

Berkeley Unified School District

Board Policy

Nondiscrimination/Harassment

BP 5145.3

Students

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 disability, race, nationality, immigration status, ethnicity, gender, gender identity, gender expression, sexual orientation, religion, or any other characteristic contained in the definition of hate crimes in Penal Code 422.55; Government Code 11135, which prohibits discrimination based on all the foregoing characteristics and on sex, color, ancestry, age, medical condition, marital status, and an individual's genetic information; 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 the characteristics listed in Education Code 220. 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 one's gender identity as specified in Education Code 221.5, and best practices based on existing state and federal law. 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 Updated Legal Guidance: Protecting Transgender and Gender Nonconforming Students Against Sex Discrimination.

Note: Education Code 234.1 mandates that districts adopt policy prohibiting discrimination which applies to all acts related to school activity or school attendance occurring within a school or under the authority of the district, 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, the U.S. Department of Education's Office for Civil Rights (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: 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 constituting unlawful discrimination or harassment 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.

The Governing Board desires to provide a safe school environment that allows all students equal access to 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, nationality, national origin, immigration status, ethnic group identification, ethnicity, age, religion, marital status, pregnancy, parental status, physical or mental disability, medical condition, sex, sexual orientation, gender, gender identity, gender expression, or genetic information, or association with a person or group with one or more of these actual or perceived characteristics.

(cf. 0410 - Nondiscrimination in District Programs and Activities)

(cf. 5131 - Conduct)

(cf. 5131.2 - Bullying)

(cf. 5137 - Positive School Climate)

(cf. 5145.7 - Sexual Harassment)

(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 occurs when prohibited conduct 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 above, unlawful discrimination 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 106.9, a district is required to publicize its nondiscrimination policies to the school community. In addition, Education Code 234.6, as added by AB 34 (Ch. 282, Statutes of 2019), requires the district, starting in the 2020-21 school year, to make readily accessible on its web site its nondiscrimination, sexual harassment, suicide prevention, and other specified policies and information related to specified state and federal laws and resources. For further information regarding specific posting requirements, see "Measures to Prevent Discrimination" in the accompanying administrative regulation.

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. In addition, the Superintendent or designee shall post the district's policies prohibiting discrimination, harassment, intimidation, and bullying and other required information on the district's web site in a manner that is easily accessible to parents/guardians and students, in accordance with law and the accompanying administrative regulation.

Note: 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 following paragraph may be modified to reflect district practice.

The Superintendent or designee shall provide training and/or 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. The Superintendent or designee shall report the 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 - Dismissal/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

49060-49079 - Student records

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

Government Code:

11135 - Nondiscrimination in programs or activities funded by state

Penal Code:

422.55 - Definition of hate crime

422.6 - Crimes, harassment

Code of Regulations, Title 5:

432 - Student record

4600-4670 - 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

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

12101-12213 - Title II equal opportunity for individuals with disabilities

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

104.8 - Notice

106.8 - Designation of responsible employee for Title IX

106.9 - Notification of nondiscrimination on basis of sex

110.25 Prohibition of discrimination based on age.

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:**

Updated Legal Guidance: Protecting Transgender and Gender Nonconforming Students Against Sex Discrimination, March 2017

California Office of the Attorney General Publications:

Promoting a Safe and Secure Learning Environment for All: Guidance and Model Policies to Assist California's K-12 Schools in Responding to Immigration Issues, April 2018

First Amendment Center Publications:

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

U.S. Department of Education, Office for Civil Rights, Publications:

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

Dear Colleague Letter: Title IX Coordinators, April 2015

Resolution Agreement Between the Arcadia Unified School District, U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division, (2013) OCR 09-12-1020, DOJ 169-12C-70

Dear Colleague Letter: Harassment and Bullying, October 2010

Notice of Non-Discrimination, Fact Sheet, August 2010

U.S. Department of Health and Human Services Publications:

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, August 2003

Web Sites:

CSBA: <http://www.csba.org>

California Department of Education: <http://www.cde.ca.gov>

California Office of the Attorney General: <http://oag.ca.gov>

California Safe Schools Coalition: <http://www.casafeschools.org>

First Amendment Center: <http://www.firstamendmentcenter.org>

U.S. Department of Education, Office for Civil Rights: <http://www.ed.gov/about/offices/list/ocr>

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