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Advisory on the Massachusetts Sex Ed Opt Out Law

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It has come to our attention that some Massachusetts school districts are under the impression that parents do not have a right to opt their children out of instruction on puberty or menstruation under the sex education opt out law, M.G.L. c. 71, § 32A. In addition, many schools have claimed that the opt out law does not apply to the topics of sexual orientation or gender identity. The purpose of this advisory is to inform parents, teachers, and school administrators about the type of content that the law properly covers.

Do Parents Have the Right to Opt Out of Puberty Instruction?

Yes. The Massachusetts sex education opt out law, 71 M.G.L., § 32A, gives parents the right to opt their children out of “curriculum which primarily involves human sexual education or human sexuality issues.” According to the Department of Elementary and Secondary Education’s (DESE’s) advisory opinion on the law, “[t]he § 32A notice and opt-out provisions apply to any courses (typically, sex education or portions of a health education or science course), school assemblies or other instructional activities and programs that focus on human sexual education, the biological mechanics of human reproduction **and sexual development**, or human sexuality issues.”¹

This same DESE advisory opinion lists the following specific topics as examples of sex education or human sexuality issues in the sample opt-out letter it provides for schools: **puberty; dating; relationships and communication skills; pregnancy; birth control; abortion; homosexuality; prevention of HIV/AIDS and other sexually transmitted diseases; and prevention of sexual abuse.** In addition, DESE’s original Health Frameworks categorized topics like puberty as “Reproduction/Sexuality” issues.²

We agree with DESE’s advisory opinion and original curriculum framework that, as a matter of common sense, puberty, menstruation, and related topics qualify as “sex education or human sexuality issues,” and more specifically as “sexual development” issues, under the opt out law. Notwithstanding any current attempt to reinterpret the law by school districts or state agencies, schools are bound to follow this original meaning of the sex ed opt out statute.

¹ “Advisory Opinion on the Parental Notification Law,” Massachusetts Department of Elementary and Secondary Education, April 7, 1997, <https://www.doe.mass.edu/lawsregs/advisory/c7132adv.html>.

² Massachusetts Comprehensive Health Curriculum Framework, Massachusetts Department of Elementary and Secondary Education, October 1999, p. 31, <https://www.doe.mass.edu/frameworks/health/1999/1099.pdf>.



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Do Parents Have the Right to Opt Out of Instruction on Sexual Orientation and Gender Identity Issues?

Yes. In DESE’s advisory opinion, “homosexuality” is listed as one of the sex education topics in DESE’s sample opt out letter. Sexual orientation is also listed in the original Health Frameworks as a “Reproduction/Sexuality” issue.³ Sexual orientation and gender identity clearly qualify as “human sexuality issues” according to the common meaning of that term and are therefore covered by the opt out law.

However, some schools have taken the position that the opt out law does not to apply to educational materials designed to “promote tolerance” toward LGBT individuals if those materials are presented “without further instruction or discussion of the physical and sexual implications of homosexuality,” and DESE has supported this position.⁴ This interpretation contradicts the plain language of the statute regarding “human sexuality issues” and Massachusetts Liberty Legal Center is actively seeking plaintiffs to sue school districts that will not allow parents to opt out from instruction on sexual orientation and gender identity.

It is also important to note that, regardless of whether schools are *required* to opt students out of instruction on sexual orientation, gender identity, or other sex ed topics, they are certainly *allowed* to opt students out of these topics. No state law or regulation requires these topics to be taught.⁵ DESE’s updated Health Frameworks covering these topics are voluntary for schools.⁶

Conclusion

In recent years, interpretations of the sex education opt out law have strayed from the clear meaning of the statute. But schools are bound to follow the original meaning of the law, not anyone’s changing interpretation of it. Instruction on puberty, menstruation, sexual orientation, and gender identity clearly qualify as “human sexual education or human sexuality issues” and are therefore covered by the sex education opt out law. Massachusetts Liberty Legal Center stands ready to litigate on behalf of parents who have wrongfully been denied their legal right to opt their children out of such content.

Have you or someone you know been denied your right to opt out? Contact us at contact@malibertylegal.org or call 781-569-0400.

³ 1999 Frameworks, p. 31, <https://www.doe.mass.edu/frameworks/health/1999/1099.pdf>.

⁴ See July 26, 2004 Letter of David P. Driscoll, Commissioner of Education, “Review of Final Local Decision under Parental Notification Law;” see also *Parker v. Hurley*, 514 F.3d 87, 92 n. 2 (1st Cir. 2008).

⁵ See M.G.L. c. 71, § 1 (listing subjects schools must teach, which do not include sex education and do not list sexual orientation or gender identity as a topic of health instruction).

⁶ See M.G.L. c. 69, §§ 1D-1E; 1L-1K (requiring adherence to frameworks only for core subjects of mathematics, science and technology, history and social science, English, foreign languages and the arts).