


<p>California Department of Justice Office of the Attorney General</p> 	<p>Legal Alert</p>	
<p><i>Subject:</i></p> <p>Guidance to School Officials re: Legal Requirements for Providing Inclusive Curricula and Books</p>	<p><i>No.</i></p> <p>OAG-2024-01</p> <p><i>Date:</i></p> <p>01/09/2024</p>	<p><i>Contact for information:</i></p> <p>LegalAlerts@doj.ca.gov</p>

TO: All County and District Superintendents, Charter School Administrators, County Office, School District, and Charter School Boards, and other interested parties

The Office of the Attorney General is issuing this legal alert to provide guidance to local school districts, charter schools, county offices of education, and other interested parties regarding the obligation to provide curricula, instructional materials, and books that are inclusive and reflect the roles and contributions of our diverse population. These legal obligations include those set forth in Assembly Bill 1078, expanding the right to inclusive curricula and books, and Assembly Bill 101, requiring a high school ethnic studies course. This legal alert provides an overview of these laws, the specific responsibilities of local educational agencies, and the role of the Office of the Attorney General in enforcing them.

Legal Requirements

For decades, courts have recognized that public schools serve a vital role in preparing youth for both adulthood and civic participation (*Brown v. Bd. of Educ.* (1954) 347 U.S. 483, 493 [emphasizing the “importance of education to our democratic society”]), and the California Supreme Court has held the right to education in public schools to be a fundamental right under California’s equal protection clause (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609, 616-617).

Under the California Constitution, as under the United States Constitution, local education agency curricular decisions must be based on legitimate pedagogical purposes, and not an attempt to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” or because of mere ideological opposition. (*McCarthy v. Fletcher* (1989) 207 Cal.App.3d 130, 146 [quoting *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 642]; Cal. Const., art. 1, § 2.)

California’s Education Code also requires that curricula and instructional materials used in public schools:

1. Reflect the diversity of the State by including a study of the role and contributions of protected groups in social sciences curricula, including the roles and contributions of all genders, Native Americans, African Americans, Latino Americans, Asian Americans, Pacific Islanders, European Americans, persons with disabilities, members of other ethnic, cultural, religious, and socioeconomic status groups, and lesbian, gay, bisexual, and transgender people 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” (Ed. Code, § 51204.5);
2. Accurately “portray the cultural and racial diversity” of society (Ed. Code, § 60040); and
3. Not contain any matter reflecting adversely on persons because of their race, sex, color, national origin, or ancestry. (Ed. Code, § 51501.)

On September 25, 2023, the Governor signed AB 1078 to expand these requirements, address incidents of school boards attempting to restrict curricula and ban library books, and ensure that students “receive a comprehensive education that celebrates the diversity of our state and promotes a sense of belonging in the classroom.”¹ AB 1078:

1. Prohibits governing boards of a school district, county board of education, or charter school (governing boards) from refusing to approve or prohibiting use of curriculum, textbooks, instructional and supplemental instructional materials, or resources or books in a school library (books and instructional materials) on the basis that they include the roles and contributions of any individual or group discussed in sections 51204.5 and 60040, unless the material has been excluded because it reflects adversely upon persons based on their race or ethnicity, gender, gender identity, gender expression, religion, disability, nationality, sexual orientation, occupation, or immigration status² (Ed. Code, § 243, subd. (a));
2. Prohibits governing boards from discontinuing appropriately adopted books and instructional materials on the basis that they contain inclusive or diverse perspectives (Ed. Code, § 51501, subd. (b)); and
3. Provides that any action to ban or censor books or instructional materials on these bases is also unlawful discrimination under Education Code section 220. (Ed. Code, § 243, subd. (b).)

To provide for inclusive curricula, California’s Education Code also requires that public schools, including charter schools, offer specific courses. Specifically, school districts shall provide comprehensive sexual health instruction at least once in junior high and at least once in high school; such education must: (1) teach pupils about gender, gender expression, and gender identity; (2) explore the harms of negative gender stereotypes; and (3) affirmatively recognize that people have different sexual orientations and be inclusive of same-sex relationships.³ (Ed. Code, §§ 51933-51934.) School authorities shall make sexual health and HIV/AIDS prevention education materials available for parents to review, and must excuse students from these classes if parents request excusal in writing. However, school districts cannot require “opt-in” parental consent for such education. (Ed. Code, §§ 51937-51939.)

In addition, the Education Code anticipates that public schools, including charter schools, will offer an annual one-semester ethnic studies course for students in grades nine through twelve, starting in the 2025-26 school year.⁴ (Ed. Code, § 51225.3, subd. (a)(1)(G)(i).) And, beginning with the class of 2030, the Education Code anticipates that all public school students will complete a mandatory one-semester ethnic studies course in order to graduate. (*Ibid.*) Schools are permitted, but not required, to make the class a full-year course. (*Ibid.*)

Ethnic studies courses offered for this purpose must be: (1) appropriate for students of diverse ethnic, cultural, and language backgrounds, genders, sexual orientations, and abilities; (2) not reflect or promote bias, bigotry, or discrimination; and (3) not teach or promote religious doctrine. (Ed. Code, § 51225.3, subd. (a)(1)(G)(v).) A student can fulfill the ethnic studies requirement by taking a course that meets one of the requirements summarized below:

- A course based on the Model Curriculum developed by the State Board of Education and available here: <https://www.cde.ca.gov/ci/cr/cf/esmc.asp>;
- A preexisting ethnic studies course;
- An ethnic studies course that is part of a course meeting the A–G requirements of the University of California and the California State University; or
- A locally created ethnic studies course approved by the governing board or body of the school district

¹ Stats. 2023, ch. 229, § 6; Assem. Floor Analyses of Assem. Bill 1078 (2023-2024 Reg. Sess.).

² In other words, the only reason a district can appropriately reject curricular materials under this provision is that such materials *malign* the listed groups, not because those materials *teach* students about such a group.

³ Enacted by the California Healthy Youth Act (A.B. 329), Stats. 2015, ch. 398, § 6.

⁴ Enacted by AB 101, Stats. 2021, ch. 661, § 1.

or charter school. However, such a course cannot be approved unless it is presented at a public meeting of the body and the public is provided an opportunity to offer feedback at a subsequent public meeting of the body.

(Ed. Code, § 51225.3, subd. (a)(1)(G)(ii).)

As many school boards are currently developing AB 101-compliant curricula, it is imperative that they do so with the intention and effect of accurately reflecting the diverse histories and contributions of groups and that these curricula do not promote bias, bigotry, or discrimination.

In 2021, the State Board of Education adopted the Ethnic Studies Model Curriculum (Model Curriculum).⁵ The model is grounded in the foundational curricular areas of the ethnic studies tradition - African American, Native American, Asian/Pacific Islander American, and Latin American studies. However, in recognition of the diversity of communities and classrooms across the state, the Model Curriculum can be adjusted to account for local needs and includes lesson plans on a variety of other groups, including Filipino Americans, Jewish Americans, Arab Americans, Sikh Americans, and Armenian Americans.⁶

If a school district chooses to create an ethnic studies course not based on the Model Curriculum, it must comply with AB 101's requirements to teach about the experiences and contributions of diverse communities in an appropriate manner regardless of whether it is following the Model Curriculum or designing its own program. (Ed. Code, §§ 51225.3, subds. (a)(1)(G)(ii) & (v).)

School districts and their governing boards should take steps to ensure that any locally-developed curricula and materials purchased from third parties are consistent with the provisions of the Education Code to avoid the costs associated with having to redesign a compliant course. They must take care that in presenting diverse perspectives they do not end up discriminating against other groups or communities. It is the intent of the Legislature that school districts and their governing boards not use portions of the draft model curriculum that were not ultimately adopted due to concerns over bias, bigotry, and discrimination. (Ed. Code, § 51225.3, subd. (a)(1)(G)(vi).)

Due to the unfortunate recent rise in antisemitism and Islamophobia, educators must be attentive to the discrimination these communities are facing. While criticism of any country's policies is permissible, care must be taken not to blame any racial, ethnic, or religious group for the actions of a government and schools must always strive to present factual and unbiased information whether discussing communities or countries. (See Ed. Code, §§ 201, 220, 51501, 60044.) Ethnic studies offers a chance to combat harmful stereotypes and open up new avenues for understanding and tolerance, but it requires diligence and care in presenting the cultures of different peoples and the teaching of sometimes controversial or divisive subjects. Such subjects should not be avoided, but approached in a balanced and sensitive manner to ensure that all students "'see' themselves in the fabric of our state."⁷

Assessing Compliance and Filing Complaints for Redress

To help ensure that school districts meet curriculum and instruction requirements, California requires that students have access to educational textbooks or instructional materials to use in class and to take home. (Ed. Code, § 60119.) These textbooks and instructional materials must be aligned to the content standards adopted by the State Board. (*Ibid.*) The governing boards of school districts are required to make an annual determination, at a public hearing, as to whether this requirement is met. (Ed. Code, § 60119, subd. (a)(1)(A) & (B).) If it is determined there are insufficient textbooks or instructional materials aligned to State Board content standards, the governing board is required to take action to ensure that, within two months of the beginning of

⁵ Cal. Dept. of Ed., *Ethnic Studies Curriculum* <<https://www.cde.ca.gov/ci/cr/cf/esmc.asp>> (as of Jan. 9, 2024).

⁶ Cal. St. Bd. of Ed., *Dear School Leader Letter Regarding Ethnic Studies Curriculum and Instructional Materials*, (Aug. 23, 2023) <<https://www.gov.ca.gov/wp-content/uploads/2023/08/8.23.23-Ethnic-Studies-Letter.pdf>> (as of Jan. 9, 2024).

⁷ Cal. St. Bd. of Ed., *Dear School Leader Letter*, *supra*, fn. 6.

the school year in which the determination is made, each student has sufficient textbooks or materials. (Ed. Code, § 60119, subd. (a)(2)(A).)

County superintendents of schools are also tasked with visiting and auditing low-performing schools annually and all schools at reasonable intervals to, among other mandates, ensure sufficient and appropriate textbooks and instructional materials. (Ed. Code, § 1240, subds. (c) & (i).) If the county superintendent determines that a school does not have sufficient textbooks or instructional materials, they must: (1) provide the school district with an opportunity to remedy the deficiency by the second month of the school term, and (2) if the deficiency is not timely remedied, request the California Department of Education purchase textbooks or instructional materials to remedy the deficiency. (Ed. Code, § 1240, subd. (i)(5).)

Anyone, including students, parents, and teachers, can also file a Uniform Complaint (and seek redress) directly with the school principal for any alleged insufficiency related to textbooks or instructional materials. In addition, anyone can file a Uniform Complaint (and seek redress) with the school principal or State Superintendent of Public Instruction if they believe that:

1. As a result of action (or inaction) by a governing board, more than one student does not have sufficient books or instructional materials that are standards-aligned⁸ (Ed. Code, § 35186, subd. (d)); or

2. A governing board has refused to approve the use of or prohibited the use of curriculum or school library resources on that the basis that they include study of the role and contributions of the individuals delineated in Education Code sections 51204.5 and 60040, unless the study of the role and contributions reflect adversely upon persons based on a characteristic delineated in section 51501.⁹ (Ed. Code, § 243; Cal. Code Regs., tit. 5, § 4630.)

Complaints filed with a school district must be resolved within 30 working days, and a report must be provided to the complainant describing how the complaint was resolved within 45 days of filing. (Ed. Code, § 35186, subd. (b).) Districts must report summarized information regarding the nature and resolution of all complaints on a quarterly basis. (Ed. Code, § 35186, subd. (e).) For complaints filed with the State Superintendent of Public Instruction, the Superintendent may directly intervene at their discretion without waiting for a local education agency to investigate; if the Superintendent finds a violation related to insufficiency, a penalty shall be assessed against the district's local control funding formula allocation. (Ed. Code, §§ 60150, subd. (b); 243, subd. (c); 35186, subd. (d).)

Compliance and the Role of the Attorney General's Office

The Attorney General's Office will play a role in monitoring compliance with these laws, including AB 1078 and AB 101. The Attorney General is the chief law officer of the state, is tasked with ensuring that the laws are "uniformly and adequately" enforced, and has the power to conduct investigations and initiate prosecutions to address potential violations of law. (Cal. Const., art. V, § 13; Gov. Code, § 11180, et seq.) Ensuring equal education opportunity and equal access to instructional materials and textbooks that reflect the diversity and

⁸ Content standards can be found on the State Board of Education website: <https://www.cde.ca.gov/be/st/ss/>. A complaint based on insufficient standards-aligned textbooks may, for example, allege that due to a school board's refusal to adopt a recommended textbook, students do not have instructional materials that provide students with the material needed to describe the social, political, cultural, and economic life and interactions among people of California during the Spanish mission and Mexican rancho periods. (See Cal. St. Bd. of Ed., *History-Social Science Content Standards for California Public Schools, Kindergarten Through Grade Twelve* (Oct. 1998) p. 13

<<https://www.cde.ca.gov/be/st/ss/documents/histsocscistnd.pdf>> (as of Jan. 9, 2024).) A complaint based on the content standards may also refer to curriculum frameworks, which provide guidance for implementing the content standards. Curriculum frameworks can also be found on the State Board of Education website:

<https://www.cde.ca.gov/ci/cr/cf/allfwks.asp>.

⁹ Complaints about any curriculum deficiencies, such as a lack of standards-aligned textbooks or instructional materials, may be filed anonymously, but complainants who identify themselves and request a response are entitled to a response. (Ed. Code, § 35186, subd. (a)(1).)

contributions and roles of all individuals and groups is a core priority for the Attorney General's office, which looks forward to assisting in the implementation of these statutes by helping stakeholders understand the laws and their requirements. This legal alert is a first step. The Attorney General's Office will also use its enforcement powers as needed if governing bodies do not comply with the new restrictions on banning or censoring of curricula, books, and educational materials or institute ethnic studies courses that do not meet the Education Code requirements laid out above. The Attorney General's Office is committed to supporting LEAs and providing oversight of these new laws as schools across the State work to ensure students have the opportunity to understand the roles, contributions, challenges, and experiences of the many diverse people who have shaped our Nation and State's history, and who continue to shape social, political, cultural, and economic life and interactions in the present day.

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