



June 14, 2023

Via Electronic Mail Only

Re: Legal Opinion Memorandum in Strong Support of the Model California Parent Notification Policy

Dear California School Board Member,

The National Center for Law & Policy (NCLP) is a non-profit civil rights advocacy organization which focuses on the protection and promotion of religious freedom, the sanctity of life, parental rights, and other civil liberties. The NCLP engages in constitutional litigation in state and federal courts. The National Center is also active in the areas of public policy and education. As the chief counsel of the NCLP, I am a constitutional attorney who is admitted and qualified to practice before the Supreme Court of the United States. My wife is a public school teacher, and we have three children who have all been publicly educated.

I have prepared this legal memorandum because the rights of parents must be respected, honored and protected in our great nation's public schools. To that noble end, the NCLP strongly supports the Model California Parent Notification Policy (MCPNP).¹ This policy has been legally vetted and approved by several respected legal organizations, including ours. It is a good policy that simply requires educators to promptly notify parents about important facts and circumstances involving their child's health and well-being on public school campuses. Parents must decide what is best for their children, not the state.

The memo highlights both legal and public policy concepts that all public school districts must understand when determining best practices in this sensitive area involving the families and children that that you serve. First, parental authority is paramount and is well-protected by the Fourteenth Amendment to U.S. Constitution

¹ Two Model Policies are attached here. The first is a broader and more comprehensive policy which requires parental notification when a student suffers a significant physical injury, makes a statement of suicidal intent, is involved in a verbal or physical altercation, including bullying, or is identifying or requesting to be identified as a gender other than the student's biological sex. The second is a more narrowly focused policy requiring parental notification when a student is identifying or requesting to be identified as a gender other than the student's biological sex. School districts are free to adopt either policy, according to their needs.

and many key decisions of the U.S. Supreme Court. Second, states like California do not possess unlimited power to coercively impose their viewpoints regarding human sexuality on children and families in our public schools. Third, there are no federal or state laws including, but not limited to, FERPA, AB 1266 or student “privacy rights,” that limit school districts from notifying parents about the health and well-being of their children at public schools, or that mandate educators lie to parents. Even if there were, the U.S. Constitution is the “supreme law of the land” any such laws would almost certainly be deemed an unconstitutional infringement of paramount parental constitutional rights by the U.S. Supreme Court. Fourth, school districts that foolishly ignore parents and families will continue to shrink and experience significant losses. Finally, this memo explains how the Model Policy properly honors parents and respects the legal rights of families

Parental Authority Is Paramount in Guiding Children under Their Care

Parental rights are among the very “basic civil rights of man.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). These rights are “far more precious ... than property rights.” *May v. Anderson*, 345 U.S. 528, 533 (1953). The freedom of parents to raise children, guided by their love for their children and their conscience, is so important that it is constitutionally protected. Indeed, parents’ “fundamental right and liberty interest” to “oversee the care, custody and control of their children” is protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Troxel v. Granville*, 530 U.S. 57, 57 (2000). These freedoms include the right to direct their child’s activities, make decisions regarding their child’s care, and control their child’s education, health, and religion. This constellation of familial interests is “essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

These fundamental parental rights exists precisely because parents and legal guardians are best positioned to understand, love, and raise children. It is axiomatic and should not be controversial that mothers and fathers, not the state, are in a much better position to authentically love, know, understand, and make better informed decisions on behalf of children in their custody, care, and control. Parents are more closely tied to their children than other adults, including teachers, not only by blood or adoption, but by profound and enduring familial bonds, as well as deep commitments to their child’s health and well-being, personal formation, and human flourishing.

Significantly, the U.S. Supreme Court recognizes this foundational truth and presumes that parents are best physically and emotionally equipped and situated to lead, guide, and direct their child:

“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically, it has been recognized that natural bonds of affection lead parents to act in the best interests of their children.”

Parham v. J. R., 442 U.S. 584, 602 (1979).

Therefore, parents' rights "presumptively include[] counseling [their children] on important decisions." See *H.L. v. Matheson*, 450 U.S. 398, 410 (1981).

The MCPNP is important because it appropriately acknowledges and respects the very special and unique role, rights, and responsibilities of parents and legal guardians. Because parents, quite naturally and organically, have the primary right and obligation to raise their children, parental authority should be honored and respected by state officials and educators, not questioned, undermined or sabotaged. Public school administrators, teachers and guidance counselors must be careful to be partners with parents and legal guardians, and must not view them or treat them as adversaries with whom they must withhold and conceal important health and safety information involving their child. Specifically, California school districts should not withhold important health and safety information from parents and legal guardians including, but not limited to, whether the child is involved in bullying incidents, a verbal or physical altercation, is suicidal, or is exhibiting gender dysphoria at school.

State Authority Is Limited in Imposing Its Divergent Orthodoxies on Children and Their Families

While the state has an important role in the education of the public, its power is limited by important constitutional considerations. "[A] [s]tate's interest in universal education ... is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children..." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

Legally, the family is a completely separate legal entity from the state, and maintains a separate, distinct and superior sphere of authority over children and legal guardians, as compared to the state. That is why the U.S. Supreme Court has repeatedly affirmed that its "decisions have respected the private realm of family life *which the state cannot enter.*" *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). Indeed, the high court again acknowledged the fundamental responsibility and right of parents, not the state, to instruct and train children, when it wrote:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children ... [t]he child is not the mere creature of the state; those who nurture him and direct his destiny [i.e., parents and guardians] have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Therefore, children belong first to their parents and families, before the state. Unfortunately, however, California has enacted a great deal of legislation in recent

decades which has undermined and severed the natural bonds between parents and children, ignoring, weakening, and destroying the fundamental and constitutionally secured rights of parents and families. If we are to remain a free people in a free republic, as opposed to submitting to overreaching government on the road to oppressive tyranny, the locus of authority and control of the family must remain with parents, and must never be ceded to the state.

Furthermore, our public schools and educators must be both mindful and careful to not question, undermine, attack, supplant, or strive to replace the sincerely-held philosophical and religious beliefs of families whose students they serve.

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

West Virginia v. Barnette, 319 U.S. 624 (1943).

The state, including our public schools, is the servant of the people, not their master. With rare and narrow exceptions, parents must remain free to raise their children as they deem best. Therefore, state legislators and state educators must refrain from the statist impulse to abuse their authority and influence by coercively imposing government-preferred orthodoxies, especially those implicating human sexuality, on students and their families. The state must educate, not indoctrinate. Indeed, the U.S. Constitution’s First Amendment² requires that the state must respect the divergent world views, including religious beliefs and practices, of the families it serves. This is true even if educators personally strongly object to the beliefs of a family, including their religious faith.

Withholding vital information from parents teaches children a horrible lesson: That it is acceptable to not tell the truth and conceal important information from the very persons who are best situated to love and protect them—their parents or legal guardians. We appropriately teach our children not to lie, and not to keep secrets from parents as a safety measure—to protect them from unsafe people, particularly adult child predators. When perhaps the second most important adult authority figure in the child’s life—their teachers—go against what parents teach their children, this confuses and destabilizes a child. It drives a wedge between parent and child, making children more vulnerable to manipulation and abuse, including sexual abuse.

A Student’s Right to Privacy Does Not Trump Parent Rights, nor Do Other Federal or State Laws Forbid Parental Notification

A minor’s right to privacy does not supersede the right of parents to direct the care and upbringing of their child. Minor students are not “little adults” nor do they inherently

² “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech....”

possess any absolute rights to autonomy or privacy, particularly vis-à-vis their parents. In fact, the “laws concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.” *Parham*, 442 U.S. at 602. Indeed, it is well-documented that the brain’s pre-frontal cortex, critical for reasoned judgment and decision making, is not fully developed until 25 years of age.³ Therefore, the best way to protect the mental and physical health and safety of children is not to speciously claim that “student privacy” somehow magically trumps all other ethical and legal considerations, including fundamental parental rights and religious liberty, or that minor students ought to make important life altering decisions *only* with state employees, cut-off and separated from their parents and family. Rather, best practices are that parents, as primary decision makers, should be provided important and accurate information involving their child’s well-being at school in a timely manner.

Robust parental rights are actually supported, not undermined, by federal law. The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) protects the privacy of student education records, however the protection is against disclosure to unauthorized third parties, not parents. In fact, FERPA gives parents the right to inspect and review their child’s education records, and this right only transfers to the student once they turn 18 years old. FERPA does not authorize public schools to either actively conceal information or to lie to parents about their child’s important health and safety information. Federal law does not require that parents be kept in the dark about important issues concerning the child’s welfare, including gender dysphoria.

Furthermore, California law, as some falsely claim, does not require schools to conceal a student’s gender identity from their parents, nor does it mandate lying to parents. Nonetheless, some anti-parent organizations deceptively claim that AB 1266⁴ somehow mandates public educators keeping parents in the dark about their child’s health and safety at school regarding gender identity. This is objectively not true. AB 1266 merely concerns itself with access to school facilities and programs based on gender-identity; it says nothing about, nor does it require, an administrator or teacher to lie to parents or conceal important information from parents.

Furthermore, even if FERPA, AB 1266, or another federal or state statute did somehow explicitly mandate that school districts mislead parents about their child’s sexuality, health and safety—which they do not, as already explained above—such a provision would be blatantly unconstitutional. As most of us learned in Civics 101, as prescribed in Article VI, the U.S. Constitution, including the Fourteenth Amendment’s protection of fundamental parental rights, is the “the supreme law of the land” and overrules any

³ *Maturation of the adolescent brain*, Published online 2013 Apr 3. doi: [10.2147/NDT.S39776](https://doi.org/10.2147/NDT.S39776)
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/#:~:text=The%20development%20and%20maturation%20of%20the%20prefrontal%20cortex%20occurs%20primarily,the%20age%20of%2025%20years> (NIH, Last accessed June 13, 2023).

⁴ https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266 (last accessed June 9, 2023)

federal or state law to the contrary (“This Constitution...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”). Therefore, any and all federal or state law to the contrary must yield.

Yet, ignoring the U.S. Constitution and key decisions of the U.S. Supreme Court, opponents of parental rights and parental notification falsely assume two things, both of which are not true: First, that in regards to students who question their gender identity, all parents will fail to act in the best interests of the health and safety of their own child (i.e., assuming parents will engage in child abuse and/or will counsel what is not objectively best for the child). Second, that all state educators will always act in the best interest of a child’s health and safety (not engaging in child abuse and always counseling what is objectively best for the child). This unfounded and misguided viewpoint improperly degrades and defames the fundamental rights of parents to make family decisions, and simultaneously elevates educators to a more powerful position of authority than parents in a child’s life that they are not qualified to assume. As the Supreme Court explained, the fact “that some parents may at times be acting against the interests of their children ... creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests. *Parham*, 442 U.S. 584, 602-603 (internal quotes and citations omitted). Therefore, at a minimum, California public school districts and educators should not engage in the dubious business of concealing the truth or deceiving parents about their child’s health and safety, including their sexuality.⁵ Vague claims about “student privacy” do not trump well-established parental rights guaranteed by the Fourteenth Amendment.

School Districts That Ignore Parents and Families Will Continue to Suffer Great Losses

California voters overwhelmingly support the fundamental constitutional right of parents to raise their children, including requiring parental notification by schools. A June 12, 2023 Rasmussen poll shows ninety-one percent (91%) believe parents, not the

⁵ While purporting to advocate for “parental rights,” the ACLU improperly privileges a student’s purported “privacy rights” over the well-established constitutional right of parents to raise their children, pitting state educators against families and children against their parents. The ACLU speciously assumes that parents will mistreat and /or abuse children struggling with gender identity and sexual orientation and that “affirming” unrelated government employees are always better equipped to help children facing human sexuality issues, when they write: “School officials may think their doing the right thing, but revealing a student’s sexual orientation or gender identity to their parents not only violates the student’s privacy rights, but can open an LGBT child to hostility, rejection, and even violence from their parents.” Significantly, however, there is no evidence that there is an actual epidemic where the majority of parents are actually abusing their children who struggle with gender dysphoria, nor can they produce any evidence thereof. <https://www.aclu.org/news/lgbtq-rights/trans-students-should-be-treated-with-dignity-not-outed-by-their-schools>

government, have the greater responsibility to raise a child.⁶ Eighty-two percent (82%) of California likely voters disagree with the statement, “A person loses their parental rights when a child enters public school,” including sixty-nine percent (69%) who strongly disagree. Only twelve percent (12%) think parental rights are lost when children enter public school.⁷ Specifically, when it comes to parental notification, voters strongly support policies like the MCPNP. Eighty-four percent (84%) of California voters would support a local law that required parents to be notified of any major change in a child’s physical, mental, or emotional health or academic performance, including sixty-six percent (66%) who would strongly support such a law.⁸ If such a law included notifying parents of a child identifying, requesting to identify, or being treated as a gender that doesn’t align with their biological sex, sixty-two percent (62%) of California voters would be more likely to support it...⁹

This means that California school districts that fail to listen to, respect, and honor parents and families will likely face significant negative consequences, including losing the enrollment of thousands of students and, with them, millions of dollars in funding. In 2019 through 2022 alone, more than 1.2 million students disenrolled in public schools nationwide with fourteen percent (14%) of them enrolling in private schools, twenty-six percent (26%) moving to home schooling, and twenty-six percent (26%) attributed to a declining school age population.¹⁰ If California continues its current overreaching, authoritarian anti-parent, anti-family and anti-religion campaign, it will continue to alienate parents and families and the mass exodus of students enrolled in public schools is likely to only continue and accelerate.

The Model Policy Properly Honors Parents and Respects the Legal Rights of Families

The model policy properly respects the authority of parents to raise and direct their child, and honors the special parent-child bond and relationship. It provides important information to parents about their child including whether a student suffers a significant physical injury, makes a statement of suicidal intent, is involved in a verbal or physical altercation (including bullying), or is identifying or requesting to be identified as a gender other than the student’s biological sex. This important information must be provided to parents within three days of the educator’s knowledge, and allows parents to fulfill their obligations as parents.

⁶ *California Voters Support Parental Rights by Overwhelming Margins*
https://www.rasmussenreports.com/public_content/politics/partner_surveys/california_voters_support_parental_rights_by_overwhelming_margins (last accessed June 14, 2023).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *With Plunging Enrollment, a “Seismic Hit” to Public Schools*, NY Times,
<https://www.nytimes.com/2022/05/17/us/public-schools-falling-enrollment.html> (last accessed June 14, 2023)

Parents are not a public enemy; they are an ally. In an environment of growing distrust of public education and documented enrollment decline, I submit that school districts that prioritize the honoring and affirming of parents and the health and well-being of children will enjoy significantly better customer satisfaction sentiments and will likely fare much better. The model policy equips parents to fulfill their moral and legal obligations to their children by giving them important health and safety information in a timely manner. It empowers parents to raise their children—not the state.

In conclusion, because parents and legal guardians retain the constitutional rights embodied in the Fourteenth Amendment and are more optimally situated to understand what is truly in the best interest of their children, I strongly recommend that all California school districts carefully consider and adopt the Model California Parent Notification Policy. Please feel free to contact me if you have any further questions.

Sincerely,

A handwritten signature in blue ink that reads "Dean R. Broyles". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Dean R. Broyles, Esq.
President & Chief Counsel
The National Center for Law & Policy