



## MEMBER ALERT

### School Success and Opportunity Act

#### STUDENTS' RIGHTS, AND MEMBERS' OBLIGATIONS, UNDER NEW GENDER IDENTITY LAW (AB 1266)

Assembly Bill 1266 (Education Code Section 221.5) will become effective January 1, 2014. This new law *confirms*, and in some respects *expands*, rights of California students whose gender identity does not equate with their birth sex. This Member Alert provides important legal and risk management guidance as Members evaluate how to implement this new law and balance the rights and concerns of other students/parents. After reviewing this Alert, we encourage each Member to:

- ensure that its policies comply with the governing laws and the recommendations made below,
- provide training to its employees and volunteers to ensure they are aware of the adopted standards and potential scenarios in which the questions/concerns may arise, and
- identify an employee (Name & Title) who should be contacted for guidance when questions/situations of concern arise.

#### **I. DEFINITION – GENDER IDENTITY GOVERNED BY SECTION 221.5(F)**

Section 221.5 does not define “gender identity.” That term, however, is generally understood to apply to students whose physical or behavioral expressions are different from social expectations of how the student might traditionally be expected to dress, groom, act/speak, choose toys, identify playmates (generally of the opposite sex), or participate in activities based on his/her sex at the time of birth. **That does not mean that the statute only applies to a “boy” dressing/acting like a “girl” or vice-versa; it applies to any boy or girl who not dress or act like a “traditional” boy or girl would be expected to dress or act.** To that end, the student also may/may not be gay, lesbian, or bisexual; in many instances, a student experiencing gender identity issues may still have an attraction for members of the opposite sex or may have, at any particular point in time, no sexual attraction.

#### **II. NEW EDUCATION CODE 221.5(F) AND CIF POLICIES RELATING TO SPORTS ACTIVITIES**

In 2012, the California Interscholastic Federation (CIF), the body governing high school interscholastic athletics, adopted the following policy: *"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."* Section 221.5(f) expands this right to include **any** Member-sponsored athletic team or competitions (intramural, “club sports” or non-CIF sanctioned sports, including middle school sports), as well as other forms of extra-curricular activities.

#### **III. PRIOR FEDERAL SETTLEMENT/AFFECT ON DISTRICT AND EMPLOYEE CIVIL EXPOSURES**

On July 24, 2013, the U.S. DOE’s Office for Civil Rights resolved a civil rights complaint against Arcadia Unified School District. In the settlement Arcadia agreed to (a) allow transgendered students to use facilities and to participate in activities consistent with the students’ gender identity, (b) adopt supporting board policies and administrative regulations, and (c) train employees regarding the adopted standards. Given the “precedent” of this federal civil rights settlement, and the impact of new Section 221.5(f) on potential state law civil rights claims, Members and their employees should ensure that they timely, properly, and proactively protect the rights of students with gender identity issues or they face civil rights claims that are costly to defend and resolve under California law. Members’ employees may also face *personal* liability under state/federal civil rights laws, with such claims raising concern regarding indemnity issues to the extent an adverse finding would be based on “intentional” misconduct.

#### **IV. ADDRESSING FACILITIES USE ISSUES**

Under Section 221.5(f) students who gender identify with the opposite sex have an automatic right to use facilities associated with the student’s identified gender. We do not agree with CASB’s preliminary guidance suggesting that

the student or parent should first make a “request” to use the alternate facilities; this could easily be seen as a violation of the student’s inherent right of use as defined in the statute. The intent of the statute is that no special permission or process is required because doing so would subject the student to scrutiny or review which the statute is intended to avoid.

In response to a complaint or concern raised by another student or parent, the District should objectively confirm that the student has a consistent and genuine identification with the opposite sex. If that is not the case, then a discussion should ensue with the student (and probably with the parents) to discuss a consistent approach to facilities use in keeping with the student’s gender identification. The discussion should lead to an agreement or understanding that can be implemented on a daily basis for the foreseeable future; later circumstances may dictate a need to reopen the dialogue and change the parties’ agreement or understanding regarding the student’s use of facilities.

Many questions or concerns may relate to locker room facilities, where student privacy is at a minimum. In keeping with the statutory framework, the expectation would be the full sharing of locker room facilities, with full and positive support by the coaching staff, will exist. The transgendered student may, however, wish to use an alternate or more private area of a locker room (locked restroom stall, or adjunct office) or shower facility. Other students may also be uncomfortable with such a situation, leading them also to seek alternate changing/showering areas. Efforts at reasonable accommodation for any affected student should be made by the physical education/coaching staff, recognizing that several larger districts have already implemented such approaches (LAUSD; SFUSD). Thus, deviations from such an approach places all concerned at risk for regulatory or civil liability.

## **V. TALKING POINTS AND COMMUNICATION ISSUES**

Whether a question or concern is raised by a student or parent regarding shared facilities or other issues arising from gender identity issues, Districts should ensure that involved staff keeps several points in mind and, depending on the circumstances giving rise to a question or concern, potentially uses some or all of the following talking points:

- “Students may have different gender identities. We support all of our students, which includes a right under the law for students to use restroom facilities that match with their gender identities.”
- We are aware of no misconduct by the involved student that would support a decision preventing them from using restroom facilities that match with their gender identity. While we recognize that may cause [you/your son/your daughter] some concern, we trust that with time those concerns will be alleviated.
- “We do not accept bullying or any other negative behavior that prevents, or seeks to prevent, any student from fully and positively attending class, participating in District-sponsored activities, or using facilities that match with their gender identity; anyone engaged in improper behavior is subject to discipline.”
- “We support all of our students. That includes support for their participation on a [team/activity] that matches with their gender identify, includes the right to use the locker room facilities used for that sport. We will provide reasonable accommodation to any student who may be uncomfortable in such situations.”
- “The District seeks to provide a safe and secure campus for all of its students. As appropriate, we may have teachers or staff members monitor our facilities to ensure that no misconduct occurs. While we cannot guarantee a student’s safety, we will take all reasonable or necessary steps to prevent anticipated or likely misconduct. We urge you to help us in that effort by keeping us apprised of any issues of concern.”

### **What not to say (or imply):**

- “It’s the law; they are making us do it.”
- “It’s your choice, but if I were you I would use [your own][another] restroom.”
- “By using that restroom, you may be [asking for trouble][putting yourself at risk].”

Such statements may suggest the District is not affirmatively supporting its students and/or implying that the student will not be safe if he/she exercises a statutorily guaranteed right. Either approach would put both the District and the individual employee at risk of a claim. The student or his/her parents may request access to a special restroom area (i.e., one not traditionally used by students), but the request needs to be made by them.