

1 Charles S. LiMandri, SBN 110841
 2 cslimandri@limandri.com
 3 Paul M. Jonna, SBN 265389
 4 pjonna@limandri.com
 5 Mark D. Myers, SBN 235719
 6 mmyers@limandri.com
 7 Jeffrey M. Trissell, SBN 292480
 8 jtrissell@limandri.com
 9 Milan L. Brandon II, SBN 326953
 10 mbrandon@limandri.com
 11 LiMANDRI & JONNA LLP
 12 P.O. Box 9120
 13 Rancho Santa Fe, CA 92067
 14 Telephone: (858) 759-9930
 15 Facsimile: (858) 759-9938

Thomas Brejcha, *pro hac vice**
 tbrejcha@thomasmoresociety.org
 Peter Breen, *pro hac vice**
 pbreen@thomasmorsociety.org
 THOMAS MORE SOCIETY
 309 W. Washington St., Ste. 1250
 Chicago, IL 60606
 Tel: (312) 782-1680
 *Application forthcoming

Attorneys for Plaintiffs

12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 ELIZABETH MIRABELLI, an
 16 individual, and LORI ANN WEST, an
 17 individual,

Plaintiffs,

v.

20 MARK OLSON, in his official capacity as
 21 President of the EUSD Board of
 22 Education, et al.,

Defendants.

Case No.: 3:23-cv-0768-BEN-WVG

**Plaintiffs’ Memorandum of Points &
 Authorities in Opposition to CDE
 Defendants’ Motion to Dismiss**

[Fed. R. Civ. P. 12(b)(1)]

[Fed. R. Civ. P. 12(b)(6)]

Judge: Hon. Roger T. Benitez
 Courtroom: 5A
 Hearing Date: August 21, 2023
 Hearing Time: 2:00 p.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION..... 1

LEGAL STANDARD..... 1

 A. Failure to State A Claim under Rule 12(b)(6) 1

 B. Lack of Subject Matter Jurisdiction under Rule 12(b)(1)..... 2

ARGUMENT3

 I. Summary of Prior Briefing & Response.....3

 II. Response to the CDE’s New Statements5

 III. For All Practical Purposes, the CDE’s FAQ Page on Gender Identity is Binding on EUSD7

 A. Background on the Purpose and Duties of the CDE.....7

 B. Compliance with the CDE’s FAQ Page is a Practical Requirement to Receive State Educational Funds..... 8

 C. In light of the CDE’s History of Enforcement, its “Agency Smurfing” Should Be Rejected 11

CONCLUSION..... 14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

303 Creative LLC v. Elenis, 13, 14, 15, 16
143 S. Ct. 2298 (2023)

Aguayo v. U.S. Bank, 2
653 F.3d 912 (9th Cir. 2011)

Ashcroft v. Iqbal, 1, 2
556 U.S. 662 (2009)

Ass’n of Mexican-Am. Educators v. State of California, 3
231 F.3d 572 (9th Cir. 2000)

Bell Atl. Corp. v. Twombly, 1
550 U.S. 544 (2007)

Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 13
547 F.3d 962 (9th Cir. 2008)

Courthouse News Serv. v. Planet, 2
750 F.3d 776 (9th Cir. 2014)

Dep’t of Com. v. New York, 14
139 S. Ct. 2551 (1991)

Doe v. Lawrence Livermore Nat’l Lab., 4
131 F.3d 836 (9th Cir. 1997)

Drobnicki v. Poway Unified Sch. Dist., 4
No. 06-cv-1563, 2007 WL 9718700 (S.D. Cal. July 13, 2007)

Ex parte Young, 4
209 U.S. 123 (1908)

Fed. Election Comm’n v. Cruz, 2
142 S. Ct. 1638 (2022)

Harris v. Amgen, Inc., 7
573 F.3d 728 (9th Cir. 2009)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES — CONT.

CASES

Lee v. City of Los Angeles, 7
 250 F.3d 668 (9th Cir.2001)

Leite v. Crane Co., 2
 749 F.3d 1117 (9th Cir. 2014)

Let Them Choose v. San Diego Unified Sch. Dist., 6
 85 Cal. App. 5th 693 (2022)

Lujan v. Defenders of Wildlife, 2
 504 U.S. 555 (1992)

Lujan v. National Wildlife Federation, 2
 497 U.S. 871 (1990)

Manzarek v. St. Paul Fire & Marine Ins. Co., 2
 519 F.3d 1025 (9th Cir. 2008)

Mecinas v. Hobbs, 4
 30 F.4th 890 (9th Cir. 2022)

Skyline Wesleyan Church v. California Dep’t of Managed Health Care, 4, 7
 968 F.3d 738 (9th Cir. 2020)

State of Texas v. U.S. Dep’t of Health & Hum. Services, 13, 14, 15
 No. 7:23-cv-22, 2023 WL 4629168 (W.D. Tex. July 12, 2023)

LAWS & REGULATIONS

5 C.C.R. § 4621(a) 10

5 C.C.R. §§ 4600-4671..... 10

5 C.C.R. § 4900(c)..... 10, 11

5 C.C.R. § 4902 11

5 C.C.R. §§ 4900-4965 10, 11

Cal. Const., art. I, § 1 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES – CONT.

LAWS & REGULATIONS

Cal. Educ. Code § 220 11

Cal. Educ. Code § 221.5(f) 6, 8, 11

Cal. Educ. Code § 234.1(g) 9

Cal. Educ. Code §§ 234-234.5 6, 11

Cal. Educ. Code § 250 10

Cal. Educ. Code § 32283.5 6

Cal. Educ. Code § 33031 5, 8

Cal. Educ. Code § 33308.5 7

Cal. Educ. Code § 33308.5(a) 7

Cal. Educ. Code § 33316(a) 7, 8

Cal. Educ. Code § 33316(b) 8

Cal. Educ. Code § 33316(c) 8

Cal. Educ. Code § 33316(d) 7

Cal. Educ. Code § 33316(e) 7

Cal. Educ. Code §§ 33300-33319.5 7

Cal. Educ. Code §§ 41330-41344.6 8

Cal. Educ. Code § 51204.5 6, 11

Cal. Educ. Code § 51500 6, 11

Cal. Educ. Code § 51501 6, 11

Cal. Educ. Code §§ 51930-51939 6

Cal. Educ. Code § 60040 6, 11

Cal. Educ. Code § 60044 6, 11

Cal. Gov. Code § 11135 10

Cal. Stats. 2011, ch. 81 6, 12

Cal. Stats. 2013, ch. 85, § 15 6, 8

Cal. Stats. 2015, ch. 398 6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES – CONT.

LAWS & REGULATIONS

Cal. Stats. 2019, ch. 49 6

Fed. R. Civ. P. 12(b)(1) 1, 2

Fed. R. Civ. P. 12(b)(6) 1, 2

OTHER AUTHORITIES

City News Service, *Newsom threatens action against Temecula school board for rejecting textbooks*, 12
 Desert Sun (July 13, 2023)

Dylan Vade, *Expanding Gender and Expanding the Law*, 10
 11 Mich. J. Gender & L. 253 (2005)

Joel Rubin, *Beliefs Imperil Funding*, 10
 L.A. Times (Mar. 14, 2004)

Joel Rubin, *School District Votes to Sue State*, 10
 L.A. Times (Sep. 3, 2004)

Letter from Michael L. Newman, Senior Assistant Attorney General, California Department of Justice, to Dr. Jodi McClay, Superintendent, Temecula Valley Unified School District (June 7, 2023) 12

Press Release: Governor Newsom and Attorney General Bonta Demand Answers from Temecula School Board, Office of the Governor (June 7, 2023) 12

Press Release: Governor Newsom Announces Contract to Secure Textbooks for Students in Temecula, Office of the Governor (July 19, 2023)..... 13

Press Release: Governor Newsom Issues Statement on Temecula Textbooks, Office of the Governor (July 21, 2023)..... 13

1 **INTRODUCTION**

2 Currently pending before the Court are three sets of parties’ cross motions:
3 Plaintiffs Elizabeth Mirabelli and Lori Ann West’s motion for a preliminary injunction
4 (ECF No. 5), the Escondido Union School District (“EUSD”) Defendants’ Rule
5 12(b)(6) motion to dismiss (ECF No. 17), and the California Department of Education
6 (“CDE”) Defendants’ Rule 12(b)(1) and 12(b)(6) motion to dismiss (ECF No. 25).¹

7 Notably, the text of each set of defendants’ motion to dismiss is copied and
8 pasted from their opposition to Plaintiffs’ motion for a preliminary injunction.
9 (*Compare* ECF No. 17; *with* ECF No. 16 (EUSD); *compare also* ECF No. 25-1; *with*
10 ECF No. 9 (CDE).) Thus, in replying to the CDE’s opposition to Plaintiffs’ motion for
11 a preliminary injunction (*see* ECF No. 18-1), Plaintiffs have already addressed the
12 CDE’s arguments in its subsequently filed motion to dismiss. A careful comparison of
13 the CDE’s opposition to Plaintiffs’ motion for a preliminary injunction, and the CDE’s
14 motion to dismiss, reveals only very minor changes. (*Compare* ECF No. 25-1; *with* ECF
15 No. 9.) Thus, Plaintiffs expressly incorporate their reply briefing herein (ECF No. 18-
16 1), summarize it below, and limit this briefing to additional arguments.

17 **LEGAL STANDARD**

18 **A. Failure to State A Claim under Rule 12(b)(6)**

19 A complaint must provide “fair notice of the nature of the claim, but also
20 grounds on which the claim rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.3
21 (2007). “To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must
22 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
23 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
24 550 U.S. at 570). A claim is facially plausible “when the plaintiff pleads factual content
25 that allows the court to draw the reasonable inference that the defendant is liable for

26 ¹ Unless otherwise noted, all quotations are “cleaned up” by omitting citations,
27 quotation marks, brackets, ellipses, and emphasis; all emphasis is added. Page
28 number references are to the ECF-generated page number contained in the header of
each ECF-filed document.

1 the misconduct alleged.” *Id.* at 678. The standard for dismissal under Rule 12(b)(6) is
2 quite strict. “A complaint must not be dismissed unless it appears beyond doubt that
3 the plaintiff can prove no set of facts in support of the claim that would entitle the
4 plaintiff to relief.” *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). The court
5 “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in
6 the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine*
7 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

8 **B. Lack of Subject Matter Jurisdiction under Rule 12(b)(1)**

9 A complaint over which there is a “lack of subject-matter jurisdiction” is subject
10 to a motion to dismiss. Fed. R. Civ. P. 12(b)(1). Subject-matter jurisdiction can be
11 challenged either “facially” or “factually,” *i.e.*, based on the face of the complaint or
12 upon asking the court to make disputed factual determinations. *Courthouse News Serv.*
13 *v. Planet*, 750 F.3d 776, 780 & n.3 (9th Cir. 2014). A facial attack under Rule 12(b)(1) is
14 treated similarly to a pleading challenge under Rule 12(b)(6). *Leite v. Crane Co.*, 749
15 F.3d 1117, 1121 (9th Cir. 2014). Here, the CDE Defendants are expressly only raising a
16 “facial” attack. (ECF No. 25-1 at 10:7-9 (“Reserving their right to present a factual
17 attack later if necessary, the State-level Defendants bring a facial challenge, because the
18 jurisdictional failures are apparent from the face of the Complaint.”).)

19 “For standing purposes, [the court must] accept as valid the merits of
20 [plaintiffs’] legal claims.” *Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1647 (2022).
21 “At the pleading stage, general factual allegations of injury resulting from the
22 defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that
23 general allegations embrace those specific facts that are necessary to support the
24 claim.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v.*
25 *National Wildlife Federation*, 497 U.S. 871, 889 (1990)).

26 ///

27 ///

28 ///

ARGUMENT

Below, Plaintiffs summarize the parties' prior briefing on the CDE's identical arguments (§ I), address the CDE's two new statements in support of its arguments (§ II), and then provide a further response to the CDE's general argument that a challenge to its Frequently Asked Questions page on gender identity discrimination is nonjusticiable (§ III).

I. SUMMARY OF PRIOR BRIEFING & RESPONSE

In the CDE Defendants' opposition to Plaintiffs' motion for a preliminary injunction and in their motion to dismiss, the CDE Defendants raise the same three arguments: (1) that Plaintiffs lack Article III standing to sue the CDE Defendants because of the lack of a traceable, causal connection between Plaintiffs' harm and the CDE's actions (ECF No. 9 at 11:10-12:10; ECF No. 25-1 at 12:11-13:12); (2) that Plaintiffs lack Article III standing to sue the CDE Defendants because Plaintiffs' harm is not likely to be redressed by a favorable ruling, and instead any ruling would be an impermissible advisory opinion (ECF No. 9 at 12:11-13:19; ECF No. 25-1 at 13:13-14:21); and (3) that Eleventh Amendment immunity bars Plaintiffs' claim, even to the extent that it seeks solely prospective injunctive or declaratory relief, due to the lack of a close connection between the CDE Defendants and the issues in this case. (ECF No. 9 at 13:20-16:17; ECF No. 25-1 at 15:1-16:28.)

In Plaintiffs' reply to the CDE in support of their motion for a preliminary injunction, Plaintiffs explained that they named both EUSD and the CDE in this case precisely because Plaintiffs expected them to each point the finger at the other. (ECF No. 18-1 at 6:2-10.) Plaintiffs further explained that education in California is ultimately a state endeavor—not a local one—with the “state [] so entangled with the operation of California's local school districts” that the State is a proper defendant in an action seeking to enjoin its interference with local school districts' compliance with Title VII. *See Ass'n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 582 (9th Cir. 2000) (en banc). (ECF No. 18-1 at 6:23-7-13.) Plaintiffs also explained

1 that, due to this entanglement, the CDE is properly named as a necessary party
2 because it is ultimately responsible for education in California. *See Drobnicki v. Poway*
3 *Unified Sch. Dist.*, No. 06-cv-1563, 2007 WL 9718700 (S.D. Cal. July 13, 2007). (ECF
4 No. 18-1 at 7:14-19.)

5 Turning to the CDE's specific arguments: On traceability, Plaintiffs explained
6 that the Complaint pleads that the origin of EUSD's policies relating to gender
7 identity was the CDE's Frequently Asked Questions page on gender identity
8 discrimination. (Compl., pp.238-49, Ex.26.) Plaintiffs further explained that the
9 Complaint pleads that EUSD denied Plaintiffs an exemption from its Parental
10 Exclusion Policies because it believed it was bound by the CDE's FAQ page.
11 (Compl., p.49, ¶201; Compl., pp.254, 266, Ex.27 at p.4, Ex. 28, p.4.) With respect to
12 traceability, these allegations are sufficient. *See Skyline Wesleyan Church v. California*
13 *Dep't of Managed Health Care*, 968 F.3d 738, 748 (9th Cir. 2020). (ECF No. 18-1 at
14 11:10-12:12.)

15 On redressability, Plaintiffs explained that the Court need not be *certain* that
16 EUSD would stop complying with the CDE's Frequently Asked Questions page on
17 gender identity discrimination, as applied to this case, if the Court found that page
18 wrong on the law. Rather, as explained by the Ninth Circuit, the fact that EUSD
19 repeatedly cited that FAQ page creates an adequate inference that a decision
20 regarding it will affect EUSD's actions in Plaintiffs' favor. *See Skyline*, 968 F.3d at
21 750. (ECF No. 18-1 at 12:13-13:14.)

22 Finally, on sovereign immunity, Plaintiffs explained that the argument is
23 misguided because it does not apply to Plaintiffs' request for prospective injunctive
24 or declaratory relief. *See, e.g., Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839
25 (9th Cir. 1997) (citing *Ex parte Young*, 209 U.S. 123 (1908).) Further, the required
26 connection between the government actors sued and the government conduct
27 causing harm is identical to the traceability and redressability analyses already
28 discussed. *See Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022). (ECF No. 18-1 at

1 13:15-15:25.) In their new motion to dismiss, the CDE Defendants do not address any
2 of Plaintiffs’ case law or arguments. However, they do make two new points, which
3 will be addressed below.

4 **II. RESPONSE TO THE CDE’S NEW STATEMENTS**

5 The *first* new point that the CDE makes concerns traceability. There, the
6 CDE argues that “Plaintiffs make no factual allegations that the SBE ever acted or
7 voted on the FAQs” (ECF No. 25-1 at 8:20-21), and “Plaintiffs make no allegation
8 alleging that the SBE members in their official capacities voted to adopt any policy of
9 ... the CDE website FAQs.” (ECF No. 25-1 at 12:14-16.) However, the CDE cites no
10 case law in support of the argument that Plaintiffs must identify a specific vote taken
11 by the State Board of Education members.

12 Analogously, the EUSD Board of Trustees also did not vote to pass AR 5145.3.
13 It is an administrative regulation issued by executive staff such as the superintendent.
14 (Compl., p.28, ¶¶115-16.) But the EUSD Board of Trustees absolutely has the
15 authority to veto it—just as the State Board of Education has the authority to order
16 the taking down of the CDE’s FAQ page on gender identity discrimination. *See* Cal.
17 Educ. Code §§ 33031, 33301(a).

18 The *second* new point that the CDE makes is on redressability. The CDE
19 argues that “EUSD is subject to general laws on nondiscrimination unrelated to
20 whether CDE has any FAQs on the subject,” such that “[e]ven if the court granted
21 this declaratory relief against the State-level Defendants, the declaration would not,
22 in and of itself, do anything to redress the alleged harm arising from EUSD’s
23 policies.” (ECF No. 25-1 at 13:18-14:5.)

24 This is a *non sequitor*. Plaintiffs seek a declaration that the CDE’s FAQ page on
25 gender identity discrimination is not required by any law, either (1) because it mis-
26 characterizes California statutory or constitutional law, or (2) because such California
27 law is preempted by federal law. (Compl., pp.63-64, ¶¶281-86; Compl., p.64, Prayer
28 ¶A.) If the Court granted this declaratory relief, then it would have held that other

1 “general laws on nondiscrimination” do not require the CDE’s Parental Exclusion
2 Policies as outlined in its FAQ page.²

3 The CDE may have meant that EUSD could promulgate its Parental Exclusion
4 Policies on its own authority, and may choose to do so, even if this Court holds that
5 they are not required by any provision in California law. (*See* ECF No. 25-1 at 8:5-11
6 (pointing the finger at EUSD).) However, it is not at all clear that EUSD would have
7 this power. One court recently held that a school district’s own COVID-19
8 vaccination mandate for students was preempted by statewide education law which
9 did not require vaccination. *See Let Them Choose v. San Diego Unified Sch. Dist.*, 85
10 Cal. App. 5th 693, 702 (2022), *review denied* (Feb. 22, 2023).

11 In the context of this case, the California legislature has been particularly busy
12 in the area of gender identity discrimination. If a school district disagreed with its
13 policies, it would be hard-pressed not to argue preemption. *See, e.g.*, Cal. Stats. 2013,
14 ch. 85, § 15 (amending Cal. Educ. Code § 221.5(f), to require that transgender
15 children have access to sport teams and bathrooms consistent with their gender
16 identity); Cal. Stats. 2019, ch. 49 (amending Cal. Educ. Code §§ 234-234.5, 32283.5
17 to require the CDE to publish anti-bullying guidelines, including on gender identity
18 bullying); Cal. Stats. 2011, ch. 81 (amending Cal. Educ. Code §§ 51204.5, 51500,
19 51501, 60040, 60044, to require school districts to adopt curriculum highlighting role
20 and contributions of LGBT individuals to development of California); Cal. Stats.
21 2015, ch. 398 (amending Cal. Educ. Code §§ 51930-51939, to require school districts
22 to adopt comprehensive sexual health curriculum, including on LGBT sexual health).

23 _____
24 ² As part of this argument, the CDE says that “[a]s to the State-level Defendants, the
25 only remedy sought in the Complaint is a declaration that the CDE’s FAQ page
26 violates the First Amendment to the Constitution.” (ECF No. 25-1 at 13:15-16.) This
27 is incorrect. The CDE is named in every cause of action, and Plaintiffs seek “[a]n
28 order temporarily, preliminarily, and permanently enjoining and prohibiting
Defendants [both EUSD and CDE] from enforcing their unlawful Parental Exclusion
Policies [found in EUSD’s AR 5145.3, and the CDE’s FAQ page] against Plaintiffs.”
(Compl., p.64, Prayer ¶B.)

1 **III. FOR ALL PRACTICAL PURPOSES, THE CDE’S FAQ PAGE ON**
2 **GENDER IDENTITY IS BINDING ON EUSD**

3 For the reasons stated in Plaintiffs’ briefing (*see* ECF No. 18-1), as summarized
4 above (*see* §§ I-II, *supra*), the CDE’s motion to dismiss should be denied. Under
5 *Skyline Wesleyan Church v. California Dep’t of Managed Health Care*, 968 F.3d 738
6 (9th Cir. 2020), its connection to this case is more than sufficient to justify its
7 participation as a defendant in this action.

8 However, even if the Court found that the allegations in the Complaint were
9 currently insufficient as to the CDE, the Court should freely grant Plaintiffs leave to
10 amend. “Dismissal without leave to amend is improper unless it is ‘clear’ that ‘the
11 complaint could not be saved by any amendment.’” *Harris v. Amgen, Inc.*, 573 F.3d
12 728, 737 (9th Cir. 2009) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 692 (9th
13 Cir.2001)). Here, as described below, Plaintiffs can plead that the CDE’s Legal
14 Advisory on gender identity discrimination, and related FAQ page, is a practically
15 binding regulation for which compliance is necessary for EUSD to receive state
16 funding. Because it is binding, Plaintiffs could plead that EUSD has no discretion to
17 exempt Plaintiffs from it without leave from the CDE, making the CDE a necessary
18 defendant in this action.

19 **A. Background on the Purpose and Duties of the CDE**

20 The provisions in the California Education Code governing the conduct of the
21 CDE are not particularly voluminous. *See* Cal. Educ. Code §§ 33300-33319.5. One of
22 its main purposes is to enact model “program guidelines” for use by local school
23 districts. Cal. Educ. Code §§ 33308.5, 33316(a), (d). These program guidelines,
24 however, “shall be designed to serve as a model or example, and shall not be
25 prescriptive. Program guidelines issued by the department shall include written
26 notification that the guidelines are merely exemplary, and that compliance with the
27 guidelines is not mandatory. *Id.* at § 33308.5(a). The CDE is also tasked with
28 providing training to local school officials, *id.* at § 33316(d), (e), and with

1 apportioning and distributing state funds to local school districts. *See id.* at
2 §§ 33316(a), (c), 41330-41344.6. The CDE is also tasked with issuing regulations to
3 implement various provisions of the California Education Code. *See* Cal. Educ. Code
4 §§ 33031, 33316(b).

5 **B. Compliance with the CDE’s FAQ Page is a Practical Requirement to**
6 **Receive State Educational Funds**

7 In light of the above statutory law, the CDE’s Frequently Asked Questions page
8 on gender identity is a unique and ambiguous document. On its face, it never states
9 under what authority it was promulgated. (*See* Compl., pp.238-49, Ex.26; Trissell
10 Decl., ¶¶2-3 & Ex.26.) It purports to “assist school districts with understanding and
11 implementing policy changes related to AB 1266 and transgender student privacy,
12 facility use, and participation in school athletic competitions.” (Ex. 26 at p.1.)

13 AB 1266 is the California School Success and Opportunity Act from 2013. *See*
14 Cal. Stats. 2013, ch. 85, § 15. That Act did not specifically order the CDE to post any
15 resources online (as some other acts do). *See id.* Rather, the Act requires local school
16 districts to admit transgender or gender diverse students to sex-segregated activities
17 or locations (sports teams, locker rooms) based on their gender identity instead of
18 their sex. *See* Cal. Educ. Code § 221.5(f).

19 Reviewing the CDE website shows that the FAQ page is actually referenced in,
20 and part of, a CDE “Legal Advisory regarding application of California’s
21 antidiscrimination statutes to transgender youth in schools.” (Trissell Decl., Ex.46.)
22 That Legal Advisory states that its purpose is “to provide California school districts
23 with updated guidance on the minimum requirements for compliance with
24 California’s prohibition on gender identity discrimination.” (*Id.* at p.1.) It then states
25 that the California Department of Education has created “FAQs” to further this
26 purpose, and links to the FAQ page. (*Id.* at p.2.)

27 With respect to the FAQ page, the Legal Advisory states that “[i]t is
28 recommended that these materials are reviewed by superintendents, principals

1 administrators and the local educational agency officer appointed pursuant to
2 Education Code Section 234.1(g) to ensure compliance with the educational equity and
3 nondiscrimination requirements of” California law. (*Id.* at p.2)

4 The Legal Advisory also states that “[e]xamples of harassment and abuse
5 commonly experienced by transgender students include, but are not limited to, being
6 teased for failing to conform to sex stereotypes, being deliberately referred to by the
7 name and/or pronouns associated with the student’s assigned sex at birth, being
8 deliberately excluded from peer activities, and having personal items stolen or
9 damaged. School district efforts to prevent and address harassment *must* include
10 strong local policies and procedures for handling complaints of harassment.” (*Id.* at
11 p.2.) Like the FAQ page itself, the Legal Advisory does not include any identification
12 of an authorizing statute or a statement that it is non-binding or mere guidance or
13 best practices. (*Id.*)

14 Neither the Legal Advisory nor the FAQ page contain a date showing when
15 they were authored—merely a date showing when they were last reviewed. However,
16 both can be found online dating back to 2016, with a version of the FAQ page being
17 last reviewed on January 29, 2016. (Trissell Decl., ¶¶3, 5.) The FAQ page also links
18 to the California School Boards Associations’ model BP 5145.3 and model AR 5145.3.
19 (*See* Ex. 26 at p.10) The model AR 5145.3 is the regulation adopted by the Escondido
20 Union School District that Plaintiffs are challenging in this case. The FAQ page says
21 that those models were also posted on January 29, 2016. (*Id.*)

22 The Legal Advisory states that it replaces a prior legal advisory, identified as
23 “LO: 1-04” and dated April 30, 2004. (Ex. 46 at p.1.) The 2004 Legal Advisory
24 states that it was issued because “[r]ecent actions by a California school district have
25 brought to our attention the need to remind school districts and county offices of
26 education about state statutes and regulations that prohibit discrimination against
27 students in various protected categories in the State of California.” (Ex. 47 at p.1.)

28 ///

1 The “recent actions” referenced were “California’s Westminster School
2 Board refus[ing] to enforce the state’s Student Safety and Violence Prevention Act of
3 2000, which protects transgender and gender non-conforming students from
4 harassment and discrimination,” in response to which “the California Department of
5 Education issued a Legal Advisory, stating that no school district could ignore state
6 law.” See Dylan Vade, *Expanding Gender and Expanding the Law*, 11 Mich. J. Gender
7 & L. 253, 316 & n.18 (2005). Ultimately, the CDE threatened to withhold \$8 million
8 in state funds for Westminster School District’s refusal to comply, which caused it to
9 relent. See Ex. 48, Joel Rubin, *Beliefs Imperil Funding*, L.A. Times (Mar. 14, 2004);
10 Ex. 49, Joel Rubin, *School District Votes to Sue State*, L.A. Times (Sep. 3, 2004).

11 As explained in the 2004 Legal Advisory, “Government Code section 11135 ...
12 prohibits discrimination against anyone who is the beneficiary of a publicly funded
13 program in California, including public school students.” (Ex. 47 at p.3.) And
14 “[u]nder Education Code section 250, compliance with all the laws regarding equity
15 and nondiscrimination is a condition of receiving any state funds.” (*Id.*) Further,
16 pursuant to California regulations, every local school district is “required to have a
17 policy against discrimination that applies to all the protected categories of students
18 listed in all [of the antidiscrimination] statutes.” (*Id.* (citing 5 C.C.R. § 4621(a)).)

19 Lastly, the 2004 Legal Advisory on gender identity states that “the California
20 State Board of Education (SBE) is empowered to make regulations to further *define*
21 *the prohibited acts of discrimination.*” (*Id.* at p.3.) However, nothing in the relevant
22 sections of the California Code of Regulations substantively defines what constitutes
23 “prohibited acts of discrimination” with respect to gender identity. See 5 C.C.R.
24 §§ 4600-4671, 4900-4965.

25 The California Code of Regulations simply state that “[i]t is the intent of the
26 State Board of Education that the Superintendent of Public Instruction assist school
27 districts and county offices of education to recognize and eliminate unlawful
28 discrimination that may exist within their programs or activities.” 5 C.C.R.

1 § 4900(c); *see also id.* at § 4902 (“[T]he Superintendent of Public Instruction is
2 responsible for providing leadership to local agencies to ensure that the requirements
3 of the following nondiscrimination laws and their related regulations are met in
4 educational programs that receive or benefit from state or federal financial assistance
5 and are under the jurisdiction of the State Board of Education”).

6 This, in turn, returns the analysis to the 2016 Legal Advisory, which states that
7 the FAQs were drafted “to ensure compliance with the educational equity and
8 nondiscrimination requirements of ... 5 California Code of Regulations Section 4900
9 et seq.” (Ex. 46 at p.3.) Thus, according to the CDE, compliance with its 2016 Legal
10 Advisory on gender identity discrimination, and the corresponding FAQ page, is a
11 condition of receiving state educational funds. Or, as simply stated by EUSD, “The
12 California Department of Education *Requires* the Policy.” (ECF No. 16 at 7:14.)

13 **C. In light of the CDE’s History of Enforcement, its “Agency**
14 **Smurfing” Should Be Rejected**

15 The CDE’s interpretation of the various statutes prohibiting gender identity
16 discrimination, as shown in its FAQ page appended to its 2016 Legal Advisory, is far
17 afield from the actual text of those statutes. The primary statutes simply prohibit
18 *discrimination* and *harassment* on the basis of gender identity, without defining those
19 terms with any specific examples. Cal. Educ. Code § 220 (discrimination), §§ 234-
20 234.5 (harassment).

21 The secondary, more specific statute, merely says that “[a] pupil shall be
22 permitted to participate in sex-segregated school programs and activities, including
23 athletic teams and competitions, and use facilities consistent with his or her gender
24 identity, irrespective of the gender listed on the pupil’s records.” Cal. Educ. Code
25 § 221.5(f). Finally, the California Constitution says that “[a]ll people are by nature
26 free and independent and have inalienable rights. Among these are enjoying and
27 defending life and liberty, acquiring, possessing, and protecting property, and
28 pursuing and obtaining safety, happiness, and *privacy*.” Cal. Const., art. I, § 1.

1 Based on these provisions alone, the CDE created its 2016 Legal Advisory,
2 promoted the CSBA’s model AR 5145.3, and drafted its own FAQ page. In light of
3 the distance between the source statutes, and the substance of the corresponding
4 interpretation, any local school district would seem well situated to challenge the
5 CDE’s interpretation of their requirements. But a recent example of the CDE’s
6 power makes clear why inaction is unsurprising.

7 Earlier this year, the Temecula Valley Unified School District rejected a new
8 social studies textbook which Board Trustees viewed as containing sexually
9 problematic content, and opted to continue using the prior 2006 books. That new
10 book, “Social Studies Alive,” is “a state recommended—not mandated—K-5 social
11 studies book.” *See* Ex. 50, City News Service, *Newsom threatens action against*
12 *Temecula school board for rejecting textbooks*, Desert Sun (July 13, 2023). There “aren’t
13 any known findings that the [2006] books’ content is in violation of state law”—
14 specifically the 2011 FAIR Act requiring celebration of LGBT history. *Id.*
15 (referencing Cal. Stats. 2011, ch. 81, which amended Cal. Educ. Code §§ 51204.5,
16 51500, 51501, 60040, 60044, to require school districts to adopt curriculum
17 highlighting role and contributions of LGBT individuals to the development of
18 California).

19 Nevertheless, the CDE itself determined that the 2006 books fail to comply
20 with the 2011 FAIR Act, and threatened action against the school district unless its
21 Board reversed its vote. *See, e.g.*, Ex. 51, Press Release: Governor Newsom and
22 Attorney General Bonta Demand Answers from Temecula School Board, Office of
23 the Governor (June 7, 2023); Ex. 52, Letter from Michael L. Newman, Senior
24 Assistant Attorney General, California Department of Justice, to Dr. Jodi McClay,
25 Superintendent, Temecula Valley Unified School District (June 7, 2023) (enclosing
26 June 1, 2023 letter from State Superintendent Thurmond). The Temecula Valley
27 School District Board of Trustees stood firm, and so Governor Newsom directed the
28 CDE to purchase the textbooks itself and fine the school district \$1.5 million. In light

1 of the looming threat, within 24 hours, the Board reversed course. *See* Ex. 53, Press
2 Release: Governor Newsom Announces Contract to Secure Textbooks for Students
3 in Temecula, Office of the Governor (July 19, 2023); Ex. 54, Press Release: Governor
4 Newsom Issues Statement on Temecula Textbooks, Office of the Governor (July 21,
5 2023).³ It would seem that failure to follow the CDE’s “recommendations” is a risky
6 proposition indeed.

7 This history of enforcement should make absolutely clear that any aggrieved
8 party has standing to challenge the CDE’s 2016 Legal Advisory and FAQ page on
9 gender identity. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308-09 (2023)
10 (Colorado’s aggressive enforcement of its antidiscrimination laws conferred standing
11 in pre-enforcement challenge). However, the CDE’s attempt to argue against
12 justiciability is not surprising. The CDE is engaged in what one court has recently
13 termed, “agency smurfing.” *State of Texas v. U.S. Dep’t of Health & Hum. Services*,
14 No. 7:23-cv-22, 2023 WL 4629168 (W.D. Tex. July 12, 2023). As explained by that
15 court:

16 A recent trend among federal agencies appears to be borrowing a
17 technique common among money launderers to avoid judicial review.
18 The technique known as “smurfing” in the financial arena occurs
19 when the launderer divides a large transaction—which might
20 otherwise trigger a bank’s reporting requirements—into various
smaller transactions to avoid detection....

21 Agency smurfing, similar to financial smurfing, occurs when the
22 executive branch smurfs one policy goal into multiple, supposedly
23 “unreviewable” and “unchallengeable” pieces. Consider an executive
24 branch, who ... seeks to achieve a policy goal contrary to the Court’s
25 holding.... In its efforts to avoid scrutiny, and eventual discovery of
their true purpose, the executive branch breaks up the policy goal into

26 ³ Plaintiffs previously requested that the Court take judicial notice of various
27 governmental documents attached to the Complaint. (*See* EF No. 5-6 (citing *Cachil*
28 *Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962,
968 n.4 (9th Cir. 2008)).) For the same reasons, Plaintiffs request that the Court take
judicial notice of Exhibits 46, 47, 51, 52, 53, and 54.

1 separate, seemingly unrelated and innocent pieces—an executive
2 order here, a press release and guidance there.

3 Then, if sued, the executive branch argues that—individually—none
4 of the divided pieces create an imminent threat of harm, thus
5 preventing potential plaintiffs from successfully challenging the policy
6 goal. And because the executive branch contends that each action
7 individually represents an amorphous, non-final action, they are
8 therefore unreviewable by the courts. For those being regulated,
however, these individual “unreviewable” and “unchallengeable”
pieces link to create a looming enforcement threat.

9 *Id.* at *1. In reviewing such “agency smurfing,” the court is “not required to exhibit a
10 naiveté from which ordinary citizens are free,” *id.* at *7 (quoting *Dep’t of Com. v. New*
11 *York*, 139 S. Ct. 2551, 2576 (1991)), and need “not play along with” such
12 gamesmanship. *Id.* at *12.

13 Here, “agency smurfing” is exactly what is occurring. The CDE has
14 promulgated a byzantine set of cross-referencing statutes, regulations, guidance
15 documents, and Legal Advisories in an effort to frustrate judicial review. Its 2016
16 Legal Advisory and FAQ page are not regulations in the California Code of
17 Regulations, but they are binding in every practical sense. CDE officials can, and
18 presumably do, cite to them when providing training to local school officials on the
19 requirements of California law. But when challenged, the CDE simply points the
20 finger to the local school districts. This Court should not allow the CDE to pass the
21 buck in such a conspicuously brazen manner.

22 CONCLUSION

23 In *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), the U.S. Supreme Court
24 reversed the decision of the lower courts to deny Ms. Lorie Smith and her company’s
25 pre-enforcement challenge against the State of Colorado. Under Colorado anti-
26 discrimination law, if Ms. Smith designed custom websites announcing an opposite-sex
27 marriage, she was equally required to design custom websites announcing an event
28 celebrating a same-sex union, and call the event a “wedding” and the union a

1 “marriage” even though she did not believe either characterization was correct. *Id.* at
2 2308.

3 In reversing the lower court’s refusal to grant pre-enforcement relief, the U.S.
4 Supreme Court chastised Colorado’s argument that a wedding website only conveyed
5 logistical information, and as such, that compelling Ms. Smith to design one for a
6 same-sex wedding was a mere incidental burden on speech. According to the High
7 Court, such an argument was, in reality, “a far cry from this case.” *Id.* at 2318. As
8 explained by the Court:

9 To be sure, our cases have held that the government may sometimes
10 “requir[e] the dissemination of purely factual and uncontroversial
11 information,” particularly in the context of “commercial advertising.”
12 *Hurley*, 515 U. S., at 573, 115 S.Ct. 2338 (internal quotation marks
13 omitted); see also *NIFLA*, 585 U. S., at ----, 138 S.Ct. at 2373; *Riley v.*
14 *National Federation of Blind of N.C., Inc.*, 487 U. S. 781, 795–796, 108
15 S.Ct. 2667, 101 L.Ed.2d 669 (1988). But this case involves nothing like
16 that. Here, Colorado does not seek to impose an incidental burden on
17 speech. It seeks to force an individual to “utter what is not in [her]
mind” about a question of political and religious significance. *Barnette*,
319 U. S., at 634, 63 S.Ct. 1178. And that, *FAIR* reaffirmed, is something
the First Amendment does not tolerate.

18 *Id.* at 2317-18. It was as plain as day to the Court that the government’s goal was one
19 that the Court could not tolerate: “allowing a government to coerce an individual to
20 speak contrary to her beliefs on a significant issue of personal conviction, all in order to
21 eliminate ideas that differ from its own.” *Id.* at 2318. At base, the point of Colorado’s
22 law was to coerce a change in views by the public, a goal which the Supreme Court
23 found repugnant and outside the authority of the government. *Id.* Thus, the Supreme
24 Court concluded its opinion stating:

25 Colorado seeks to force an individual to speak in ways that align with its
26 views but defy her conscience about a matter of major significance. In the
27 past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the
28 First Amendment’s boundaries by seeking to compel speech they
thought vital at the time. But, as this Court has long held, the opportunity
to think for ourselves and to express those thoughts freely is among our

1 most cherished liberties and part of what keeps our Republic strong. Of
2 course, abiding the Constitution’s commitment to the freedom of speech
3 means all of us will encounter ideas we consider “unattractive,” *post*, at
4 2342–2343 (opinion of SOTOMAYOR, J.), “misguided, or even
5 hurtful,” *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338. But tolerance, not
6 coercion, is our Nation’s answer. The First Amendment envisions the
7 United States as a rich and complex place where all persons are free to
8 think and speak as they wish, not as the government demands. Because
9 Colorado seeks to deny that promise, the judgment is *Reversed*.

8 *Id.* at 2321-22.

9 Just as in *303 Creative LLC*, the government’s goal is shrouded in anti-
10 discrimination and anti-harassment rhetoric. Facilitating the social transition of
11 children to a new gender—by using preferred pronouns and concealing information
12 from parents—is called an “anti-discrimination” measure despite having no
13 cognizable connection of any kind to the actual definition of the word
14 “discrimination.” The Court should see through this rhetoric. Plaintiffs Elizabeth
15 Mirabelli and Lori Ann West are committed to treating all transgender or gender
16 diverse children with kindness, respect, and love. But they cannot sign on to what the
17 government is asking them to do here: “defy [their] conscience about a matter of major
18 significance.” *Id.* at 2321.

19 For its part, the CDE is practically committed to ensuring that local school
20 districts follow its “recommendations” on compliance with California law and, as
21 shown by the recent example of Temecula Valley Unified School District, can make
22 good on enforcing compliance. Thus, unless the CDE is willing to affirm that no
23 provision of California law requires parental deception on a child’s gender identity,
24 and disclaim any intent to enforce its view against EUSD, it is a proper party in this
25 action and should be enjoined from “interfering in any way, including by taking action
26 against the EUSD Defendants, with Mrs. Mirabelli’s and Mrs. West’s ability to
27 communicate with the parents of transgender or gender diverse students in accordance
28 with this Court’s order.” (ECF No. 5 at 3:7-10.)

1 For the foregoing reasons, Plaintiffs respectfully request that this Court deny the
2 CDE’s motion to dismiss, deny EUSD’s motion to dismiss, and grant Plaintiffs’
3 motion for a preliminary injunction.

4
5 Respectfully submitted,

6 LiMANDRI & JONNA LLP

7
8 Dated: July 24, 2023

By:


9 Charles S. LiMandri
10 Paul M. Jonna
11 Mark D. Myers
12 Jeffrey M. Trissell
13 Milan L. Brandon II
14 Attorneys for Plaintiffs
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Elizabeth Mirabelli v. Mark Olson, President of the EUSD Board of Education, et al.
USDC Court Case No.: 3:23-cv-00768-BEN-WVG

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9120, Rancho Santa Fe, California 92067, and that I served the following document(s):

- **Plaintiffs’ Memorandum of Points & Authorities in Opposition to CDE Defendants’ Motion to Dismiss; and**
- **Declaration of Jeffrey M. Trissell, Esq. in support of Plaintiffs’ Opposition to CDE Defendants’ Motion to Dismiss.**

on the interested parties in this action by placing a true copy in a sealed envelope, addressed as follows:

Thomas Prouty, Deputy General Counsel
 Len Garfinkel
 California Department of Education
 1430 “N” Street, Suite 5319
 Sacramento, CA 95814
 Tel: 916-319-0860; Fax: 916-322-2549
 E-Mail: tprouty@cde.ca.gov
 E-Mail: lgarfinkel@cde.ca.gov
Attorneys for CDE Defendants

Daniel R. Shinoff, Esq.
 Artiano Shinoff
 3636 Fourth Avenue, Suite 200
 San Diego, CA 92103
 Tel: 619-232-3122
 E-Mail: Dshinoff@as7law.com
 E-Mail: nlay@as7law.com
Attorneys for EUSD Defendants

 X **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

 X **(BY ELECTRONIC MAIL)** I served a true copy, electronically on designated recipients via electronic transmission of said documents.

 X **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on July 24, 2023, at Rancho Santa Fe, California.



 Kathy Denworth

1 Charles S. LiMandri, SBN 110841
 2 cslimandri@limandri.com
 3 Paul M. Jonna, SBN 265389
 4 pjonna@limandri.com
 5 Mark D. Myers, SBN 235719
 6 mmyers@limandri.com
 7 Jeffrey M. Trissell, SBN 292480
 8 jtrissell@limandri.com
 9 Milan L. Brandon II, SBN 326953
 10 mbrandon@limandri.com
 11 LiMANDRI & JONNA LLP
 12 P.O. Box 9120
 13 Rancho Santa Fe, CA 92067
 14 Telephone: (858) 759-9930
 15 Facsimile: (858) 759-9938

Thomas Brejcha, *pro hac vice**
 tbrejcha@thomasmoresociety.org
 Peter Breen, *pro hac vice**
 pbreen@thomasmorsociety.org
 THOMAS MORE SOCIETY
 309 W. Washington St., Ste. 1250
 Chicago, IL 60606
 Tel: (312) 782-1680
 *Application forthcoming

Attorneys for Plaintiffs

12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA

15 ELIZABETH MIRABELLI, an individual,
 16 and LORI ANN WEST, an individual,

17 Plaintiffs,

18 v.

19 MARK OLSON, in his official capacity as
 20 President of the EUSD Board of
 21 Education, et al.,

22 Defendants.

Case No.: 3:23-cv-0768-BEN-WVG

**Declaration of Jeffrey M. Trissell,
 Esq. in support of Plaintiffs’
 Opposition to CDE Defendants’
 Motion to Dismiss**

**[Fed. R. Civ. P. 12(b)(1)]
 [Fed. R. Civ. P. 12(b)(6)]**

Judge: Hon. Roger T. Benitez
 Courtroom: 5A
 Hearing Date: August 21, 2023
 Hearing Time: 2:00 p.m.

1 I, Jeffrey M. Trissell, Esq., declare and state as follows:

2 1. I am an attorney at law duly licensed to practice in the State of California
3 and in the Southern District of California. I am an attorney with LiMandri & Jonna
4 LLP, and am counsel of record for Plaintiffs Elizabeth Mirabelli and Lori Ann West.
5 The matters discussed below are based on my own personal knowledge. I could and
6 would testify to them if called upon to do so in court.

7 **THE HISTORY OF THE CDE’S WEBPAGES ON GENDER IDENTITY**

8 2. Attached to the Complaint as **Exhibit 26** is a true and correct copy of a
9 printout of the California Department of Education webpage titled: “School Success
10 and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions.” A copy of
11 that Exhibit is also attached to this declaration for ease of reference. That webpage is
12 available online here: <https://www.cde.ca.gov/re/di/eo/faqs.asp>.

13 3. I searched for this FAQ page in the website <https://web.archive.org>.
14 The earliest capture of this webpage dates to February 20, 2016, and that version of
15 the webpage says it was last reviewed on January 29, 2016. *See* [https://web.archive.org/
16 web/20160220203003/https://www.cde.ca.gov/re/di/eo/faqs.asp](https://web.archive.org/web/20160220203003/https://www.cde.ca.gov/re/di/eo/faqs.asp).

17 4. Attached hereto as **Exhibit 46** is a true and correct copy of a printout of
18 the California Department of Education webpage titled: “Legal Advisory regarding
19 application of California’s antidiscrimination statutes to transgender youth in
20 schools.” That page is here: <https://www.cde.ca.gov/re/di/eo/legaladvisory.asp>.

21 5. The Legal Advisory is not dated. Therefore, I searched for it in the
22 website <https://web.archive.org>. The earliest version that I found of it was captured
23 on October 2, 2016. *See* [https://web.archive.org/web/20161002214353/https://
24 www.cde.ca.gov/re/di/eo/legaladvisory.asp](https://web.archive.org/web/20161002214353/https://www.cde.ca.gov/re/di/eo/legaladvisory.asp).

25 6. The Legal Advisory attached as Exhibit 46 states that it replaces a prior
26 legal advisory, identified as “LO: 1-04” and dated April 30, 2004. Searching the
27 website <https://web.archive.org>, I found a copy of that prior legal advisory, a true and
28 correct printout of which is attached as **Exhibit 47**. That webpage is here:

1 <https://web.archive.org/web/20040808050344/http://www.cde.ca.gov/nr/re/ht/y>
2 [r04ltr0430.asp](https://web.archive.org/web/20040808050344/http://www.cde.ca.gov/nr/re/ht/y).

3 7. The 2004 Legal Advisory states that it was issued because of “[r]ecent
4 actions by a California school district.” Various legal sources, such as journal articles,
5 identified this as the Westminster School Board’s refusal to enforce a recent
6 California statute adding gender identity as a protected characteristic to various anti-
7 discrimination laws. Several news articles discuss this refusal and the aftermath.

8 8. Attached hereto as **Exhibit 48** is a true and correct copy of the Los
9 Angeles Times article by Joel Rubin, titled *Beliefs Imperil Funding*, and dated March
10 14, 2004. That article is available online here: [https://www.latimes.com/archives/la-](https://www.latimes.com/archives/la-xpm-2004-mar-14-me-gender14-story.html)
11 [xpm-2004-mar-14-me-gender14-story.html](https://www.latimes.com/archives/la-xpm-2004-mar-14-me-gender14-story.html).

12 9. Attached hereto as **Exhibit 49** is at true and correct copy of the Los
13 Angeles Times article by Joel Rubin, titled *School District Votes to Sue State*, and
14 dated September 3, 2004. That article is available online here:
15 <https://www.latimes.com/archives/la-xpm-2004-sep-03-me-gender3-story.html>.

16
17 **THE CDE’S RECENT ENFORCEMENT HISTORY**

18 10. Attached hereto as **Exhibit 50** is a true and correct copy of the Desert
19 Sun article titled *Newsom threatens action against Temecula school board for rejecting*
20 *textbooks*, and dated July 13, 2023. That article is available online here:
21 [https://www.desertsun.com/story/news/education/2023/07/13/newsom-threatens-](https://www.desertsun.com/story/news/education/2023/07/13/newsom-threatens-action-against-temecula-school-board-for-rejecting-textbooks/70412171007/)
22 [action-against-temecula-school-board-for-rejecting-textbooks/70412171007/](https://www.desertsun.com/story/news/education/2023/07/13/newsom-threatens-action-against-temecula-school-board-for-rejecting-textbooks/70412171007/).

23 11. Attached hereto as **Exhibit 51** is a true and correct copy of the press
24 release from the Office of Governor Gavin Newsom titled *Governor Newsom and*
25 *Attorney General Bonta Demand Answers from Temecula School Board*, and dated June
26 7, 2023. That press release is available online here:
27 <https://www.gov.ca.gov/2023/06/07/temecula-school-board/>.

28 ///

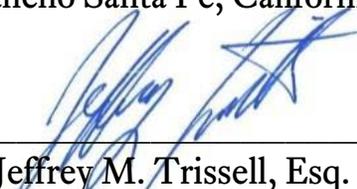
1 12. That press release linked to a letter sent by Attorney General Rob Bonta
2 to the Temecula Valley Unified School District, dated June 7, 2023. A true and
3 correct copy of that letter, along with its referenced enclosure, is attached as
4 **Exhibit 52**. The letter is available online here: [https://oag.ca.gov/system/files/
5 attachments/press-docs/Letter%20to%20TVUSD.pdf](https://oag.ca.gov/system/files/attachments/press-docs/Letter%20to%20TVUSD.pdf).

6 13. Attached hereto as **Exhibit 53** is a true and correct copy of the press
7 release from the Office of Governor Gavin Newsom titled *Governor Newsom*
8 *Announces Contract to Secure Textbooks for Students in Temecula*, and dated July 19,
9 2023. That press release is available online here:
10 <https://www.gov.ca.gov/2023/07/19/temecula-contract/>.

11 14. Attached hereto as **Exhibit 54** is a true and correct copy of the press
12 release from the Office of Governor Gavin Newsom titled *Governor Newsom Issues*
13 *Statement on Temecula Textbooks*, and dated July 21, 2023. That press release is
14 available online here: [https://www.gov.ca.gov/2023/07/21/temecula-curriculum-
15 adoption/](https://www.gov.ca.gov/2023/07/21/temecula-curriculum-adoption/).

16 I declare under penalty of perjury under the laws of the United States and the
17 State of California that the foregoing is true and correct.

18 Executed on July 24, 2023, in Rancho Santa Fe, California.

19 
20 _____
21 Jeffrey M. Trissell, Esq.

22
23
24
25
26
27
28

EXHIBIT 26



[Home](#) / [Resources](#) / [Department Information](#) / [Equal Opportunity & Access](#)

Frequently Asked Questions

School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions.

Consistent with our mission to provide a world-class education for all students, from early childhood to adulthood, the California Department of Education issues the following Frequently Asked Questions (FAQs) in an effort to (a) foster an educational environment that is safe and free from discrimination for all students, regardless of sex, sexual orientation, gender identity, or gender expression, and (b) assist school districts with understanding and implementing policy changes related to AB 1266 and transgender student privacy, facility use, and participation in school athletic competitions.

These FAQs are provided to promote the goals of reducing the stigmatization of and improving the educational integration of transgender and gender nonconforming students, maintaining the privacy of all students, and supporting healthy communication between educators, students, and parents to further the successful educational development and well-being of every student.

[Expand All](#) | [Collapse All](#)

1. What is Assembly Bill (AB) 1266?

AB 1266, also known as the “School Success and Opportunity Act,” was introduced by Assemblyman Tom Ammiano on February 22, 2013. It requires that pupils be permitted to participate in sex-segregated school programs, activities, and use facilities consistent with their gender identity, without respect to the gender listed in a pupil’s records. AB 1266 was approved by Governor Brown on August 12, 2013.

According to Assemblyman Ammiano, “This bill is needed to ensure that transgender students are protected and have the same opportunities to participate and succeed as all other students.” “AB 1266 clarifies California’s student nondiscrimination laws by specifying that all students in K-12 schools must be permitted to participate in school programs, activities, and facilities in accordance with the student’s gender identity.”

As part of the analysis of AB 1266, Assemblyman Ammiano also stated, “Athletics and physical education classes, which are often segregated by sex, provide numerous well-documented positive effects for a student’s physical, social, and emotional development. Playing sports can provide student athletes with important lessons about self-discipline, teamwork, success, and failure, as well as the joy and shared excitement that being a member of a sports team can bring. When transgender students are denied the opportunity

to participate in physical education classes in a manner consistent with their gender identity, they miss out on these important benefits and suffer from stigmatization and isolation. In addition, in many cases, students who are transgender are unable to get the credits they need to graduate on time when, for example, they do not have a place to get ready for gym class."

2. When did this law go into effect?

AB 1266 became a provision within California Education Code, Section 221.5(f), on January 1, 2014. It is important to note that prior to the enactment of AB 1266, both state and federal law have prohibited gender-based discrimination for some time.

Federal Protection:

Title IX prohibits sexual harassment and discrimination based on gender or sex stereotypes in every jurisdiction. While Title IX does not specifically use the terms "transgender" or "gender identity or expression," courts have held that harassment and other discrimination against transgender and gender nonconforming people constitutes sex discrimination. This position has also been supported by the U.S. Department of Education. These rights were clarified in the October 26, 2010, "Dear Colleague Letter" and the April 29, 2014, guidance issued by the U.S. Department of Education, Office for Civil Rights, described in the "Recent Developments and Resources" section at the end of this document.

California Law:

It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state. (Education Code Section 200.)

No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid. (Education Code Section 220.)

3. What specifically does AB 1266 provide?

Pre-existing state law prohibits public schools from discriminating on the basis of several characteristics, including sex, sexual orientation, and gender identity. Pre-existing state law also requires that participation in a particular physical education activity or sport, if required of pupils of one sex, be available to pupils of each sex. AB 1266 requires a pupil be

permitted to participate in sex-segregated school programs, activities, and facilities including athletic teams and competitions, consistent with his or her gender identity, regardless of the gender listed on the pupil's records.

As amended, Education Code Section 221.5(f) provides that “a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”

4. How should a school district, teacher, school administrator or other employee define gender, transgender, or gender identity?

There are a number of developing terms used to describe transgender characteristics and experiences, which may differ based on region, age, culture, or other factors. Many of these terms are not currently defined by law. However, several common definitions have been used by the courts, the U.S. Department of Education, and a number of groups with educational equity expertise, including the Gay, Lesbian, Straight, Education Network, and the California School Boards Association. Any definitions provided in these materials are provided to facilitate the process of providing safe and nondiscriminatory learning environments and are not provided for the purpose of labeling any students.

"Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. (*Education Code* Section 210.7.)

"Gender identity" refers to a person's gender-related identity, appearance or behavior whether or not different from that traditionally associated with the person's physiology or assigned sex at birth.

"Gender expression" refers to external cues that one uses to represent or communicate one's gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics.

"Transgender" describes people whose gender identity is different from that traditionally associated with their assigned sex at birth. "Transgender boy" and "transgender male" refer to an individual assigned the female sex at birth who has a male gender identity. "Transgender girl" and "transgender female" refer to an individual assigned the male sex at birth who has a female gender identity. An individual can express or assert a transgender gender identity in a variety of ways, which may but do not always include specific medical treatments or procedures. Medical treatments or procedures are not considered a prerequisite for one's recognition as transgender.

"Gender nonconformity" refers to one's gender expression, gender characteristics, or gender identity that does not conform to gender stereotypes "typically" associated with one's legal sex assigned at birth, such as "feminine" boys, "masculine" girls and those who are perceived as androgynous. Sexual orientation is not the same as gender identity. Not all transgender youth identify as gay, lesbian or bisexual, and not all gay, lesbian and bisexual youth display gender-nonconforming characteristics.

5. How can a teacher or school administrator determine whether a student is transgender or not?

The first and best option is always to engage in an open dialogue with the student and the student's parent or parents if applicable (but see FAQs 6 and 7). Gender identity is a deeply rooted element of a person's identity. Therefore, school districts should accept and respect a student's assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student's core identity. Some examples of evidence that the student's asserted gender identity is sincerely held could include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.

If a student meets one or more of those requirements, a school may not question the student's assertion of their gender identity except in the rare circumstance where school

personnel have a credible basis for believing that the student is making that assertion for some improper purpose. The fact that a student may express or present their gender identity in different ways in different contexts does not, by itself, undermine a student's assertion of their gender identity.

A school cannot require a student to provide any particular type of diagnosis, proof of medical treatment, or meet an age requirement as a condition to receiving the protections afforded under California's antidiscrimination statutes. Similarly, there is no threshold step for social transition that any student must meet in order to have his or her gender identity recognized and respected by a school.

6. May a student's gender identity be shared with the student's parents, other students, or members of the public?

A transgender or gender nonconforming student may not express their gender identity openly in all contexts, including at home. Revealing a student's gender identity or expression to others may compromise the student's safety. Thus, preserving a student's privacy is of the utmost importance. The right of transgender students to keep their transgender status private is grounded in California's antidiscrimination laws as well as federal and state laws. Disclosing that a student is transgender without the student's permission may violate California's antidiscrimination law by increasing the student's vulnerability to harassment and may violate the student's right to privacy.

- A. Public Records Act requests - The Education Code requires that schools keep student records private. Private information such as transgender status or gender identity falls within this code requirement and should not be released. (Education Code Section 49060.)
- B. Family Educational and Privacy Rights (FERPA) - FERPA is federal law that protects the privacy of students' education records. FERPA provides that schools may only disclose information in school records with written permission from a student's parents or from the student after the student reaches the age of 18. (20 U.S.C. Section 1232g.) This includes any "information that . . . would allow a reasonable person in the school community . . . to identify the student with reasonable certainty." (34 C.F.R. Section 99.3.)
- C. California Constitution - Minors enjoy a right to privacy under Article I, Section I of the California Constitution that is enforceable against private parties and government officials. The right to privacy encompasses the right to non-disclosure (autonomy privacy) as well as in the collection and dissemination of personal information such as medical records and gender identity (informational privacy).
Even when information is part of a student's records and therefore covered by FERPA, the law provides several exceptions that permit appropriate communications under

circumstances in which the student or others may be at risk of harm. Transgender or gender nonconforming students are often subject to stressors which can place them at risk of self-harm. FERPA expressly permits the disclosure of information from a student's records "...to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." (34 C.F.R. Section 99.36(a).) "If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals." (*Id.* Section 99.36(c).)

Moreover, although FERPA restricts disclosures of information obtained from a student's records, it was never intended to act as a complete prohibition on all communications. One threshold point that is often overlooked is that FERPA limits only the disclosure of records and information from records about a student. It does not limit disclosure or discussion of personal observations.

In other words, if a school employee develops a concern about a student based on the employee's observations of or personal interactions with the student, the employee may disclose that concern to anyone without violating, or even implicating, FERPA. Of course, in most cases, the initial disclosure should be made to professionals trained to evaluate and handle such concerns, such as school student health or welfare personnel, who can then determine whether further and broader disclosures are appropriate.

7. What steps should a school or school district take to protect a transgender or gender nonconforming student's right to privacy?

To prevent accidental disclosure of a student's transgender status, it is strongly recommended that schools keep records that reflect a transgender student's birth name and assigned sex (e.g., copy of the birth certificate) apart from the student's school records. Schools should consider placing physical documents in a locked file cabinet in the principal's or nurse's office. Alternatively, schools could indicate in the student's records that the necessary identity documents have been reviewed and accepted without retaining the documents themselves. Furthermore, schools should implement similar safeguards to protect against disclosure of information contained in electronic records.

Pursuant to the above protections, schools must consult with a transgender student to determine who can or will be informed of the student's transgender status, if anyone, including the student's family. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student's parents. In those very rare circumstances where a school believes there is a specific and compelling "need to know," the school should inform the student that the school intends to disclose the student's transgender status, giving the

student the opportunity to make that disclosure her or himself. Additionally, schools must take measures to ensure that any disclosure is made in a way that reduces or eliminates the risk of re-disclosure and protects the transgender student from harassment and discrimination. Those measures could include providing counseling to the student and the student's family to facilitate the family's acceptance and support of the student's transgender status. Schools are not permitted to disclose private student information to other students or the parents of those students.

A transgender student's right to privacy does not restrict a student's right to openly discuss and express their gender identity or to decide when or with whom to share private information. A student does not waive his or her right to privacy by selectively sharing this information with others.

8. What is a school or school district's obligation when a student's stated gender identity is different than the student's gender marker in the school's or district's official records?

A school district is required to maintain a mandatory permanent student record which includes the legal name of the student and the student's gender. If and when a school district receives documentation that such legal name or gender has been changed, the district must update the student's official record accordingly.

If the school district has not received documentation supporting a legal name or gender change, the school should nonetheless update all unofficial school records (e.g. attendance sheets, school IDs, report cards) to reflect the student's name and gender marker that is consistent with the student's gender identity. This is critical in order to avoid unintentionally revealing the student's transgender status to others in violation of the student's privacy rights, as discussed above in section 6.

If a student so chooses, district personnel shall be required to address the student by a name and the pronouns consistent with the student's gender identity, without the necessity of legal documentation or a change to the student's official district record. The student's age is not a factor. For example, children as early as age two are expressing a different gender identity. It is strongly suggested that teachers privately ask transgender or gender nonconforming students at the beginning of the school year how they want to be addressed in class, in correspondence to the home, or at conferences with the student's parents.

In addition to preserving a transgender student's privacy, referring to a transgender student by the student's chosen name and pronouns fosters a safe, supportive and inclusive learning environment. To ensure that transgender students have equal access to the programs and activities provided by the school, all members of the school community must use a transgender student's chosen name and pronouns. Schools should also implement safeguards to reduce the possibility of inadvertent slips or mistakes, particularly among temporary personnel such as substitute teachers.

If a member of the school community intentionally uses a student's incorrect name and pronoun, or persistently refuses to respect a student's chosen name and pronouns, that conduct should be treated as harassment. That type of harassment can create a hostile learning environment, violate the transgender student's privacy rights, and increase that student's risk for harassment by other members of the school community. Examples of this type of harassment include a teacher consistently using the student's incorrect name when displaying the student's work in the classroom, or a transgender student's peers referring to the student by the student's birth name during class, but would not include unintentional or sporadic occurrences. Depending on the circumstances, the school's failure to address known incidents of that type of harassment may violate California's antidiscrimination laws.

9. How does a school or school district determine the appropriate facilities, programs, and activities for transgender students?

A school may maintain separate restroom and locker room facilities for male and female students. However, students shall have access to the restroom and locker room that corresponds to their gender identity asserted at school. As an alternative, a "gender neutral" restroom or private changing area may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a "gender neutral" restroom or private changing area shall be a matter of choice for a student and no student shall be compelled to use such restroom or changing area.

If there is a reason or request for increased privacy and safety, regardless of the underlying reason, any student may be provided access to a reasonable alternative locker room such as:

- A. Use of a private area in the public area of the locker room facility (i.e., a nearby restroom stall with a door, an area separated by a curtain, or a P.E. instructor's office in the locker room).
- B. A separate changing schedule (either utilizing the locker room before or after the other students).
- C. Use of a nearby private area (i.e., a nearby restroom or a health office restroom).

It should be emphasized that any alternative arrangement should be provided in a way that keeps the student's gender identity confidential.

Schools cannot, however, require a transgender student to use those alternatives. Requiring a transgender student to be singled out by using separate facilities is not only a denial of equal access, it also may violate the student's right to privacy by disclosing the student's transgender status or causing others to question why the student is being treated differently.

Some students (or parents) may feel uncomfortable with a transgender student using the same sex-segregated restroom or locker room. This discomfort is not a reason to deny access to the transgender student. School administrators and counseling staff should work with students and parents to address the discomfort and to foster understanding of gender identity, to create a school culture that respects and values all students.

10. How should a school or district determine the appropriate placement for transgender students related to sports and physical education classes?

Transgender students are entitled to and must be provided the same opportunities as all other students to participate in physical education and sports consistent with their gender identity. Participation in competitive athletic activities and contact sports are to be addressed on a case-by-case basis. For additional guidance, the California Interscholastic Federation issued new bylaws in 2013, which provide a detailed process for gender identity participation in interscholastic sports. (See, Recent Developments section below.)

11. May a school district or school enforce a gender-based dress code?

Nondiscriminatory gender segregated dress codes may be enforced by a school or school district pursuant to district policy. Students shall have the right to dress in accordance with their gender identity, within the constraints of the dress codes adopted by the school. School staff shall not enforce a school's dress code more strictly against transgender and gender nonconforming students than other students.

12. How should school districts and schools address harassment, bullying and abuse of transgender students?

California law requires that schools provide all students with a safe, supportive and inclusive learning environment, free from discrimination, harassment, and bullying. Examples of harassment and abuse commonly experienced by transgender students include, but are not limited to, being teased for failing to conform to sex stereotypes, being deliberately referred to by the name and/or pronouns associated with the student's assigned sex at birth, being deliberately excluded from peer activities, and having personal items stolen or damaged. School district efforts to prevent and address harassment must include strong local policies and procedures for handling complaints of harassment, consistent and effective implementation of those policies, and encouraging members of the school community to report incidents of harassment. Beyond investigating incidents, schools should implement appropriate corrective action to end the harassment and monitor the effectiveness of those actions.

13. Should a school district or school generally review its gender-based policies?

As a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose. Examples of policies and practices that should be reconsidered include: gender-based dress code for graduation or senior portraits and asking students to line up according to gender. Gender-

based policies, rules, and practices can have the effect of marginalizing, stigmatizing, and excluding students, whether they are gender nonconforming or not. In some circumstances, these policies, rules, and practices may violate federal and state law. For these reasons, schools should consider alternatives to them.

Whenever students are separated by gender in school activities or are subject to an otherwise lawful gender-specific rule, policy, or practice, students must be permitted to participate in such activities or conform to such rule, policy, or practice consistent with their gender identity.

RECENT DEVELOPMENTS AND RESOURCES

The [California School Boards Association’s \(CSBA\) Final Guidance Regarding Transgender Students, Privacy, and Facilities](#) 

CSBA has also promulgated a model board policy and administrative regulation that can be adopted by districts:

[Board Policy 5145.3](#)  (PDF; Posted 29-Jan-2016)

[Administrative Regulation 5145.3](#)  (PDF; Posted 29-Jan-2016)

CSBA also issued a [policy brief](#)  (PDF) on the issue of how schools can support transgender and gender nonconforming students

Office for Civil Rights Complaint and Resolution Agreement

On July 24, 2013, the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division entered into a Resolution Agreement with the Arcadia Unified School District to resolve a complaint alleging violations of Title IX. The case was brought on behalf of a transgender student who was denied access to the boys' restrooms and locker rooms, and required to sleep in a separate facility during an overnight field trip. The agreement requires the school district to treat the student in a manner consistent with his gender identity for all purposes. Moreover, the school district agreed to retain a consultant to revise their policies to prohibit discrimination on the basis of gender identity and implement a district-wide training program for staff and students.

The [Resolution Agreement](#)  (PDF; Posted 29-Jan-2016) between the Office for Civil Rights and Arcadia Unified School District

California Interscholastic Federation

In February 2013, the California Interscholastic Federation (CIF) issued new bylaws which provide that all students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity. CIF Regulation 300 D, Gender Identify Participation, provides:

Participation in interscholastic athletics is a valuable part of the educational experience for all students. All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records. The student and/or the student's school may seek review of the student's eligibility for participation in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth, should either the student or the school have questions or need guidance in making the determination, by working through the procedure set forth in the "Guidelines for Gender Identity Participation."

NOTE: The student's school may make the initial determination whether a student may participate in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth.

The new [California Interscholastic Federation bylaws](#) 

Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, April 29, 2014

In April 2014, the U.S. Department of Education, Office for Civil Rights, issued guidance making clear that federal law prohibits discrimination against students on the basis of transgender status: "[Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation](#)  (PDF; Posted 29-Jan-2016)."

Office for Civil Rights Dear Colleague Letter, October 26, 2010

In October 2010, the U.S. Department of Education, Office for Civil Rights, issued a Dear Colleague Letter that, among other things, clarified that although Title IX does not prohibit discrimination on the basis of sexual orientation, harassment directed at a student because that student is gay, lesbian, bisexual, or transgender may constitute sexual harassment and sex discrimination prohibited by Title IX.

The [U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, October 26, 2010](#)  (PDF; Posted 29-Jan-2016)

Other Resources

Gay-Straight Alliance Network/Tides Center, Transgender Law Center and National Center for Lesbian Rights. (2004). [Beyond the Binary: A Tool Kit for Gender Identity Activism in Schools](#). San Francisco, CA: GSA Network  (PDF; Posted 29-Jan-2016)

Gerald P. Mallon, "Practice with Transgendered Children," in *Social Services with Transgendered Youth* 49, 55-58 (Gerald P. Mallon ed., 1999)

Stephanie Brill & Rachel Pepper, *The Transgender Child*, 61-64 (2008).

Questions: School Health and Safety Office | shso@cde.ca.gov | 916-319-0914

Last Reviewed: Thursday, September 16, 2021

EXHIBIT 46



Home / Resources / Department Information / Equal Opportunity & Access

Legal Advisory

Legal Advisory regarding application of California's antidiscrimination statutes to transgender youth in schools.

This advisory replaces LO: 1-04 dated April 30, 2004, regarding application of California's antidiscrimination statutes to transgender youth in schools. The purpose of this advisory is to provide California school districts with updated guidance on the minimum requirements for compliance with California's prohibition on gender identity discrimination.

State and federal law generally prohibits discrimination, harassment, intimidation and bullying of students based on their actual or perceived sex, gender, sexual orientation, gender identity or expression, race, color, ancestry, national origin, ethnic group identification, age, religion, marital or parental status, physical or mental disability or genetic information, or association with a person or group with one or more of these actual or perceived characteristics. (Education Code sections 220, 234.1; 42 U.S.C. sections 2000d-2000e-17, 2000h-2000h-6.)

In addition, Education Code Section 234.1, as amended by AB 9 (Ch. 728, Statutes of 2011), and Section 235, mandate that school districts ("districts"), including charter or alternative schools, adopt a policy prohibiting discrimination, harassment, intimidation and bullying based on the above categories at school or in any school activity related to school attendance or under the authority of the district. Education Code Section 234.1 further requires districts to adopt a process requiring school personnel to immediately intervene, when it is safe to do so, whenever they witness acts of discrimination, harassment, intimidation or bullying based on the characteristics specified in Education Code sections 220 or 234.1 or Penal Code Section 422.55, including gender identity.

Education Code Section 221.5 specifically prohibits discrimination on the basis of sex with regard to enrollment in classes or courses, career counseling and availability of physical education activities or sports to both sexes.

In 2013, AB 1266 amended Education Code Section 221.5 to clarify that students must be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity, regardless of the gender listed in their student records. Even prior to the passage of AB 1266, the U.S. Department of Education's Office for Civil Rights and U.S. Department of Justice's Civil Rights Division investigated a civil rights complaint based on *federal* law against Arcadia Unified School District by a transgender student. The district agreed to provide transgender and gender-nonconforming students with equal access to district facilities, programs and activities consistent with their gender identity. (See [Resolution Agreement](#) (PDF))

Therefore, California and federal law require schools to afford students equal opportunity and access to the school's facilities, activities, and programs, in a manner that is consistent with each student's gender identity, irrespective of whether the student's gender identity matches the student's assigned sex at birth. Education Code Section 210.7 (defining "gender" to include "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."). Creating that type of school environment will help ensure that all students will be provided an environment that will nurture their growth, both academically and developmentally.

The Department has prepared [FAQs](#) which address key issues regarding the requirements and implementation of AB 1266. These issues are: (1) privacy with respect to the student's transgender status; (2) names and pronouns; (3) school records; (4) dress codes and uniforms; (5) restrooms and locker rooms; (6) physical education classes and school sports; and (7) protection from harassment. The FAQs also contain a glossary of definitions and list of helpful resources, including a model board policy and administrative regulation developed by the California School Boards Association for adoption by districts. It is recommended that these materials are reviewed by superintendents, principals, administrators and the local educational agency officer appointed pursuant to Education Code Section 234.1(g) to ensure compliance with the educational equity and nondiscrimination requirements of Education Code Section 200 et seq. and 5 California Code of Regulations Section 4900 et seq.

California law requires that schools provide all students with a safe, supportive and inclusive learning environment, free from discrimination, harassment, and bullying. Examples of harassment and abuse commonly experienced by transgender students include, but are not limited to, being teased for failing to conform to sex stereotypes, being deliberately referred to by the name and/or pronouns associated with the student's assigned sex at birth, being deliberately excluded from peer activities, and having personal items stolen or damaged. School district efforts to prevent and address harassment must include strong local policies and procedures for handling complaints of harassment, consistent and effective implementation of those policies, and encouraging members of the school community to report incidents of harassment. Beyond investigating incidents, schools should implement appropriate corrective action to end the harassment and monitor the effectiveness of those actions.

If you have further questions regarding this legal advisory, please contact us.

Questions: School Health and Safety Office | shso@cde.ca.gov | 916-319-0914

Last Reviewed: Tuesday, March 21, 2023

EXHIBIT 47

The Wayback Machine - https://web.archive.org/web/20040808050344/http://www.cde.ca.gov:80/nr/re/ht/yr04ltr0430.asp



California Department of EDUCATION

Change Text Size: A A A

Search GO

Advanced | Site Map | A-Z Index

Curriculum & Instruction	Testing & Accountability	Professional Development
Finance & Grants	Data & Statistics	Learning Support
		Specialized Programs

Home » Newsroom » Quick References » Hot Topics

[Printer-friendly version](#)



CALIFORNIA DEPARTMENT OF EDUCATION
1430 N STREET
SACRAMENTO, CA
95814-5901

JACK O'CONNELL
State Superintendent of
Public Instruction
PHONE: (916) 319-0800

Date: April 30, 2004

LEGAL ADVISORY

LO: 1-04

To: All County and District Superintendents
Schools Legal Counsel

From: Marsha A. Bedwell, General Counsel
Michael E. Hersher, Assistant General Counsel
(916) 319-0860

Subject: Gender Equity and Discrimination Laws in California Public Schools

Recent actions by a California school district have brought to our attention the need to remind school districts and county offices of education about state statutes and regulations that prohibit discrimination against students in various protected categories in the State of California. There should be no confusion about a district or county office's responsibility to protect all children from unlawful discrimination. The State of California has spoken on this issue, and no local district or county office has authority to choose which laws to enforce or to adopt its own limiting definition of any protected class. This advisory explains what the laws related to discrimination say and provides some advice on how to handle particular issues.

There are a number of statutes and regulations that define various terms related to gender equity and discrimination. They prohibit certain forms of disparate or preferential treatment on the basis of the categories of students.

Education Code section 212 defines "sex" as "the biological condition of being a male or female human being." 5 CCR section 4910(v) further defines "sex" as "the biological condition or quality of being a male or female human being." 5 CCR section 4910(w) defines "sexual orientation" as "actual or perceived heterosexuality, homosexuality, or bisexuality." Finally, 5 CCR section 4910(k) defines "gender" as "a person's actual sex or perceived sex and includes a person's perceived identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's sex at birth." (Emphasis added.) For the purposes of compliance with California law, all of those statutory and regulatory definitions apply to all public school students in California. Local Education Agencies (LEAs) do not have the discretion to eliminate or modify those definitions in a manner that reduces the protection of California students from unlawful discrimination. ¹

The guarantee of educational equity and freedom of students from unlawful discrimination is stated in Education Code sections 200-283. In particular, Section 220 states:

No person shall be subjected to discrimination on the basis of sex, ethnic group identification, race, national origin, religion, color, mental or physical disability, or any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code in any program or activity conducted by an

educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid. (Emphasis added.)

Penal Code section 422.6 states as follows, and must be read together with the categories stated above:

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics. (Emphasis added.)

In addition, Government Code section 11135 further prohibits discrimination against anyone who is the beneficiary of a publicly funded program in California, including public school students, as follows:

No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. (Emphasis added.)

Pursuant to Education Code section 221.1 and Government Code section 11138, the California State Board of Education (SBE) is empowered to make regulations to further define the prohibited acts of discrimination and to provide procedures for monitoring and investigating local education agency (LEA) practices with regard to discrimination policies and complaints. Pursuant to Education Code section 253, the State Department of Education, under the direction of the State Superintendent of Public Instruction, is required to monitor compliance with the sex discrimination statutes and, in particular, incidents of sexual harassment. Under Education Code section 250, compliance with all the laws regarding equity and nondiscrimination is a condition of receiving any state funds.

The SBE has promulgated various regulations to provide a complaint procedure at the local level and for appeal to the state level in discrimination cases. (5 Cal. Code of Regs. secs. 4600-4671.) Section 4610(c) of those regulations states:

This Chapter also applies to the filing of complaints which allege unlawful discrimination on the basis of any protected group as identified under Education Code § 200 in any program or activity conducted by a local agency, which is funded directly by, or that receives or benefits from any state financial assistance. ²

5 California Code of Regulations section 4621 requires each LEA to "adopt policies and procedures consistent with this Chapter for the investigation and resolution of complaints." Every LEA is therefore required to have a policy against discrimination that applies to all the protected categories of students listed in all the statutes cited above and a complaint procedure that enforces that policy. Education Code section 231.5 specifically requires all LEAs to have a written policy on sexual harassment that is publicly disseminated to staff, parents, and students.

The recent controversy has centered on the application of the sex and gender discrimination provisions to "transgender" students; that is, students who perceive themselves as having the "identity, appearance, or behavior" of a gender other than their "sex at birth." While this advisory cannot anticipate every factual situation that could arise under these laws, several controversial scenarios have raised the concern of local school boards.

For example, some LEAs are concerned that 5 CCR section 4910(k) will permit boys to use the girls' bathroom or locker room, if the boys perceive or identify themselves as girls. That is not true. Education Code section 231 specifically states that nothing in the sex equity and sexual harassment statutes or regulations prohibits an LEA from maintaining separate bathroom, locker room, or residential facilities for males and females. That statute clearly balances the gender self-perceptions of particular students against the privacy and perceptions of other students and sets a reasonable limit on "transgender" rights. In addition, school district officials in several instances were able to find reasonable alternative toilet and locker room accommodations for transgender students by allowing the controlled use of faculty facilities. Given that willingness to create local solutions, this Department has yet to receive a formal discrimination complaint related to a transgender student on this issue.

There are, however, potentially contentious issues in this area. We believe that Section 4910(k) protects from harassment or abuse any student whose "identity, appearance, or behavior" is different than the stereotypical characteristics of males or females in our society. For example, if a girl comes to school in clothing that some perceive as boys' clothing, or plays games on the playground that are perceived as boys' games, that girl is protected from bullying or other harassment by the nondiscrimination laws. In our view, if the discriminatory treatment or abuse is based on the perception that a student's "identity, appearance, or behavior" is inappropriate to their sex, it is unlawful gender-based discrimination and must be resolved by the LEA pursuant to its local discrimination policy and complaint procedure. ³

Changing perceptions of gender-appropriate "identity, appearance, and behavior" are a challenge that must be faced by school officials, parents, and students throughout the State of California. That challenge can and must

be met without violating the nondiscrimination laws passed by the Legislature and the regulations promulgated by the State Board of Education. This legal advisory provides information regarding the specific existing statutes and regulations related to sex and gender equity. Any suggested approaches to specific factual situations herein that constitute interpretations or applications of those laws are provided for illustration only. We will resolve complaints of discrimination against individual students in particular situations on a case-by-case basis. If you have further questions regarding this legal advisory, please contact us.

1 Education Code section 35160 states that LEA discretion is limited where particular programs or activities are prohibited by state law. Further, as agencies of the State of California, neither LEAs nor this Department have discretion to declare any statute or regulation to be unconstitutional; only the courts may exercise such authority. (Cal. Const., Art. III, sec. 3.5.)

2 This regulation has been submitted to the Office of Administrative Law for revision consistent with recent amendments to Education Code sections 200 and 220, pursuant to 1 Cal. Admin. Code section 100.

3 There has been some misinterpretation of the language of Penal Code section 422.76, which states that it is a hate crime to attack a person based on the attacker's perception of the victim's gender, even if the perpetrator's perception of the victim's gender is wrong. That same rule would apply to unlawful discrimination based on an incorrect perception of a student's gender. However, that Penal Code provision, which attempts to prohibit unlawful and hateful intentions, does not conflict with 5 CCR section 4910(k) regarding the prohibition of discrimination based on gender-based assumptions and stereotypes. That regulation clearly protects the perceived "identity, appearance, and behavior" of the alleged victim. Moreover, a student would be entitled to protection even if the discriminating party were wrong about the student's self-perception.

[Download Free Readers](#)

California Department of Education
1430 N Street
Sacramento, CA 95814

[Contact Us](#) | [Web Policy](#) | [Feedback](#)

Last Modified: [Wednesday, July 14, 2004](#)

EXHIBIT 48



CALIFORNIA

Beliefs Imperil Funding

BY JOEL RUBIN

MARCH 14, 2004 12 AM PT

TIMES STAFF WRITER

Citing their Christian principles, trustees of a small Orange County school district are defying a state anti-discrimination law that allows students and school staff to define their own gender.

A refusal by a three-trustee majority of the five-member school board to reverse its position could ultimately jeopardize as much as \$40 million in state and federal funding, two-thirds of the budget for a district that serves 10,000 students in kindergarten through eighth grade.

It is a risk, said the defiant trustees of the Westminster School District, that they're willing to take if the alternative is to compromise their morals.

"It's amazing how much we've eroded our society," said trustee Judy Ahrens, who describes herself as a devout Christian. "Everyone always wants to fix things tomorrow. Well, I'm saying the time is ripe now. I might take a lot of heat for it today, but the rewards are going to be great in heaven."

At issue is the wording of a state law that requires schools to protect certain groups from discrimination, including transsexuals and others who embrace unconventional gender roles. The three trustees say the law allows grade-school students and staff to immorally redefine their sexual identity.

By refusing to comply with state law, the three have pitted themselves against fellow board members, parents and school administrators. Their critics accuse them of inappropriately imposing their own beliefs while ignoring their responsibilities to uphold state law.

“We do not see this as a moral issue,” said Trish Montgomery, a district spokeswoman, speaking for the superintendent and other administrators. “It is a matter of complying with the law.”

The debate over gender definitions has polarized the board like no other issue. It was triggered in January, when district administrators informed trustees that Westminster’s policy for handling discrimination complaints was not in compliance with state regulations.

In listing groups that are protected from discrimination, the district makes a nonspecific reference to “gender” and no reference to “sex” and “sexual orientation.”

ADVERTISEMENT

The omissions are significant in light of an anti-discrimination law signed in 2000 by then-Gov. Gray Davis to protect transsexuals and others who do not fall into common gender categories, and gays on school campuses.

The law requires schools' anti-discrimination complaint procedures to reflect the state's definition of "sex" as male or female, and "gender," as "a person's actual sex or perceived sex and includes a person's perceived identity, appearance or behavior."

But where lawmakers saw equal rights, Ahrens and fellow board members Helena Rutkowski and Blossie Marquez-Woodcock saw an assault on morals and ethics.

"I can't, with a clear conscience, ... vote for this trash," Marquez-Woodcock declared at an early February board meeting, during which she and her two allies voted down the state's wording.

A review by California Department of Education officials later in the month found the district out of compliance. State officials advised the board to make the required changes at a Feb. 26 emergency meeting. The board convened, but the three trustees refused to reconsider.

No other district in the state has hesitated to update its anti-discrimination policies, said Gary Page, the Education Department official who reviewed Westminster.

If the district remains in violation beyond an April 12 deadline, it will be exposed to formal complaints from anyone challenging the policy, according to Michael Hersher, an attorney for the Education Department.

California law, he said, allows the department to withhold some or all of a district's state and federal funding if it refuses to comply with state mandates. Westminster receives \$40 million -- nearly two-thirds of its \$68-million annual budget -- from state and federal sources. The department could also sue to force the district to adopt the state regulations.

The three board members' unbending stance has angered and disappointed the board's two other members, district Supt. Barbara DeHart and scores of parents, who, at a

March 4 board meeting, protested the early-February vote to reject the state's wording. Of 10 who spoke on the issue, nine criticized the board majority's position.

"They are going to risk our children's education for their own personal convictions," said parent Patricia Ashcraft, who spoke at the meeting. "They're trying to fight a morality issue ... but they're doing it in the wrong arena."

If the three want to take issue with state law, Ashcraft and district officials said, they should do so by lobbying legislators.

Ahrens, Rutkowski and Marquez-Woodcock said they had no intention of changing their minds and do not believe the state will impose financial sanctions. They insisted that they are opposed to discrimination against anyone, but that providing special protection for transsexuals offended their Christian beliefs.

"It's totally anti-family," Ahrens said. "It's not protecting the kids. If we include this identity-crisis language, looking down the road, we could be in some real trouble.... If we have done this right, this will cause people to take a look at what's going on and ask why three brave women had to take a moral stand."

Ahrens said she fears that the state law would allow young boys to become "peeping Toms" in girls' bathrooms and encourage cross-dressing. "The possibilities are endless," she said.

Montgomery, the district spokeswoman, dismissed such concerns. Principals have always prohibited students from entering bathrooms they shouldn't, she explained, and they would continue to do so.

Carolyn Laub, executive director of the Gay/Straight Alliance Network, a statewide advocacy group that campaigned for the new gender definitions, said the group has been tracking the Westminster case with some concern. "This is a district that is willing

to discriminate on the basis of gender,” Laub said. “That should be appalling to everyone.”

Laub contrasted Westminster with more liberal districts, such as San Francisco Unified, that have sought to ensure that staff and students understand the state law.

Westminster board President James Reed said trustees would address the issue April 1, when district lawyers will lay out the possible consequences to the district if it continued not to comply. However, Reed was not confident that his three colleagues could be swayed.

“The frustrating part is that I can’t seem to get them to see that this is about the law.... I can understand that they have intense emotional concerns about this, but that does not change the fact that we must be in compliance with the law.”



Joel Rubin

Joel Rubin is an assistant editor in Metro, overseeing the criminal justice team. A native of Maine, he moved to Los Angeles in 2003 to join the Los Angeles Times. Prior to his current assignment, Rubin covered federal courts and agencies, the Los Angeles Police Department and the region’s public schools.

EXHIBIT 49

Los Angeles Times

ADVERTISEMENT

School District Votes to Sue State

By JOEL RUBIN

SEP. 3, 2004 | 12 AM



TIMES STAFF WRITER

Months after narrowly avoiding severe financial sanctions because of its controversial stand against a state anti-discrimination regulation, the Westminster School District resumed the fight Thursday, voting to sue the state Department of Education.

Voting 3 to 2, the small Orange County district agreed to become the plaintiff in a case planned and funded by the Alliance Defense Fund, an Arizona-based Christian legal organization that recently argued against same-sex marriages before the California Supreme Court.

At issue is a part of the state education code -- and the accompanying regulation written to enforce it -- that is meant to protect transsexual teachers and students, as well as others who do not conform to traditional gender roles, from discrimination at school.

Mark Bucher, the lawyer the district hired in April, said the definitions of “gender” in the education code and the regulation contradict each other. The lawsuit, he said, is aimed at forcing state education officials to rewrite the regulation.

ADVERTISEMENT

The education code defines gender as a victim’s biological sex or the perception of their sex by those accused of discriminating against them, while the regulation defines gender

as “a person’s actual sex or perceived sex.”

The distinction between the two is important to trustees Judy Ahrens, Helena Rutkowski and Blossie Marquez. Citing their Christian beliefs, they have said the regulation is immoral because it allows people to define their gender.

State Sen. Joe Dunn (D-Santa Ana), a lawyer who has criticized the board, expressed anger at the board’s decision and said the definitions are not contradictory.

“These three trustees have willingly allowed themselves to become a pawn of a much larger debate,” he said. “Their vote underscores that they’re not interested in the education of children, but rather pushing a conservative social agenda on all of California.”

ADVERTISEMENT

A spokesman for the Department of Education declined to comment.

Bucher and Alliance lawyer Robert Tyler said this was not a debate over morals.

The lawsuit, they said, is necessary to protect districts from discrimination claims that could arise because of the vague definitions.

With state schools chief Jack O’Connell threatening to withhold nearly \$8 million in school funding, the three trustees repeatedly refused to revise the district’s anti-discrimination policies to reflect the regulation’s definition of gender.

ADVERTISEMENT

In April, as a state deadline for compliance passed, the trustees relented and adopted a policy that technically satisfied O’Connell’s demands. The threats of financial sanctions were dropped.

To assuage their moral objections, however, the board inserted language from the state code into the district policy to prohibit claims that are based on how a victim perceives his or her sex.

Throughout the debate, the trustees' stance has infuriated parents, teachers and other trustees who have accused the three of imposing their religious beliefs on the district and jeopardizing the education of its 10,000 students.

"I wish I could say I was surprised [about the lawsuit], but this is what Bucher and these three are about," said parent Louise MacIntyre, who is leading a campaign to recall Ahrens and Marquez. "We are a little school district with a really big problem."

ADVERTISEMENT



Joel Rubin

[Twitter](#)

[Instagram](#)

[Email](#)

[Facebook](#)

Joel Rubin covers federal courts and agencies for the Los Angeles Times.

SUBSCRIBERS ARE READING

BUSINESS

If you're in love with Trader Joe's, its stances can also break your heart

CALIFORNIA

Homeless people in L.A. increasingly are taking their lives by hanging

CALIFORNIA

Raucous parties, young adults fueling California's COVID-19 crisis

FOOD

'This rice is life-giving!': An Eagle Rock chef shares her recipe

TELEVISION

As Ashton Kutcher and Jay Leno support Ellen DeGeneres, a backlash brews

ADVERTISEMENT

[Subscribe for unlimited access](#)

Follow Us



Copyright © 2020, Los Angeles Times | [Terms of Service](#) | [Privacy Policy](#) | [CA Notice of Collection](#) | [Do Not Sell My Info](#)

EXHIBIT 50

Desert Sun.

EDUCATION

Newsom threatens action against Temecula school board for rejecting textbooks

City News Service

Published 2:58 p.m. PT July 13, 2023

Gov. Gavin Newsom on Thursday vowed that the state will deliver new social studies textbooks to students in the Temecula Valley Unified School District, and make the school board foot the bill, after a majority of its members rejected the books over questionable content.

Newsom and other state officials renewed their calls for the TVUSD Board of Trustees to repeal a 3-2 decision in May to decline use of a state recommended – not mandated – K-5 social studies book, “Social Studies Alive.”

The governor referred to the board members who opposed the tract as part of “cancel culture.”

“Radicalized zealots on the school board rejected a textbook used by hundreds of thousands of students, and now children will begin the school year without the tools they need to learn,” Newsom said. “If the school board won’t do its job by its next board meeting to ensure kids start the school year with basic materials, the state will deliver the book into the hands of children and their parents – and we’ll send the district the bill and fine them.”

Newsom implied penalties would stem from the district’s failure to provide learning materials under the Fair, Accurate, Inclusive & Respectful – FAIR – Act of 2011, which holds that broad viewpoints, without prejudice to sexual preference or orientation, should be taught in K-12 schools.

The district’s current K-5 social studies curriculum relies on textbooks from 2006, but there aren’t any known findings that the books’ content is in violation of state law.

“I am glad to join in this action with Gov. Newsom and thank him for his leadership in calling for Temecula’s school board to reverse course to prevent further harm to students,” State

Superintendent of Instruction Tony Thurmond said. “Inclusive education promotes the academic achievement and social development of our students. School districts should not ban books in California, especially as it harms students of color and LGBTQ+ youth.”

TVUSD board President Joseph Komrosky, along with trustees Danny Gonzalez and Jennifer Wiersma, voted against adoption of Social Studies Alive for the K-5 curriculum based in part on its celebration of gay San Francisco politician Harvey Milk, whom Komrosky referred to as a “pedophile” for his documented interactions with a teenage boy from another state when Milk was in his 30s.

“My remarks about Mr. Milk are not based upon being a homosexual,” Komrosky said publicly last month. “But rather, based upon an adult having a sexual relationship with a minor. I’ll ask you one simple question, governor: Do you approve of any 33-year-old person, regardless of their gender identity or sexual preference, having a sexual relationship with a 16-year-old?”

Gonzalez joined Komrosky, saying that he couldn’t understand the need to highlight Milk in Social Studies Alive when there “are plenty of historical figures who made great strides in the (gay) community that are not associated with inappropriate sexual relationships with children.”

“Discussing matters of sexuality with children under 10 in a public school setting is inappropriate,” the trustee said. “As a parent, this is not a conversation (I want my kids to have with) anyone else but me, and especially not before we even learn about the birds and the bees.”

When the TVUSD board held its meeting to finalize a vote rejecting Social Studies Alive on May 16, the majority of attendees, mostly parents, were supportive, according to published reports.

Trustees Allison Barclay and Steven Schwarz voted in favor of adopting the book, which was recommended by the Temecula Valley Educators Association.

Gonzalez characterized allegations by the governor that K-5 school kids would be bereft of appropriate social studies reading material because the new textbooks were turned down as hype.

“Our teachers and students will have what they need at the start of (the academic) year, and (we’ll) continue to work through this,” he said.

The fall term in TVUSD begins on Aug. 14.

EXHIBIT 51

Governor Newsom and Attorney General Bonta Demand Answers from Temecula School Board

Published: Jun 07, 2023

SACRAMENTO – Governor Gavin Newsom and California Attorney General Rob Bonta today issued a joint statement urging the Temecula Valley Unified School District Board of Education (Board) to provide information regarding its process and decision-making related to the Board’s decision to reject the Social Studies Alive program for grades 1 through 5 on May 16, 2023. The curriculum, recommended by district staff and adopted by the State Board of Education, is in line with the FAIR Act’s requirements. In light of this, Attorney General Bonta has sent a letter today to Superintendent McClay and Board President Komrosky expressing concern over the Board’s actions, and seeking information regarding its decision.

“In the Golden State, our kids have the freedom to learn — and there are consequences for denying that freedom,” **said Governor Gavin Newsom**. “California is closely watching the actions of malicious actors seeking to ban books, whitewash history, and demonize the LGBTQ+ community in Temecula and across the state. If the law is violated, there will be repercussions.”

“We urge the Board to adhere to the FAIR Act’s provisions and provide a comprehensive social sciences curriculum that reflects our diverse state and nation. This should include accurate representations of historical figures like Harvey Milk and not be influenced by personal bias,” **said Attorney General Rob Bonta**. “Restricting what our children are taught in school based on animus or ideological opposition contradicts our societal values. The Board needs to explain its decision making, and moving forward will need to ensure students have access to a wide range of ideas and perspectives.”

Attorney General Bonta’s letter emphasizes that local educational agencies have a legal obligation to implement a social sciences curriculum highlighting the contributions of various groups, including

gay, bisexual, and transgender Americans. Furthermore, it highlights that a decision to remove or reject curriculum materials reflecting these identities may constitute unlawful discrimination. Concerning statements made by Board members during the May 16 meeting, including allegations about LGBTQ+ community leader Harvey Milk, the Attorney General's letter expresses deep concern about the potential discriminatory intent.

To investigate the Board's process and rationale for rejecting Social Studies Alive, the letter requests the Board produce various documents, including instructional materials assessment and adoption policies, documents related to the proposed adoption of Social Studies Alive, and any complaints related to the program no later than June 22. The letter sent by Attorney General Bonta can be found [here](#). Today's action follows the statewide letter issued on June 1 by Governor Newsom, Attorney General Bonta and Superintendent Thurmond on "Educational Rights and Requests to Remove Instructional Materials," which is available on the California Department of Education [website](#).

###

EXHIBIT 52



ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Telephone: (213) 269-6280

Facsimile: (916) 731-2129

E-Mail Address: Michael.Newman@doj.ca.gov

June 7, 2023

SENT VIA E-MAIL

Dr. Jodi McClay, Superintendent
Dr. Joseph Komrosky, Board President
Temecula Valley Unified School District Board of Education
31350 Rancho Vista Road
Temecula, CA 92592
Email Address: jmcclay@tvusd.us
Email Address: jkomrosky@tvusd.us

**RE: Information Request Regarding May 16, 2023 Board Action Rejecting
Elementary Social Science Curriculum**

Dear Superintendent McClay and Board President Komrosky:

We write to express our serious concern regarding the Temecula Valley Unified School District Board of Education (“Board”)’s vote on May 16, 2023 to reject district staff’s recommendation to adopt *Social Studies Alive* for use as a history-social science program for grades 1 through 5. Consistent with the June 1, 2023 joint letter that Governor Newsom, Attorney General Bonta, and Superintendent of Public Instruction Thurmond sent all local educational agencies on this topic, a copy of which is enclosed for ease of reference, we request that you provide the Department of Justice with information related to the basis for the Board’s action, as detailed below.

Social Studies Alive is a State Board of Education-adopted social studies curriculum program. As Temecula Valley district staff advised the Board, the program complies with the FAIR Act, which, as explained in the June 1 letter, requires local educational agencies to administer a representative social sciences curriculum that provides instruction on “the role and contributions of specified groups, which include gay, bisexual, and transgender Americans to the development of California and the United States and “the role of these groups in contemporary society.”¹

Moreover, state law prohibits discrimination on the basis of protected characteristics, which include sexual orientation.² A local educational agency’s decision to remove or reject curriculum materials on the basis that the materials discuss or reflect these characteristics and identities may constitute unlawful discrimination.

¹ Ed. Code, § 51204.5.

² Ed. Code, § 220.

June 7, 2023

Page 2

We are particularly concerned about statements made by Board members during the May 16 meeting, which included allegations about Harvey Milk, whose life is discussed in supplemental materials included in *Social Studies Alive*. Not only could such statements reflect that the decision was motivated by a desire to erase from the history taught to students the contributions of a prominent and respected gay rights activist and leader, but they also suggest that the Board's action may have been tainted by discriminatory animus. Moreover, the invocation of a long-standing, but discredited, trope designed to demonize members of the LGBTQ community is likely to contribute to creating (if not intended to create) a hostile environment for LGBTQ students and staff, in violation of their civil rights.

To better understand the basis for the Board's rejection of *Social Studies Alive* as an adopted curriculum program and to determine whether the Constitution or laws of the state have been violated, you are requested to provide to the Attorney General's Office by June 22, 2023, the following materials:

- All policies and procedures for the assessment and adoption of instructional materials, including assessments of their suitability for students;
- All policies and procedures related to the removal or discontinuation of instructional materials;
- Documents and communications related to the proposed adoption of *Social Studies Alive*, including the materials shared as part of the public review period and any comments or feedback received during the public review period;
- Documents and communications reflecting the basis for the Board's rejection of *Social Studies Alive*, including any briefing materials provided to Board members about agenda item O.5 of the May 16 Board meeting, any notes or other materials prepared by Board members regarding the agenda item, and any communications between Board members and members of the public about *Social Studies Alive* and/or the agenda item; and
- Any complaints received related to *Social Studies Alive*, including complaints received related to statements made during the May 16 Board meeting or the Board's rejection of *Social Studies Alive*.

If you have any questions regarding these requests, please do not hesitate to reach out to the undersigned.

Sincerely,



Michael L. Newman
Senior Assistant Attorney General
Civil Rights Enforcement Section

For ROB BONTA
Attorney General

Encl. June 1, 2023 letter, entitled "Educational Rights and Requests to Remove Instructional Materials"



**Governor of the State of
California**

Gavin Newsom,
Governor of California

1021 O Street, Suite 9000
Sacramento, CA 95814
916-445-2841

**Office of the Attorney
General**

Rob Bonta,
Attorney General

1300 I Street, Suite 1142
Sacramento, CA 95814
916-445-9555

**California Department of
Education**

Tony Thurmond,
*State Superintendent of
Public Instruction*

1430 N Street
Sacramento, CA 95814
916-319-0800

June 1, 2023

Dear California County and District Superintendents and Charter School Administrators and School Principals:

Educational Rights and Requests to Remove Instructional Materials

As we close this school year and look to the next, communities across California and the nation are being confronted with threats that invoke a darker past. In the first half of the 2022–23 school year alone, 1,477 books were banned nationally, with teachers and librarians threatened with prison time for shelving the wrong book.¹ As state leaders elected to represent the values of all Californians, we offer our response in one shared voice: Access to books—including books that reflect the diverse experiences and perspectives of Californians, and especially those that may challenge us to grapple with uncomfortable truths—is a profound freedom we all must protect and cultivate.

This letter outlines key considerations to assist you with fielding requests within your community while you continue to support your students and their educational rights.

I. The Constitution Restricts the Removal of Books From Libraries and Curricula

As the Supreme Court stated over 50 years ago: “It can hardly be argued that ... students ... shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² Freedom of speech includes the right to receive information and ideas, including those that are controversial, unpopular, or offensive to some.³ “[T]he

¹ <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/>

² *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 506.

³ *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico* (1982) 457 U.S. 853, 866–867 (“The right of freedom of speech and press ... necessarily protects the

June 1, 2023

Page 2

function of books and other literary materials, as well as of education itself, is to stimulate thought, to explore ideas, [and] to engender intellectual exchanges.”⁴

While local educational agencies⁵ “have broad discretion in the management of school affairs,” this discretion “must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”⁶ Therefore, while a local educational agency or administrator may remove books and other materials from a school library because of their educational suitability, pervasive vulgarity or profanity, or factual inaccuracies, it “may not remove books from school library shelves simply because [officials] dislike the ideas contained in those books... .”⁷

For example, “If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.”⁸ Similarly, students’ rights would also be violated “if an all-white school board, motivated by racial animus, decided to remove all books authored by [people of color] or advocating racial equality and integration.”⁹

These principles also apply to decisions about school curricula. Curricular decisions must be based on legitimate pedagogical interests and not an attempt at “rigid and exclusive indoctrination”; “to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”; or because of ideological opposition.¹⁰ And removing materials from curricula or libraries may also violate the First Amendment, even when prompted by complaints from parents or threats of lawsuits.¹¹

right to receive it. ... It would be a barren marketplace of ideas that had only sellers and no buyers.”) (internal citations omitted); *Monteiro v. Tempe Union High School Dist.* (9th Cir. 1998) 158 F.3d 1022, 1029–1032.

⁴ *Monteiro v. Tempe Union High School Dist.*, *supra*, at p. 1032.

⁵ Ed. Code, § 56026.3.

⁶ *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, *supra*, 457 U.S. at p. 864.

⁷ *Id.* at p. 872; *McCarthy v. Fletcher* (1989) 207 Cal.App.3d 130, 144.

⁸ *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, *supra*, 457 U.S. at p. 871.

⁹ *Ibid.*

¹⁰ *McCarthy v. Fletcher*, *supra*, 207 Cal.App.3d at p. 146; *Monteiro v. Tempe Union High School Dist.*, *supra*, 158 F.3d at p. 1029 fn. 8.

¹¹ *Monteiro v. Tempe Union High School Dist.*, *supra*, 158 F.3d at p. 1029 (“[A] student’s First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are removed from a mandatory reading list because of threats of damages, lawsuits, or other forms of retaliation.”).

June 1, 2023

Page 3

“Our Constitution does not permit the official suppression of *ideas*,”¹² yet that appears to be what is happening here. “[I]f we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes,” then local educational agencies and school officials must abide by the First Amendment.¹³

II. Education and Exposure to Various World Views Are Vital for our Youth

Education is essential to prepare our youth for civic participation and to instill the values needed to maintain our democracy.¹⁴ As California’s own Constitution recognizes, the “diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people... .”¹⁵ Moreover, since before the days of *Brown v. Board of Education*,¹⁶ formal education has played an essential role in the struggle for civil rights and in building understanding of differences as well as shared values. Schools “bring together members of different racial and cultural groups and, hopefully, help them to live together ‘in harmony and mutual respect.’”¹⁷

“Those who choose the books and literature that will influence the minds and hearts of our nation’s youth and those who teach young people in our schools bear an awesome responsibility.”¹⁸ This responsibility must neither be taken lightly nor used for inappropriate, political, or partisan ends.

III. California Education Code Requires Local Educational Agencies to Provide a Representative and Unbiased Curriculum and Protects a Student’s Right to Freedom of Speech

Local educational agencies must provide students a representative social sciences curriculum that provides instruction on “the role and contributions of both men and women, Native Americans, African Americans, Mexican Americans, Asian Americans, Pacific Islanders, European Americans, lesbian, gay, bisexual, and transgender Americans, persons with disabilities, and members of other ethnic and cultural groups” to the development of California and the United States and “the role of these groups in contemporary society.”¹⁹ Any instructional materials adopted by a local educational

¹² *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, *supra*, 457 U.S. at p. 871 (emphasis in original); see also *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 642 (“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... .”).

¹³ *West Virginia State Board of Education v. Barnette*, *supra*, 319 U.S. at p. 637.

¹⁴ See *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. at p. 864 (quoting *Ambach v. Norwick* (1979) 441 U.S. 68, 76–77).

¹⁵ Cal. Const., art. IX, § 1.

¹⁶ *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.* (1954) 347 U.S. 483.

¹⁷ *Hartzell v. Connell* (1984) 35 Cal.3d 899, 908 (internal citations omitted).

¹⁸ *Monteiro v. Tempe Union High School Dist.*, *supra*, 158 F.3d at p. 1032.

¹⁹ Ed. Code, § 51204.5.

June 1, 2023

Page 4

agency must “accurately portray the cultural and racial diversity of our society,” including the roles and contributions of these groups.²⁰

Schools may not adopt textbooks or other materials or provide or sponsor instruction or activities that promote discriminatory bias against or that reflect adversely on persons on the basis of race, ethnicity, nationality, gender, gender identity, gender expression, religion, disability, sexual orientation, immigration status, or any other protected characteristic.²¹ California law strictly prohibits discrimination on any of these bases.²² A local educational agency’s removal of materials on the basis that the materials discuss or reflect these characteristics and identities may constitute unlawful discrimination. A complaint of discrimination based on a protected characteristic may be filed with a local educational agency and appealed to the California Department of Education (CDE).²³

California law also prohibits instructional materials that contain any “sectarian or denominational doctrine” or other propaganda.²⁴

In addition to requiring local educational agencies to provide a representative and unbiased curriculum in these ways, the *Education Code* provides robust protections for student speech, including protections beyond those guaranteed by the Constitution. California students:

... have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities.²⁵

Only expression that is obscene, libelous, or slanderous or that “so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school” may be prohibited.²⁶ Prior restraint of any other type of expression violates the law, including in “material prepared for official school publications,” like school newspapers.²⁷ Furthermore, local educational agencies must

²⁰ Ed. Code, § 60040.

²¹ Ed. Code, §§ 51500, 51501, 60044. Section 51500 also prohibits teachers from providing instruction “which reflects adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry.”

²² Ed. Code, § 220.

²³ Ed. Code, § 33315, subd. (a).

²⁴ Ed. Code, § 60044.

²⁵ Ed. Code, § 48907, subd. (a).

²⁶ *Ibid.*

²⁷ *Id.*, subd. (d).

June 1, 2023

Page 5

“adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner” of speech activities.²⁸

For further guidance, please refer to the CDE’s recent publication, “Guidance on Removal of Instruction or Instructional Materials,” which is available on the CDE Curriculum Frameworks and Instructional Resources web page at <https://www.cde.ca.gov/ci/cr/cf/index.asp>.

IV. Possible Requests for Information

If your local educational agency does remove or ban instructional materials from classrooms or libraries, you may be requested to provide the Attorney General’s Office with materials to allow it to analyze your agency’s actions and procedures. These materials may include the following:

- All policies and procedures related to the First Amendment and freedom of speech;
- All policies and procedures for the assessment of instructional materials, library books, and other materials for students, including assessments of their suitability for students;
- All policies and procedures related to the removal or discontinuation of instructional materials or the removal of any books or other materials from school libraries and/or classrooms;
- All documents and communications related to the materials, including those reflecting the basis for their removal or assessments of their suitability for students; and
- Any complaints received related to the materials.

Please be prepared to respond to requests for information in the event the Attorney General’s Office reaches out.

Sincerely,

GAVIN NEWSOM
Governor

ROB BONTA
Attorney General

TONY THURMOND
State Superintendent of
Public Instruction

²⁸ *Id.*, subd. (b).

EXHIBIT 53

Governor Newsom Announces Contract to Secure Textbooks for Students in Temecula

Published: Jul 19, 2023

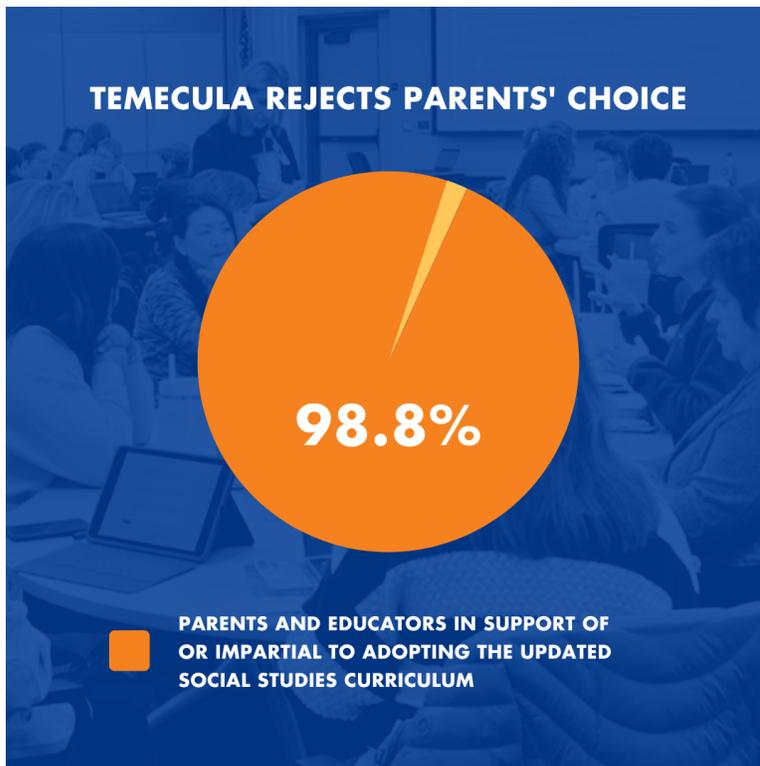
WHAT YOU NEED TO KNOW: California is entering into a contract to secure textbooks for students in Temecula following the local school board’s failure to provide adequate instructional materials.

SACRAMENTO – Following the Temecula Valley Unified School District’s failure to adopt an updated social studies curriculum, today Governor Gavin Newsom announced the state is entering into a contract to secure textbooks to ensure students in the district begin the school year with access to up-to-date books and materials that comply with state law. Elementary students in Temecula are slated to begin the school year on August 14, 2023, without proper instructional materials – in violation of state law – because of the school board’s 3-2 majority’s repeated decision to reject an updated curriculum.

“The three political activists on the school board have yet again proven they are more interested in breaking the law than doing their jobs of educating students — so the state will do their job for them,” **said Governor Newsom.** “California will ensure students in Temecula begin the school year with access to materials reviewed by parents and recommended by teachers across the district. After we deliver the textbooks into the hands of students and their parents, the state will deliver the bill — along with a \$1.5 million fine — to the school board for its decision to willfully violate the law, subvert the will of parents, and force children to use an out-of-print textbook from 17 years ago.”

Due to the board majority’s inaction, students in the district are forced to use a textbook published in 2006. According to the district’s [own documents](#) published online, the district is out of compliance with at least three separate state laws and frameworks with its current curriculum. Last week, the Governor and state leaders [demanded](#) the school district follow the law and adopt an updated curriculum. Yesterday, July 18, 2023, the school board again voted by a 3-2 majority to reject the adoption of a new social studies curriculum that was recommended by teachers

representing every elementary school in the district and reviewed by parents and community members.



The textbook the state is securing on behalf of the school district is part of one of the four standard programs approved by the state and is routinely and widely used across hundreds of school districts in California. During the last academic year, the curriculum was piloted by nearly 1,300 families in Temecula classrooms and was recommended by teachers representing every elementary school in the district and overwhelmingly supported by parents and community members. Materials were available for public and parent review for months. According to the school district, during the community feedback period, 98.8% of parents, educators, and community members expressed being supportive or impartial to the adoption.

The Governor is working with the Legislature and Superintendent of Public Instruction Tony Thurmond to enact [legislation](#) to impose fines on any school district that fails to provide adequate instructional materials. California provides instruction and support services to roughly 5.9 million students in grades transitional kindergarten through twelve in more than 1,000 districts and over 10,000 schools throughout the state. Under Governor Newsom's leadership, education funding is at a record high in California, totaling \$129.2 billion in the 2023-24 budget.

###

EXHIBIT 54

Governor Newsom Issues Statement on Temecula Textbooks

Published: Jul 21, 2023

SACRAMENTO – Following the Temecula Valley Unified School District governing board’s decision Friday to adopt an updated social studies curriculum that was approved by local parents and teachers, Governor Gavin Newsom issued the following statement:

“Fortunately, now students will receive the basic materials needed to learn.

“But this vote lays bare the true motives of those who opposed this curriculum. This has never been about parents’ rights. It’s not even about Harvey Milk – who appears nowhere in the textbook students receive. This is about extremists’ desire to control information and censor the materials used to teach our children.

“Demagogues who whitewash history, censor books, and perpetuate prejudice never succeed. Hate doesn’t belong in our classrooms and because of the board majority’s antics, Temecula has a civil rights investigation to answer for.”

Friday’s decision by the school board to adopt an up-to-date history and social studies curriculum comes following multiple demands by Governor Newsom. Following a series of [prior](#) actions, earlier this week the Governor [announced](#) the state would fine the school district and enter into a contract to secure textbooks if the board failed to adopt a legally-compliant social study curriculum.

The Temecula Valley Unified School District board majority’s actions are being investigated by the California Department of Education. On June 7, 2023, Attorney General Bonta and Governor Newsom [announced](#) an inquiry into the district by the California Department of Justice related to civil rights violations.

###