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LEGAL ADVISORY

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To: All County and District Superintendents
Schools Legal Counsel

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Subject: Gender Equity and Discrimination Laws in California Public Schools

Recent actions by a California school district have brought to our attention the need to remind school districts and county offices of education about state statutes and regulations that prohibit discrimination against students in various protected categories in the State of California. There should be no confusion about a district or county office's responsibility to protect all children from unlawful discrimination. The State of California has spoken on this issue, and no local district or county office has authority to choose which laws to enforce or to adopt its own limiting definition of any protected class. This advisory explains what the laws related to discrimination say and provides some advice on how to handle particular issues.

There are a number of statutes and regulations that define various terms related to gender equity and discrimination. They prohibit certain forms of disparate or preferential treatment on the basis of the categories of students.

Education Code section 212 defines "sex" as "the biological condition of being a male or female human being." 5 CCR section 4910(v) further defines "sex" as "the biological condition **or quality** of being a male or female human being." 5 CCR section 4910(w) defines "sexual orientation" as "actual **or perceived** heterosexuality, homosexuality, or bisexuality." Finally, 5 CCR section 4910(k) 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.**" (Emphasis added.) **For the purposes of compliance with California law, all of those statutory and regulatory definitions apply to all public school students in California. Local Education Agencies (LEAs) do not have the discretion to eliminate or modify those**

definitions in a manner that reduces the protection of California students from unlawful discrimination.¹

The guarantee of educational equity and freedom of students from unlawful discrimination is stated in Education Code sections 200-283. In particular, Section 220 states:

No person shall be subjected to discrimination on the basis of **sex, ethnic group identification, race, national origin, religion, color, mental or physical disability**, or any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code 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.)

Penal Code section 422.6 states as follows, and must be read together with the categories stated above:

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person's **race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.** (Emphasis added.)

In addition, Government Code section 11135 further prohibits discrimination against anyone who is the beneficiary of a publicly funded program in California, including public school students, as follows:

No person in the State of California shall, on the basis of **race, national origin, ethnic group identification, religion, age, sex, color, or disability**, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. (Emphasis added.)

¹ Education Code section 35160 states that LEA discretion is limited where particular programs or activities are prohibited by state law. Further, as agencies of the State of California, neither LEAs nor this Department have discretion to declare any statute or regulation to be unconstitutional; only the courts may exercise such authority. (Cal. Const., Art. III, sec. 3.5.)

Pursuant to Education Code section 221.1 and Government Code section 11138, the California State Board of Education (SBE) is empowered to make regulations to further define the prohibited acts of discrimination and to provide procedures for monitoring and investigating local education agency (LEA) practices with regard to discrimination policies and complaints. Pursuant to Education Code section 253, the State Department of Education, under the direction of the State Superintendent of Public Instruction, is required to monitor compliance with the sex discrimination statutes and, in particular, incidents of sexual harassment. Under Education Code section 250, compliance with **all** the laws regarding equity and nondiscrimination is a condition of receiving any state funds.

The SBE has promulgated various regulations to provide a complaint procedure at the local level and for appeal to the state level in discrimination cases. (5 Cal. Code of Regs. secs. 4600-4671.) Section 4610(c) of those regulations states:

This Chapter also applies to the filing of complaints which allege unlawful discrimination on the basis of any protected group as identified under Education Code § 200 in any program or activity conducted by a local agency, which is funded directly by, or that receives or benefits from any state financial assistance.²

5 California Code of Regulations section 4621 requires each LEA to “adopt policies and procedures consistent with this Chapter for the investigation and resolution of complaints.” Every LEA is therefore required to have a policy against discrimination that applies to all the protected categories of students listed in all the statutes cited above and a complaint procedure that enforces that policy. Education Code section 231.5 specifically requires all LEAs to have a written policy on sexual harassment that is publicly disseminated to staff, parents, and students.

The recent controversy has centered on the application of the sex and gender discrimination provisions to “transgender” students; that is, students who perceive themselves as having the “identity, appearance, or behavior” of a gender other than their “sex at birth.” While this advisory cannot anticipate every factual situation that could arise under these laws, several controversial scenarios have raised the concern of local school boards.

For example, some LEAs are concerned that 5 CCR section 4910(k) will permit boys to use the girls’ bathroom or locker room, if the boys perceive or identify themselves as girls. That is not true. Education Code section 231 specifically states that nothing in the sex equity and sexual harassment statutes or regulations prohibits an LEA from maintaining separate bathroom, locker room, or residential facilities for males and females. That statute clearly balances the gender self-perceptions of particular

² This regulation has been submitted to the Office of Administrative Law for revision consistent with recent amendments to Education Code sections 200 and 220, pursuant to 1 Cal. Admin. Code section 100.

students against the privacy and perceptions of other students and sets a reasonable limit on “transgender” rights. In addition, school district officials in several instances were able to find reasonable alternative toilet and locker room accommodations for transgender students by allowing the controlled use of faculty facilities. Given that willingness to create local solutions, this Department has yet to receive a formal discrimination complaint related to a transgender student on this issue.

There are, however, potentially contentious issues in this area. We believe that Section 4910(k) protects from harassment or abuse any student whose “identity, appearance, or behavior” is different than the stereotypical characteristics of males or females in our society. For example, if a girl comes to school in clothing that some perceive as boys’ clothing, or plays games on the playground that are perceived as boys’ games, that girl is protected from bullying or other harassment by the nondiscrimination laws. In our view, if the discriminatory treatment or abuse is based on the perception that a student’s “identity, appearance, or behavior” is inappropriate to their sex, it is **unlawful** gender-based discrimination and must be resolved by the LEA pursuant to its local discrimination policy and complaint procedure.³

Changing perceptions of gender-appropriate “identity, appearance, and behavior” are a challenge that must be faced by school officials, parents, and students throughout the State of California. That challenge can and must be met without violating the nondiscrimination laws passed by the Legislature and the regulations promulgated by the State Board of Education. This legal advisory provides information regarding the specific existing statutes and regulations related to sex and gender equity. Any suggested approaches to specific factual situations herein that constitute interpretations or applications of those laws are provided for illustration only. We will resolve complaints of discrimination against individual students in particular situations on a case-by-case basis. If you have further questions regarding this legal advisory, please contact us.

³ There has been some misinterpretation of the language of Penal Code section 422.76, which states that it is a hate crime to attack a person based on the attacker’s perception of the victim’s gender, even if the perpetrator’s perception of the victim’s gender is wrong. That same rule would apply to unlawful discrimination based on an incorrect perception of a student’s gender. However, that Penal Code provision, which attempts to prohibit unlawful and hateful intentions, does not conflict with 5 CCR section 4910(k) regarding the prohibition of discrimination based on gender-based assumptions and stereotypes. **That regulation clearly protects the perceived “identity, appearance, and behavior” of the alleged victim.** Moreover, a student would be entitled to protection even if the discriminating party were wrong about the student’s self-perception.