Colorado Department of Education Guidance on Implementation of Proposition 134

Introduction

The Colorado Department of Education (Department or CDE) recognizes that implementing Proposition 134 presents challenges for schools, districts, students, families, and athletic programs. Many questions are left unresolved by the new statutory language, and future litigation or legislation may attempt to resolve issues presented by the new law.

Until such questions are resolved, CDE expects schools and districts to implement the law in a manner that best accomplishes all of the following:

- Complies with the statutory requirements of Proposition 134;
- Protects student privacy;
- Complies with the Colorado Anti-Discrimination Act, the requirements in section 22-1-143 related to harassment in schools, and other applicable state and federal laws and constitutional provisions; and
- Maintains a safe and inclusive environment for all students, by actively working to prevent and address harassment, bullying, intimidation, or public disclosure of confidential student information.

The questions below are intended to provide initial guidance **for K-12 public schools**. Nothing in this guidance creates new legal requirements beyond those established in statute. This guidance is subject to revision based on legislative changes or future review by a court.

General Requirements

1. What are the new statutory requirements in Article 60?

The passage of Proposition 134 adds a new Article 60 to title 25 of the Colorado Revised Statutes ("Article 60"). For K-12 public schools, Article 60 requires that the applicable governing board for each public school (e.g., local board of education, charter school board, or BOCES board) adopt a policy incorporating the following statutory requirements:

- An interscholastic or intramural athletic team or sport that is sponsored by a school or athletic association shall be expressly designated as for (1) males,

men, or boys; (2) females, women, or girls; or (3) coeducational or mixed (§ 25-60-103(1)(a)-(c));
- An interscholastic or intramural athletic team or sport sponsored by a school or athletic association that is designated for females, women, or girls shall not be open to a male student or participant (§ 25-60-103(2)(a));
- An interscholastic or intramural athletic team or sport sponsored by a school or athletic association that is designated for males, men, or boys shall not be open to a female student or participant unless there is no female team offered or available for such sport for such female student or participant (§ 25-60-103(2)(b));
- Any student may participate in coeducational or mixed teams or sports (§ 25-60-103(3));
- "Male" means a person whose biological reproductive system is organized around the production of sperm (§ 25-60-102(5));
- "Female" means a person whose biological reproductive system is organized around the production of ova (§ 25-60-102(3)); and
- An individual born with a diagnosis or disorder or difference in sex development must receive all legal protections and accommodations afforded under federal law (§ 25-60-105).

2. When do these statutory requirements go into effect?

Proposition 134 takes effect January 1, 2027. Section 25-60-104(1) requires districts to adopt implementing policies but sets no deadline, and § 25-60-104(2) directs the Commissioner to allow a reasonable time to comply. CDE will not consider a district that is developing its policy in good faith to have intentionally refused to comply. CDE understands that community feedback will be a critical component of the policy-development process.

Implementation Guidance

3. What actions demonstrate compliance with Article 60?

As the agency charged with enforcement of Article 60 for school districts, CDE believes that a school or district demonstrates compliance with Article 60 if it enacts a policy that contains the statutory requirements listed in question number one of this guidance. A school or district may reasonably trust that students, parents, and guardians will comply with school or district policies. If a school or district becomes aware that a student is competing on a team or in a sport inconsistent with the policy, the school or district should review question seven of this guidance.

4. Are public schools required to verify whether a child is male or female as defined by Article 60?

No. CDE does not read the measure to require physical examinations, genetic testing, medical documentation, or parent affirmations to determine the child's "biological reproductive system" and, therefore, whether the child is male or female as defined under Article 60. Doing so could implicate the constitutional rights of students and the right to be free from discrimination and harassment.

Therefore, schools and districts are not required to modify existing practices related to records, registration, or sports physicals.

5. What actions should not be taken?

Schools or districts should not undertake any of the following:

- Physical examinations conducted for the purpose of determining eligibility under Article 60;
- Visual inspections of a student's body;
- Requests for photographs of a student's body;
- Genetic testing;
- DNA testing or cheek swabs;
- Laboratory testing conducted solely for purposes of determining eligibility under Article 60;
- Affidavits regarding a student's biological reproductive system; or
- Questioning students regarding intimate medical information beyond what is ordinarily collected through routine athletic participation processes.

As a reminder, section 24-74.1-102 prohibits public schools and districts from collecting birth certificates. Moreover, Colorado permits the issuance of a new birth certificate with a different sex or gender designation. Thus, a student's current birth certificate does not necessarily reveal the student's sex assigned at birth.

6. Does the statute require schools or districts to establish a complaint process?

No. Article 60 does not require schools or districts to establish a complaint process for alleged violations of the statute. CDE recommends against establishing a complaint process.

If a school or district decides to implement an avenue for raising potential concerns with school or district compliance, it must be a confidential process that ensures

student privacy and protects students from bullying and harassment. For example, such a process would:

- Identify a confidential point of contact;
- Protect student privacy and ensure confidentiality;
- Prohibit public or private accusations or questioning regarding a student's eligibility and allow for disciplinary action of students or employees if the designated confidential process is not followed; and
- Consider using visitor and spectator codes of conduct as necessary to address harassing conduct that is targeted toward particular students.

7. What should a school or district do if a concern is raised?

Article 60 does not dictate or require procedures for responding to concerns.

However, it is expected that individuals will raise concerns given the number of examples nationally of transgender and cisgender students reporting harassment and bullying related to these issues. CDE recommends that schools and districts plan for how to respond to concerns in alignment with state and federal non-discrimination and student privacy rights.

If a concern is raised, the school or district should not take any of the actions described in question 5 of this guidance. Also, as noted below, it would be unlawful to share confidential information or student records with an individual raising concerns.

If a school or district knows that a student is out of compliance with the policy, CDE recommends a confidential meeting with the student's parent or guardian to privately discuss available participation options under the statutes.

8. How should a school or district ensure the other legal protections of students?

When implementing Article 60, schools and districts must also comply with other laws protecting the rights of students and families.

Under the Federal Educational Rights and Privacy Act (FERPA), a school may not disclose any confidential student record or information to any third party, including to a person who raised a concern, without prior written consent from a student's parent or, if applicable, from an eligible student who is 18 years of age. Information related to whether a student is male or female as defined in Article 60 and the student's gender identity, medical history, or athletic eligibility should be treated as a confidential student record. Thus, if a school or district implements athletic

registration paperwork with information from a physician, parent, or guardian regarding a student's sex as defined under Article 60, it will be a confidential educational record protected by FERPA.

Under the Colorado Anti-Discrimination Act, which prohibits discrimination in places of public accommodation, section 22-1-143, C.R.S., which prohibits harassment in public schools, and other applicable state and federal laws, all students remain entitled to a safe, supportive, and nondiscriminatory educational environment. Students must not be subjected to bullying, harassment, or retaliation because of sex, gender identity, gender expression, or any other protected characteristic. In certain circumstances, the school or district will be required to activate its procedures to address discrimination or harassment and offer supportive measures to students.

Article 60 presents a real risk that individuals will rely on subjective judgments about students' appearance or sex-based stereotypes and those judgments will unfairly burden a group of students on the basis of sex. Students should not be questioned or challenged based on perceptions of whether they appear sufficiently masculine or feminine, including judgments based on height, athletic build, hairstyle, voice, manner of dress, manner of expression, and other physical characteristics.

CDE acknowledges the difficult position of schools and districts due to unanswered questions about how to square Article 60 with other laws and constitutional rights.

9. Must a school or district change a student's educational records to comply with Article 60?

No. Article 60 addresses eligibility for participation in school-sponsored athletic teams and sports. The statute does not require schools or districts to amend educational records that are otherwise maintained in accordance with state and federal law.

Enforcement and Oversight

10. What role does CDE play in implementation?

Article 60 states:

> If the commissioner of education determines that any school district as defined in section 22-30-103(13) has intentionally refused to comply with this article [60], the

> commissioner shall notify the school district of the noncompliance and allow the school district a reasonable time to comply. If the commissioner determines, after such time has elapsed, that the school district is not in compliance, the commissioner shall take appropriate remedial action within the commissioner's authority.

CDE is currently evaluating the procedures it will use to implement this requirement. Any compliance review will be at the district policy level and will not entail review of an individual student's athletic eligibility. The commissioner's existing authority to address compliance is limited. In the context of Article 60, the commissioner does not have authority to:

- restrict a school district's funding based on compliance with Article 60;
- remove a student from a team or sport;
- declare certain teams, schools, or districts eligible or ineligible for sports competition; or
- change a school or district's plan type or accreditation rating.

11. What is the role of CHSAA in enforcement of the new statutes?

The new statutes do not confer any enforcement authority on CHSAA.

12. Is there a private right of action to bring a lawsuit against a school or district for failure to comply with Article 60?

No. The new statutory language does not create an avenue for filing a lawsuit against a school or district for violations of the statute. CDE recommends consulting with private legal counsel regarding any question about such rights.

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CDE acknowledges that schools and districts will likely have additional questions. CDE will continue to provide guidance as more information becomes available.