

Students

Nondiscrimination/Harassment

BP 5145.3(a)

Note: The following mandated policy reflects various provisions of state and federal law which prohibit discrimination against students in educational programs and activities based on certain actual or perceived characteristics of an individual, including Education Code 220, which prohibits discrimination based on race, nationality, ethnicity, gender, gender identity, gender expression, sex, sexual orientation, religion, or any other characteristic contained in the definition of hate crimes in Penal Code 422.55; Title VI (42 USC 2000d-2000e-17), which prohibits discrimination based on race, color, or national origin; Title IX (20 USC 1681-1688), which prohibits discrimination based on sex, gender, gender identity, pregnancy, and parental status; the Age Discrimination Act of 1975 (42 USC 6101-6107), which prohibits discrimination based on age; and Title II (20 USC 12101-12213) and Section 504 (29 USC 794), which prohibit discrimination based on disability. Education Code 260 gives the Governing Board primary responsibility for ensuring that district programs and activities are free from discrimination based on age or any of these characteristics. See also BP 0410 - Nondiscrimination in District Programs and Activities.

Note: Moreover, this sample Board policy and the accompanying administrative regulation reflect the statutory right of a transgender student to participate in sex-segregated educational programs and use facilities consistent with his/her gender identity as specified in Education Code 221.5, best practices based on existing state and federal law, and regulatory agency guidance such as the May 2016 Dear Colleague Letter: Transgender Students jointly issued by the U.S. Department of Justice's Civil Rights Division and U.S. Department of Education's Office for Civil Rights (OCR). Though OCR's enforcement of the May 2016 Dear Colleague Letter has been enjoined by a federal court, many of the recommended practices have already been adopted by California school districts to reflect state law protecting the rights of transgender students. Districts with questions about the rights of transgender and gender-nonconforming students should consult legal counsel as appropriate. For more information on the rights of transgender students, see CSBA's policy brief Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students and its Final Guidance Regarding Transgender Students, Privacy, and Facilities.

Note: Education Code 234.1 mandates that districts adopt policy prohibiting, at school or in any school activity related to school attendance or under the authority of the district, discrimination, including discriminatory harassment, intimidation, and bullying, based on the foregoing characteristics. The California Department of Education (CDE), through its Federal Program Monitoring process, reviews districts' uniform complaint procedures (UCP) and other anti-discrimination policies and practices to ensure compliance with these requirements. In addition, OCR is responsible for the administrative enforcement of federal laws and regulations prohibiting discrimination on the basis of race, color, national origin, sex, disability, and age in programs and activities that receive federal financial assistance from the department, and requires the adoption of nondiscrimination policies and complaint procedures.

Note: CSBA staff received feedback and comment from representatives of CDE and OCR regarding this policy and the accompanying regulation as they relate to the UCP requirements. As a result, the sample policy and regulation have been drafted to go beyond the minimal requirements under California's UCP laws and regulations in an attempt to address issues and concerns raised by CDE and OCR. While CDE and OCR have not approved or signed off on them, CSBA believes that the additional details provided herein may help school districts and county offices of education during any compliance check by CDE or in the event that a CDE or OCR investigation occurs.

The Governing Board desires to provide a safe school environment that allows all students equal access and opportunities in the district's academic, extracurricular, and other educational support programs, services, and activities. The Board prohibits, at any district school or school activity, unlawful discrimination, including discriminatory harassment, intimidation, and bullying, targeted at any student by anyone, based on the student's actual or perceived race, color, ancestry, national origin, nationality, ethnicity, ethnic group identification, age, religion, marital or parental status, physical or mental disability, sex, sexual orientation, gender, gender identity, or gender expression or association with a person or group with one or more of these actual or perceived characteristics.

Note: Education Code 234.1 prohibits unlawful discrimination in school-related activities and when it affects school attendance. However, OCR has clarified in several publications that conduct that occurs off campus may have an adverse effect on a student at school (i.e., create a "hostile environment" for the student). When that happens, the district has an obligation to investigate and to take steps to protect the student.

This policy shall apply to all acts related to school activity or to school attendance occurring within a district school, and to acts which occur off campus or outside of school-related or school-sponsored activities but which may have an impact or create a hostile environment at school.

(cf. 0410 - Nondiscrimination in District Programs and Activities)
 (cf. 5131 - Conduct)
 (cf. 5131.2 - Bullying)
 (cf. 5137 - Positive School Climate)
 (cf. 5145.9 - Hate-Motivated Behavior)
 (cf. 5146 - Married/Pregnant/Parenting Students)
 (cf. 6164.6 - Identification and Education Under Section 504)

Unlawful discrimination, including discriminatory harassment, intimidation, or bullying, may result from physical, verbal, nonverbal, or written conduct based on any of the categories listed above. Unlawful discrimination also includes the creation of a hostile environment through prohibited conduct that is so severe, persistent, or pervasive that it affects a student's ability to participate in or benefit from an educational program or activity; creates an intimidating, threatening, hostile, or offensive educational environment; has the effect of substantially or unreasonably interfering with a student's academic performance; or otherwise adversely affects a student's educational opportunities.

Note: In addition to the types of prohibited student conduct described below, prohibited conduct also includes different treatment of students with respect to the provision of opportunities to participate in school programs or activities or the provision or receipt of educational benefits or services. See BP 0410 - Nondiscrimination in District Programs And Activities.

Unlawful discrimination also includes disparate treatment of students based on one of the categories above with respect to the provision of opportunities to participate in school programs or activities or the provision or receipt of educational benefits or services.

The Board also prohibits any form of retaliation against any individual who reports or participates in the reporting of unlawful discrimination, files or participates in the filing of a complaint, or investigates or participates in the investigation of a complaint or report alleging unlawful discrimination. Retaliation complaints shall be investigated and resolved in the same manner as a discrimination complaint.

Note: Pursuant to Education Code 234.1 and 34 CFR 106.8, a district is required to adopt and publicize its nondiscrimination policies to the school community. The following paragraph may be modified to reflect district practice.

Note: In addition, in its October 2010 Dear Colleague Letter: Harassment and Bullying, OCR identifies training of the school community as one of the key measures for minimizing discriminatory and harassing behavior in school. See the accompanying administrative regulation for specific measures to prevent discrimination and facilitate students' access to the educational program.

The Superintendent or designee shall facilitate students' access to the educational program by publicizing the district's nondiscrimination policy and related complaint procedures to students, parents/guardians, and employees. He/she shall provide training and information on the scope and use of the policy and complaint procedures and take other measures designed to increase the school community's understanding of the requirements of law related to discrimination. The Superintendent or designee shall regularly review the implementation of the district's nondiscrimination policies and practices and, as necessary, shall take action to remove any identified barrier to student access to or participation in the district's educational program. He/she shall report his/her findings and recommendations to the Board after each review.

(cf. 1312.3 - Uniform Complaint Procedures)
 (cf. 1330 - Use of Facilities)
 (cf. 4131 - Staff Development)
 (cf. 4231 - Staff Development)
 (cf. 4331 - Staff Development)
 (cf. 6145 - Extracurricular and Cocurricular Activities)
 (cf. 6145.2 - Athletic Competition)
 (cf. 6164.2 - Guidance/Counseling Services)

Regardless of whether a complainant complies with the writing, timeline, and/or other formal filing requirements, all complaints alleging unlawful discrimination, including

discriminatory harassment, intimidation, or bullying, shall be investigated and prompt action taken to stop the discrimination, prevent recurrence, and address any continuing effect on students.

Note: Policies related to discrimination must be consistent with the First Amendment right to free speech. Education Code 48950 prohibits a district from subjecting a high school student to disciplinary sanctions solely on the basis of speech or other communication that would be constitutionally protected if engaged in outside of campus. However, Education Code 48950 also specifies that the law does not prohibit discipline for harassment, threats, or intimidation unless constitutionally protected. Whether such speech might be entitled to constitutional protection would be determined on a case-by-case basis, with consideration for the specific words used and the circumstances involved. The district should consult legal counsel as necessary.

Students who engage in unlawful discrimination, including discriminatory harassment, intimidation, retaliation, or bullying, in violation of law, Board policy, or administrative regulation shall be subject to appropriate consequence or discipline, which may include suspension or expulsion when the behavior is severe or pervasive as defined in Education Code 48900.4. Any employee who permits or engages in prohibited discrimination, including discriminatory harassment, intimidation, retaliation, or bullying, shall be subject to disciplinary action, up to and including dismissal.

(cf. 4118 - Suspension/Disciplinary Action)
 (cf. 4119.21/4219.21/4319.21 - Professional Standards)
 (cf. 4218 - Dismissal/Suspension/Disciplinary Action)
 (cf. 5144 - Discipline)
 (cf. 5144.1 - Suspension and Expulsion/Due Process)
 (cf. 5144.2 - Suspension and Expulsion/Due Process (Students with Disabilities))
 (cf. 5145.2 - Freedom of Speech/Expression)

Record-Keeping

The Superintendent or designee shall maintain a record of all reported cases of unlawful discrimination, including discriminatory harassment, intimidation, or bullying, to enable the district to monitor, address, and prevent repetitive prohibited behavior in district schools.

(cf. 3580 - District Records)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination
 48900.3 Suspension or expulsion for act of hate violence
 48900.4 Suspension or expulsion for threats or harassment
 48904 Liability of parent/guardian for willful student misconduct
 48907 Student exercise of free expression
 48950 Freedom of speech
 48985 Translation of notices

49020-49023 Athletic programs
 51500 Prohibited instruction or activity
 51501 Prohibited means of instruction
 60044 Prohibited instructional materials
 CIVIL CODE
 1714.1 Liability of parents/guardians for willful misconduct of minor
 PENAL CODE
 422.55 Definition of hate crime
 422.6 Crimes, harassment
 CODE OF REGULATIONS, TITLE 5
 432 Student record
 4600-4687 Uniform complaint procedures
 4900-4965 Nondiscrimination in elementary and secondary education programs
 UNITED STATES CODE, TITLE 20
 1681-1688 Title IX of the Education Amendments of 1972
 12101-12213 Title II equal opportunity for individuals with disabilities
 UNITED STATES CODE, TITLE 29
 794 Section 504 of Rehabilitation Act of 1973
 UNITED STATES CODE, TITLE 42
 2000d-2000e-17 Title VI and Title VII Civil Rights Act of 1964, as amended
 2000h-2-2000h-6 Title IX of the Civil Rights Act of 1964
 6101-6107 Age Discrimination Act of 1975
 CODE OF FEDERAL REGULATIONS, TITLE 28
 35.107 Nondiscrimination on basis of disability; complaints
 CODE OF FEDERAL REGULATIONS, TITLE 34
 99.31 Disclosure of personally identifiable information
 100.3 Prohibition of discrimination on basis of race, color or national origin
 104.7 Designation of responsible employee for Section 504
 106.8 Designation of responsible employee for Title IX
 106.9 Notification of nondiscrimination on basis of sex
 COURT DECISIONS
 Donovan v. Poway Unified School District, (2008) 167 Cal.App.4th 567
 Flores v. Morgan Hill Unified School District, (2003) 324 F.3d 1130

Management Resources:

CSBA PUBLICATIONS

Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014

Final Guidance Regarding Transgender Students, Privacy, and Facilities, March 2014

Safe Schools: Strategies for Governing Boards to Ensure Student Success, 2011

FIRST AMENDMENT CENTER PUBLICATIONS

Public Schools and Sexual Orientation: A First Amendment Framework for Finding Common Ground, 2006

NATIONAL SCHOOL BOARDS ASSOCIATION PUBLICATIONS

Dealing with Legal Matters Surrounding Students' Sexual Orientation and Gender Identity, 2004

U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS

Dear Colleague Letter: Transgender Students, May 2016

Examples of Policies and Emerging Practices for Supporting Transgender Students, May 2016

Dear Colleague Letter: Title IX Coordinators, April 2015
Dear Colleague Letter: Harassment and Bullying, October 2010
Notice of Non-Discrimination, January 1999
WEB SITES

CSBA: <http://www.csba.org>
California Department of Education: <http://www.cde.ca.gov>
California Safe Schools Coalition: <http://www.casafeschools.org>
First Amendment Center: <http://www.firstamendmentcenter.org>
National School Boards Association: <http://www.nsba.org>
U.S. Department of Education, Office for Civil Rights:
<http://www.ed.gov/about/offices/list/ocr>