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**Student Identity
 And
 California Civil Rights**

Presented by:
 Kristopher L. Carpenter, Esq.
kcarpenter@mycharterlaw.com

THE CHARTER LAW FIRM

YM&C Firm Overview

- Partners have over 100 years of collective experience working with charter schools
- 28 attorneys working with charter schools throughout the state in all areas of charter school law (e.g., employment/labor, special education, nonprofits, litigation, audits, facilities, etc.)
- Represent most of California's charter schools
- Conduct workshops for charter schools in all areas of legal compliance

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The Current Landscape

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The Current Landscape



- 18 States have High or Medium Strength “Gender Identity” Laws. (TGLC)
- Expanding federal recognition of rights (Hodges v. Obergefell)
- Failure of legal challenges to non-discrimination laws.
- People are feeling safer to come out as tolerance continues to increase.
- Many negative stereotypes perpetrated by media and sensationalists.

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The Current Landscape



- 80% of transgender students feel unsafe at school due to their gender expression.
- 78% will suffer some kind of harassment, bullying, or mistreatment.
- More than 50% will have attempted suicide by age 20.
- 12% will be sexually assaulted at school by either a student or staff member.

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Developments: USDOE



- April 29, 2014 – USDOE issues supplement to its sexual harassment guidelines interpreting Title IX’s discrimination prohibition to encompass gender identity and gender expression, and that it would accept complaints on that basis.
- November 2, 2015 – USDOE OCR issues findings that Illinois’ District 211 violated Title IX by forcing a transgender student to use a separate “locker” room. OCR reaffirms that Title IX prohibits sex discrimination on the basis of gender identity. (OCR Case 05-14-1055.)
- January 7, 2015 – USDOE confirms stance in a publicly released letter responding to an attorney’s request for clarification.
- May 13, 2016 – USDOE issues guidance on transgender student rights and discrimination based on gender identity.
- **February 22, 2017 – USDOE retracts the May 13, 2016 Guidance Letter. However, the April 29, 2014 guidance and November 2, 2015 OCR ruling remain in effect.**

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**Developments:
Federal Court of Appeals and
US Supreme Court**



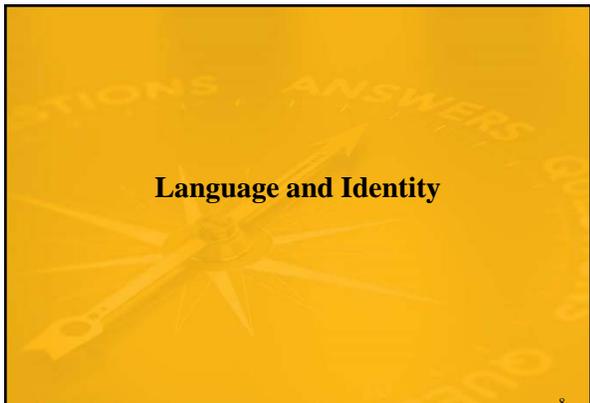
- **G.G. v. Gloucester County School Board (822 F.3rd 709 – 4th Circuit Court of Appeals - April 19 2016.)**
 - Transgender student appeals and successfully overturns a lower court decision stating a school district policy requiring student’s use the bathroom/locker room of their biological sex was not discrimination under Title IX.
 - Court ruled that Title IX requires schools to allow transgender students access to restroom facilities in accordance with their gender identity.
 - Significant as it is the first Federal Appellate Court decision to rule on and uphold the interpretation of Title IX as protecting transgender individuals.
 - School Board appealed to the U.S. Supreme Court, which stayed the ruling on August 3, 2016.
 - March 6, 2017 - U.S. Supreme Court remands the case without hearing back to the 4th Circuit to rehear the case in light of the February 22, 2017 retraction of the USDOE Guidance Letter. (136 S. Ct. 2442.)

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Language and Identity



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Terms



- **“Gender Identity”**
 - An individual’s internal sense of being male, female, or something else. Since gender identity is internal, one’s gender identity is not necessarily visible to others.
- **“Gender Expression”**
 - How a person represents or expresses one’s gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics.

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Terms



- “Transgender”
 - 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 the person’s assigned sex at birth. (5 CCR 4910(k).)
 - Adjective used to describe a person whose gender identity or expression is different from that traditionally associated with an assigned sex at birth.
- “Gender Non-Conforming”
 - Adjective used to describe a person whose gender expression differs from stereotypical expectations.

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Pronouns



- A student has a **right** to the use of his or her preferred pronoun at school and in class
 - Intentional use of the non-preferred pronoun is considered gender identity harassment.
 - Don’t assume a preferred pronoun; ask
 - He/Him/His; She/Her/Hers; They/Them/Theirs
- A student has the **right** to self-identify.
 - Preferred pronoun, name (e.g., “John” to “Janet”, or “Kelly” to “Kyle”), and gender should be used in all non-legal documentation.
 - Class Role Sheets
 - References by Staff

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Confirming Identification



- The legislative history of AB1266 (Cal. Ed. Code section 221.5) and the policies that inspired the law provide excellent guidance on determining whether a student has a “genuinely-held gender identity” through a four-pronged analysis of:
 1. The student’s medical history (if revealed);
 2. The student’s care or treatment of the gender-related identity they express;
 3. The student’s consistent and uniform assertion of the gender identity at school; and
 4. Any other evidence or actions that indicate the identity is sincerely held and/or a part of the person’s core identity.

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**California
Student Identity Law**



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The California Constitution



- Article I, Section 1: “All people are by nature free and independent and have inalienable rights. Among these are ... pursuing and obtaining **safety, happiness, and privacy.**”
 - Including transgender students
- Article I, Section 31(a): “The State shall not discriminate against ... any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of ... public education”



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Title IX



- Federal civil rights law prohibiting discrimination based on sex for all schools receiving any federal funds.
- April 29, 2014 – US Department of Education Office of Civil Rights issues new guidance:
 - “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation.”
- Transgender students have the right to make complaints to the OCR for discrimination, which can result in investigation.



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Title IX Cont.



- Title IX affects all areas of school operations and requires the following for compliance:
 - Comparable educational opportunities made to both girls and boys, including college and career readiness, STEM, and the arts;
 - Equal treatment of students, regardless of gender, in all programmatic areas, including extra-curricular activities, discipline, and counseling and guidance.
 - Equal access to athletic opportunities and benefits at all levels.
 - Enforcement of the prohibition against sexual or gender-based harassment, bullying, or violence.



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California Education Code 220



- **Non-Discrimination Requirement for All Public Schools**
- “No person shall be subjected to discrimination on the basis of disability, gender, **gender identity**, **gender expression**, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 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.”
- **Mandatory part of your charter petition**
 - (Ed. Code 47605(d)(1).)



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Cal. Education Code 221.5



- “Sex Equity in Education Act” passed in 2014
- Prohibits sex discrimination in classes, programs, counseling, and facilities.
 - Counselors are required to “affirmatively” explore careers and courses that are “nontraditional for that pupil’s sex.”
 - E.g. “girls in woodshop, boys in home economics”



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Education Code 221.5 (Cont.)



- 221.5(f) – Right to use facilities or participate in programs that are sex-segregated “consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”
 - “Genuinely-held” gender identity
 - Use of restrooms
 - Participation in sex-segregated activities
 - Dress codes
 - ALL CONDUCT RULES STILL APPLY



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Cal. Penal Code 422.55



- California’s “Hate Crime” statute – crimes motivated by the victim’s membership in a “protected class” carry harsher sentences.
- Protected Classes: Disability, Gender, Gender Identity, Gender Expression, Nationality, Race or Ethnicity, Religion, or Sexual Orientation.
 - “Actual or Perceived”
 - “Or Association With”



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PENALTIES & CONSEQUENCES



- Not complying with Title IX can cause the loss of ALL federal funding. (Although, as of yet, this has not happened.)
 - However, the **cost** of an OCR investigation can be astronomical, in both the financial and reputational senses.
- Cal. Ed. Code section 262.4 (1998) – Students (or parents, or organizations) can bring a lawsuit to enforce Ed. Code sections 220 and 221.5.
 - Any lawsuit is costly and the school can be required to pay substantial damages, including **punitive damages and full attorneys’ fees and costs.** (*Donovan v. Poway USD*, 167 Cal.App.4th 567.)
 - Generally should follow the Uniform Complaint Procedures, but are NOT required to do so. (Ed. Code section 262.3.)
- Violation of Ed. Code section 220 can result in revocation proceedings. (Ed. Code sections 47605(d)(1) and 47607(c).)
- Violation of Penal Code section 422.55 is considered a felony and provides for substantial fines. (Pen. Code sections 422.6, 422.7, 422.75)



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California Healthy Youth Act AB 329 (2015)



- New legislation effective January 2016 – establishes Ed. Code sections 51930-51939.
 - Requires all public schools provide “integrated, comprehensive, accurate, and unbiased sexual health and HIV prevention” instruction; at least once in middle school and once in high school, and allows for instruction in all public grades (K-12).
 - Requires all public schools to affirmatively recognize different sexual orientations, gender, gender expression, gender identity and explore the harms of negative gender stereotypes. (see, Ed. Code sections 51933(b)(6), (d)(1) and (d)(4); Ed. Code sections 220 and 221.5.)
 - Only considered “**sex education**” when there is instruction on “human development and sexuality, including education on pregnancy, contraception, and sexually transmitted infections” (Ed. Code. Section 51931(b).)



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“Opting-out” of Instruction



- Parents only have an “opt-out” right when their student is scheduled to have **sex education** during that academic year, meaning instruction specific to **human sexuality**. (Ed. Code section 51937.)
 - The right to “opt-out” “... does not include the right to restrict the flow of information in the public schools. Parents do not have a fundamental due process right generally to direct how a public school teaches their child.” (*Fields v. Palmdale School District* (9th Cir., 2006) (447 F.3d 1187).)
- At the beginning of the school year, the school must notify parents of students who will be required to take sexual education instruction, and allow for the parent to:
 - View the sex education curriculum and instructional materials
 - Affirmatively opt-out and request that their student not receive such instruction.
- **Diversity and tolerance curricula are not “sex education”** and California law explicitly provides that “instruction or materials that discuss gender, sexual orientation, or family life and do not discuss human reproductive organs and their functions” are not subject to the parental notice and opt-out laws. (Ed. Code section 51932(b).)



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Confidentiality



- Personally identifiable student information is subject to strict confidentiality laws, and thus
 - **Federally:** Family Educational Rights and Privacy Act (20 U.S.C. section 1232g; 34 CFR Part 99.)
 - Allows only for the disclosure of “directory information” (see, RAFS Educational Records and Student Information Policy.)
 - Parent’s may “opt-out” to remove their student’s “directory information” from disclosure.
 - **State:** California Constitution, Article 1, Section 1; California Information Practices Act (Civil Code section 1798 et seq.); Ed. Code sections 49062, 49073.1, 49073.6 et seq., and 49073.1, among others.
- A school is legally prohibited from revealing or providing notice to parents regarding other students’ personally identifiable information
 - “information that, alone or in combinations, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify a student with reasonable certainty.”



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Selected Sources and Resources

- Youth Suicide Prevention Program
- American Society of Suicidology
- Federal Office for Victims of Crime
- California Safe Schools Coalition
- National Center on Safe Supportive Learning Environments
- Gay, Lesbian & Straight Education Network
- Gay and Lesbian Alliance Against Defamation
- Gay Straight Alliance Network
- Transgender Law Center
- Trans Student Educational Resources
- National Center for Transgender Equality
- National Gay and Lesbian Task Force
- Lambda Legal



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**QUESTIONS AND
RESPONSES**

**THANKS FOR
ATTENDING TODAY!**



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THE CHARTER LAW FIRM



SACRAMENTO OFFICE:
855 UNIVERSITY AVENUE
SUITE 190
SACRAMENTO, CA 95825

LOS ANGELES OFFICE:
8200 LANKERSHAW BLVD.
SUITE 370
NORTH HOLLYWOOD, CA 91601

SAN DIEGO OFFICE:
891 CAMINO DE LA REINA
SUITE 910
SAN DIEGO, CA 92108

WALNUT CREEK OFFICE:
300 YONKOD VALLEY ROAD
SUITE 190
WALNUT CREEK, CA 94596

CONTACT:
916.648.1400
INFO@MYCHARTERLAW.COM
WWW.MYCHARTERLAW.COM

