



## **Privacy, Parental Notification, and Free Speech in California Public Schools**

**Schools must accommodate requests for access to facilities that preserve student privacy.**

California students have a constitutional right to bodily privacy. As the Ninth Circuit 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).

Students may, for a variety of reasons, feel that the communal showers, lockers, and restrooms at their school (and lodging on overnight trips) do not afford them sufficient privacy. In such circumstances, students and parents have the right to request that the school reasonably accommodate the student’s privacy needs. This could include ensuring the availability of single-stall restrooms and changing areas. But under no circumstances can anyone be compelled by school officials to share intimate spaces with members of the opposite biological sex.

**Schools should notify parents and provide an opt-out when controversial topics will be presented by school personnel or guest speakers.**

Both the U.S. Supreme Court and California courts recognize that parents possess a fundamental right to direct the upbringing and education of their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re Marriage of Harris*, 34 Cal. 4th 210, 223 (2004). And the California legislature has accordingly recognized that “parents and guardians have the ultimate responsibility for impacting values regarding human sexuality to their children.” Cal. Educ. Code § 51937. In furtherance of these parental rights, all California public schools are required to give at least 14 days’ notice to parents before sexual health education or HIV prevention education are taught, and must give parents the ability to opt their child out of receiving this instruction. *See* Cal. Educ. Code § 51938.

Because discussions of gender identity and sexual orientation are issues that many parents desire to introduce to their children in their own time and in a manner consistent with their values and beliefs, schools should respect the authority of parents and provide notice and opt-out prior to these issues being taught to students. Nothing in California law prohibits schools from providing notice and opt-out before these issues are raised. In fact, doing so shows a proper respect for the primary role of parents in addressing controversial topics.

**Students cannot be compelled to express or support ideas or beliefs with which they disagree.**

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). As a result, students cannot be compelled to engage in expression with which they disagree.

The efforts to indoctrinate children with gender identity and sexual orientation ideology in public school often conflict with these free speech principles. This is especially true when schools attempt to compel students to “celebrate” a transgender student coming out or to require them to use certain words or pronouns. As the U.S. Supreme Court warned when ruling against a school that attempted to compel students to recite the Pledge of Allegiance:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

*W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Unfortunately, school officials often trample students’ rights under the guise of attempting to prevent controversy and avoid offending other students. But this is not a permissible basis for compelling speech. A school “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 509. Students “may not be confined to the expression of those sentiments that are officially approved.” *Id.* at 511.

School officials cannot command their students to accept or celebrate ideas, values, and beliefs regarding sexual orientation and gender identity. Parents and students alone have the right to determine what values are central to their lives. In the same manner, schools cannot command students to use words, pronouns, or engage in other expression that conflicts with their values and beliefs. To do so tramples students’ well-established rights and opens up schools to potential liability for infringing those rights.

## **Model Parental Rights in Child's Education Policy**

### **SECTION 1. DEFINITIONS.**

As used in this policy:

- (a) COMPREHENSIVE SEXUAL HEALTH EDUCATION has the meaning set forth in California Education Code § 51931(b).
- (b) HIV PREVENTION EDUCATION has the meaning set forth in California Education Code § 51931(d).
- (c) FAMILY LIFE EDUCATION means instruction, materials, presentations, or programming that discuss gender, gender identity, gender expression, sexual orientation, harassment, bullying, intimidation, relationships, or family.
- (d) PHYSICAL PRIVACY CONCERN means any circumstances where a child may be in a state of undress in the same room as someone of the opposite biological sex while on school premises or, if not on school premises, while under the supervision of school personnel. The term includes, but is not limited to, the presence of any person on school premises who asserts a gender identity different from the person's biological sex and who is permitted by policy, practice, or law to access restrooms, locker rooms, showers, and overnight accommodations consistent with the person's gender identity.

### **SECTION 2. RIGHT TO NOTIFICATION OF INSTRUCTION IN COMPREHENSIVE SEXUAL HEALTH EDUCATION, HIV PREVENTION EDUCATION, RESEARCH ON PUPIL HEALTH BEHAVIORS AND RISKS, AND FAMILY LIFE EDUCATION.**

- (a) A parent or guardian of a pupil has the right to excuse their child from all or part of comprehensive sexual education, HIV prevention education, and family life education through a passive consent ("opt-out") process.
- (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 shall notify the parent or guardian of each pupil about instruction in comprehensive sexual health education, HIV prevention education, and family life education 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, HIV prevention education, and family life education are available for inspection.
  - (2) Advise the parent or guardian whether the comprehensive sexual health education, HIV prevention education, and/or family life education will be taught by school district personnel or by outside consultants. A school may provide comprehensive sexual health education, HIV prevention education and/or family life education, to be taught by outside consultants, and may hold an assembly to deliver comprehensive sexual health education, HIV prevention education, and/or family life education by guest speakers, but if it elects to provide comprehensive sexual health education, HIV prevention education, and/or family life 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 California Education Code 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 policy.
- (4) Advise the parent or guardian that the parent or guardian has the right to excuse their child from comprehensive sexual health education, HIV prevention education, and family life education and that in order to excuse their child they must state their request in writing to the school district.

### SECTION 3. RIGHT TO NOTIFICATION OF PHYSICAL PRIVACY CONCERNS.

(c) 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 shall notify the parent or guardian of each pupil about any physical privacy concern planned for the coming year. If a physical privacy concern occurs after the beginning of the school year, notice shall be made by mail or another commonly used method of notification to each parent or guardian no less than 14 days before the occurrence of a physical privacy concern; or if a physical privacy concern occurs without the prior knowledge of school personnel, within twenty-four (24) hours of any school personnel first learning of the physical privacy concern. The notice shall do all of the following:

- (1) Advise the parent or guardian of the specific circumstances resulting in the physical privacy concern, provided however that the notice shall not include any personal identifying information.
- (2) Advise the parent or guardian of any activities, including school activities and overnight trips, that will be impacted by the physical privacy concern.
- (3) Advise the parent or guardian that the parent or guardian has the right to excuse their child from participating in any instruction or school activities that create a physical privacy concern and that in order to excuse their child they must state their request in writing to the school district.
- (4) Advise the parent or guardian that the parent or guardian has the right to
  - a. obtain a privacy accommodation for their child, such as a single-user restroom, locker room or similar facility, while on school premises or attending school-sponsored events, and
  - b. obtain lodging accommodations for their child during any school-related overnight trips, such as a separate hotel room or lodging where the sleeping quarters and restrooms, showers and locker rooms are limited to members of the same biological sex,
- (5) Advise the parent or guardian that in order to obtain privacy or lodging accommodations for their child, they must state their request in writing to the school district.
- (6) Include information explaining the parent's or guardian's right to request a copy of this policy.

#### SECTION 4. SCHOOL'S RESPONSIBILITIES.

- (a) The school shall be responsible for ensuring that every parent or guardian receives all written notices. Any failure to properly notify a parent or guardian that results in a child receiving comprehensive sexual health education, HIV prevention education, or family life education against the wishes of the parent or being exposed to a physical privacy concern against the wishes of the parent shall be considered the fault of the school.
- (b) The school shall be responsible for removing a parent's or guardian's child at the proper times according to the parent's or guardian's opt-out request as indicated in the signed statement from the parent or guardian. The school shall follow the parent's or guardian's opt-out request until the school is notified in writing by parent or guardian that their opt-out request has changed.
- (c) The school shall be responsible for ensuring that there are sufficient facilities to accommodate all children whose parents or guardians have requested privacy or lodging accommodations. The school shall also be responsible for ensuring that no child is coerced or pressured into circumstances that create a physical privacy concern.
- (d) The school shall be responsible for ensuring that no child participates in a school activity of which a parent or guardian has opted their child out.