

CLIENT NEWS BRIEF

California Department of Education Issues Guidance Regarding the Application of California's Antidiscrimination Statutes to Transgender Youth in Schools

The California Department of Education (CDE) recently issued guidance regarding Assembly Bill (AB) 1266. This bill, effective January 1, 2014, amended the Education Code to require that students be permitted to: (1) participate in sex-segregated school programs and activities, including athletic teams and competitions; and (2) use facilities consistent with their gender identity regardless of the gender assigned at birth. The term "gender identity" refers to a person's gender-related identity, appearance or behavior whether or not stereotypically associated with the person's assigned sex at birth. Along with its guidance, CDE also issued Frequently Asked Questions that address many of the specific concerns school districts may have with the application of this new law.

If a student would like to participate in sex-segregated school programs or activities or use facilities consistent with the student's gender identity, CDE encourages administrators and staff to engage in an open dialogue with a student in order to determine whether the student is transgender (e.g., whether that student's gender identity is sincerely held). If it is determined a student is sincere in asserting his or her gender identity, school districts are required to respect and accept that student's gender identity when the student expresses that identity at school. Except in rare circumstances, when district administrators believe the student has an improper purpose for asserting his or her gender identity, school districts are prohibited from questioning the student's assertion of their gender identity. The fact that a student expresses his or her gender identity differently across multiple contexts does not, by itself, discredit a student's assertion of his or her gender identity. School districts may not require a student to provide a diagnosis, proof of medical treatment, or meet an age requirement, as a condition of receiving the protections afforded to transgender students.

CDE provides extensive guidance for districts regarding transgender students' privacy rights. Specifically, CDE requires districts to use extreme caution when revealing or discussing a student's gender identity to others (i.e., parents or guardians of the student) as this may place the student in an unsafe situation. Student safety is a concern in this situation because a transgender student may not openly express his or her gender identity in all contexts, including at home.

Transgender students have the right to keep their transgender status private under federal and state laws. Schools are not permitted to disclose a student's transgender status to other students, school staff, or parents of other students. A school district's disclosure of a student's transgender status, without the student's permission, may violate California's anti-discrimination law by increasing the student's vulnerability to harassment and may violate the student's right to privacy. Accordingly, school districts are required to consult with transgender students to determine who, if anyone, can or will be informed of the student's transgender status. According to the CDE guidance, this includes the student's parents or guardian. The CDE guidance asserts that, except for rare exceptions, schools should not inform parents about a student's transgender status without the student's permission. The CDE guidance does not address how a school district would prevent a parent from having access to

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As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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the student's records.

CDE provides an exception to the general rules regarding non-disclosure of a transgender student's status, permitting districts to reveal this information only to essential persons when necessary to protect the health or safety of the student or others.

CDE recommends districts keep records regarding a student's transgender status separate and apart from that student's school records (e.g., records that reflect the student's biological name and gender at birth) in order to prevent improper disclosure in violation of the student's privacy rights. School districts should maintain a permanent student record for each student which reflects that student's legal name and assigned gender. School districts should only change these records when they receive documentation indicating that a student's legal name or gender have changed. However, all members of the school community are required to use the student's name and pronouns consistent with the student's gender identity, regardless of whether the student has legally changed his or her name or gender. A student's or teacher's consistent refusal to use the proper name or pronoun to address a transgender student may constitute harassment.

Pursuant to the CDE guidance, school districts are required to permit transgender students to use school facilities (i.e., restrooms, changing rooms and showers) consistent with the student's gender identity. A school district is prohibited from requiring a transgender student to use a separate restroom or private changing area. Requiring a transgender student to be singled out by using separate facilities is not only a denial of equal access, but may violate the student's right to privacy by disclosing the student's transgender status or causing others to question why the student is being treated differently. A "gender neutral" restroom or private changing area, if available, may be used by any student who desires increased privacy, regardless of the underlying reason. This "gender neutral" facility should be made available in a manner that protects the gender identity of the students who use it.

CDE requires school districts to provide transgender students with the same opportunities as all other students to participate in physical education and sports consistent with their gender identity. Whenever students are separated by gender in school activities or subject to an otherwise lawful gender-specific rule, policy or practice, students must be permitted to participate in such activities or conform to such rule, policy or practice consistent with their gender identity. Similarly, transgender students are required to comply with the dress code consistent with their gender identity. A school dress code may not be enforced more strictly against a transgender student compared to other students.

CDE also requires school districts to have policies and procedures for handling complaints of harassment against transgender students. School districts must investigate such incidents and implement appropriate corrective action in order to prevent such incidents from reoccurring.

In order to ensure compliance with AB 1266, school districts should review all policies to ensure that gender-based policies have a clear and sound pedagogical purpose. Specifically, CDE cautions school districts against using some gender-based policies (i.e., gender-based dress code for graduation or senior portraits, asking students to line up according to gender, etc.).

Lozano Smith attorneys are available to provide guidance regarding transgender student issues and the impact of the new CDE guidance.

Click the following links for a copy of the CDE's [Guidance](#) and [Frequently Asked Questions](#).

If you have any questions about AB 1266 and how it impacts school districts, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

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