



November 1, 2017

**RE: CA FAIR EDUCATION ACT (SB 48)—HISTORY AND SOCIAL SCIENCE
FRAMEWORK AND SUGGESTED CURRICULA ARE NOT MANDATORY, VIOLATE
THE LAW, AND ARE CULTURALLY INTOLERANT**

Dear California Public School Board Members, Parents, and Educators:

Thank you for your careful and prompt attention to the important matters addressed in this legal opinion memorandum. Please be advised that the National Center for Law & Policy (NCLP) is a non-profit legal organization representing individuals and groups whose civil rights have been threatened or infringed by the government and its various agents. We advocate for religious freedom, freedom of speech, and rights of conscience, including student and parental rights related to public education.

I serve as the NCLP's President and Chief Counsel. I am a California-based constitutional attorney with more than twenty years of experience in state and federal courts, am a member of the California State Bar, and am admitted and qualified as an attorney and counselor of the Supreme Court of the United States. In addition, my wife is a California certified public school teacher with more than fifteen years of experience, and all three of my children attend public schools in our state.

Because of the NCLP's expertise involving constitutional rights and other important legal issues in public school settings, including advising and assisting school boards, we were recently asked to assist a California school district that was struggling with the best manner in which to implement the FAIR Education Act (hereinafter "SB 48" or the "Act"), especially in light of the aggressive "transformational" and controversial approach suggested by the History and Social Science Framework (hereinafter "Framework" or "HSS Framework"). In the process of assisting this district, our research revealed important time-sensitive factual and legal information.

As more Californian educators and parents have read the HSS Framework and have compared the Framework and proposed curriculum changes to the very limited and focused goals and mandates of the Act—profound alarm and serious concerns have rapidly multiplied across the state. As a result, our organization has been contacted by an increasing number of deeply concerned school board members, teachers, and parents, asking for help with the urgent, sensitive, and important factual and legal issues discussed in this letter.

As an initial matter, let me assure you that California public school boards, schools, and teachers have broad discretion in adopting curriculum and implementing instruction under the FAIR Education Act (SB 48). I am writing today to confirm serious concerns about the 2016 History-Social Science Framework and to make Californians aware of the discretion and positive options

that local school board, teachers, and parents have requiring their immediate attention and action. The HHS Framework, is “too much too soon,” especially for young children.

In summary, this legal opinion memorandum discusses the following points:

- The FAIR Education Act (SB 48) affirms the ultimate authority of school boards, teachers, and parents regarding instructional materials--the HHS Framework and suggested curricula are not mandatory.
- The textbook changes being promoted by LGBT activists affirm a new “transformational” sexual worldview, intolerantly denigrating the worldviews and cultural values of others.
- The HHS Framework and California Department of Education (CDE) curricula undermine legally protected parental rights to direct the education and moral development of their children and to determine what is age appropriate.
- Unconstitutional government-compelled speech is coerced by the approach embodied in the HSS Framework, suggested curricula, and board policies promoted by CDE.
- Unconstitutional state anti-religious hostility and discrimination pervades the HHS Framework and suggested curricula.
- Gender dysphoria is not a healthy lifestyle choice and should not be promoted by California’s public schools

The FAIR Education Act (SB 48) affirms the ultimate authority of school districts, teachers, and parents regarding instructional materials--the HHS Framework and suggested curricula are not mandatory.

SB 48 was enacted by the California Legislature and signed by Governor Brown in 2011. On July 14, 2016, the State Board of Education adopted the 2016 History-Social Science Framework (hereinafter “**Framework**”¹). The nearly 1,000 page Framework “has two primary audiences: (1) educators, and (2) developers and publishers of curriculum programs and materials.”² Publishers have already been briefed on the Framework and have been in the process of developing Framework-based textbooks that are now being reviewed in Sacramento.

The existing History-Social Science Content Standards,³ adopted in 1998, have not been changed by SB 48 or the recent Framework. As is further discussed below, however, neither the Content Standards nor the Framework are binding on local educational agencies or entities, they merely serve as examples for development of the curriculum.⁴ What *is* binding on local school boards

¹ See *History–Social Science Framework*, <http://www.cde.ca.gov/ci/hs/cf/sbedraftthssfw.asp>

² *Id.*, *Framework*, Chapter 1, p. 4.

³ See *History-Social Science Content Standards for California Public Schools*, <http://www.cde.ca.gov/be/st/ss/documents/histsocscistnd.pdf>

⁴ The History-Social Science Content Standards for California Public Schools include the following notice on page two: “The guidance in History–Social Science Content Standards for California Public Schools is not binding on

are the statutes, regulations and court decisions, including SB 48. Also binding on local school boards, as discussed below, are the provisions of the U.S. Constitution and the decisions of the U.S. Supreme Court.

Among other things, SB 48, requires history and social science instruction regarding the contributions of various groups in the history of California and the United States, adding **“European Americans, lesbian, gay, bisexual, and transgender Americans, persons with disabilities, and members of othercultural groups”** to the categories of instruction required.⁵ However, SB 48 explicitly gives discretion to **school boards** in adopting curriculum consistent with the goals of the law.⁶ Each local school district, acting through its **board of directors**, has the **authority and discretion** to decide how SB 48 is implemented in the curriculum in compliance with California law. This wide-ranging discretion includes determining *what* is included in the curriculum and *when* (at what grade levels) it is taught to students.⁷

local educational agencies or other entities. Except for the statutes, regulations, and court decisions that are referenced herein, the document is exemplary, and compliance with it Prepared for publication is not mandatory. (See Education Code Section 33308.5.)”, <http://www.cde.ca.gov/be/st/ss/documents/histsocscistnd.pdf>

⁵ See CAL.EDUC.CODE §51204.5 (“51204.5. Instruction in social sciences shall include the early history of California and a study of 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 economic, political, and social development of California and the United States of America, with particular emphasis on portraying the role of these groups in contemporary society.”), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_48_bill_20110714_chaptered.pdf

⁶ See CAL.EDUC.CODE §60040 (“60040. When adopting instructional materials for use in the schools, **governing boards shall include only instructional materials which, in their determination**, accurately portray the cultural and racial diversity of our society, including: (a) The contributions of both men and women in all types of roles, including professional, vocational, and executive roles. (b) The role and contributions of 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 total development of California and the United States (emphasis added).”), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_48_bill_20110714_chaptered.pdf; See CAL.EDUC.CODE §60044 (“60044. A **governing board** shall not adopt any instructional materials for use in the schools that, **in its determination**, contain: (a) Any matter reflecting adversely upon persons on the basis of race or ethnicity, gender, religion, disability, nationality, sexual orientation, occupation, or because of a characteristic listed in Section 220. (b) Any sectarian or denominational doctrine or propaganda contrary to law (emphasis added).”), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_48_bill_20110714_chaptered.pdf

⁷ See California Department of Education, Senate Bill 48, FAQ 4 (“Instruction in history–social science should include the contributions of those groups listed above in Education Code Section 51204.5, **but it is up to local districts to determine how the instructional content is included**. That section applies to the course of study in grades one through twelve, but again **it falls to the teacher and the local school and district administration to determine how the content is covered and at which grade level(s)** (emphasis added).”),

<http://www.cde.ca.gov/ci/cr/cf/senatebill48faq.asp>; See also, Fair Education Act webpage (“Who Will Determine What is Taught Under These Updated Education Guidelines? **There is no state-mandated curriculum on these topics. Instead, the state issues guidelines and then lessons are developed and approved at the local level, where school districts and school board members**, with input from parents and teachers, will decide what’s appropriate for each classroom (emphasis added).”), <http://www.faireducationact.com/about-fair/>.

However, we have received information that pro-LGBT educational activists and allied government officials statewide have been misleading local school boards by misinforming them that the HSS Framework is mandatory and must be adopted as a precursor to adopting a new History-Social Science curriculum. In that vein, we are informed that the California School Board Association (CSBA) has been circulating a model school board policy that, if adopted, goes far beyond the requirements of SB 48 by stating that a local school board's choices regarding implementing SB 48 must be "consistent with the state's curriculum framework for history-social science."

But, this approach is a rather blatant misreading and misapplication of the law. In fact, by law, the 2016 Framework for History-Social Science⁸ developed by the CDE merely serves as a descriptive **example or model**, but is not, pursuant to California law (See Education Code Section 33308.5), prescriptive or mandatory.⁹ In fact, neither the State Department of Education (CDE) nor the State Board of Education (SBE) has the authority to change or update existing California History-Social Science Content Standards¹⁰ to comply with SB 48.¹¹ Rather, local school boards and teachers retain tremendous control over the curriculum and instruction and we urge you to carefully exercise this authority in a manner that respects the rights and consciences of families, students, and religious communities. We believe these concealments and misrepresentations may have been deliberately designed to coerce unsuspecting districts to forfeit local authority and autonomy in order to blindly adopt the more aggressive "transformational" Framework.

In fact, even LGBT advocates have admitted that school districts can comply with SB 48 without adopting the aggressive approach of the HSS Framework. The Framework was largely created by LGBT advocates and activists in cooperation with the CDE who were attempting to push cultural boundaries in a "transformational" way, inculcating new worldviews and sexual values, far exceeding the limited goals of SB 48. Here is a quote from a report produced by the advocacy

⁸ See <http://www.cde.ca.gov/ci/hs/cf/sbedrafthssfw.asp>

⁹ See CAL. EDUC. CODE §33308.5 ("33308.5. (a) Program guidelines issued by the State Department of Education shall be designed to serve as a **model or example**, and **shall not be prescriptive**. Program guidelines issued by the department shall include written notification that the guidelines are merely **exemplary**, and that compliance with the guidelines is not mandatory (emphasis added)."),

http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EDC§ionNum=33308.5;

For example, the *English Language Arts/English Language Development Framework for California Public Schools: Kindergarten Through Grade Twelve* includes the following notice on page 3: "The guidance in the *English Language Arts/English Language Development Framework for California Public Schools: Kindergarten Through Grade Twelve* is not binding on local educational agencies or other entities. Except for the statutes, regulations, and court decisions that are referenced herein, the document is exemplary and compliance with it is not mandatory. (See Education Code Section 33308.5).", <http://www.cde.ca.gov/ci/rl/cf/documents/elaeldfwintro.pdf>

¹⁰ See, <http://www.cde.ca.gov/be/st/ss/documents/histsoecistnd.pdf> (Adopted October 1998).

¹¹ See, California Department of Education, Frequently Asked Questions, Senate Bill 48, FAQ 5: "This law does not change the standards, nor does it include any authority for the State Board of Education (SBE) to change the standards to reflect the law's provisions. <http://www.cde.ca.gov/ci/cr/cf/senatebill48faq.asp>."; See also, *What You Need to Know about California's New History-Social Science Framework*, <http://chssp.ucdavis.edu/blog/what-you-need-to-know-about-california2019s-new-history-social-science-framework>

organization Committee on LGBT History promoting the HSS Framework, which they admit far exceeds the Act:

“While the narrowest interpretation of **law might require addition of a few token LGBT history-making individuals, this report calls for a more transformational approach**. Social science education researchers have deemed a transformational approach the best practice for integrating diversity into frameworks and curricula. Such an approach expands *students’ abilities to understand gender and sexuality as changing historical categories* and as lenses for historical and contemporary analysis. (emphasis added)”¹²

Activists have hijacked SB 48 and are, by their own admission, seizing this cultural moment to *transform* (replace) the sexual *worldviews* (lenses) of students. But is this really the role of our public schools? School boards who reject the extremely aggressive approach of the Framework do not need to worry that their schools or students will be disadvantaged. Students not indoctrinated by the Framework will not fail standardized tests, because California does not currently test for History-Social Science (HSS) and it is not likely that HSS testing will “return to the state level anytime soon,” according to experts.¹³ Furthermore, our current legal research confirms that school districts will not face any other potential disadvantages, including the loss of funding. Local control funding structures would have to be significantly changed before school districts could be punished for rejecting the Framework.

The HHS textbook changes being promoted by LGBT activists teach a new “transformational” sexual worldview, intolerantly denigrating the worldviews and cultural values of others.

The California State Board of Education (SBE) has been in the process this year of adopting kindergarten through grade eight (K-8) instructional materials. However, for high schools, instructional materials are adopted at the local level by the governing board of a school district or other educational agency, and the schedule for new adoptions is set by the local agency.

The Instructional Quality Commission (IQC), which advises the SBE on matters related to curriculum and instruction, has been reviewing publishers’ proposed K-8 textbooks to recommend to California School Districts as compliant with the FAIR Education Act (SB 48). Although the proposed textbooks are actually generally compliant with the very limited goals of the Act, several exceed the Act’s requirements following the Framework’s expansive approach. Furthermore, a group of LGBT activist organizations, calling itself the FAIR Education Act Implementation Coalition (hereinafter “Coalition”), recently complained to the IQC in a September 17, 2017 35 page letter,¹⁴ arguing for a much more aggressive transformational

¹² See, http://cta-glbtc.org/docs/SB48_Making_the_Framework_FAIR.pdf

¹³ See, *What You Need to Know about California’s New History-Social Science Framework*, <http://chssp.ucdavis.edu/blog/what-you-need-to-know-about-california2019s-new-history-social-science-framework>

¹⁴ See, <https://drive.google.com/file/d/0B9njBaZTrCfSUWIHcjYwRDF4dVlkUDdnNWhuSVR5bzNqeFdn/view>

approach. “We have reviewed all of the programs submitted to the IQC for use in K-8 History-Social Science instruction and we’re **appalled** to find that several failed to **substantively include** LGBT people or events in history as required by the History-Social Science (HSS) **Framework** (emphasis added).”

The Coalition is essentially lobbying that the new HSS text books include as *many* LGBT heroes as possible, introduced to very young children *as soon as is possible*, with *more graphic* discussions of sexuality--even though their aggressive sexualized approach is not required by the FAIR Act. The Coalition’s letter details page after page of changes the book publishers are purportedly “required” to make so that the curriculum adheres to the HSS Framework. For example, one publisher was told to change its second grade curriculum (i.e. for seven- and eight-year-old children) to make sure students learn about families with two dads, about same-sex romantic partners, and emphasizing the lesbianism of historical figures. By so doing, activists are attempting to expose an impressionable and vulnerable captive audience of students to controversial sexual issues, which are more appropriate for high school sex education courses, by infusing sexually charged instructional materials in lessons for children as young as seven and eight years old (second grade) or earlier. It is too much too soon. However, because it’s not sex education, per se, parents and students will have no right to opt out—unless the district secures broader opt out rights.

In addition, the Coalition suggests that only positive things are taught about LGBT historical figures. At the same time their suggested amendments, quite intolerantly, openly attack and disparage religious groups and individuals, including defaming the Puritans as “intolerant,” who happen to be “European Americans” and, as such, are supposed to be treated in a positive light under SB 48 as well. Furthermore, their advocated changes also aggressively undermine Judeo-Christian binary gender roles widely accepted by European Americans. This is a flagrant violation of California Education Code 51501, which prohibits instructional materials “reflecting adversely upon persons because of their...religion” and the U.S. Constitution’s First Amendment, which forbids government hostility towards religion.

The Coalition concludes its misleading letter by threatening: “It would be particularly problematic if the IQC prohibits publishers, who are eager to ensure their programs comply with these **historic, legally mandated changes to the framework**, from making the necessary additions to align with the HSS Framework and **comply with the FAIR Education Act** (emphasis added).” This is a clear pattern. Again, the blatantly false argument the Coalition asserts here is that in order to comply with the law (the FAIR Education Act), the IQC *must* incorporate the HSS Framework, and is therefore required to incorporate the Framework’s aggressive approach into the textbooks it recommends to California school districts. This is simply not true.

Local school districts, schools and teachers do not have to comply with the HSS Framework or the Commission’s even more aggressive textbook suggestions. School districts are completely free to decide *when* LGBT heroes are introduced (i.e. when it is developmentally age-appropriate), *how* they are introduced (how sexually focused and graphic the discussions are), and *how often* they are introduced.

The HHS Framework and CDE curricula undermine legally protected parental rights to direct the education and moral development of their children and to determine what is age appropriate.

Both the U.S. Supreme Court and California courts recognize that parents possess a fundamental right to direct the care, upbringing, and education of their children.¹⁵ And the California legislature has accordingly recognized that “**parents and guardians have the ultimate responsibility for impacting values regarding human sexuality to their children.**”¹⁶

The United States Supreme Court has repeatedly recognized the crucial importance of parents and guardians in the fundamental role in inculcating values to children under their care.

“The fundamental theory of liberty upon which all governments in this Union repose **excludes any general power of the State to standardize its children** by forcing them to accept instruction from public teachers only. **The 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.”¹⁷

Ethical and moral issues involving human sexuality, including sexual orientation and gender identity, are among the most controversial and contested issues in our nation and state today. These hotly contested matters are extremely sensitive, especially when they involve young children and the need to make careful determinations as to what is age appropriate. Young children have tender consciences and their moral formation is a critical and delicate process. Even if those who developed the HHS Framework and the activists supporting this “transformational” approach truly believe in their hearts that their motives are pure, just, and right, that is not enough. As long as our republic still values individual liberties, the state simply does not have the legal authority to substitute its heavily value-laden “moral” teaching on these sexual matters, replacing those of parents in the home and bulldozing the moral instruction of parents, families, and faith communities. Ironically, many of those same people who purportedly opposed the “legislation of morality” are now, quite coercively, legislatively imposing their “new” sexual ethics and morality on all Californians.

California law similarly recognizes and honors the primacy of parents in determining the age appropriateness of sex education materials for their children. Section 51933(a) of the California Education Code¹⁸ requires that sexual health education instruction and materials be age-appropriate. Section 51931(a) defines “age-appropriate” to mean that “topics, messages, and teaching methods [must be] suitable to particular ages or age groups of children and adolescents, based on developing cognitive, emotional, and behavioral capacity typical for the age or age group.”

¹⁵ See *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re Marriage of Harris*, 34 Cal. 4th 210, 223 (2004).

¹⁶ Cal. Educ. Code § 51937.

¹⁷ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

¹⁸ Hereinafter all statutory references will be to the California Education Code.

Indeed, parents are the much better and are more accurate judges of what is age-appropriate for their individual children, not the state or the state's purported educational experts. The California Legislature recognized this when it enacted § 51938(a), which states: "A parent or guardian of a pupil has the right to excuse their child from all or part of comprehensive sexual health education, HIV prevention education, and assessments related to that education through a passive consent ("opt-out") process. A school district shall not require active parental consent ("opt-in") for comprehensive sexual health education and HIV prevention education." The Legislature also recognized the value of parental involvement in these controversial matters by enacting § 51937, which states that one of the California Healthy Youth Act's purposes is (emphasis added):

"to create a streamlined process to make it easier for parents and guardians to review materials and evaluation tools related to comprehensive sexual health education and HIV prevention education, and, if they wish, to excuse their children from participation in all or part of that instruction or evaluation. The Legislature recognizes that while parents and guardians overwhelmingly support medically accurate, comprehensive sex education, parents and guardians have the ultimate responsibility for imparting values regarding human sexuality to their children (emphasis added)."

In furtherance of these parental rights, all California public schools are required to give at least 14 days' notice to parents before sexual health education or HIV prevention education are taught, and must give parents the ability to opt their child out of receiving this instruction.¹⁹ This same opportunity should be afforded families when *the very same sexual issues* are raised in other subjects and contexts including, but not limited to, history and social science instruction. Changing the name of the class does not magically transform the sexual content or obliterate parental rights. Because sexual content, once limited to sexual education courses, is now infused throughout the curriculum, legislative correction is needed here, or, in the alternative, local districts should have the power to adopt broader opt-out policies.

Tolerance is a two-way street. Interestingly, while the HHS Framework bends over backwards to address the discrimination characteristic of "sexual identity," it, at the same time fails to acknowledge that by so aggressively privileging this one characteristic in policy and practice, that the state has now marginalized, alienated, discriminated against, and perhaps even "bullied" children and families whom, for many reasons, including "religion," have a different view of how children should be instructed on sexuality, including transgenderism. Discrimination, even that which is employed in the misguided attempt to end discrimination, is still discrimination. California's families, including religious parents, deserve much better than to be so ignored and marginalized.

Indeed, this well-established principle of the state deferring to parents is also appropriate outside of the sex education course context, because discussions of gender identity and sexual orientation are issues that many parents desire to introduce to their children in their own time and in a manner consistent with their own values and beliefs. Thus, schools should respect the authority of parents and provide notice and opt-out prior to these issues being taught to students. In fact, nothing in California law prohibits schools from providing notice and opt-out before these issues are raised

¹⁹ See Cal. Educ. Code § 51938.

or taught at public school. Rather, doing so demonstrates a proper respect for the primary role of parents in addressing such sensitive and controversial topics.

Unconstitutional government-compelled speech is coerced by the approach of HSS framework, curricula, and board policies being promoted by CDE

Over thirty years ago, the United States Supreme Court decided *Tinker v. Des Moines School District*, a case involving several students who had been suspended from school for wearing black armbands to class in protest of the war in Vietnam. The court famously held that, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."²⁰ Moreover, "students may not be regarded as closed circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."²¹

The U.S. Constitution and well-established U.S. Supreme Court precedent denies public schools the power to compel students to speak state-sanctioned messages that violate their consciences, including transgender affirming messages and the use of state-sanctioned pronouns. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' " *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) ("the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees.")).

Yet, the California School Boards Association (CSBA) has issued sample administrative regulations to be adopted by local school boards that would require that teachers face disciplinary action for **"failing to address a student by a name and the pronouns consistent with his/her gender identity"** (emphasis added).²² And, earlier this school year, at a Rocklin Academy Family of Schools (RAFS) site, near Sacramento, California, a first grade female student, who had been in kindergarten with a transgender student (a biological boy who now believes or feels that he is a girl), was on the playground and addressed the transgender student by his male name and may have used a male pronoun. The young girl was pulled out of class and was questioned by the principal, purportedly in order to determine whether she was discriminating against and/or bullying the transgender student. After being questioned, this sensitive female student was so distraught that she did not want to return to school the next day and, as a result of the trauma inflicted by this incident, the family has pulled her from RAFS. As a result of the RAFS board's mishandling of this incident, and an incident that occurred two months before in a kindergarten classroom (where transgender promoting books were read

²⁰ *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969).

²¹ *Id.* at 511.

without parental knowledge or consent and a transgender boy presented to the class in dress), more than 40 families pulled more than 71 students from the culturally insensitive district. California school districts that fail to appropriately handle this controversial issue will surely face similar results as more families flee to private schools and homeschools for safety from freedom-crushing state mandates.

Indeed, it is our informed legal opinion that RAFS clearly violated the student's First Amendment right to be protected from government compelled speech during and after the playground incident. The teachers and administrators involved were clearly attempting to force the student to believe and express views about gender, which defy biology, logic, and the student's conscience. The same applies to proposed CSBA regulations for California teachers whose alleged "crime" will be simply to base gender identity on objective factors, including biology and science, as opposed to the state-imposed new "transformative" sexual orthodoxy of subjective thoughts and feelings.

Almost everyone agrees that bullying, in any form, is not healthy or productive. Everyone should be treated with dignity and respect. But if we value rights of conscience and freedom, we must not allow conscientious objectors to the new sexual orthodoxy in our educational system to be coerced. Conscientious objectors, for very sound ethical, scientific, and medical reasons, having nothing to do with bigotry or hate, do not agree that imposing an ideology of transgenderism on children is age-appropriate or healthy. It is not right for them to be bullied, silenced, or compelled to speak only state-approved messages about transgenderism by the coercive power of the state. Such discrimination is not justified, even in the name of ending discrimination. Such intolerance must not be permitted in order to enforce a new form of "tolerance." Compelled speech is not permitted, even in the name of the laudable goals of ending bullying or trying to help kids with gender dysphoria. The Orwellian specter of this coerced-expression of controversial sexual ideology is quite frightening, where thousands of teachers and students across California have their consciences crushed into compelled transgender-affirming expression by the force of the state. Such hypocritically and ironically bullying and discriminatory behavior must not be permitted to stand in a free republic.

Unconstitutional State Anti-Religious Hostility and Discrimination Pervades the HHS Framework and Curricula

Religious speech also falls within the scope of *Tinker*. The Supreme Court has affirmatively established that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."²² Indeed, privately expressed religious speech may not be constitutionally suppressed, or discriminated against, by any agent of the state on the sole reason that the speech or expression contains religious content.²³ Such discrimination necessarily amounts to an unconstitutional act of state-sponsored

²² *Capitol Square Review v. Pinette*, 515 U.S. 753, 760 (1995).

²³ See, e.g., *Good News Club v. Milford School District*, 121 S.Ct. 2093 (2001); *Lamb's Chapel v. Center Moriches Unions School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

hostility toward religion.²⁴ And although religious-based speech can often be controversial and cause uneasiness among some people who hear or see it, such effects are an inadequate basis for allowing a public school to prohibit student religious expression during school non-instructional hours.²⁵

Activist organizations that participated in the development of the “LGBT-inclusive” HHS Framework include Our Family Coalition, Equality California, GSA Network, the Los Angeles LGBT Center, and the ACLU.²⁶ The Framework may validate and include LGBT students, but it simultaneously invalidates and excludes religious students. In fact, a careful reading of the Framework reveals that it unnecessarily and aggressively greatly exceeds the limited and flexible requirements of SB 48. The Framework does so by not merely acknowledging the historical contributions of LGBT individuals and groups, but by, starting in the second grade, going far beyond SB 48²⁷ and **redefining marriage and family** in radical and transformative ways, coercively imposing these new and not universally accepted definitions on public school students who are a captive audience (*See* attached excerpts from the Framework). But such morally and sexually charged curriculum changes are not required by the limited goals of SB 48.

In fact, proponents of SB 48 *claim* that the intent of the law is *not* to teach about human sexuality or morality—but rather state that it is their desire to leave such sensitive matters to parents and religious communities²⁸. However, this is precisely what the Framework does by going out of its way to only praise LGBT “civil rights” activists and their sexual identity; at the same time, it denigrates all opponents as “intolerant.”²⁹ While presenting LGBT historical figures in a positive light, the Framework characterizes religion and religious people in a very negative light.³⁰ This

²⁴ *See, generally, Lynch*, 465 U.S. 668 (1984).

²⁵ *See, e.g., Tinker, supra* n. 6, at 509 (“In order for the State in the person of school officials to justify prohibition of a particular expression or opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular point of view (underline added).”)

²⁶ *See* <http://www.eqca.org/fairact/>

²⁷ *See What You Need to Know about California’s New History-Social Science Framework*, Nancy McTygue, one Framework’s authors, admits in her blog “we were empowered, and in some cases, required, to go beyond the [1998] Standards’ outline....includ[ing] substantive new content about the history of LGBTQ citizens,”

<http://chssp.ucdavis.edu/blog/what-you-need-to-know-about-california2019s-new-history-social-science-framework>

²⁸ *See* The Fair Education Act, FAQ (“**Will These Lessons Include Information About Sex?** Under these updated guidelines, students will learn age-appropriate facts about what really happened in history, but lessons **will not include** the intimate details of historical figures’ lives. **Lessons about morality or sex are not part of the guidelines and are left entirely for parents to discuss with their kids at home** (emphasis added).”),

<http://www.faireducationact.com/about-fair/>

²⁹ *See* attached *History-Social Science Framework Excerpts*; *See also, History-Social Science Framework*,

<http://www.cde.ca.gov/ci/hs/cf/sbedraftthssfw.asp>

³⁰ *Id.* Catholic Missions are described as sites of conflict, conquest, and forced labor (4th Grade Framework); Puritans are described as being intolerant of any dissent and oppressive towards women (5th Grade Framework); Male/female distinctions and roles are challenged and undermined and transgenderism is promoted (8th Grade Framework); Progressive European ideas about race and sexuality are positively described as liberating and unrestrained sexual expression, including that of gays, lesbians, transgender individuals is praised and (11th Grade Framework), LGBT activism is compared to the women’s rights and black civil rights movements and the U.S. Supreme Court’s 2015 redefinition of marriage (*Obergefell v. Hodges*) is celebrated (12th Grade Framework).

approach naturally tends to disrespect, undermine, and contradict the fundamental responsibility of parents, guardians, and religious communities in teaching children about sexuality and in inculcating virtue and morality. In doing so, the Framework forcibly imposes a statist sexual orthodoxy—coercing moral judgments on students and families regarding sensitive moral, ethical, and religious matters that the state would be well-advised to instead leave to the consciences of parents, guardians, and religious communities.

According to Pew research, approximately 75% of our citizens in California identify as religious³¹—Christian, Buddhist, Jewish, Hindu, Muslim and others. California’s religious families and students have just as much right as LGBT students and families to have their history accurately portrayed in the classroom. Furthermore, they should have the same right *not* to have their beliefs and practices disparaged, denigrated, or defamed by the textbooks and in classroom instruction. And, while it is clear that the HHS Framework is not only inclusive but actively promotes LGBT families, it is also clear that the repeatedly expressed perspective of the HHS Framework on families who have religious faith is not equally inclusive, but is actually more hostile and disparaging. The U.S. Constitution does not permit the state to engage in such naked hostility towards religion and its religious citizens.

Furthermore, more than fifty percent (50%) of the population in California identify as Christians.³² One of the primary faith traditions in our nation and in California is the Judeo-Christian tradition, shared by many Jews, Christians, Catholics, and others. Orthodox believers in these faith traditions believe that the holy scriptures teach in Genesis chapter one that God created humans **in his image** (the image of God or Imago Dei), **male and female**. Jesus affirmed this view in Matthew 19:4-6.³³ The idea here is that men and women are both unique and valuable, created in the image of God and that they complement each other, both sexually and socially.

This perspective, also known as the gender “binary,” has been the basis of nearly 5,000 years of human history. Long accepted as normative, only very recently has the complementarian gender binary been challenged. However, the HHS Framework, with its radical “transformational” approach seeks to obliterate the fixed gender binary, completely supplanting the Judeo-Christian worldview and its anthropology. In essence, it seeks to **replace** the idea of Imago Dei with the now popular image of the imago “gay”—more specifically the view that human gender is **subjective and fluid**, primarily determined by actions, thoughts and feelings as opposed to **objective and fixed** factors, including the creator’s design and fixed genetic factors.

As pointed out earlier, the HHS Framework’s new sexual orthodoxy inculcates a worldview regarding human sexuality that is fundamentally at odds with most, if not all, religious traditions, stigmatizing, marginalizing, and disparaging as much as 75% of California’s population who identify as religious. Furthermore, the HHS Framework and suggested curricula go to great lengths not only to promote LGBT sexual ideology, but seek to specifically target and attack Judeo-Christian sexual ethics. The HHS Framework indoctrinates students in anti-religious stereotypes by repeatedly describing various religious groups, including the Puritans, as

³¹ See, Pew Research Study (2015): <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>

³² See, https://www.huffingtonpost.com/2012/05/29/most-and-least-christian-states_n_1547045.html

³³

“intolerant,” implying that these religious groups and individuals were or are “intolerant,” bigoted or hateful to women and LGBT persons.³⁴

In sum, the HHS Framework and many of the proposed textbooks embody constitutionally forbidden government hostility towards religion. Therefore, it is my informed legal opinion that the HHS Framework actually violates SB 48 and the First Amendment to the U.S. Constitution and California law by encouraging state actors (teachers) to inculcate hostility toward religion, specifically Christianity, by sponsoring **activities** or giving **instruction** that promotes “discriminatory bias” towards religion and by, as the HHS Framework has indeed infused in the new curriculum,³⁵ leading to the adoption suggested **textbooks or instructional materials** that “reflect adversely upon” persons on the basis of religion. This approach not only violates the law, but it is stigmatizing and marginalizing, undermining laudable educational goals such as authentic tolerance, diversity, and inclusion.

Gender dysphoria is not a healthy lifestyle choice and should not be promoted by California’s public schools

Recently, progressive cultural leaders have been advocating the view that gender (sex) is not a fixed biological (i.e. genetically determined) category, but is merely a social construct. This theory has led to the new cultural ideology embodied in the new “transformative” sexual orthodoxy that individuals, including young children, in spite of obvious biological limitations, can essentially self-select their gender, based primarily or solely on their feelings and thoughts. When it comes to gender today, feelings have replaced facts. Ideology has replaced science. Subjective identifications have replaced objective truth. Consequently, transgenderism is being discussed, mainstreamed and normalized in public education.

Popular culture, including movies and television and literature, is jumping on the bandwagon. Public schools have been quick converts to the movement. Some parents, being carried along in this powerful cultural stream, are willingly subjecting their own biologically purportedly “mis-gendered” children to begin a course of aggressive hormone therapies and, in some cases, even invasive surgeries. The HHS Framework and suggested curricula are no exception to these trends and commit considerable ink to promoting transgenderism as quite normal and healthy. But are these recently popular trends actually in the best interest of children?

³⁴ Demonizing religious dissenters as “hateful” “bigots” who are “on the wrong side of history” has been effective but profoundly dishonest and misleading tactic of LGBT activists to attempt to undermine, marginalize and silence those who do not agree with the new sexual orthodoxy. This approach is itself intolerant, divisive, and defamatory, as most dissenters are actually motivated by deep personal religious faith and love.

³⁵ See, CAL.EDUC.CODE §51500 (“51500. A teacher shall not give instruction and **a school district shall not sponsor** any activity that **promotes a discriminatory bias on the basis of** race or ethnicity, gender, **religion**, disability, nationality, sexual orientation, or because of a characteristic listed in Section 220. (emphasis added)”), See, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_48_bill_20110714_chaptered.pdf

Normalizing transgenderism and promoting this ideology is actually not a healthy or compassionate response to gender dysphoria, or the distress which very few children experience resulting from the sex or gender they were assigned at birth. Gender dysphoria, in fact, remains classified as a mental disorder by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.³⁶ Granted, people struggling with gender dysphoria must be treated with compassion and respect. However, an obvious question that we really need to ask ourselves in this cultural moment is, "Do we really want to affirm and normalize psychological disorders in our children?"

Dr. Paul McHugh is the Distinguished Professor of Psychiatry at the Johns Hopkins University School of Medicine and is one of America's most well respected psychiatrists. Although an early advocate for sex-reassignment surgery, Dr. McHugh has decidedly jumped off of the growing trans bandwagon.³⁷ He confirms the basic truth that gender is biologically determined and that sex change is biologically and medically impossible. He also notes that the emotional, psychological, and physical outcomes for transgender individuals are far from ideal and are predominantly very poor. And, regarding childhood medical intervention, Dr. McHugh solemnly warns, "Given that close to 80% of such children would abandon their confusion and grow naturally into adult life if untreated, these medical interventions come close to child abuse."³⁸ Indeed, studies confirm that sex reassignment surgery is not medically effective to treat gender dysphoria and that many who go under the knife later regret their decision.³⁹

Maleness and femaleness are undeniable physical realities. Validating an individual's right to subjectively choose their own reality, disconnected from biological facts, is not cultural progress; rather it is social insanity. It will not lead to human flourishing, but to our degradation and demise. All change is not progress. We must protect children, not subject them to such dangerous reality-denying sociological experiments in our public schools.

Conclusion

Our children are our most precious natural resource—they are our future. They are not mere creatures of the state—to be coercively indoctrinated, like unwilling experimental test subjects, with the new sexual orthodoxy, fundamentally undermining and trampling the primary role of parents and religious communities to inculcate fundamental moral values, especially those involving the sensitive and controversial area of human sexuality.

Tolerance is a two-way street. Authentic diversity and inclusion requires that *all* Californians are respected and tolerated, not only LGBT families. Bullying and marginalization are not problems

³⁶ American Psychiatric Association, "Gender Dysphoria," in Diagnostic and Statistical Manual of Mental Disorders, 5th ed. (Arlington, VA: American Psychiatric Publishing, 2013), 302.85.

³⁷ Dr. Paul McHugh, "Transgender Surgery Isn't the Solution" Wall Street Journal, May 13, 2016, <https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>

³⁸ *Id.*

³⁹ David Berry, "Sex Changes Are Not Effective, Say Researchers," Guardian, July 30, 2004, <https://www.theguardian.com/society/2004/jul/30/health.mentalhealth>

solely experienced by the LGBT community. As the secular state grows and exerts its near totalistic power, religious Californians, though in the majority, increasingly find themselves at the margins of our social fabric. Hyper-focusing only on one community or cause, in the furor of the seemingly noble cause of ending all forms of discrimination, tends to have unintended (though perhaps intended by some) consequences of quite hypocritically and ironically subjecting other groups to intolerance, bigotry, marginalization, and discrimination—both in our public schools and culture.⁴⁰ Those recently claiming social status as the “bullied,” especially the more radical and aggressive elements among LGBT activists, are rapidly becoming intolerant cultural bullies seeking to silence and obliterate those who dare disagree with their ideological agenda and new “transformative” sexual orthodoxy. What is lost? Inclusion. Diversity. Tolerance.

In fact, the stakes are much higher than we now realize or will admit. Our very freedom is at stake. The freedom of speech, the free exercise of religion, and the freedom to not live under the thumb of the new state-established gender binary decimating “church”⁴¹ of radical sexual liberty. This issue is far too important for us to allow the narrow ideology of the newly powerful cultural elites pushing the new sexual orthodoxy to dominate and control this important conversation—selfishly silencing all voices of dissent. Rather, the law and the truth should dictate what local school districts in California, in partnership with parents, teach to our children in our Golden State.

In the process, rather than being coerced to march lock-step with the new sexual ideology, we should be thoughtfully asking and carefully answering the following questions:

1. What does the law actually mandate (SB 48)?
2. In what ways do the HSS Framework and suggested curricula actually undermine the goals of SB 48 and violate California law and the First Amendment rights of parents and students?

⁴⁰ The FAIR Education Act is actually far broader than only acknowledging LGBT historical figures. California Education Code Section 51204.5 added other groups to existing law (added groups in bold) including “...a study of 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 economic, political, and social development of California and the United States of America, with particular emphasis on portraying the role of these groups in contemporary society.” Yet the LGBT Coalition completely ignored the issue of whether these other groups were “substantively included” in their self-serving advocacy regarding the new textbooks. Shamefully, as extensively documented in this memorandum, the changes they have suggested actually target and attack “European Americans,” especially those with a Judeo-Christian worldview, slandering their view religious beliefs about gender roles, woman, and same-sex relationships as “intolerant.”

⁴¹ Many of the popular claims of LGBT sexual orthodoxy are actually claims of faith, akin to religious belief or comprehensive worldviews, especially as to anthropology. This is because many of their central beliefs are not necessarily objectively verifiable or scientifically provable. These include the belief that people are born gay and that personal feelings about gender should overrule biology. These “religious” beliefs are a replacement for traditional religious beliefs and are now being taught to children as matters of absolute truth or sexual orthodoxy in public schools.

3. How may the implementation of the HHS Framework and curricula foster hostility, discrimination, and intolerance toward religious families and community members—and how can we avoid such results and be more inclusive, allowing more diversity?
4. How do we implement SB 48 in the best interests of *all* families and children, being culturally and religiously sensitive to *all* groups—honoring inclusion and diversity?

In conclusion, if the HHS Framework is implemented in the curriculum and classroom as written, a large number of religious students, families, teachers and faith groups will increasingly feel marginalized and ostracized in California's public schools—as unwelcome outsiders whose purportedly “intolerant” ways are not accepted. I believe the unmoderated infusion of the HHS Framework, imposing a new sexual orthodoxy in the curriculum and in classrooms, will result in widespread, systematic, government coerced, anti-religious discrimination. This is neither culturally inclusive nor is it religiously tolerant.

The HHS Framework gives religious families one more excuse to join millions of others abandoning public education, leading to the growing loss of students and funding. Therefore, we strongly urge all local school board members and parents to oppose and reject the Framework as a deeply flawed model for complying with SB 48. All change is not progress. Anti-religious discrimination is not the answer to solving LGBT issues—and will prove fundamentally self-defeating.

Specifically, we recommend that school boards create their own a policy, rather than the model California School Board Association policy, which more clearly acknowledges the mandatory provisions of SB 48 (i.e. acknowledging LGBT heroes in history) while at the same time allowing the board the flexibility to consider whether to accept or reject the more aggressive guidance of the HHS Framework, which far exceeds the law. It is important that local school boards refrain from putting their stamp of approval on the religiously intolerant portions of the HHS Framework and retain their right to determine, on a local level, precisely what is taught to students and at what grade levels in a spirit of tolerance, inclusivity, and respect for the diversity of religious beliefs in each community.

Please contact your local public school district to confirm the process and timing of implementing SB 48. Investigate whether the school board has already adopted policies affirming the HHS Framework. Vigilantly monitor the process of curriculum adoption over the next months and years. If there is a curriculum review committee, considering joining it. Refuse to be silent or silenced by the opposition. Share your concerns with parents and teachers, including PTA members and leaders. Be prepared to organize opposition to the HHS Framework's ideological indoctrination, which disregards parents and marginalizes religious families and children. Tell your school board, superintendent and administrators that the HHS Framework is “too much too soon.” Be diligent and intentional. We cannot afford to leave this to chance.

Please feel free to forward this letter and its attachments to interested school board members, parents, and educators. Time is of the essence. School boards across the state are being encouraged to adopt policies affirming the misguided HSS Framework and religiously discriminatory textbooks adopted by the CDE as I write this legal opinion memorandum. School districts can and should comply with SB 48 without engaging in religiously-intolerant radical secular indoctrination in “transformational” sexual worldviews and without throwing religious families and religious communities under the bus.

Remember that California school districts are completely free to comply with the FAIR Education Act (SB 48), while at the same time exercising their legally sanctioned authority to ignore all or parts of the more aggressive HSS Framework and the CDE suggested textbooks. Indeed, the California Department of Education’s own FAQ on SB 48 acknowledges the discretion of “the teacher and local school and district administration to determine **how** the content is covered and **at what grade levels** (emphasis added).”⁴²

Let’s proceed with caution regarding these extremely controversial, divisive, and potentially dangerous issues and make sure that we put kids first—they are not social-political ping-pong balls to be indoctrinated at the whim of the state. Thank you for your careful consideration of these important issues and your respect for families and the protection of children.

Sincerely,



Dean R. Broyles, Esq.

The National Center For Law & Policy

⁴² See, <https://www.cde.ca.gov/ci/cr/cf/senatebill48faq.asp>