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LEGAL UPDATE

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To: Superintendents, Member School Districts (K-12)

From: Marko Fong, Assistant General Counsel *MF*

Subject: **AB 887 – Gender Discrimination**
Memo No. 06-2012

On January 1, 2012, AB 887 augmented all references to gender discrimination in California law to expressly include “gender identity” and “gender expression.” For example, these code sections were amended to read as follows.

1) Education Code section 210.2

"Disability, gender, *gender identity*, *gender expression*, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics

2) Education Code section 210.7

"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.

3) Education Code section 220

No person shall be subjected to discrimination on the basis of disability, gender, *gender identity*, *gender expression*, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational

institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.

4) Government Code section 12920

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, *gender identity*, *gender expression*, age, or sexual orientation...

AB 887 makes it clear that transgendered and transsexual individuals have all the legal protections of California Civil Rights Law. These include protection from harassment/bullying, access to programs, and freedom from discrimination in the workplace. While it was clear previously that a transgendered staff member could not be disciplined simply for being transgendered, it was not necessarily clear that a physically male individual could dress as a “woman” while at work. The addition of “gender expression” means that a transgendered teacher who is physiologically male can neither be disciplined for wearing a dress in class or for presenting as a woman while at work. Attire that would be otherwise inappropriate for a staff member of that gender, however, would still be subject to reprimand or a request from a supervisor that the individual wear more appropriate clothing. Similarly, a prospective employee may come to a job interview dressed as a member of the gender with which he or she identifies and that may not negatively influence the hiring decision.

The amendments also make it clear that transgendered students can come to school dressed as the gender with which they identify and can expect to be treated as a member of gender they are expressing. Students who do this can also expect not to be harassed.

The changes in the law were not intended to affect eligibility for boys and girls sports or the maintenance of separate bathrooms and lockers designated as “male” or “female.” 5 CCR 4910 (v) currently defines “sex” as the biological condition or quality of being a male or female human being.¹

Transgendered or transsexual individuals have a right to a conveniently located bathroom and/or locker facility where they will be safe and free from harassment or bullying. Although the Unruh Act’s² protections do not extend to forcing an institution to undertake new construction

¹ Education Code section 231 also provides: 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.

² Civil Code section 51(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

unless required by other laws, Districts should, when practical, strongly consider making a private unisex bathroom an option for all students and staff. Some school districts in California have adopted policies that allow individuals to use the designated bathroom for the gender with which the individual identifies psychologically.

A public institution also may not require a transgendered individual to use a bathroom or locker facility where the individual has been or will be subject to ridicule, harassment, or physical abuse. If that is the case with existing “men’s” bathrooms for an individual who is physically male or for “women’s” bathrooms for a physically female individual, the district must take measures to protect the transgendered individual and provide him or her with a safe-convenient bathroom or changing facility.

Districts may adopt a policy that requires individuals who want to “express” as a gender other than their birth gender to support their status with documentation from a medical or health care professional.

Please contact any attorney in this office, if you have questions about these issues or a specific matter related to AB 877.