

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

Parents/guardians may not selectively opt students 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 instruction.¹¹ However, schools are not allowed to permit parents/guardians to selectively opt their students out of lessons that are focused on LGBTQ content, while leaving them in the classroom for other sexual health instruction. Doing so would violate the non-discrimination provisions of the Education Code discussed above and would open districts up to significant liability for 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.

Permitting parental opt-out that targets LGBTQ-related lessons would make it impossible for a school to fulfill its mandate of correcting hostile environments and would instead promote, allow, and facilitate discrimination in violation of both state and federal law. If a student who is otherwise in the sexual health education class were to be absent solely for the LGBTQ-related content, this would clearly communicate bias against LGBTQ people to other students in the class. Additionally, research has demonstrated that the availability of LGBTQ-inclusive curricula can reduce discrimination and harassment experienced by LGBTQ students.¹² Therefore, in allowing parents to selectively remove their students from this instruction, a school would be acting against its obligation to affirmatively reduce discrimination and harassment.

Parents/guardians may, of course, choose to remove their students from comprehensive sexual health and HIV prevention instruction in its entirety, including the LGBTQ-focused content.

Parents may not opt students out of general instruction or programming relating to LGBTQ people and issues.

Parents do not have a general right to opt their students out of public school programming or instruction in California. They may only do so in very narrow and well-defined circumstances when a statute specifically allows. Absent such an exception, 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.

The Education Code provides for only two circumstances under which parents have the right to opt their children out of participation in class—1) comprehensive sexual health and HIV prevention education,¹³ and 2) “instruction in health” that “conflicts with the religious training and 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

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).

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>.

Programming and instruction relating to LGBTQ people—for example, mandated instruction about the contributions of LGBTQ people in history and social science or assemblies on bullying and harassment—are not comprehensive sexual health and HIV prevention education. This is clearly articulated in the California Healthy Youth Act, which in section 51932(b) specifically 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, since the parental opt-out applies only to comprehensive sexual health and HIV prevention education, the law is clear that the instruction, materials, and programming referenced in section 51932(b) are not subject to parental notification and consent, and parents may not opt their students out of them.



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.