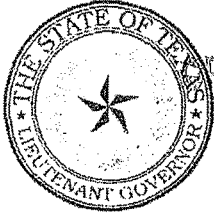


RECEIVED

MAY 31 2016



OPINION COMMITTEE *The Senate of*
The State of Texas

FILE # ML-48014-16
ID. # 48014

RQ-0107-KP

DAN PATRICK
LIEUTENANT GOVERNOR

CAPITOL OFFICE
State Capitol, Room 2E.13
Post Office Box 12068
Austin, Texas 78711
(512) 463-0001
Fax: (512) 463-8668

May 31, 2016

Via email to Opinion_committee@texasattorneygeneral.gov

The Honorable Ken Paxton, Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for an opinion regarding the legality of Fort Worth Independent School District's "Transgender Guidelines"/policy and whether Superintendent Kent Scribner had authority to unilaterally adopt said policy, without school board adoption and without public comment from parents and citizens

Dear Attorney General Paxton:

The Fort Worth Independent School District's Superintendent, Dr. Kent Scribner, has unilaterally adopted a new mandatory policy he dubs "Fort Worth ISD Transgender Student Guidelines" (attached and hereafter referred to as "policy") without adoption by school board vote and without public comment from parents and citizens. Under the threat of *adverse employment action* for failure to comply, this policy instructs school personnel to conceal from parents certain information I believe they are entitled to receive under the law.

In light of your pending lawsuit on similar subject matter directives from the federal government, and until the Texas Legislature can address the disruption, privacy and safety concerns this policy creates in allowing boys to share bathrooms, locker rooms, showers, and changing facilities with girls, I focus this request for your opinion on:

- 1) Does Superintendent Scribner's policy violate Chapter 26 of the Texas Education Code, or any other law, in its effort to keep student information from parents, and;
- 2) Did Superintendent Scribner have the authority to unilaterally adopt this policy without adoption by school board vote and without public comment?

Under this policy:

- All school personnel are required to acknowledge and not question the gender identity a student asserts, regardless of their assigned sex at birth, and states “no medical or mental health diagnosis or treatment is required to have a student’s gender identity recognized and respected.” (see policy, page 4)
- School personnel are required to “address the student by the name and pronoun that corresponds to his/her gender identity even in the absence of a court order legally changing his/her name or parent/guardian permission.” (see policy, page 4)
- Despite being required to *publicly* address the student while at school and outside the parents’ presence by the student’s name and pronoun that corresponds to his/her asserted gender identity, school personnel must keep the “student’s actual or perceived gender identity and expression private,” including from the student’s parents, and only share this information on a “need to know basis or as the student directs.” (see policy, page 5)
- “When contacting the parent or guardian of a transgender student, school personnel must use the student’s legal name and the pronoun corresponding to the student’s gender assigned at birth unless the student, parent, or guardian has specified otherwise.” (see policy, page 5)
- For official school records, recognizing name and gender cannot be legally changed absent a court order, personnel are told, “[u]ntil a legal name or gender change occurs, school personnel may use an ‘also known as’ description with the student’s preferred name.” (see policy, pages 4 and 5)
- For unofficial records, personnel are told, “[t]o the extent the school is not legally required to use a student’s legal name or gender on school records or other documents, all personnel must use the name and gender preferred by the student.” (see policy, page 5)
- When school records are requested by parents that are required to be released, but may contain information regarding a student’s actual or perceived gender identity, personnel are instructed to contact the school district’s Office of Legal Counsel. (see policy, page 5).

This policy's effort to conceal information from parents appears violative and in direct contravention to the spirit of Texas Education Code, Chapter 26.

Texas Education Code § 26.001 begins:

Parents are partners with educators, administrators, and school district boards of trustees in their children's education. Parents shall be encouraged to actively participate in creating and implementing educational programs for their children. Tex. Educ. Code § 26.001.

Superintendent Scribner's policy and the manner in which he unilaterally adopted it without board approval or public comment is quite inconsistent with the concept of parents partnering with administrators, educators and board trustees.

Furthermore, parents are guaranteed certain rights and are entitled access to *all* written records of a school district concerning their child, including, but not limited to, counseling records, psychological records, health and immunization information, teacher and school counselor evaluations, and reports of behavioral patterns. Tex. Educ. Code § 26.004.

Additionally, parents are entitled to full information regarding the school activities of their child and any attempt by any school district employee to encourage or coerce a child to withhold information from the child's parent is grounds for discipline. Tex. Educ. Code § 26.008.

In addition to a policy that focuses on removing parents from close involvement with their student children, I am deeply concerned that the very process for school board review, vote and adoption of new school district policy was circumvented here. If new mandatory policies that threaten adverse employment action for failure to comply can be unilaterally adopted by superintendents, why have elected school board trustees accountable to the voters?

I understand part of a superintendent's duties include preparing recommendations for policies to be adopted by the school board, and school boards and superintendents are to work together to establish district-wide policies. Tex. Educ. Code § 11.201 (7) and § 11.1512 (4). However, I find no authority vested in superintendents to also act as the school board for the purpose of district-wide policy adoption.

I expect the lawsuit you recently filed challenging similar subject matter directives from the federal government will clarify the controlling law at that level. It is my hope this opinion request will reaffirm the transparent partnership required by state law between parents, educators, administrators, and school board trustees, and will further affirm the appropriate means of consideration, review and adoption of any new district-wide policy.

The Honorable Ken Paxton

May 31, 2016

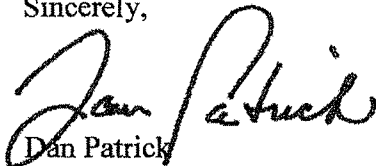
Page 4

I ask your opinion on:

- 1) Does Superintendent Scribner's policy violate Chapter 26 of the Texas Education Code, or any other law, in its effort to keep student information from parents, and;
- 2) Did Superintendent Scribner have the authority to unilaterally adopt this policy without adoption by school board vote and without public comment?

Thank you for all you do for Texas. I look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Patrick". The signature is written in a cursive, flowing style with a large initial "D".

Dan Patrick
Lieutenant Governor

**FORT WORTH INDEPENDENT SCHOOL DISTRICT
RECOMMENDED REGULATION
APPROVAL FORM**

| | |
|---|--|
| Department Office of Legal Services | Review and Approval |
| Date 4/19/2016 | <input checked="" type="checkbox"/> Reviewed by <u>[Signature]</u> Date <u>4-25-16</u> |
| Subject New Administrative Regulation "Transgender Student Guidelines" | <input checked="" type="checkbox"/> Reviewed by <u>[Signature]</u> Date <u>4-25-16</u> <input checked="" type="checkbox"/> Approved by <u>[Signature]</u> Date <u>4-19-16</u> <input type="checkbox"/> Approved by _____ Date _____ <input type="checkbox"/> Approved by _____ Date _____ <input checked="" type="checkbox"/> Approved by <u>[Signature]</u> Date <u>4/19/16</u> Dr. Kent P. Scribner, Superintendent |

COMMENTS SECTION

(Attach additional sheets as needed.)

District staff has developed the attached Transgender Student Guidelines. The guidelines have been reviewed and approved by Michael Steinert, Assistant Superintendent, Student Support Services; Valerie Carrillo, Chief Legal Counsel; and Georgi Roberts, Director, Health and PE. These guidelines are in alignment with Board Policy FFH (Local).

Fort Worth ISD Transgender Student Guidelines

Fort Worth Independent School District (the "District") seeks to ensure the health and safety of all students, prevent discrimination and bullying, foster a conducive learning environment for all students, and provide equal access and opportunity to participate in all programs and activities. As such, the District adopts these Transgender Student Guidelines ("Guidelines"), which are mandatory for the 2015-2016 school year and continuing thereafter unless and until revised or revoked. Failure to comply with these Guidelines may result in adverse employment action.

Helpful Definitions

The following definitions are not meant to label individuals but to enhance our understanding of transgender issues and guide actions and discussion of related topics:

- Gender – a person's actual or perceived sex, which includes a person's perceived identity, appearance or behavior, whether or not that identity, appearance or behavior is different from that traditionally associated with a person's sex at birth
- Sex – the biological condition or quality of being female or male
- Gender Identity – a person's internal identification as female, male or a non-binary understanding of gender, regardless of one's assigned sex at birth
- Gender Expression – a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth
- Gender nonconforming – displaying a gender identity or expression that may differ from that typically associated with one's sex assigned at birth. A person's gender expression may differ from stereotypical expectations about how females and males are "supposed to" look or act. Gender nonconforming is not synonymous with transgender. Some, but not all gender nonconforming persons, identify as transgender.
- Transgender – a person who consistently and uniformly asserts a gender identity that is different from the person's sex at birth
- Transgender female – a person who is male at birth but identifies as female
- Transgender male – a person who is female at birth but identifies as male
- Preferred Gender Pronouns – the pronoun a person prefers to have used when referred to in conversation (e.g., a person with a traditionally male gender identity likely prefers he, him, and his)

- Transition – the process of aligning the external and internal identities, which may or may not include medical treatment

Transitions are not linear and may include any combination of physical, social and medical processes. Not all transgender people transition or transition in the same way. Most importantly, transitions are private and personal, and information about a transition should not be discussed unless conversation is initiated and led by the transgender person.

It is important to note that not all people will fit a particular definition or pattern. Instead of focusing on what definition applies to a particular person, school personnel are required to show respect for the student’s desires and wishes to the extent practical so as to foster a productive educational process for all.

Purpose of Guidelines

School support should be an integral part of educational and personal success. The District remains committed to the safety of all of its students. These Guidelines seek to ensure that no student experiences an unsafe or unwelcome learning environment. Transgender youth may experience additional challenges at school. Support from classmates and school personnel may help transgender students who otherwise feel ostracized or disengaged.

In light of the increasing number of known transgender students in schools as well as the growing support for research indicating that enforcing fixed notions of what it means to be a boy or a girl may have negative effects on children (especially when experienced in a learning environment), the District implements these Guidelines to provide direction for personnel to address issues that may arise concerning the needs of and challenges facing transgender students and to foster an inclusive and productive learning environment for all students.

Fort Worth ISD Current Policy

FFH (LOCAL) provides as follows:

| | |
|--------------------------------|---|
| STATEMENT OF NONDISCRIMINATION | The District prohibits discrimination, including harassment, against any student on the basis of race, color, religion, gender, sexual orientation, gender identity and expression, national origin, disability, or any other basis prohibited by law. The District prohibits dating violence, as defined by this policy. Retaliation against anyone involved in the complaint process is a violation of District policy and is prohibited. |
|--------------------------------|---|

REPORTING
PROCEDURES

STUDENT REPORT

Any student who believes that he or she has experienced prohibited conduct or believes that another student has experienced prohibited conduct should immediately report the alleged acts to a teacher, counselor, principal, other District employee, or the appropriate District official listed in this policy.

EMPLOYEE REPORT

Any District employee who suspects or receives notice that a student or group of students has or may have experienced prohibited conduct by an employee shall immediately notify the appropriate District official listed in this policy and take any other steps required by this policy.

If a student or group of students has or may have experienced prohibited conduct by a student, a District employee shall immediately notify the principal.

TITLE IX COORDINATOR

Reports of discrimination based on sex, including sexual harassment, may be directed to the Title IX coordinator. The District designates the following person to coordinate its efforts to comply with Title IX of the Education Amendments of 1972, as amended:

Name: Rufino Mendoza
Position: Director, Employee Relations
Address: 100 North University Drive, Fort Worth, TX 76107
Telephone: (817) 814-2790

These Guidelines provide guidance to ensure compliance with current Policy and to illustrate the District's commitment to ensuring a safe learning environment, specifically for transgender students.

Governing Law

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, is a federal civil rights law that prohibits discrimination on the basis of sex in any federally funded education program or activity. The Office of Civil Rights ("OCR") is the federal agency responsible for enforcing Title IX. OCR has provided written guidance that Title IX prohibits sex discrimination based not only on sex and sexual orientation but also on gender identity. Discrimination on the basis of sex, including sexual discrimination, sexual harassment, and sexual violence are prohibited by Title IX. School districts are subject to investigation and possible sanctions by OCR if a district knew or should have reasonably known about sex harassment or violence.

Guidelines

General Guidelines

The District requires all personnel to acknowledge the gender identity that each student consistently and uniformly asserts. No medical or mental health diagnosis or treatment is required in order to have a student's gender identity recognized and respected. School personnel must not question any student's sincerely held belief regarding his or her gender identity once established and known.

The District expressly prohibits any personnel from engaging in, encouraging, or failing to report discrimination or harassment based on sex, including but not necessarily limited to a student's gender identity, gender expression, gender transition, transgender status, or gender non-conformity.

The campus counselor will serve as a designated ally for students who wish to discuss these issues. The ally may help with questions and concerns voiced from students and school personnel regarding transgender or gender identity issues. Additionally, the ally may offer extra support for transgender students as they navigate their experience at school.

Names and Pronouns

Unless otherwise required by law (see recordkeeping below), school personnel must use the name and pronouns preferred by a student. Continued intentional misuse of a student's new name and pronouns, coupled with reference to the student's former gender, undermines the student's desires and is contrary to the District's goal of treating students with dignity and respect.

School personnel should address the student by the name and pronoun that corresponds to his/her gender identity even in the absence of a court order legally changing his/her name or parent/guardian permission. If school personnel are unsure how a student wants to be addressed in communications with a parent or guardian or in conferences with a parent or guardian, ask the student privately.

It is always appropriate to ask a student his/her preferred name and gender pronoun. This can set the tone for a more respectful and trusting relationship.

Recordkeeping

Official Records: School personnel may only change a student's name on official records when the name of the student is changed by appropriate court action, such as by a name change proceeding. Upon the submission of evidence of the appropriate court action, school personnel must change the student's official name in all school records to reflect the legal name change.

School personnel must change a student's gender on official records when the gender of the student is changed on his or her birth certificate. Upon the submission of evidence of an amended birth certificate, school personnel must change the student's official gender in all school records to reflect the legal change. The new name and gender is the official legal name and gender of the student for all purposes, including school registration.

Until a legal name or gender change occurs, school personnel may use an "also known as" description with the student's preferred name.

Unofficial Records: To the extent the school is not legally required to use a student's legal name or gender on school records or other documents, all personnel must use the name and gender preferred by the student.

Privacy and Confidentiality

All students have a right to privacy. This includes keeping a student's actual or perceived gender identity and expression private. School personnel may only share this information on a need-to-know basis or as the student directs. This includes sharing information with the student's parent or guardian. When contacting the parent or guardian of a transgender student, school personnel must use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise.

A name in a school's database is part of an official educational record and is therefore covered by the Family Education Rights and Privacy Act (FERPA). As set forth in the preceding section, official records may not be changed absent court order or other legal document. If a parent or guardian requests access to his/her student's educational records as defined by FERPA, access must be provided. A request by a parent or guardian for educational records under FERPA may include unofficial records directly related to the student, including records containing a student's actual or perceived gender identity. The Office of Legal Counsel should be advised when a request for student records is made and a transgender student's privacy may be of concern (e.g. when the student has not yet disclosed gender identity status to a parent or guardian).

Note, however, that private information about a student's gender identity may be provided to others without parental consent only if it is reasonably believed by personnel that providing this information would likely help to prevent anticipated harm to the student, whether such harm is anticipated to be brought by the student or by another. If an employee believes a student is in danger of such harm, the employee must contact the designated ally and/or the Office of Legal Counsel to assist in deciding to whom any disclosure might be appropriate.

When communicating to the media or community about issues related to gender identity, school personnel must contact or direct the person making the inquiry to the Communications Department (who will consult the designated ally before responding) rather than directly commenting on the issue. School personnel should direct inquiries from families or the immediate school community to the designated ally.

To ensure confidentiality when discussing a particular concern (e.g. conduct, discipline, grades, attendance or health), school personnel's focus must be specifically school-related and not on the student's gender identity or expression.

Student Transitions

In most cases, transitioning is a very private matter. Students may choose whether or not to have their parents participate in this process. In fact, notifying a parent or guardian carries risks for the student in some cases. School personnel must consider the health, well-being and safety of the transitioning student.

When appropriate, schools should work closely with a student and family in devising a plan regarding the confidentiality of the student's transgender status.

Prior to notifying any parent or guardian regarding the student's gender identity or any potential transition process, school personnel must work closely with the student to assess the degree to which, if any, the parent or guardian has been or will be involved in the process.

Restrooms and Related Facilities

Students must feel comfortable and safe in the use of restrooms and locker room facilities. Under no circumstances may a school require a student to use facilities that are potentially unsafe for the student.

If other students feel uncomfortable sharing a restroom with a transgender student or if a student has a need or desire for increased privacy, the school must allow the student(s) access to a single stall restroom, a gender neutral restroom, or the opportunity to visit the facility when other students are not present. The single-user restroom, however, must not be given as the only option for transgender students who need or desire increased privacy.

Any student who has a need or desire for increased privacy in a locker room facility may have access to a reasonable accommodation such as the following:

- a. Assignment of a student locker near the staff office or a supportive peer group;
- b. Use of a private area within the public area of the locker room facility (e.g., nearby restroom stall with a door or an area separated by a curtain);
- c. Use of a nearby private area; or

- d. A separate changing schedule.

Dress Code and Appearance

Dress codes must be applied to students transitioning to a different gender in the same way that they are applied to other students. Dress codes should not be used to prevent a transgender student from living full-time in the role consistent with his or her gender identity.

Gender-based Activities

Participation in gender-based activities is a valuable part of the education experience for all students. Specifically, transgender student-athletes must have equal opportunity to participate in sports.

Physical Education: For physical education classes that are gender-based, transgender students shall participate in physical education by their gender identity asserted at school.

Athletics: The District supports the participation of transgender students in all athletic activities. All students should have the opportunity to participate in athletics in a manner that is consistent and uniform with their gender identity, irrespective of the gender listed on a student's records or identification documents. The District's Athletic Director, in conjunction with the Superintendent of Schools, will make a decision in accordance with these Guidelines.

To determine whether participation of a transgender student athlete is appropriate, the District may consider the following:

- A written statement from the student affirming the consistent gender identity and expression to which the student self-relates;
- Documentation from individuals such as parents, friends, and/or teachers that affirm the student's gender identity; and
- University Interscholastic League ("UIL") regulations, if applicable.

Once a decision has been made by the District, the Athletic Director or other appointed school administrator may communicate that decision to the appropriate athletics' authority. Note, however, that the UIL or other governing athletic body may have ultimate authority to determine the team on which a student can participate in league play.

School Activities: All students have the right of equitable access to activities and programs in their school. Students may not be excluded from participation in, be denied the benefits of, or be subjected to harassment or other forms of discrimination on the basis of gender identity in any program or activity. These activities and programs may include, but are not limited to, cheer class, homecoming, prom, spirit day, celebrations, assemblies, acknowledgments, after school activities/programs, and all extra-curricular activities.

Creating a Supportive Environment

Administrators must affirmatively seek opportunities to be an example in abandoning gender references and creating an inclusive environment. School personnel must be role models of these guidelines. Wherever arbitrary gender dividers can be avoided, they must be eliminated. Calling students "students" or "scholars" instead of "boys and girls" may seem insignificant, but can make a notable difference to students who feel alienated because they do not identify as either of the two binary categories. Start the day with inclusive language, and stick with it. Educators should feature diversity in books, posters, and workbooks.

