

Issue 9

May 1, 2014



Dear ,

Please find below the HK School Law Monthly Newsletter for May 2014. We appreciate your interest and look forward to hearing from you soon.

Thank you to everyone who has registered for the EdTec and HK School Law Annual Summer Seminar to date. We look forward to meeting you and discussing critical legal updates for charter school operators, administrators, board members and HR personnel. This year's Seminar is in beautiful Lake Arrowhead, so we encourage you to schedule a weekend getaway and enjoy some much need respite.

If you like this newsletter, [please forward it to an interested friend!](#)

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AB 1266: SCHOOL SUCCESS AND OPPORTUNITY ACT

OVERVIEW

Signed into law on August 12, 2013, and effective January 1, 2014, Governor Jerry Brown's AB 1266 School Success and Opportunity Act ("SSOA") extends statewide rights to transgender students to use facilities and fully participate in all school programs and activities that match their gender identities.

The SSOA is a landmark law making it clear that California public schools have a responsibility to ensure that all of their students—regardless of gender identity—can access school-based resources. While several of California's largest school districts have already adopted gender-inclusive policies prior to the bill's passage, many of the state's nearly 1,000 school districts did not and continued to separate transgender students from their peers or required them to enroll in and attend classes that conflicted with their gender identity. The SSOA clarifies the state's existing nondiscrimination laws and is designed to protect members of the lesbian, gay, bisexual, and transgender or LGBT community from exclusion from physical education, athletic teams, and other school activities and facilities.

Please see the [What You Need To Do](#) section of this newsletter for further information about practical next steps for charter school operators.

OVERVIEW AND COURT CHALLENGES

Existing law prohibits public schools from discriminating on the basis of specified characteristics, including gender, gender identity, and gender expression, and specifies various statements of legislative intent and the policies of the state in that regard. Existing law requires that participation in a particular physical education activity or sport, if required of pupils of one sex, be available to pupils of each sex.

This bill would require that a pupil 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.

Attempted court challenges to the law have been unsuccessful. Plaintiffs in the California Education Committee, LLC, et al. v. Jack O'Connell sought to challenge the definition of "gender" in the nondiscrimination provisions of the Education Code as amended through SB 777 (Kuehl), arguing that SB 777 placed "educators in the impossible position of (1) reading the minds of individuals to determine the individual's self-defined sexual identity so as not to inadvertently discriminate against an individual based upon their self-defined sex and (2) protecting the privacy and safety of all students from persons of the opposite sex." Additionally, plaintiffs argued that a particular student's privacy would be invaded because the school district "will allow transgender students to use whatever facility they identify with." The State Superintendent of Public Instruction (SPI) filed a demurrer and moved to dismiss the case. The Sacramento Superior Court granted the motion to dismiss the case for plaintiffs' failure "to state facts sufficient to constitute a cause of action."

In an Amici Curiae submitted in support of the demurrer filed by the then SPI, the National Center for Lesbian Rights, Equality California, and Gay-Straight Alliance argued that "subjective discomfort in the presence of transgender individuals does not create a protected privacy interest" and pointed out that "claims of discomfort in the presence of a minority group propped up decades of racial segregation in housing, education, and access to public facilities like restrooms and drinking fountains."

Furthermore, the Amici Curiae brief noted that in a discrimination case brought by a transgender student, a Massachusetts court held that school officials discriminated based on gender when they applied the school's dress code to forbid the plaintiff, who had a female gender identity, from wearing girls' clothes. The court wrote that it could not allow the stifling of the student's selfhood merely because it would cause some members of the community discomfort and concluded that the school could not place restrictions on transgender students that were not placed on other female students. Lastly, the Amici brief argued that "a non-discriminatory policy permitting transgender students to use facilities that correspond to their consistently expressed gender identity would have little or no effect on the privacy interests of other students because schools can easily provide reasonable accommodations to balance the privacy interests of all students."

PURPOSE OF THE LAW

Proponents of the law argue that pupils who are unfairly denied access to facilities on an equal basis with their peers can suffer physical, psychological and academic harm. The SSOA extends this logic to students with transgender identities. For example, an eight-year-old transgender girl in a suburban school district who was told to use a nurse's restroom intentionally avoided drinking and eating certain food to avoid having to use the restroom, rather than face questions from her classmates as to why she would not use a girl's restroom. As another example, a transgender boy attending a middle school in the Bay Area was told he had to use the nurse's restroom and was prohibited from entering a boy's restroom. The pupil felt more comfortable using the boy's restroom and subsequently received detention. The boy was also threatened with suspension from school for defying school authorities.

A 2009 national school climate survey indicated that lesbian, gay, bisexual, and transgender (LGBT) youths largely felt unsafe at school, and were more than three times as likely as other students to have missed class or an entire day of school because of feeling unsafe or uncomfortable. Situations such as these prevent transgender students from getting the credits they need to graduate on time while others simply drop out of school. The survey authors wrote, "All students should have a fair opportunity to participate in school programs, activities and facilities. Yet transgender young people often must overcome significant stigma and challenges. This bill [the SSOA] would ensure that all pupils, including those who are transgender, have equal access to all educational opportunities and have the chance to fully participate and succeed in school and graduate on time with their classmates."

Similarly, a 2010 study by the National Center for Transgender Equality and the Gay and Lesbian Task Force found that nearly 60 percent of transgender and gender-nonconforming students reported being bullied or assaulted in school because of their gender identity. The Center argues that such harassment and violence leads to both immediate and long-term adverse outcomes for the students, including disproportionately high rates of suicide, homelessness, and illness. As a result of these and

other studies, some groups and government agencies have already adopted anti-discrimination policies similar to the requirements of the SSOA.

In 2012, for example, the California Interscholastic Federation (CIF), the body that governs 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."

In addition, several school districts, including San Francisco Unified School District and Los Angeles Unified School District, already have policies prohibiting discrimination against transgender youth and allow youth to participate in activities and use facilities associated with his or her gender. LAUSD, for example, determines student eligibility on a case-by-case basis, verifying that a student's gender identity has been both "consistent" and "persistent."

AROUND THE COUNTRY

Other states also have regulations or agency-specific rules that apply to schools in a manner similar to AB 1266.

In June, the Colorado civil rights division ruled in favor of Coy Mathis, a 6-year-old transgender student who was born a boy and now identifies herself as a girl. The agency sided with Mathis' parents, who complained that her elementary school, in Fountain, had violated her civil rights by barring her from the girls' restroom.

In addition to Colorado, transgender facilities access gained renewed attention on January 30, 2014, when Maine's Supreme Judicial Court ruled that schools in the state must allow students to use the restrooms for the gender with which they identify.

At the federal level, transgender advocates have called for clearer federal guidelines from the U.S. Department of Education on how federal Title IX nondiscrimination provisions apply to transgender and "gender nonconforming youth" in public schools. While the agency has included transgender youth in its guidance for addressing bullying, the Office of Civil Rights has not yet issued any specific policy guidance on issues like school facilities and gender-segregated activities. Still, the Office has worked to resolve complaints regarding transgender students, including a complaint filed and resolved in Arcadia, Calif., before California's new transgender law was enacted.

AMENDMENTS TO THE EDUCATION CODE APPLY TO CHARTER SCHOOLS

The SSOA amends section 221.5 of the Education Code to read:

(a) It is the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses.

(b) A school district may not prohibit a pupil from enrolling in any class or course on the basis of the sex of the pupil, except a class subject to Chapter 5.6 (commencing with Section 51930) of Part 28 of Division 4 of Title 2.

(c) A school district may not require 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.

(d) A school counselor, teacher, instructor, administrator, or aide may not, on the basis of the sex of a pupil, offer vocational or school program guidance to a pupil of one sex that is different from that offered to a pupil of the opposite sex or, in counseling a pupil, differentiate career, vocational, or higher education opportunities on the basis of the sex of the pupil counseled. Any school personnel acting in a career counseling or course selection capacity to a pupil shall affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. The parents or legal guardian of the pupil shall be notified in a general manner at least once in the manner prescribed by Section 48980, in advance of career counseling and course selection commencing with course selection for grade 7 so that they may participate in the counseling sessions and decisions.

(e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.

(f) 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.

Education Code section 235 applies Education Code 221.5 to charter schools.

POSSIBLE CHALLENGES AHEAD

A [coalition opposing the law](#) failed to gather enough valid signatures in an effort to place the law up for a vote in the November elections. Last November, the coalition submitted over 600,000 signatures in support of a referendum. An initial random count of eligible signatures led to the process of validating all the signatures, but the final count of validated signatures came up lacking. The group has promised to continue to challenge implementation of the law.

WHAT YOU NEED TO DO

Adopting a transgender school policy that conforms to the SSOA's requirements would be an important first step.

As a necessary next step, education of staff on the requirements of the SSOA would be highly recommended to avoid claims of discrimination for violations of the law.

Finally, appropriate disciplinary investigatory and disciplinary procedures should be ensured when allegations of discrimination under the SSOA are raised.

We would stress that you consult with legal counsel prior to implementation of any of these policies, procedures or educational initiatives. The new law is certain to raise important questions by school staff and administrators, as well as students and parents, and seeking proper legal guidance to ensure compliance and avoid claims of discrimination will be essential.

QUESTIONS?

As always, if you have questions about this newsletter or any other matter, please contact us at any time for guidance.

Regards,

HK School Law

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