”
 - Gender means sex, and includes a person’s gender identity and gender-related appearance and behavior, whether or not stereotypically associated with the person’s assigned sex at birth
 - Sex includes gender identity and gender expression



Transgender Discrimination/Harassment

- **Recent Legislation re Students' Rights: AB 1266**

- California Education Code section 221.5, effective January 1, 2014, to add subparagraph (f), which states:

“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.”



AB 1266 Spurred Public Debate

- **AB 1266 was subject to an unsuccessful referendum petition.**
- **Groups threatened schools with lawsuits if schools allowed transgender students to use restrooms consistent with their gender identity.**
- **Uncertainty about the status of AB 1266 created confusion amongst parents and school districts.**

State of the Law Before AB 1266

- **Programs and Sports**

- AB 1266 does not add any additional responsibilities for school districts in regards to sex-segregated education programs and extracurricular activities.
- Education Code section 220 and 234.1 already prohibit gender identity discrimination against students in educational programs and activities, and requires that school districts have anti-discrimination policies that include gender identity.
- Some districts were already taking steps to accommodate transgender students.

State of the Law Before AB 1266 (cont.)

- **Federal Enforcement**

- The United States Office of Civil Rights and the United States Department of Justice concluded that Title IX may also protect the right of transgender students to use sex-segregated facilities that correspond to their gender identity, as the definition of “sex” includes gender-based.
 - (See *Dear Colleague Letter*, US Department of Education, Office of Civil Rights, Oct. 26, 2010; OCR Agreement with Arcadia Unified School District, July 23, 2013.).

State of the Law Before AB 1266 (cont.)

- **CIF RULE 300 (Effective February 2013)**
 -All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records. Should any questions arise whether a student's request to participate in a sex-segregated activity consistent with his or her gender identity is bona fide, a student may seek review of his or her eligibility for participation...
- **CIF Developed an Appeals Process When Student Participation is Challenged.**
 - **Step 1 – Hearing Before Eligibility Committee**
 - **Step 2 – Hearing Before CIF Executive Director**

State of the Law Before AB 1266

- **Restrooms & Locker Rooms**
 - The CDE advised school districts they were under no obligation to allow gender identity-based bathroom and locker room access
 - Advice was based on Education Code section 231: "Nothing herein shall be construed to prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes, so long as comparable facilities are provided."
 - The CDE directed school districts to "find reasonable alternative toilet and locker room accommodations for transgender students by allowing the controlled use of faculty facilities."

AB 1266 Major Impacts

- **Restrooms & Locker Rooms After AB 1266**
 - School districts cannot provide a unisex bathroom as an alternative for transgender students.
 - Rather, school districts must allow access to sex-segregated facilities based on gender identity.
 - Failure to do so could violate the newly passed law and the Unruh Civil Rights Act which prohibits facility access discrimination based on gender identity. (Civ. Code, § 51.)

Transgender Discrimination/Harassment

- **Privacy Issues**
 - Students have the responsibility to inform school authorities of their gender identity (unless the student is too young).
 - School districts need to balance the privacy and safety of other students with a student's right to self-identify his or her gender and to take steps to ensure the student's assertion of gender identity is legitimate.
 - School districts should accept a student's assertion of contrasting gender identity when there is corroborating evidence the student's gender identification is sincere.
 - This may include consistent assertions of gender by the student; documentation and testimony of gender identifiable behavior; a letter confirming gender identity from a parent, social worker, psychologist, or health care provider; or a legal change of gender.

Transgender Discrimination/Harassment

- **Privacy Issues**

- All students have a right to keep their gender identity and assigned sex at birth private from others.
- If school districts grant access to sex-segregated facilities and activities, they must be careful not to disclose information about a student's gender identity, assigned sex at birth, legal name, and legal gender because this information may constitute confidential medical information. The district should not disclose any of this information unless the student has authorized such disclosure or if the District is compelled by law.

Transgender Discrimination/Harassment

- **Privacy Issues**

- Many transgender students hide their gender identity from their parents. When contacting a parent of a transgender student, school personnel should use the student's legal name and the pronoun corresponding to the student's legal gender unless the student or parent has indicated otherwise.

ACCOMMODATING TRANSGENDER STUDENTS

- A. The recent legislation (AB 1266) amending Education Code section 221.5 has not substantially changed our recommended approach with respect to transgender students.
 1. The Office of Civil Rights and the Department of Justice have advised public school districts to observe the requirements now codified by AB 1266 in light of existing California and federal laws against sex discrimination. [*E.g., Arcadia Unified School District.*]
 2. When a student requests the District to implement measures to reasonably accommodate the student's **consistently asserted gender identity**, we recommend the District engage the student and his/her parents in an **interactive process** in order to identify and address potential issues.

UTILIZING THE INTERACTIVE PROCESS

- B. Interactive Process: The interactive process requires time in order to gather information from the student and to develop a plan to help implement a smooth accommodation. The participants in a meeting ideally include the **student**, the **parents**, a District **student services administrator** and a **school administrator** who will oversee the implementation of the plan and respond to any concerns.
 1. Definitions: "Gender" means sex, and includes a person's 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. [Educ. Code § 210.7.]
 2. District's Goal: The goal of the interactive process is to agree on an **accommodation plan** for the student and the school.

ACCOMMODATION PLAN

- a. The transgender student's rights are:
 - 1) To be protected against discrimination, harassment, bullying and intimidation on the basis of gender identity and gender expression (Educ. Code §§ 200, 220 and 234-234.5);
 - 2) A right to privacy; and
 - 3) A right to freedom of expression to be open about sexual orientation and gender identity.
- b. The District's legitimate, non-discriminatory interests are:
 - 1) To protect the transgender student from discrimination, harassment, bullying or intimidation;
 - 2) To minimize substantial disruption to the instructional program;
 - 3) To protect other students' reasonable expectations of privacy; and
 - 4) To receive prompt notification from the transgender student of any problems.

INTERACTIVE MEETING

3. Agenda for Interactive Meeting:
 - a. Ask student preference in name and pronoun to be used at meeting.
 - b. Explain purpose of meeting to understand his/her needs and create a type of transition plan.
 - c. Explain school district's role to balance rights and interests (see above).
 - d. Explain interactive process, which often requires more than one meeting to discuss day-to-day logistics, notification of teachers, name changes, schedule changes, complaint protocols, identification of safe adults and friends, etc.
 - e. Ask student about goals and hopes for their change in gender identity/expression from male to female/female to male (mostly just listen and take notes).
 - f. Discuss precautions school should be prepared to provide the transgender student.
 - g. Ask student about requests of the school (mostly just listen and take notes).

ACCOMMODATION PLAN TOPICS AND QUESTIONS

4. Specific topics and questions to cover:
 - a. Notify and provide guidance for teachers, registrar, counselor and other adults with a legitimate need to know.
 - b. Discuss level of privacy and confidentiality desired by student.
 - c. Discuss ideas for notification of class-mates.
 - 1) Explain that notification of others is a personal decision, *not* a school-related responsibility.
 - 2) The school will notify teachers of the accommodation so they can properly address the student, supervise and intervene if there are problems.
 - 3) Identify safe friends and/or adults to share news.
 - 4) Identify potentially unsafe students and/or adults and develop plan.

ACCOMMODATION PLAN TOPICS AND QUESTIONS

- d. Discuss use of public boys'/girls' restrooms (confirm private stalls in bathrooms).
 - 1) We recommend ANY student be permitted to use single-stall bathrooms for increased privacy, where available.
 - 2) Transgender male (female/male) will use a private stall in male restroom.
 - 3) Transgender females (male/female) will use a private stall in female restroom.
- e. Change class schedule regarding boy's/girl's P.E.
- f. Discuss use of boys'/girls' locker room (confirm private changing stalls, private bathroom stalls, and private showers). Provide transgender students with an accommodation that best meets the needs and privacy concerns of all students involved.

ACCOMMODATION PLAN TOPICS AND QUESTIONS

- g. Confirm application of dress code, if any.
- h. Change name and gender on which school records (informal vs. legal name change).
- i. Establish reporting protocols for student if the student encounters problems from students or adults.
- j. Discuss school's prior training of students and staff regarding harassment and bullying, as well as ideas to refresh that training.
- k. Discuss student's preferred timing for accommodation; *e.g.*, next week as opposed to later in the year or at the beginning of next year. (cont.)

ACCOMMODATION PLAN TOPICS AND QUESTIONS

- l. Ask about the student's level of commitment to this transition – For example, has he/she already experimented with presenting as a male/female? If so, were there any issues that would help the school with the transition? If not, ask him/her if he/she feels the school environment is the best place to experiment? (Some students and adults experiment in general society first, like on a vacation or visiting a relative, to determine how it feels, what to expect, etc.) These questions are not asked to be judgmental or invasive, but to gather information and determine the level of commitment to the transition.
- 5. Close the meeting by asking if any questions and explain that you will do some research to determine how to balance rights and how to implement the ideas discussed.
 - a. Suggest times for the next meeting, and explain that the transition may take place later, not because the school is saying he/she can't transition, but because the transition involves a lot of details.

TOPICS NOT TO DISCUSS

6. Areas Not to Discuss: The District does not have legal authority to **ask for medical documentation of transgender status**. It may be deemed a violation of the student's privacy rights to inquire about whether they will engage in certain medical treatments. (However, if the student offers medical information, you can ask questions as it relates to school – *i.e.*, taking medication on campus, etc.)
 - a. Caution: Parents/guardians may NOT be supportive of the student's gender identity decision.
 - b. District probably cannot disclose transgender identity or require parental consent.
 - 1) *E.g.*, Educ. Code § 49602: Confidentiality of pupil counseling information by pupil 12 year or older.
 - 2) *Cf.*, Family Code §§ 6920-6929, 7050, *et seq.*

FINAL CONSIDERATIONS

- c. Staff Training: We recommend districts immediately provide staff training on the new laws, with an emphasis on transgender issues.
- d. Athletic Team Participation: The CIF recently passed a policy ["300(d) Gender Identity Participation"] regarding a transgender student's opportunity to participate in CIF activities.
 - 1) This policy states:
 - a. All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records.
 - 2) The policy further states:
 - a. Should any questions arise whether a student's request to participate in sex-segregated activity consistent with his or her gender identity is bona fide, a student may seek review of his her eligibility for participation by working through the procedures set forth in the "Guidelines for Gender Identity Participation."

FINAL CONSIDERATIONS

3. A district will be **acting lawfully** and **avoiding unlawful discrimination** by allowing male/female transgender students to try out for athletic team participation that corresponds to the student's consistently asserted gender identity.
 - a. If a transgender student makes a team and there is any challenge to that student's eligibility, we recommend following the CIF procedures noted above.
 - b. If the District does not allow transgender pupils to try out for athletic teams that correspond to the students' gender identity, the District risks a claim of unlawful discrimination on the basis of gender identity.

Transgender Discrimination/Harassment

Consideration for Accommodating Transgender Persons:

- 1 Agenda for interactive meeting
- 2 Specific topics and questions to cover during an interactive meeting
- 3 Areas not to discuss during an interactive meeting
- 4 Staff Training
- 5 Athletic Team Participation

Thank You

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