



COUNTY OF SAN MATEO

INTERDEPARTMENTAL CORRESPONDENCE

To: All San Mateo County School District Superintendents
From: John C. Beiers, County Counsel
Subject: *Revised* Model Gender Nondiscrimination Policy to Support Implementation of AB1266
Date: November 27, 2013

To support county school districts with the implementation of AB 1266, we have drafted the attached Model Gender Nondiscrimination Policy. Districts may wish to adopt the Model Policy with revisions appropriate to their specific circumstances to assist school personnel in accommodating transgender students pursuant to the new law.

Effective January 1, 2014, AB 1266 adds the following sentence to Section 221.5 of the Education Code:

A pupil shall be permitted to participate in sex-segregated school programs, activities, and facilities, including athletic teams and competitions, consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

This means that transgender students – those whose gender identity is the opposite of their sex at birth – must be allowed to fully participate in school in a way that is consistent with their asserted gender identities. For example, a transgender boy – that is, a student who was born a girl but who exclusively and consistently asserts the gender identity of a boy – cannot be prohibited from using the boys' bathroom or from participating on boys' teams.

Although discrimination based on gender identity is generally prohibited under existing law, the Legislature adopted this bill to eliminate obstacles to the full participation of transgender students in school programs that were not clearly addressed under general nondiscrimination statutes. Supporters of the bill cited evidence showing that, among other things, transgender students are at increased risk of not graduating because they cannot dress for mandatory physical education classes without being forced to use the locker room for the gender that is opposite to their asserted gender identity, a situation

that inadvertently communicates to pupils that transgender students' asserted gender identity is not to be taken seriously. Given that transgender students are among the most at risk of bullying and harassment, it is not surprising that many avoid participating in sex-segregated school programs entirely despite possible consequences such as nongraduation.

This law raises practical concerns. For example, the most frequently reported concern is that some students may pretend to be transgender in order to access restrooms and locker rooms for the opposite sex in order to sexually harass students of the opposite sex or otherwise create mischief. The attached Model Policy is intended to address concerns such as these. The Model Policy was itself modeled after similar policies that have been in place for some time in Los Angeles, San Francisco, and Oakland with no reported incidents of abuses of these policies.

The key practical aspect of the Model Policy is the requirement that a transgender student "genuinely" assert his or her expressed gender identity. We advise that the determination of whether a student genuinely asserts a particular gender identity should be made at the student's school site based on relevant factors such as (1) the student's medical history; (2) care or treatment of the gender-related identity; (3) consistent and uniform assertion of such an identity [at school]; and/or (4) any other evidence that the identity is sincerely held or part of the person's core identity.

Although the "genuinely assert" qualification is not found in the text of the statute, we believe that it is supported by the legislative history of the statute and by the fact that a similar, and possibly more restrictively qualification appears in policies that inspired the law (i.e., that a transgender student "exclusively and consistently" assert his or her expressed gender identity). A boy who wears a dress to school one day hoping to create mischief under the new law does not qualify. Simply verbalizing that he identifies as a girl (or that he is gay, which is a separate matter in any case) similarly does not qualify a boy who otherwise dresses and presents as a boy to use girls' facilities. Therefore, the "genuinely assert" requirement makes it exceptionally difficult for a student who is not authentically transgender to pretend to be.

We suggest that school superintendents consult with their boards to consider adopting the Model Policy as appropriate to help school personnel differentiate between students who do and do not qualify for transgender nondiscrimination protection under AB 1266. Please feel free to consult with the deputy county counsel representing your school district if you would like assistance in tailoring the Model Policy to the particular needs

of your school district.

JCB:kem/ala

**Model Policy for Gender Discrimination
(for use as of January 1, 2014, the effective date of AB1266)**

Non-Discrimination for Students and Employees

This Board Policy is meant to advise school site staff and administration regarding transgender and gender non-conforming students in order to ensure that all students have equal access to all components of their educational program consistent with California law, while maintaining a safe learning environment for the entire District community.

California Law Prohibits Gender-Based Discrimination in Public Schools

The California Education Code states that “all pupils have the right to participate fully in the educational process, free from discrimination and harassment.” Cal. Ed. Code Section 201(a). Section 220 of the Education Code provides that no person shall be subject to discrimination on the basis of gender, gender identity, or gender expression in any program or activity conducted by an educational institution that receives or benefits from state financial assistance. The Code further provides that public schools have an affirmative obligation to combat sexism and other forms of bias, and a responsibility to provide equal educational opportunity to all pupils. Cal. Ed. Code Section 201(b).

Section 221.5 of the Education Code states that the policy of the State of California is that “elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses,” and that a “pupil shall be permitted to participate in sex-segregated school programs, activities, and facilities, including athletic teams and competitions, consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”

The California Code of Regulations similarly provides that “No person shall be excluded from participation in or denied the benefits of any local agency's program or activity on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability in any program or activity conducted by an ‘educational institution’ or any other ‘local agency’ . . . that receives or benefits from any state financial assistance.” 5 CCR Section 4900(a).

The California Code of Regulations defines “gender” as: “a person's actual sex or *perceived sex* and includes a *person's perceived identity, appearance or behavior*, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's sex at birth.” 5 CCR Section 4910(k)(emphasis added).

[District Name] Board Policy Prohibits Gender-Based Harassment

[District Name] Board Policy [Number] requires that “All educational programs, activities and employment practices shall be conducted without discrimination based on . . . sex, sexual orientation, [or] gender identity . . .” Board Policy [Number] requires that “students should treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person” based on sex, sexual orientation, gender expression or gender identity.

Therefore, transgender and gender non-conforming students must be protected from discrimination and harassment in the public school system. Staff must respond appropriately to ensure that schools are free from any such discrimination or harassment.

Issues of Privacy

All students, including transgender and gender variant students, have the right to openly discuss and express their sexual orientation, gender identity, and gender expression and to decide when, with whom, and how much to share private information.

Names/Pronouns

Students shall have the right to be addressed by a name and pronoun corresponding to their gender identity that has been genuinely asserted. The determination whether a

student genuinely asserts a particular gender identity should be made at the student's school site based on relevant factors, such as (1) a student's medical history; (2) care or treatment of the gender-related identity; (3) consistent and uniform assertion of such identity; and/or (4) any other evidence that the gender identity asserted is sincerely held or part of the student's core identity. Students may request to be addressed by their "preferred name" (and preferred pronoun) that corresponds to their gender identity without obtaining a court order or without changing their official records. This directive does not prohibit inadvertent slips or honest mistakes, but it does bar the intentional and persistent refusal to respect a student's gender identity.

The parent/legal guardian with legal custody of a child may request that their child be registered in school under a name different from that appearing upon documentary proof of age or school records. This may be accomplished by completion of an [District to identify proper form]. After the school receives and verifies the contents of the completed [form], the requested name shall be included in the [student record keeping system] in addition to the student's legal name, in order to inform teachers of the name and pronoun to use when addressing the student.

Official Records

The District is required to maintain a mandatory permanent pupil record which includes the legal name of the pupil, as well as the pupil's gender. 5 Cal. Code Reg. 432(b)(1)(A), (D). The District shall change a student's official records to reflect a change in legal name or gender upon receipt of documentation that such legal name and/or gender have been changed pursuant to California legal requirements.

Restroom Accessibility

Schools may maintain separate restroom facilities for male and female students. However, students shall have access to the restroom that corresponds to their gender identity that has been genuinely asserted. Where available, a gender neutral bathroom may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a gender neutral bathroom shall be a matter of choice for a student, and no student shall be compelled to use such bathroom. Administrators are encouraged to identify gender neutral bathrooms, if any, on their campuses.

Locker Room Accessibility

Schools may maintain separate locker room facilities for male and female students. However, students shall have access to the locker room facility that corresponds to their gender identity that is genuinely asserted. In locker rooms that involve undressing in front of others, students who want to use the locker room corresponding to their gender identity that is genuinely asserted will be provided access in a manner that best meets the needs and privacy concerns of all students involved. Based on availability and appropriateness to address privacy concerns of all students involved, such access could include, but is not limited to:

- Use of a private area in the public area (i.e., a bathroom stall with a door, an area separated by a curtain, a PE instructor's office in the locker room);
- A separate changing schedule (either utilizing the locker room before or after the other students); or
- Use of a nearby private area (i.e., a nearby restroom, a nurse's office).

Sports and Physical Education Classes

Transgender students shall be provided the same opportunities to participate in physical education as all other students. Generally, students should be permitted to participate in gender-segregated recreational gym class activities and sports in accordance with the student's gender identity that is genuinely asserted. Participation in competitive athletic activities and contact sports will be resolved on a case by case basis.

Dress Codes

School sites can enforce dress codes that are adopted pursuant to Education Code 35291. Students shall have the right to dress in accordance with their gender identity that is genuinely asserted, within the constraints of the dress codes adopted at their school site.

Gender Segregation in Other Areas

As a general rule, in any other circumstances where students are separated by gender in school activities (i.e., class discussions, field trips), students shall be permitted to participate in accordance with their gender identity that is genuinely asserted.

Activities that may involve the need for accommodations to address student privacy concerns will be addressed on a case by case basis. In such circumstances, staff shall make a reasonable effort to provide an available modification to the activity that can address any such concerns.

Complaints

Complaints alleging discrimination or harassment based on a student's gender identity or gender expression are to be handled in the same manner as other discrimination/harassment complaints.