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Keeping Pace with Developments in Student Gender Identity Rights

In May 2016, the U.S. Department of Education's Office for Civil Rights (OCR) and U.S. Department of Justice's (DOJ) issued joint guidance regarding transgender student rights, sparking nationwide media coverage and a surge in lawsuits related to the guidance, as if it was the first time this issue had ever been breached on a local, state or federal level. To the contrary, and especially in California, the statutory framework regarding transgender student rights have been in place for several years, and school districts have been complying with those laws-without any notable incident-during that time period. This is not to say, however, that execution of these laws is simple. To fully understand recent developments in this area and how to proceed with legally compliant practices, a review of the recent past is necessary, including existing state and federal laws and guidance. With that context, and an understanding of the now-pending lawsuits relating to transgender students in schools, there is a defined approach for California school administrators to fully grasp all relevant options, comply with the law, while taking into account their local communities' interests and concerns.

What is the law in California?

In California, effective January 1, 2012, among other changes, AB 887 amended Education Code section 220 to specifically prohibit discrimination in any school program or activity based upon gender identity or gender expression. AB 887 also added Education Code section 210.7, which defines "gender" as "sex, and includes a person's gender identity and gender expression" and "gender expression" to mean "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." Additionally, since 2005, title 5 of the California Code of Regulations has defined "gender" in the context of nondiscrimination as follows: "sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." (Cal. Code Regs., tit. 5, § 4900, subd. (k).)

SB 887's changes to the law resulted in some school districts taking affirmative steps as early as 2012 to make clear the protections against student discrimination based upon a student's gender identity. In fact, certain school districts around the state instituted protections and policy in this regard even earlier. This said, AB 1266's adoption in 2013, effective January 1, 2014, was the most prominent catalyst for school districts taking proactive policy and other steps to address the protections afforded to students based upon gender identity. AB 1266 amended Education Code section 221.5, subdivision (f), which now provides: "a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities *consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.*" This change in the law made clear the scope of protections afforded to transgender students, and in particular their legal right to access school programs and facilities based upon their gender identity, not their sex at birth.

While an initial attempt to put AB 1266 on the statewide ballot and a



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referendum vote failed (more on that later), school boards and school administrators grappled (mostly with success) with designing policies and procedures for addressing student rights under the new law, awaiting further guidance from the California Department of Education (CDE) on point. At long last, in February 2016, CDE issued a formal Legal Advisory and Frequently Asked Questions (FAQs) on Education Code section 221.5's application to California schools. These documents, while not binding as law themselves, provide guidance to schools on this issue, including CDE's perspective on rights entitled to transgender students, and practical advice on a wide range of topics, including but not limited to: access to restrooms, other facilities and programs; student records; determining a student's transgender status; privacy rights of transgender students; and student names, pronouns and records relative to gender identity. Apart from these areas, CDE's FAQs also specify that "gender identity" should be understood by school officials to "refer to a person's gender-related identity, appearance or behavior whether or not different from that traditionally associated with the person's physiology or assigned sex at birth." Suffice it to say, there is presently a clear picture of CDE's view relative to legal rights of transgender students and school district obligations in this regard.

What is federal law perspective on transgender student rights?

Since approximately 2014, OCR has been investigating complaints and entering into resolution agreements with school districts around the country, premised upon an understanding of transgender student rights consistent with California law—albeit based upon federal law's Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) and Title IX's implementing regulations. While such federal administrative oversight has been ongoing for several years, it was in May of this year that OCR and the DOJ issued its widely publicized joint guidance on the rights of transgender students under federal law, accompanied by a 25-page guide, "Examples of Policies and Emerging Practices for Supporting Transgender Students." This federal guidance is generally consistent with, and covers the same subjects, as that covered in the CDE's Legal Advisory and FAQs on AB 1266.

Isn't OCR's interpretation of federal law being challenged in the courts?

Yes, the federal guidance has resulted in rash of six or more lawsuits around the country challenging the federal agencies' interpretation of Title IX and its regulations to protect transgender students. Notably, in the weeks leading up to the issuance of the joint guidance, the U.S. Court of Appeals, Fourth Circuit (which includes within its jurisdiction Virginia, West Virginia, Maryland, North Carolina and South Carolina), held that OCR's interpretation that Title IX's implementing regulation (34 C.F.R. § 106.33), protects against discrimination based upon a student's gender identity, was entitled to deference and ultimately controlling weight. (*G.G. v. Gloucester Cnty. Sch. Bd.* (4th Cir. 2016) 822 F.3d 709.) This is the only federal appellate court to reach this issue. However, the United States Supreme Court recently signaled that it may be poised to grant review in the *G.G.* case, and has stayed that opinion until the high court has the chance this fall to make a decision on whether it will do so.

Most recently, a United States District Court in Texas has issued a preliminary injunction barring OCR, the DOJ and other federal agencies from enforcing the joint guidance. (*State of Texas v. United States* (N.D. Tex. Aug. 21, 2016, No. 16-00054).) The plaintiffs in the case include the states of Texas, Alabama, Wisconsin, West Virginia, Tennessee, Arizona, Maine, Oklahoma, Louisiana, Utah, Georgia, Mississippi, and Kentucky. While only certain states are plaintiffs in this case, and the issuing court is located in Texas, the preliminary injunction states that it applies to "all states," thus appearing to enable states across the nation to "invoke" the preliminary injunction as a basis to halt OCR and/or DOJ actions regarding enforcement of the joint guidance. This said, *the injunction also expressly notes that its effect does not reach state laws on point.*

In sum, the above and other now-pending federal court lawsuits challenge OCR's interpretation of the Title IX regulations in two primary respects: (1) that the interpretation goes beyond the scope and intent of Title IX, hoping for a different ruling than that in *G.G.*; and (2) that the interpretation, which permits students to access restrooms and locker rooms based upon their gender identity as opposed to biological birth sex, violates the constitutional privacy rights of gender-conforming students using those facilities. None of these lawsuits, filed in Illinois, Texas,

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North Carolina and elsewhere, have resulted in a final decision on the merits, and no final decision by these courts would have a binding effect in California with regard to California law.

Where does this leave the status of transgender student rights relative to California schools and students?

First, protection of transgender students' rights under Education Code sections 220, 221.5(f), and other provisions, is controlling state law in California. Discrimination against students based upon their gender identity in school programs and activities, including with respect to access to restrooms and locker rooms, is unlawful. CDE's guidance is a helpful tool for compliance in this respect. Second, returning to the failed attempt to collect sufficient signatures to put AB 1266 to a referendum vote on a statewide ballot, litigation over the signature count remains pending in Sacramento County Superior Court, and presents the possibility that at some point in the future after a final decision in that case, AB 1266 might be tested by the state's voters. Unless or until that happens, the current state of the law remains in place.

Third, in terms of federal law, at this time, it is unclear how the federal government will proceed with regard to states and school districts within states that are *not parties* to the "nationwide injunction" case, *State of Texas v. United States* noted above, including California and its schools districts. An emergency appeal of the court's preliminary injunction by the defendant federal agencies is anticipated. If the injunction is stayed, or limited in scope only to those states that are parties to the case, California school districts will continue to be subject to compliance with the federal joint guidance through OCR complaint investigations and the State's Federal Program Monitoring Process. Regardless, it is very important to keep in mind that the joint guidance is consistent with the CDE's interpretation and recommended application of California law.

With all of this in mind, school districts should consider express Board policies and regulations and/or, at minimum, internal operating procedures, which are designed to address the needs and legal rights of transgender students, while also ensuring for options or accommodations to address privacy-related requests by non-transgender students. Policies, regulations and/or procedures may address: program and activities access; student privacy; student name and pronoun use; student records; procedures for handling gender-identity related requests; necessary school officials for working with transgender students and their families on requests and needs; protocol for responding to inquiries by third parties regarding transgender students; dress codes; athletic participation. In the facilities context, school districts must plan and provide program and activities access. At the elementary grade levels, it means providing restroom access. At the secondary grade levels, locker room access must also be considered. Access must be accomplished through nondiscriminatory policy (as addressed above), but additional options may be provided through design alternatives to protect a student's privacy and ensure a safe environment.

What about design considerations-modernization, new construction and costs?

It is no secret that financial resources for construction have been limited in recent years, constraining the options available for school districts to address facilities access. To comply with state law, school districts have been employing low cost solutions to provide necessary access through smart policymaking (as addressed in this article)-which is necessary notwithstanding other facilities options a school district might make available to its students. But, as school districts undertake modernization of their facilities and new construction, it is critical to stay abreast of legal requirements, establish policies that are legally compliant and sensitive to community interests, and that districts start the necessary dialogue early with project architects so there is a clear understanding of desired approach. This can be accomplished by including specific standards in a school district's educational specifications-which provide guidance to the project architect undertaking a specific modernization or new construction design. For instance, a school district may prescribe standards in its educational specifications to include female, male and gender neutral restrooms; or that each locker room shall include all or a certain number of privacy changing stalls. Setting educational specifications will help reduce design costs in the future and-along with sound policymaking that ensures legally required access notwithstanding facilities options-may reduce legal risk, in the future.

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