



PACIFIC JUSTICE INSTITUTE

Summary of Parental Opt-Out Rights for Sex Education in California

Much confusion has been generated by the enactment in 2015 of the California Healthy Youth Act (CHYA), a euphemism given to the latest revision of the state's main set of sex education laws. The good news is that, while there is much to be concerned about in the legislation, important protections of parental rights remain. The following questions and answers, which are followed by detailed information taken directly from the statutes themselves, should clear up much of the confusion.

QUICK Q&A ON SEX ED LAWS

Q: Is sex education now mandated for kindergarten or elementary grades?

A: Absolutely not!

Q: Do parents in California still have the right to opt their children out of sex education?

A: Absolutely!

Q: Can my child be punished if I opt them out of sex ed?

A: No, that would be illegal.

Q: What notice is required to be given to parents about sex education?

A: The notice provisions are detailed and set forth below.

Q: Did the Legislature intend for teachers to replace parents in teaching kids about sex?

A: No.

Q: Can sex education still promote abstinence?

A: Yes. In fact, sex ed that does not highlight abstinence would be non-compliant.

Q: Can a school choose not to promote Planned Parenthood?

A: Yes.

Q: Can I opt my child out of LGBT discussions?

A: Yes, if it is presented as part of sex ed.

Q: Can a teacher ask my child sex-related questions without my knowledge or consent?

A: No.

Q: What is required to be included as part of comprehensive sex education?

A: The list is fairly long but is included below.

Q: How is it determined what is "age appropriate" instruction?

A: This phrase is defined by statute.

DETAILED ANSWERS ON SEX ED

Q: Is sex education now mandated for kindergarten or elementary grades?

A: Absolutely not! The Education Code, in Section 51934, provides:

(a) Each school district shall ensure that all pupils in grades 7 to 12, inclusive, receive comprehensive sexual health education and HIV prevention education from instructors trained in the appropriate courses. Each pupil shall receive this instruction at least once in junior high or middle school and at least once in high school.

The same statute then goes on in subsection (b) to allow school districts to begin sex ed sooner. Thus, it is crucial for parents to be engaged the with decision-making of their local school board and let their voices be heard.

(b) A school district may provide comprehensive sexual health education or HIV prevention education consisting of age-appropriate instruction earlier than grade 7 using instructors trained in the appropriate courses. A school district that elects to offer comprehensive sexual health education or HIV prevention education earlier than grade 7 may provide age appropriate and medically accurate information on any of the general topics contained in paragraphs (1) to (11), inclusive, of subdivision.

Q: Do parents in California still have the right to opt their children out of sex education?

A: Absolutely! According to the Ed Code, Section 51938 states:

(a) A parent or guardian of a pupil has the right to excuse their child from all or part of comprehensive sexual health education, HIV prevention education, and assessments related to that education through a passive consent ("opt-out") process.

The Ed Code further provides, in Section 51939:

A pupil may not attend any class in comprehensive sexual health education or HIV prevention education, or participate in any anonymous, voluntary, and confidential test, questionnaire, or survey on pupil health behaviors and risks, if the school has received a written request from the pupil's parent or guardian excusing the pupil from participation.

One of the things that changed with the enactment of the California Healthy Youth Act was that parents must now be more proactive to opt-out; school districts can no longer limit sex ed by requiring an opt-in process or skipping the subject entirely (as was permissible before the CHYA).

Also noteworthy from Section 51938 is that parents may choose to opt their children out of "part" of sex ed. Some school districts have mistakenly told parents this is not possible, but state law says otherwise.

Q: Can my child be punished if I opt them out of sex ed?

A: No, that would be illegal. Section 51939(b) mandates:

A pupil may not be subject to disciplinary action, academic penalty, or other sanction if the pupil's parent or guardian declines to permit the pupil to receive comprehensive sexual health education or HIV prevention education or to participate in anonymous, voluntary, and confidential tests, questionnaires, or surveys on pupil health behaviors and risks.

The same Section further states:

(c) While comprehensive sexual health education, HIV prevention education, or anonymous, voluntary, and confidential test, questionnaire, or survey on pupil health behaviors and risks

is being administered, an alternative educational activity shall be made available to pupils whose parents or guardians have requested that they not receive the instruction or participate in the test, questionnaire, or survey.

Q: What notice is required to be given to parents about sex education?

A: Ed Code Section 51938 reads:

(b) At the beginning of each school year, or, for a pupil who enrolls in a school after the beginning of the school year, at the time of that pupil's enrollment, each school district shall notify the parent or guardian of each pupil about instruction in comprehensive sexual health education and HIV prevention education and research on pupil health behaviors and risks planned for the coming year. The notice shall do all of the following:

(1) Advise the parent or guardian that written and audiovisual educational materials used in comprehensive sexual health education and HIV prevention education are available for inspection.

(2) Advise the parent or guardian whether the comprehensive sexual health education or HIV prevention education will be taught by school district personnel or by outside consultants. A school district may provide comprehensive sexual health education or HIV prevention education, to be taught by outside consultants, and may hold an assembly to deliver comprehensive sexual health education or HIV prevention education by guest speakers, but if it elects to provide comprehensive sexual health education or HIV prevention education in either of these manners, the notice shall include the date of the instruction, the name of the organization or affiliation of each guest speaker, and information stating the right of the parent or guardian to request a copy of this section, Section 51933, and Section 51934. If arrangements for this instruction are made after the beginning of the school year, notice shall be made by mail or another commonly used method of notification, no fewer than 14 days before the instruction is delivered.

(3) Include information explaining the parent's or guardian's right to request a copy of this chapter.

(4) Advise the parent or guardian that the parent or guardian has the right to excuse their child from comprehensive sexual health education and HIV prevention education and that in order to excuse their child they must state their request in writing to the school district.

Q: Did the Legislature intend for teachers to replace parents in teaching kids about sex?

A: No. Ed Code Section 51937 reads:

It is the intent of the Legislature to encourage pupils to communicate with their parents or guardians about human sexuality and HIV and to respect the rights of parents or guardians to supervise their children's education on these subjects. The Legislature intends to create a streamlined process to make it easier for parents and guardians to review materials and evaluation tools related to comprehensive sexual health education and HIV prevention education, and, if they wish, to excuse their children from participation in all or part of that instruction or evaluation. The Legislature recognizes that while parents and guardians overwhelmingly support medically accurate, comprehensive sex education, parents and guardians have the ultimate responsibility for imparting values regarding human sexuality to their children.

Q: Can sex education still promote abstinence?

A: Yes. Even in California, where pro-life beliefs are under assault, Ed Code Section 51934 explains:

Information that abstinence from sexual activity and injection drug use is the only certain way to prevent HIV and other sexually transmitted infections and abstinence from sexual intercourse is the only certain way to prevent unintended pregnancy. This instruction shall provide information about the value of delaying sexual activity while also providing medically accurate information on other methods of preventing HIV and other sexually transmitted infections and pregnancy.

Q: Can a school choose not to promote Planned Parenthood?

A: Yes. Ed Code Section 51936 allows but does not require schools to contract with consultants or guest speakers for sex ed but mandates:

All outside consultants and guest speakers shall have expertise in comprehensive sexual health education and HIV prevention education and have knowledge of the most recent medically accurate research on the relevant topic or topics covered in their instruction.

Section 51938(d) further states:

(d) The use of outside consultants or guest speakers as described in paragraph (2) of subdivision (b) is within the discretion of the school district.

While sex ed now must include discussions about abortion, as well as other methods of contraception, don't let any school official tell you that Planned Parenthood is the only qualified presenter or resource!

Q: Can I opt my child out of LGBT discussions?

A: Yes, if those discussions are included as part of sex ed, or involve questioning of your child about their beliefs. With the enactment of the CHYA, the Legislature created needless confusion about LGBT issues in sex education. On the one hand, it is now mandated that LGBT issues be covered in sex ed, and as explained above, parents may opt out of all or part of such instruction. At the same time, the Legislature awkwardly attempted to exclude some LGBT discussions from sex ed.

Ed Code Section 51932(b) now 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.

Although the statutes when taken together are not particularly well constructed, the implication is that parental opt-out rights apply primarily to sex ed, but not necessarily to other discussions of LGBT issues that might arise, say, in a social science class or anti-bullying assembly. The opt-out right would apply, though, if a discussion in a social science class involved surveys, questionnaires, analysis or evaluation of the students' beliefs, as protected elsewhere in federal and state law and further explained in the next question and answer below.

Q: Can a teacher ask my child sex-related questions without my knowledge or consent?

A: No. This is one area where both federal and state law protect families. These protections include but extend beyond sex ed or LGBT issues.

The controlling federal law is 20 U.S.C. Section 1232h. It is too lengthy to reprint here, but it declares that no minor student may be required, absent written parental consent, to

participate in a survey, analysis, or evaluation that would reveal information in any of 8 different areas. Those areas are:

- (1) political affiliations or beliefs of the student or the student's parent;*
- (2) mental or psychological problems of the student or the student's family;*
- (3) sex behavior or attitudes;*
- (4) illegal, anti-social, self-incriminating, or demeaning behavior;*
- (5) critical appraisals of other individuals with whom respondents have close family relationships;*
- (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;*
- (7) religious practices, affiliations, or beliefs of the student or student's parent; or*
- (8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).*

State law is similar but has fewer categories. Ed Code Section 51513 reads:

No test, questionnaire, survey, or examination containing any questions about the pupil's personal beliefs or practices in sex, family life, morality, and religion, or any questions about the pupil's parents' or guardians' beliefs and practices in sex, family life, morality, and religion, shall be administered to any pupil in kindergarten or grades 1 to 12, inclusive, unless the parent or guardian of the pupil is notified in writing that this test, questionnaire, survey, or examination is to be administered and the parent or guardian of the pupil gives written permission for the pupil to take this test, questionnaire, survey, or examination.

The CHYA modified the requirements of Section 51513 by saying that sex-related assessments can be administered to students in grades 7-12. Parents can still opt out, but parental consent may not be required. In this regard, Section 51938 reads:

(c) Notwithstanding Section 51513, anonymous, voluntary, and confidential research and evaluation tools to measure pupils' health behaviors and risks, including tests, questionnaires, and surveys containing age-appropriate questions about the pupil's attitudes concerning or practices relating to sex, may be administered to any pupil in grades 7 to 12, inclusive. A parent or guardian has the right to excuse their child from the test, questionnaire, or survey through a passive consent ("opt-out") process. A school district shall not require active parental consent ("opt-in") for these tests, questionnaires, or surveys in grades 7 to 12, inclusive. Parents or guardians shall be notified in writing that this test, questionnaire, or survey is to be administered, given the opportunity to review the test, questionnaire, or survey if they wish, notified of their right to excuse their child from the test, questionnaire, or survey, and informed that in order to excuse their child they must state their request in writing to the school district.

To the extent that state law may now be less protective than federal law, the CHYA yields to 20 U.S.C. Section 1232h. Violation of this federal law can lead to the loss of federal funding, which would be catastrophic for most school districts.

Q: What is required to be included as part of comprehensive sex education?

A: The list in Ed Code Section 51933 is fairly long but is included here:

All comprehensive sexual health education and HIV prevention education pursuant to Section 51934, whether taught or supplemented by school district personnel or by outside consultants or guest speakers pursuant to Section 51936, shall satisfy all of the following criteria:

- (a) Instruction and materials shall be age appropriate.*
- (b) All factual information presented shall be medically accurate and objective.*
- (c) All instruction and materials shall align with and support the purposes of this chapter as set forth in paragraphs (1) to (5), inclusive, of subdivision (b) of Section 51930 and may not be in conflict with them.*

(d) (1) Instruction and materials shall be appropriate for use with pupils of all races, genders, sexual orientations, and ethnic and cultural backgrounds, pupils with disabilities, and English learners.

(2) Instruction and materials shall be made available on an equal basis to a pupil who is an English learner, consistent with the existing curriculum and alternative options for an English learner pupil as otherwise provided in this code.

(3) Instruction and materials shall be accessible to pupils with disabilities, including, but not limited to, the provision of a modified curriculum, materials and instruction in alternative formats, and auxiliary aids.

(4) Instruction and materials shall not reflect or promote bias against any person on the basis of any category protected by Section 220.

(5) Instruction and materials shall affirmatively recognize that people have different sexual orientations and, when discussing or providing examples of relationships and couples, shall be inclusive of same-sex relationships.

(6) Instruction and materials shall teach pupils about gender, gender expression, gender identity, and explore the harm of negative gender stereotypes.

(e) Instruction and materials shall encourage a pupil to communicate with his or her parents, guardians, and other trusted adults about human sexuality and provide the knowledge and skills necessary to do so.

(f) Instruction and materials shall teach the value of and prepare pupils to have and maintain committed relationships such as marriage.

(g) Instruction and materials shall provide pupils with knowledge and skills they need to form healthy relationships that are based on mutual respect and affection, and are free from violence, coercion, and intimidation.

(h) Instruction and materials shall provide pupils with knowledge and skills for making and implementing healthy decisions about sexuality, including negotiation and refusal skills to assist pupils in overcoming peer pressure and using effective decision making skills to avoid high-risk activities.

(i) Instruction and materials may not teach or promote religious doctrine.

Ed Code Section 51934 further provides:

(a) Each school district shall ensure that all pupils in grades 7 to 12, inclusive, receive comprehensive sexual health education and HIV prevention education from instructors trained in the appropriate courses. Each pupil shall receive this instruction at least once in junior high or middle school and at least once in high school. This instruction shall include all of the following:

(1) Information on the nature of HIV, as well as other sexually transmitted infections, and their effects on the human body.

(2) Information on the manner in which HIV and other sexually transmitted infections are and are not transmitted, including information on the relative risk of infection according to specific behaviors, including sexual activities and injection drug use.

(3) Information that abstinence from sexual activity and injection drug use is the only certain way to prevent HIV and other sexually transmitted infections and abstinence from sexual intercourse is the only certain way to prevent unintended pregnancy. This instruction shall provide information about the value of delaying sexual activity while also providing medically accurate information on other methods of preventing HIV and other sexually transmitted infections and pregnancy.

(4) Information about the effectiveness and safety of all federal Food and Drug Administration (FDA) approved methods that prevent or reduce the risk of contracting HIV and other sexually transmitted infections, including use of antiretroviral medication, consistent with the federal Centers for Disease Control and Prevention.

(5) Information about the effectiveness and safety of reducing the risk of HIV transmission as a result of injection drug use by decreasing needle use and needle sharing.

(6) Information about the treatment of HIV and other sexually transmitted infections, including how antiretroviral therapy can dramatically prolong the lives of many people living with HIV and reduce the likelihood of transmitting HIV to others.

(7) Discussion about social views on HIV and AIDS, including addressing unfounded stereotypes and myths regarding HIV and AIDS and people living with HIV. This instruction shall emphasize that successfully treated HIV-positive individuals have a normal life expectancy, all people are at some risk of contracting HIV, and the only way to know if one is HIV-positive is to get tested.

(8) Information about local resources, how to access local resources, and pupils' legal rights to access local resources for sexual and reproductive health care such as testing and medical care for HIV and other sexually transmitted infections and pregnancy prevention and care, as well as local resources for assistance with sexual assault and intimate partner violence.

(9) Information about the effectiveness and safety of all FDA-approved contraceptive methods in preventing pregnancy, including, but not limited to, emergency contraception. Instruction on pregnancy shall include an objective discussion of all legally available pregnancy outcomes, including, but not limited to, all of the following:

(A) Parenting, adoption, and abortion.

(B) Information on the law on surrendering physical custody of a minor child 72 hours of age or younger, pursuant to Section 1255.7 of the Health and Safety Code and Section 271.5 of the Penal Code.

(C) The importance of prenatal care.

(10) Information about sexual harassment, sexual assault, sexual abuse, and human trafficking. Information on human trafficking shall include information on the prevalence, nature, and strategies to reduce the risk of human trafficking, techniques to set healthy boundaries, and how to safely seek assistance.

(11) Information about adolescent relationship abuse and intimate partner violence, including the early warning signs thereof.

(b) A school district may provide comprehensive sexual health education or HIV prevention education consisting of age-appropriate instruction earlier than grade 7 using instructors trained in the appropriate courses. A school district that elects to offer comprehensive sexual health education or HIV prevention education earlier than grade 7 may provide age appropriate and medically accurate information on any of the general topics contained in paragraphs (1) to (11), inclusive, of subdivision (a).

Q: How is it determined what is “age appropriate” instruction?

A: This phrase is defined by statute, but the person in the best position to determine what is age appropriate for a child are that child’s parents. Ed Code Section 51931 states:

For the purposes of this chapter, the following definitions apply:

(a) “Age appropriate” refers to topics, messages, and teaching methods suitable to particular ages or age groups of children and adolescents, based on developing cognitive, emotional, and behavioral capacity typical for the age or age group.

Of course, conflicts over sex education may arise that are not fully addressed above. This general information does not constitute legal advice, so contact Pacific Justice Institute via our website, www.PJI.org, if you believe your rights have been violated and you need representation.