



FAQs on Proposed Parental Rights in Child’s Education Policy

In response to several incidents where schools discussed sensitive topics regarding gender identity or sexuality with young children without notifying the families before doing so, parents and pro-family groups across California are looking at proposals that would provide robust protections for parental rights and student privacy. We have been asked to provide a legal analysis of such a proposal—the Parental Rights in Child’s Education Policy (hereinafter the “Parental Rights Policy”).

What does the proposed Parental Rights Policy do?

The proposed Parental Rights Policy accomplishes three goals:

1. It incorporates existing California law into local policy, which requires schools to provide notification to parents before topics regarding comprehensive sex education and HIV prevention education are taught and provides parents the ability to opt their child out of receiving that instruction so that parents can instruct their children on these sensitive topics at home in a manner consistent with the families’ beliefs.
2. Recognizing that discussions of family structures, gender identity, sexual orientation, and harassment are also sensitive topics, it requires schools to provide the same notification and opt-out to parents when these topics are discussed as when comprehensive sex education and HIV prevention are discussed. It merely adds a few additional topics to the list of topics where notification and the ability to opt-out are given.
3. If the school gives any person permission to come on campus and to use restrooms, locker rooms, or showers designated for the opposite biological sex, then the school must give notice to parents so that those with privacy concerns can request access to alternative privacy accommodations for their child (such as a single-user restroom or changing room).

Parental Notification and Opt-Out

Does the notification and opt-out policy for discussions of gender identity or sexual orientation violate state law?

No. California law mandates that schools provide notification and opt-out when schools teach comprehensive sex education and HIV prevention education.¹ Discussions of gender identity and sexual orientation, when not included as part of comprehensive sex education, are

¹ California Education Code §§ 51937-51939.

not subject to the state law's mandate.² In other words, schools are not mandated by state law to provide notification and opt-out before these sensitive topics are discussed.

But nothing in California law prevents schools from voluntarily providing notification and opt-out on these or other sensitive subjects. For example, the same section of the California Education Code that exempts discussions of gender identity and sexual orientation from the mandatory notification and opt-out also exempts any “description or illustration of human reproductive organs that may appear in a textbook ... if the textbook does not include other elements of comprehensive sexual education.” This section was intended to allow schools to use textbooks in a human anatomy class that include accurate illustrations of the male and female human body. The use of such a textbook would not trigger the mandatory notification and opt-out requirement. However, a school could nonetheless voluntarily provide a warning to parents if students were going to view a detailed illustration of the human body in their anatomy class so that parents could decide whether their child is mature enough to handle exposure to the imagery.

Simply put, California law only makes notification and opt-out mandatory in certain instances. In all other instances, schools can voluntarily provide notification and opt-out. In recognition that certain topics raise many of the same parental rights concerns as sex education, the proposed Parental Rights Policy merely requires the school to provide notification and opt-out as it is already permitted to do under state law.

Does allowing an opt-out undermine a school's efforts to teach students about bullying and tolerance?

Schools have a duty to protect every child against bullying and harassment, and they have full authority to prevent bullying and discipline anyone who engages in it. Unfortunately, some anti-bullying education has very little to do with stopping kids from bullying. Instead, it has been co-opted as an opportunity to instruct children about gender identity ideology and similar controversial topics. That is why, when these topics are discussed, parents should be notified to determine whether they are comfortable with the school exposing their child to these issues, or whether the parent would prefer to talk to their child about bullying in a manner that does not expose them to gender identity ideology before a child is mature enough to understand it.

Why doesn't the proposed Parental Rights Policy include discussion of all topics that parents deem to be “controversial” or “sensitive”?

The Policy lists many of the sensitive topics that are increasingly being imposed on young children in many school districts in California. However, it is not an exhaustive list. If there are more instructional topics that parents believe should be included, then they should be added.

Won't the proposed Parental Rights Policy prevent “organic” conversations on these topics from happening in the classroom?

No. The proposed Parental Rights Policy requires that when a teacher plans to cover gender identity, sexual orientation, or similar topics in class as part of the regular instruction—or when

² If discussions of “gender, gender identity, gender expression, sexual orientation, discrimination, harassment, bullying, intimidation, relationships, or family” are made in the context of comprehensive sex education, then the notification and opt-out requirements under state law are required. *See* California Education Code § 51932(b).

she reasonably anticipates that such topics may come up—she must first provide notification and the opportunity to opt-out to parents.

Students have a constitutional right to discuss controversial issues when it is relevant to the subject matter being discussed. The proposed Parental Rights Policy would not interfere with students' First Amendment rights. But when teachers initiate the discussion, because of the power and level of influence they hold over children in their class, they should respect parental rights by providing notification and opt-out prior to the discussions occurring.

Does the Parental Rights Policy discriminate against LGBT individuals by allowing parents to opt their child out of discussions involving LGBT topics? Wouldn't that be like allowing parents to opt their child out of lessons on Black History month?

No. California law already requires schools to allow parents to opt their child out of sex education—which discusses the differences between the sexes. Yet that opt-out provision is not considered discrimination on the basis of sex, which is prohibited under California state law. The same would be true for schools that allow parents to opt their child out of discussions about the beliefs of various religions in a social studies class. It is not discrimination based on religion to give parents the option to discuss the different religions and their beliefs at home.

Likewise, it is not discrimination against LGBT individuals to recognize that discussions of sexual preferences and asserting a gender identity different from one's biological sex are sensitive topics—especially for young, impressionable children—and that, like religion or sex, many parents prefer to decide when and how their child is first exposed to these topics.

Why does the proposed Parental Rights Policy duplicate portions of California state law?

California law requires all public schools to provide notification and opt-out before giving instruction in comprehensive sex education or HIV prevention. The proposed Parental Rights Policy incorporates the state law into the school's local policy, something that is entirely permissible (and is a common practice).

Incorporating these requirements into local policy also provides parents greater awareness of their rights under state law, as many families may not know about their right to be notified and opt their child out of certain subjects. Giving parents more information on their rights under state law is a good thing for all families.

Privacy Protections

Why are the protections for privacy contained in the Parental Rights Policy needed?

Students have a constitutional right to bodily privacy. As the Ninth Circuit Court of Appeals has recognized, “[s]hielding one’s unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.” *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988).

Schools have a duty to protect that privacy. And that means that no student should ever be required to share a shower, locker room, restroom, or other facility where the student is in a state of undress, with someone of the opposite biological sex. Thus, if a school allows a biological

male to use the girls' restrooms or locker rooms—even if the male asserts a female gender identity—the school must at a minimum provide alternative restrooms or locker rooms to girls at the school who do not wish to share a restroom or locker room with a biological male. Such accommodations ensure that the privacy of all students is protected.

But in order to request such an accommodation, parents and students must have notice that a school has authorized a person to use facilities of the opposite sex. For example, if a school's policy allows individuals to use restrooms consistent with their gender identity (meaning that a male who asserts a female identity can use the girls' restroom), then parents must be notified so that they can ensure their daughters are given access to an accommodation that protects their privacy.

Schools that refuse to provide notification to parents of policies or actions that potentially violate the bodily privacy of minors clearly do not take privacy seriously and do not care that a young child may be forced to share a locker room—or restroom with someone of the opposite biological sex.

Would this policy require a school to notify parents anytime a transgender person comes on to school property, including visitors or a delivery person?

No. This policy only requires a school to provide notification if it allows a person of one biological sex to use privacy facilities (such as locker rooms or restrooms) of the opposite biological sex.

Won't this policy force schools to “out” transgender students, making them a target for bullying?

No. Every student should be protected against bullying and harassment, and schools should punish students who engage in such conduct. Furthermore, under federal law, schools are not allowed to publicize personally identifying information about a student. So a school could not say “Johnny lives at 123 Main St.” or “Suzie is biologically a male.”

But a school should inform parents and students if it is going to allow an individual to access privacy facilities of the opposite sex so that parents who do not want their child to share locker rooms or restrooms with someone of the opposite sex can request an accommodation.

Schools would comply with this proposed policy by sending a note home to parents saying, “Our school has a policy of allowing individuals to use restrooms and locker rooms consistent with their gender identity. And we have at least one student or teacher who has been permitted to use privacy facilities consistent with this policy.”

Schools routinely provide notification of similar issues. For example, if one student in a school had a severe peanut allergy, the school would be wise to make an announcements notifying parents that there is a child with an allergy (without identifying the child) so that parents will not pack peanut butter sandwiches in school lunches.

Bodily privacy is no less important. Schools must take it seriously. And that means they must notify parents when a potential privacy issue arises so that parents can make an informed decision as to whether they will request an accommodation for their child.