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NEW SEXUAL HEALTH EDUCATION REQUIREMENTS

Two bills on the subject of sexual health instruction passed this year – SB 695 and AB 329. The resulting changes are both cosmetic and material.

I. SB 695. The less contentious of the two bills, SB 695 mandates consideration of adding sexual harassment and violence to the state's health framework. The bill also adds Section 51225.36 to the Education Code, mandating instruction on sexual harassment and violence if a governing board makes completion of a course in health education a requirement for graduation from high school. If a district has such a requirement, the instruction must include information on the affirmative consent ("Yes Means Yes") standard of Section 67386. The requirement only applies to districts with high schools, and only applies if the district requires a unit of health to graduate.

The "affirmative consent" language from Section 67386 reads:

"'Affirmative consent' means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent."

II. AB 329. This bill makes numerous changes to the existing "Comprehensive Sexual Health Act" which permitted, but did not require, education on sexually transmitted diseases, unintended pregnancy, healthy relationships and marriage, contraception and abstinence, the law on surrender of physical custody of children under 72 hours of age, and making and implementing responsible decisions about sexuality.

A. Changes.

1. The new program will be called the "California Healthy Youth Act" instead of the "California Comprehensive Sexual Health" and "HIV/Aids Prevention Education Act."
2. Under the bill, previously optional instruction becomes mandatory. The mandated instruction as to HIV/AIDS, impact and prevention, and refusal skills is retained.

3. While many of the following topics were in the permissive statutes, the following topics are now required components of the mandatory instruction:

- The effects of STIs (including but not limited to HIV/AIDS) on the human body
- The manner in which STIs are/are not contracted, including injection drug usage
- Emphasis that abstinence from sexual activity and injection drug usage is the only certain way to avoid HIV/AIDS and unintended pregnancy
- Information about the effectiveness and safety of FDA approved use of anti-retroviral medication
- Information on reducing the risk of HIV transmission by decreasing needle use and sharing
- Information about treatment, life expectancy, and transmitting HIV and other sexually transmitted infections
- Social views on HIV/AIDS, unfounded stereotypes and myths, emphasizing that successfully treated HIV-positive individuals have a normal life expectancy, that everyone is at some risk of contracting HIV, and that testing is the only way to know if one is HIV-positive
- Information on local resources, how to access local resources, and pupils' legal rights to access local resources for sexual and reproductive health care, testing, medical care for HIV and other STIs, pregnancy prevention and care, and for assistance with sexual assault and intimate partner violence
- Information about the effectiveness and safety of approved contraceptive methods in preventing pregnancy, including but not limited to emergency contraception; instruction on pregnancy is to include an objective discussion of all legally available pregnancy outcomes, including parenting-adoption-abortion, legal information on surrendering physical custody of a minor child 72 hours of age or younger, and the importance of prenatal care
- Information about sexual harassment, sexual assault, adolescent relationship abuse, intimate partner violence, and sex trafficking

B. Instruction and materials in the newly mandated programs must:

- Be age appropriate
- Be medically accurate and objective
- Align with and support the stated purposes of the Act
- Be appropriate for all races, genders, sexual orientations, and ethnic and cultural backgrounds, pupils with disabilities, and English learners
- Be equally available to English learners
- Be accessible to pupils with disabilities, including a modified curriculum, materials and instruction, and auxiliary aids
- Not reflect or promote bias against any person on the basis of any protected category
- Affirmatively recognize that people have different sexual orientations and must, when discussing or providing examples of relationships and couples, be inclusive of same-sex relationships
- Teach about gender, gender expression, gender identity, and explore the harm of negative gender stereotypes
- Encourage a pupil to communicate with his or her parents/etc. about human sexuality and provide the knowledge and skills to do so
- Teach the value of and prepare pupils to have and maintain committed relationships such as marriage

- Provide pupils with knowledge and skills they need to form healthy relationships based on mutual respect and affection, free from violence, coercion, and intimidation
- Provide pupils with knowledge and skills for making and implementing healthy decisions about sexuality, including negotiation and refusal skills to assist them in overcoming peer pressure, and using effective decision making skills to avoid high-risk activities
- Not teach or promote religious doctrine

C. **Legislative Intent.**

The bill appears to express the Legislature's concern about compliance with the current provisions, due in part to the reluctance of some districts to offer the programs and in part to other districts' failure to offer all required portions. The Assembly comments on the bill cite findings from a 2011 study as revealing that only:

- 25% of districts discussed the required topic of emergency contraception
- 58% of districts included required information about contraception (19% of districts reported that birth control methods are mentioned but that most of the instructional time was spent on the benefits of abstinence)
- 75% of districts provided required HIV prevention topics
- 16% of districts taught students that condoms are not an effective way to prevent pregnancy and transmission of STIs
- 30% of districts addressed sexual orientation
- 63% of districts provided the required teacher training
- 61% of districts provided required materials in languages other than English
- 73% of districts provided required materials to make content accessible to students with disabilities

D. **When the New Program Must Be Offered - Retraining?**

The new program must be given at least once to each junior high/middle school 7th-8th grader and at least once again in high school. A district may (but is not required to) provide the training to students earlier than grade 7. We are still investigating whether training under the current (pre-January 1, 2016) criteria meets the new requirements or whether students who have already gone through the program must complete the new program as well.

While CDE is not responding to contacts, we understand K-8 districts are required to use a state-approved curriculum, and there will be none until the state moves to adopt/approve a curriculum including the new requirements. For high schools, we understand the curriculum can be developed/approved by the district.

E. **Notice Requirements.**

Districts must give notice of the comprehensive sexual health education each year, and to a new student on enrollment. The notice must include advising parents about:

- Training planned for the year
- Written and audiovisual materials available for inspection
- Instruction being provided by employees or outside vendors or guest speakers, and if by outside vendors/speakers the notice must also include information on the date, the name of the outside vendor/speaker, and their organization or affiliation
- Obtaining copies of the relevant Education Code Sections

- Their right to opt out of all or part of such instruction and/or from health behaviors and risks tests, questionnaires, and surveys to be administered in the 7-12th grades
- Their right to review the tests, questionnaires, or surveys.
- The requirement that the opt out must be stated in writing to the district

F. Parental Opt Out is Continued.

- Providing the ability to opt out is mandatory
- Districts cannot require an opt in
- Parents can opt out of all or part of the instruction
- Parents also have the right to excuse their student from health behaviors and risks tests, questionnaires, and surveys to be administered in the 7-12th grades, and they must be notified of their right to review those tests, questionnaires, or surveys

The question was raised whether a district can require an "all or nothing" approach to the opt-out rights, either taking all or none of the instruction. The answer appears to be no, in that the language of the new section will read, in part:

"51938. (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"

Since parents have the right to review the materials, and the right to opt out of parts of the instruction, it may be necessary to structure the training to enable partial opt outs, such as teaching identified subjects pursuant to a fixed schedule. Since amended Section 51934, (a)(1)-(10), will list the required subjects, that section may also provide the structure for the instruction on the required components. When the state adopts/approves a curriculum for this instruction, that curriculum may also provide a structure enabling partial opt outs.

The scope of a partial opt out is not further defined, and there may be some parents who wish to opt out of only a portion of a required component and not the entire component. While this could lead to an administrative nightmare, it may also indicate that, if the training cannot be structured in a manner to permit that level of opt out, a district may be permitted to indicate that an "all or nothing" opt out is appropriate (but likely only as to the component containing the undesired instruction and not as to the entire program). It is unlikely that a state-approved curriculum will be structured in a way that supports an "all-or-nothing" argument as to the entire program.

Please let us know if you have questions regarding this information.

— William A. Hornback

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