



# MEMBER ALERT

## Transgender Students – Facilities and Programs

### STUDENTS' RIGHTS AND MEMBERS' OBLIGATIONS

On May 13, 2016, the U.S. Departments of Education and Justice jointly issued guidelines regarding transgender students' rights under the nondiscrimination provisions of Title IX.<sup>1</sup> California earlier adopted Education Code Section 221.5, which arguably provides broader protections for students and greater obligations for Members. Given continuing legal challenges and media coverage on this subject, this Member Alert provides legal and risk management guidance so Members can (a) ensure that their policies comply with all governing laws and standards, and (b) better respond to questions, concerns, or events involving students, parents, or community members.

#### **I. Gender Identity Definitions and Understandings**

Federal guidelines note that "A person's gender identity may be different from or the same as the person's sex assigned at birth," with "gender" defined as the current "internal sense of gender." Education Code Section 221.5 does not define "gender identity," although that term has been interpreted as applying 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, or participate in activities based on his/her sex at birth.

#### **II. Privacy Rights**

Under interpretations of the Family Educational Rights and Privacy Act ("FERPA"), a student's legal name, sex assigned at birth and gender transition status are considered protected identifiable information ("PII"). Even if a student voluntarily discloses his/her gender identity, Members' employees should refrain from disclosing such PII to anyone who does not have a direct, legitimate educational interest in the information. What may seem open or obvious to some still must be treated as private and confidential, at least from the standpoint of the Member's employees and volunteers.

#### **III. CIF and Sports/Recreational and Extra-Curricular Activities and Programs**

The California Interscholastic Federation (CIF), the body governing high school interscholastic athletics, has adopted the following bylaw: "*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.*" CIF defines gender identity as "[a] person's deeply-felt internal sense of being male or female."

Beyond CIF-governed sports, Section 221.5(f) states that a student in **any** Member-sponsored program, activity, or athletic team shall be entitled to use "facilities" (which would include locker rooms and bathrooms) consistent with his/her gender identity, regardless of the gender listed in their pupil records.

#### **IV. Civil Exposures/Duty to Advise of Rights of Appeal**

Compliance with the express mandates of Section 221.5, as well as the spirit of that law, are important in avoiding significant claim exposures under that law, as well as under federal or state civil rights or privacy laws. Students denied access to gender-identified facilities, either at their "home" schools, "away games" or events, or off-site field trips or activities, may be able to successfully argue that their rights have been impaired if they can also show that a Member's employees or volunteers were aware of the violation and failed to ensure compliance with the law. If successful, the

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<sup>1</sup> On August 21, 2016, in *Texas v. United States of America*, 2016 WL 4426495 (N.D.Tex., 2016), the trial court issued a nationwide injunction prohibiting enforcement of the guidelines. The United States Supreme Court may also accept review of *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709 (4th Cir., 2016), which upheld the guidelines, with that decision stayed pending the Supreme Court's decision. Because California law is broader than the federal guidelines, these federal cases may not determine Members' obligations and students' rights. Thus, to avoid confusion, communications with students/parents should presently refer only to California law.

students would be entitled to money damages and attorneys' fees.<sup>2</sup> The same is true for a failure to comply with the obligation to provide class and career counseling that might better relate to the student's identified, rather than actual, gender. This exposure can arise, in part, because the Member's employees may be considered guardians or protectors of the students' rights, requiring affirmative and protective action despite an employees' or volunteers' personal beliefs or viewpoints.<sup>3</sup>

Further, Members' employees who receive a written complaint (text, email, letter) must also timely advise the student and parent that they may appeal any adverse action they believe is "discriminatory" to the State Department of Education. Doing so does not prevent the student/parent from seeking an immediate injunction, but if they file the appeal they must wait 60 days before also seeking monetary damages or relief unless the Member failed to timely advise them of their appeal rights.

#### V. Addressing Facilities Use Issues with Employees, Volunteers and Community Members

Certain interpretations of Section 221.5, because there is no "notice" requirement in the statute, support the right of a student to automatically use gender-associated facilities without first seeking permission or authorization. At the very least, there is an automatic right to use the gender-associated facilities upon notice by a student or his/her parent or guardian that the student is asserting a gender identity different from that contained in his school records. Within the confines of the law, this would extend to lockerroom areas. While the gender-identifying student or his/her parents might request an alternate, more private facility, the Member's employees and volunteers cannot dictate a different location even in such intimate areas. Notably, the federal guidelines make clear that other students' discomfort in such a setting cannot outweigh the transgendered student's safety and comfort, including the ability to shower and change in the lockerroom associated with their identified gender.

Questions or concerns regarding transgender students and facilities can be raised by employees, volunteers, parents and community members. While employees and volunteers are encouraged to speak with their supervisors, principals, or public information officers regarding the Member's agreed response to such situations, the following potential "talking points" are provided for consideration.

- Each student has a legal right to use the [bathroom/lockerroom] associated with his/her gender identity. Our students are using [bathroom/lockerroom] facilities in a manner consistent with governing laws, and we will support them in the use of facilities that match with their current gender identity.
- While [you/your son/your daughter] may be concerned with the use of a [bathroom/lockerroom] at the same time as a student whose gender identity is different from their gender at birth, no student should feel threatened or intimidated in their use of our facilities matching with their gender identity, and we expect all students to act in a proper and responsible manner in these areas.
- While we understand your personal viewpoints on this issue, each of our employees and volunteers must work to support and protect all of our students' rights even if you believe the law is incorrect or should be changed. We therefore need to ask for your assurance that you will support all of our students, including our transgender students, if you are going to be a [volunteer/field trip driver/coach].
- Personal information about our students, including their gender identity, is private. Is there something we can do to help you or your child better understand gender-related issues within our school?
- **Statements that should never be made:** "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 suggest the Member may not be meeting its obligations, the student may not be safe if he/she exercises a statutory right, or that there is an ability to engage in further debate on the subject, even though the law is clear regarding the Member's obligations.

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<sup>2</sup> E.g., *Donovan v. Poway Unified School Dist.*, 167 Cal.App.4th 567 (2008)

<sup>3</sup> *Brown v. Shasta Union High School Dist.*, not reported, 2010 WL 3442147 ["Public school officials are government agents for purposes of the protection of students' constitutional rights."], citing *In re William G.*, 40 Cal.3d 550, 558-562 (1985)