

LGBTQ-Inclusivity Requirements and How They Interact with Parental Opt-Out

The California Healthy Youth Act, Education Code (EC) §§ 51930-51939, which took effect January 1, 2016, requires school districts to provide students with integrated, accurate, and inclusive comprehensive sexual health and HIV prevention education at least once in middle school and once in high school. Among other things, the California Healthy Youth Act strengthened and updated Education Code requirements to ensure that students of all genders and sexual orientations are affirmatively included and reflected in instruction on healthy relationships and comprehensive sexual health and HIV prevention education.

California schools must provide LGBTQ-inclusive comprehensive sexual health and HIV prevention education.

Under the California Healthy Youth Act, all comprehensive sexual health and HIV prevention instruction and materials in grades K-12 must be inclusive of lesbian, gay, bisexual, transgender, and/or queer (LGBTQ) students. Instruction must affirmatively recognize that people have different sexual orientations and, when discussing or providing examples of relationships and couples, must be inclusive of same-sex relationships.¹ It must also teach students about gender, gender expression, gender identity, and explore the harm of negative gender stereotypes.² This means that schools must teach about sexual orientation and transgender, cisgender, and non-binary gender identities.

The California Healthy Youth Act requires that sexual health education be appropriate for use with students of all genders and sexual orientations and clearly states that part of the intent of the law is “to encourage a pupil to develop healthy attitudes concerning adolescent growth and development, body image, gender, sexual orientation, relationships, marriage, and family.”³

For more information about implementing inclusive comprehensive sexual health and HIV prevention education in your schools, see our LGBTQ & Gender Inclusiveness Assessment Tool.⁴

¹ EC § 51933(d)(5).

² EC § 51933(d)(6).

³ EC § 51930.

⁴ Available at http://www.aclunc.org/sex_ed.

School districts have an affirmative obligation to protect LGBTQ students from discrimination and harassment and to promote inclusivity.

Strong state and federal law prohibits discrimination on the basis of gender or sexual orientation in schools.⁵ In addition, California schools have an affirmative duty to protect LGBTQ students from discrimination and harassment, to ensure inclusivity for students of all genders and sexual orientations,⁶ and to take steps to prevent all forms of discrimination and harassment.⁷ These steps include: adopting policies that explicitly prohibit discrimination and harassment based on protected characteristics that include sexual orientation and gender identity; adopting a process for receiving and investigating discrimination and harassment complaints; publicizing the policies and complaint process; and protecting complainants from retaliation.

California law further prohibits bias in any school instruction or activity on the basis of sexual orientation or gender identity.⁸ Indeed, in addition to mandating that comprehensive sexual health and HIV prevention education lessons be inclusive of LGBTQ individuals and families,⁹ California law also affirmatively requires schools to include instruction on LGBTQ people in history and social sciences lessons.¹⁰

Schools may not facilitate selective opt-out of the LGBTQ-related content in sexual health education.

The California Healthy Youth Act permits parents/guardians to opt out of “all or part” of comprehensive sexual health and HIV prevention instruction.¹¹ Schools must therefore allow parents/guardians to opt their students out of this instruction in its entirety, including all LGBTQ-related content that is taught within comprehensive sexual health and HIV prevention. However, as pertains to the “or part” language of the law, schools may not facilitate the selective opt-out of lessons that are focused on LGBTQ content by parents/guardians whose students are otherwise in the classroom for other comprehensive sexual health and HIV prevention instruction. Doing so would violate the non-discrimination

⁵ See, e.g., EC § 220; Civil Code § 51; Title IX of the Civil Rights Act of 1964, 20 U.S.C. §§ 1681 *et seq.*

⁶ EC §§ 201, 220.

⁷ EC § 234.1.

⁸ EC §§ 51500, 51501.

⁹ EC § 51934.

¹⁰ EC § 51204.5.

¹¹ EC § 51938(a). Opt-in or active parental consent is prohibited for instruction in comprehensive sexual health and HIV prevention education. Additionally, the same requirements for opt-out apply in all grades, K-12. For more information about how these requirements should be implemented in elementary school, see Facts about the California Health Youth Act in Grades K-6, *available at* http://www.aclunc.org/sex_ed.

provisions of the Education Code discussed above and would open districts up to significant liability for discrimination.

In order to meet the requirements of the California Healthy Youth Act, schools must integrate LGBTQ people throughout the curriculum and may not isolate this content to particular lessons. Additionally, research has demonstrated that the availability of LGBTQ-inclusive curricula can reduce discrimination and harassment experienced by LGBTQ students.¹² Separating out LGBTQ content and facilitating parental opt-out from that content would make it impossible for a school to fulfill its mandate of correcting hostile environments and would instead promote discrimination in violation of both state and federal law.

General instruction or programming relating to LGBTQ people and issues is not subject to parental opt-out.

Section 51932(b) of the California Healthy Youth Act states:

This chapter does not apply to instruction, materials, presentations, or programming that discuss gender, gender identity, gender expression, sexual orientation, discrimination, harassment, bullying, intimidation, relationships, or family and do not discuss human reproductive organs and their functions.

Therefore, when topics such as gender, gender identity, gender expression, and sexual orientation *are* included in a curriculum that discusses reproductive organs and their functions, that curriculum in its entirety is sexual health education and is thus subject to the parental notification and consent provisions of the California Healthy Youth Act. When the topics referenced in section 51932 are addressed in instruction or programming that does not discuss reproductive organs—for example, mandated instruction about the contributions of LGBTQ people in history and social science or assemblies on bullying and harassment—that instruction or programming *is not* comprehensive sexual health and HIV prevention education and is thus not subject to the parental notification and consent provisions of the California Healthy Youth Act.

The right of parents to opt out of comprehensive sexual health education is conferred by specific language in the California Healthy Youth Act.¹³ The Education Code provides for only one other circumstance in which parents have the right to opt their children out of participation in class: “instruction in health” that “conflicts with the religious training and

¹² See Joseph G. Kosciw, et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN, available at <https://www.glsen.org/article/2015-national-school-climate-survey>; GLSEN, 2015 State Snapshot: School Climate in California, available at <https://www.glsen.org/sites/default/files/California%20State%20Snapshot%20-%20NSCS.pdf>.

¹³ EC § 51938(a).

beliefs of a parent or guardian of a pupil.”¹⁴ While “instruction in health” is not statutorily defined, a California court has held that it does not include a curriculum designed to teach elementary school students about LGBTQ people and families.¹⁵

Beyond the two narrow, well-defined circumstances described above, parents do not have a right to opt their students out of public school programming or instruction in California. Schools are not permitted to allow parents to opt their children out of any generally provided instruction—especially any programming or instruction relating to LGBTQ issues provided under a school’s affirmative obligation to protect LGBTQ students from discrimination and harassment and create safe and welcoming school environments.



For more information, go to http://www.aclunc.org/sex_ed.

If you are concerned that your school is not following the law, contact the ACLU for help.

¹⁴ EC § 51240(a).

¹⁵ See *Balde v. Alameda Unified School District*, No. RG09-468037 (Cal. Super. Ct. Dec. 1, 2009), available at <https://www.scribd.com/document/23792346/Order-Denying-Petitions-Petition-for-Writ-of-Mandamus-in-Balde-v-Alameda-Unified-School-Dist-No-RG09-468037-Cal-Alameda-County-Sup-ct>.