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5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

General Counsel
Carl D. Corbin

Attorneys
Jennifer Henry
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Kaitlyn A. Schwendeman
Leah M. Smith
Loren W. Soukup
Erin E. Stag

Of Counsel
Robert J. Henry
Frank Zotter, Jr.

LEGAL UPDATE

April 18, 2022

To: Superintendents, Member School Districts (K-12)
From: Carl D. Corbin *CDC*
General Counsel
Subject: Addressing the Needs of Transgender Youth
Memo No. 13-2022

The purpose of this Legal Update is to provide a gentle reminder to Local Educational Agencies (“LEAs”)¹ regarding their duties to transgender youth.

Legal Basis for Protection for Transgender Youth

In California, Assembly Bill (“AB”) 1266, also known as the “School Success and Opportunity Act,” was introduced by Assemblyman Tom Ammiano on February 22, 2013 and requires that pupils be permitted to participate in sex-segregated school programs, activities, and use facilities consistent with their gender identity, without respect to the gender listed in a pupil’s records. AB 1266 was approved by Governor Brown on August 12, 2013.

AB 1266 is codified at Education Code section 221.5(f), which provides:

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.

Education Code section 220 also provides:

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

¹ Which include TK-12 school districts, charter schools, and county offices of education.



contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, 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. [Emphasis added].

At the federal level, there is an Executive Order that was issued on January 20, 2021, by President Biden that clarifies students have protection from discrimination on the basis of gender identity and/or sexual orientation under Title IX.²

CDE Resources

The California Department of Education (“CDE”) has a webpage with extensive information related to the rights and protections for transgender youth in a helpful “Question and Answer” format.³ The California School Boards Association (“CSBA”) has also developed various policies to include a model Nondiscrimination/Harassment Board Policy (“BP”) 5145.3 and Administrative Regulation (“AR”) 5145.3.

Determining Whether a Student is Transgender

CDE has advised:

A school cannot require a student to provide any particular type of diagnosis, proof of medical treatment, or meet an age requirement as a condition to receiving the protections afforded under California’s antidiscrimination statutes. Similarly, there is no threshold step for social transition that any student must meet in order to have his or her gender identity recognized and respected by a school. [Q&A 5]

Sharing a Student’s Transgender Identity with the Student’s Parents, Other Students, and the Public

CDE has advised:

A transgender or gender nonconforming student may not express their gender identity openly in all contexts, including at home. Revealing a student’s gender identity or expression to others may compromise the student’s safety. Thus, preserving a student’s privacy is of the utmost importance. The right of transgender students to keep their transgender status private is grounded in California’s antidiscrimination laws as well as federal and state

² <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

³ <https://www.cde.ca.gov/re/di/eo/faqs.asp#accordionfaq>.



laws. Disclosing that a student is transgender without the student's permission may violate California's antidiscrimination law by increasing the student's vulnerability to harassment and may violate the student's right to privacy. [Q&A 6]

Practical Steps an LEA Can Take to Protect a Transgender Student's Right to Privacy

CDE has advised:

To prevent accidental disclosure of a student's transgender status, it is strongly recommended that schools keep records that reflect a transgender student's birth name and assigned sex (e.g., copy of the birth certificate) apart from the student's school records. Schools should consider placing physical documents in a locked file cabinet in the principal's or nurse's office. Alternatively, schools could indicate in the student's records that the necessary identity documents have been reviewed and accepted without retaining the documents themselves. **Furthermore, schools should implement similar safeguards to protect against disclosure of information contained in electronic records.** [Q&A 7, Emphasis added].

A Transgender Youth Should be Referred to in Accordance with Their Preferred Pronouns

CDE has advised:

In addition to preserving a transgender student's privacy, referring to a transgender student by the student's chosen name and pronouns fosters a safe, supportive and inclusive learning environment. To ensure that transgender students have equal access to the programs and activities provided by the school, all members of the school community must use a transgender student's chosen name and pronouns. Schools should also implement safeguards to reduce the possibility of inadvertent slips or mistakes, particularly among temporary personnel such as substitute teachers.

If a member of the school community intentionally uses a student's incorrect name and pronoun, or persistently refuses to respect a student's chosen name and pronouns, that conduct should be treated as harassment. That type of harassment can create a hostile learning environment, violate the transgender student's privacy rights, and increase that student's risk for harassment by other members of the school community. Examples of this type of harassment include a teacher consistently using the student's incorrect name when displaying the student's work in the



classroom, or a transgender student's peers referring to the student by the student's birth name during class, but would not include unintentional or sporadic occurrences. Depending on the circumstances, the school's failure to address known incidents of that type of harassment may violate California's antidiscrimination laws. [Q&A 8]

A Transgender Youth May Choose to Discuss Their Gender with Others

CDE has advised:

A transgender student's right to privacy does not restrict a student's right to openly discuss and express their gender identity or to decide when or with whom to share private information. A student does not waive his or her right to privacy by selectively sharing this information with others. [Q&A 7].

LEA's Obligation When a Student's Expressed Gender Identity is Different Than in Official Records

CDE has advised:

A school district is required to maintain a **mandatory permanent student record** which includes the legal name of the student and the student's gender. If and when a school district receives documentation that such legal name or gender has been changed, the district must update the student's official record accordingly.

If the school district has not received documentation supporting a legal name or gender change, the **school should nonetheless update all unofficial school records** (e.g. attendance sheets, school IDs, report cards) to reflect the student's name and gender marker that is consistent with the student's gender identity. [Q&A 8, Emphasis added].

The CSBA model AR 5145.3, provides:

A student's legal name as entered on the mandatory student record required pursuant to 5 CCR 432 shall only be changed with proper documentation. A student's gender as entered on the student's official record required pursuant to 5 CCR 432 shall only be changed with written authorization of a parent/guardian having legal custody of the student. (Education Code 49061)

However, when proper documentation or authorization, as applicable, is not submitted with a request to change a student's



legal name or gender, any change to the student’s record shall be limited to the student’s unofficial records such as attendance sheets, report cards, and school identification.

As a practical matter, LEAs should update all of their electronic records to ensure that the student’s information reflects their expressed gender and name except for those very limited mandatory student records (which states the student’s birth name and gender), which can be maintained in a separate secure location as advised by CDE.

To be very clear, just because information is maintained in an electronic student information system that does not automatically make all of the electronic information a “mandatory permanent student record.” So electronic student information can be updated as per the above guidance from CDE.

LEA Determination of Restroom and Locker Use

CDE has advised:

A school may maintain separate restroom and locker room facilities for male and female students. However, students shall have access to the restroom and locker room that corresponds to their gender identity asserted at school. As an alternative, a “gender neutral” restroom or private changing area may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a “gender neutral” restroom or private changing area shall be a matter of choice for a student and no student shall be compelled to use such restroom or changing area.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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