

CLIENT NEWS BRIEF

Education Code Revised to Extend Pupil Rights in Sex-Segregated School Programs, Facilities and Activities

On August 12, 2013, Governor Brown signed into law Assembly Bill (AB) 1266, which amends the Education Code regarding prohibited discrimination in public schools and requires schools to allow a student to participate in sex-segregated school programs and use facilities consistent with the student's gender identity. Under existing law, Education Code section 221.5 provides that elementary and secondary school classes and courses must be conducted without regard to the sex of the pupil enrolled in these classes and courses. In addition, school districts are prohibited from enrolling a pupil in any class or course, on the basis of the sex of the pupil, with the exception of sex education courses. Existing law also prohibits a school district from requiring a pupil of one sex to enroll in a particular class or course, unless the same class or course is also required of a pupil of the opposite sex.

Education Code section 221.5 requires that participation in a particular physical education activity or sport is available to pupils of each sex if required of pupils of one sex. Notably, Education Code section 231 currently provides that nothing in Education Code section 221.5 et seq. "shall be construed to prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for different sexes, so long as comparable facilities are provided." Relying on section 231 of the Education Code, the California Department of Education issued a 2004 Legal Advisory to all county and district superintendents concluding that existing law does not require school districts to allow biologically male students to use the female students' bathroom or locker room if the male students perceive or identify themselves as female, and vice versa.

AB 1266 provides an additional component to Education Code section 221.5. Under AB 1266, a student must be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities, including bathroom facilities, consistent with his or her gender identity and irrespective of the gender listed on the pupil's records. AB 1266 makes clear that transgender and gender nonconforming students have a right to participate in school extracurricular and athletic activities based upon their gender identity regardless of their biological sex. AB 1266 thus extends existing protections and rights for students based upon gender identity, while also implicitly narrowing Education Code section 231's directive that schools may maintain separate restrooms, and other facilities, and require use of such facilities on the basis of a student's sex without reference or qualification in terms of the student's gender identity. In other words, regardless of Education Code section 231, AB 1266 appears to now permit a student to use the relevant facilities based upon gender identity, as opposed to based upon the student's biological sex.

School districts may want to re-evaluate existing board policies and administrative regulations to ensure that they are in compliance with these new legal changes. AB 1266 is effective January 1, 2014. Updated guidance on this issue from the California Department of Education would also be of significant value, such as: (1) whether there are certain standards and criteria that a

August 2013
Number 47



Thomas R. Manniello
Partner and Students
Practice Group Co-Chair
Monterey Office
tmanniello@lozanosmith.com



George R. Valenzuela
Senior Counsel
Petaluma Office
gvalenzuela@lozanosmith.com



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school district may impose to determine and/or validate that a given student in fact has a gender identity that permits access, participation and use of certain programs and facilities that vary from the student's biological sex, and (2) what conditions, if any, may be placed upon a student's use of bathroom and locker room facilities when students of the opposite biological sex are present. AB 1266 does not address these issues.

For further information regarding pupil rights with respect to sex segregated school programs, facilities and activities, or practical steps that can be taken with regard to these issues, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).