BEFORE THE MARYLAND STATE BOARD OF EDUCATION

CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.	*
Appellants	*
v.	*
MONTGOMERY COUNTY BOARD OF EDUCATION	*
Appellee	*

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BOARD OF EDUCATION MEMORANDUM
IN RESPONSE TO REQUEST FOR STAY

COMAR 13A.01.02.01B gives the State Superintendent of Schools the authority to stay any action taken by a local board of education for a period not to exceed 60 days. No guidelines are provided in the regulation, leaving the decision to the discretion of the State Superintendent. This memorandum is provided to assist the State Superintendent in the exercise of her discretion by providing the procedural background, areas of significant disputed fact, and an overview of the law applicable to the issues raised by Appellants as justification for the stay.

I INTRODUCTION

The curriculum at issue in this appeal contains two 45 minute lessons for the family life sections of the 8th and 10th grade health education curriculum and a lesson and video that is part of the 10th grade health curriculum on use of a condom ("Revised Lessons"). The Revised Lessons were developed by staff in full compliance with State regulations, county policy and practice, and in consultation with medical specialists. The Revised Lessons were presented to the county board for approval on January 9, 2007, with the recommendation of the Superintendent, the staff, the medical advisory panel, and the Citizens' Advisory Committee on Family Life and Human Development ("CAC"). The Board approved the Revised Lessons for field testing in six schools in the spring of 2006.

When stripped of incendiary language[1] and unsupported assertions presented as "fact," it is evident that Appellants simply disagree with the curriculum and want it rewritten to include *their* views on sexual orientation. They base their objection primarily

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1 At page 31 of the Appeal, for example, Appellants say that "[s]tudents are being molested on account of their religious beliefs by being forced with the NO-CHOICE of either leaving the class and sitting in a library doing independent work . . . or having to listen to negative stereotyping and epithets (homophobe and prejudiced) being directed at them as members of a group holding a moral view antithetical to the viewpoint espoused by MCPS."

on religious grounds[2] and on a fundamentally flawed view of the applicable law. Appellants do not raise any valid legal basis for concluding that the Revised Lessons violate either federal or state law.

I. PROCEDURAL BACKGROUND

Development of 2004 Curriculum. In the Fall of 2002, the County Board received two reports from the then-constituted CAC regarding the need to include lessons in the health curriculum on sexual orientation and the proper use of a condom. COMAR states that the function of the CAC is to "consult with . . . educators in developing, implementing, and evaluating" the comprehensive health education curriculum. COMAR 13A.04.18.03D(1). Based on the CAC reports and input from staff, the County Board approved development of lessons on sexual orientation and use of a condom, including an instructional video.

A writing committee comprised of school staff and two members of the CAC developed draft lessons for Grade 8 and Grade 10 in the spring of 2003 and a draft video was prepared during the summer. The CAC spent time during the 2003-2004 school year reviewing, evaluating, and revising the materials. The curriculum

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[2] See, for example, Appellants' Exhibit L consisting of "Affidavits of Religious Objection."

modifications were approved on November 9, 2004, by the County Board for field testing in the spring of 2005 (“2004 curriculum”).

On May 1, 2005, just days before the field tests were to begin, two of the Appellants here, Citizens for a Responsible Curriculum (“CRC”) and Parents and Friends of Ex-Gays and Gays (“PFOX”), filed suit in the United States District Court for the District of Maryland seeking to a temporary restraining order (“TRO”) and permanent injunctive relief to prevent implementation of the 2004 curriculum.

Legal Challenge to 2004 curriculum. On May 5, 2005, the Court issued a TRO order, based on the Court’s concern that the materials (primarily found in teacher resource materials that were not part of the official curriculum) described some religious groups as having negative attitudes about gay people while other religious groups were described as more tolerant of the homosexual lifestyle. See attached Memorandum Order at 17-19. Significantly, none of the materials that troubled the District Court are contained in the Revised Lessons that are the subject of the current Appeal. In its opinion, the District Court noted that plaintiff’s Free Speech claim also warranted additional investigation. See attached Memorandum Opinion at 19-21. The District Court, however, did not issue a final ruling on either of the claims in the lawsuit.

In accordance with the TRO, the Superintendent immediately suspended the field test of the 2004 curriculum and further recommended that the County Board rescind its

approval and that it direct the Superintendent to research, develop, and recommend new curriculum . On May 23, 2005, the County Board approved the Superintendent's recommendation and cited specific materials, primarily from the teacher resource materials of the 2004 curriculum, that were not to be used in any way in the revised lessons. The County Board also disbanded the then-existing CAC so that any revised curriculum would be reviewed by a newly-constituted CAC, including representatives of CRC and PFOX. The Revised Lessons would begin with a clean slate.

Having withdrawn the challenged 2004 curriculum, including associated teacher resource materials, the County Board entered into a Settlement Agreement on June 27, 2005. The settlement agreement ended the federal District Court litigation. In pertinent part, the Settlement Agreement provided that neither the revised curriculum nor the associated resource materials would discuss religious beliefs or characterize beliefs as attributed to specific religious denominations or sects.

Development of Revised Lessons. Following the settlement of the lawsuit concerning the rescinded 2004 curriculum, a new CAC was established in July 2005 and new members were appointed in October 2005 and January 2006. All 15 members of the committee were County residents who had not served previously on the CAC. The County Board appointed eight members at large and seven members who were representatives of various organizations, including one representative from the CRC

and one from PFOX. The CAC was chaired by a pediatrician on the staff of Shady Grove Adventist Hospital, who was the former chair of that hospital's Department of Pediatrics, former president of the hospital's medical staff, and a former assistant attorney general for the state of Connecticut.

The CAC met in the summer of 2006, MCPS staff began drafting Revised Lessons. The Superintendent directed the staff to consult with medical specialist to ensure that the Revised Lessons were medically accurate and age appropriate. Staff consulted with a panel of four physicians who are experts in pediatric medicine adolescent health. The physicians were recommended by the Maryland Chapter of the American Academy of Pediatrics. Members of the panel were: Dr. Lawrence D'Angelo, chief of the Division of Adolescent and Young Adult Medicine, Children's National Medical Center (CNMC); Dr. Jennifer Maehr, director, School-based Clinics in Prince George's County Public Schools; Dr. Rachel Moon, director of academic development, Goldberg Center for Community Pediatric Health, CNMC; and Dr. Jennifer Tender of the General and Community Pediatrics, CNMC. The former medical director of the Adolescent Health Center at CNMC, the late Dr. Edla Arce, also collaborated with the local school system in development of these lessons. The panel made recommendations for the Revised Lesson, including reviewing and recommending selected passages from the texts to be used in the Revised Lessons.

The staff worked on the revised lessons during the 2005-06 school year and completed them in the late summer of 2006. The Revised Lessons were presented to the CAC in the fall of 2006. The CAC met nine times to review the proposed lessons and voted on more than 200 proposals for additions and modifications to the staff-developed curriculum and video. The CAC approved 83 of the 200 changes it considered. Of the 83 changes recommended to the Superintendent by the CAC, 69 were accepted by the Superintendent and staff and were incorporated into the Revised Lessons that were presented to the County Board.

The Revised Lessons were presented to and approved by the County Board on January 9, 2007, for field testing during the second semester at Grade 8 and Grade 10. (A copy of the Superintendent's recommendation and the resolution approved by the County Board is provided because Appellants' Exhibit A inadvertently copied only the odd numbered pages.) The Superintendent selected three middle schools to field test the Grade 8 revised lessons and three high schools to field test the Grade 10 revised lessons and the condom demonstration video. Teachers are being trained and parent information meetings are being held for the parents of students taking health second semester at the pilot schools. All materials will be available at the parent meetings and at the schools for review in accordance with COMAR 13A.04.18.03C(3)(b).

II. SIGNIFICANT FACTUAL DISPUTES

In their Appeal, the Appellants make sweeping allegations and subjective conclusions for which there is no factual basis in the record. For example, the Appellants' allege that "the revised materials go beyond the ethic of teaching respect by demanding affirmation of a homosexual behavior . . . ." Appeal at 3. There is no basis for this in the record. In fact, the lessons are entitled "Respect for Differences in Human Sexuality" and are designed to promote tolerance and respect. Grade 8, lesson 1, examines the components of a healthy relationship, the effects of stereotyping and harassment and the positive results of respect, empathy, and tolerance. Grade 8, lesson 2, defines the terms gender identity, sexual identity, and sexual orientation which includes heterosexual, homosexual, and bisexual. Grade 10, lesson 1, defines terms related to sexual orientation and identifies laws designed to prevent harassment and discrimination based on sexual orientation and gender identify. Grade 10, lesson 2, examines sexual orientation and the challenges some adolescents may face. Contrary to Appellants' allegation that "the revised materials. . .demand[] affirmation of homosexual behavior" (Appeal at 3), the Revised Lessons are carefully tailored to avoid making or opposing any moral judgment about any sexual orientation. There is no requirement that a student "affirm" homosexual behavior and Appellants cannot cite any such requirement in the Revised Lessons. (A copy of these four lessons is provided because Appellants' Exhibit A inadvertently provided every other page.)

The Appellants' also allege that "[t]he Additional Lessons prohibit discussion of homosexuality, bisexuality, lesbianism, sexual orientation and gender identity . . ." Appeal at 17. The Appellants cite nothing in the record to support this allegation. Indeed, the Revised Lessons encourage thoughtful discussion among students. For example, Grade 10, lesson 1, specifically asks students "What are some advantages and disadvantages to revealing one's sexual orientation and/or gender identity?" and direct students to discuss their answers with a classmate nearby. (Grade 10, Lesson 1, at 4 and 11).

In addition, the Appellants assert that "MCPS believes that anyone who disagrees [with them about sexual orientation] is 'intolerant'," and that "MCPS is teaching INTOLERANCE when it teaches that people who *morally disagree with the homosexual lifestyle* are homophobic and prejudiced." Appeal at 23 and 26. Appellants do not and cannot cite to any part of any the Revised Lessons to support these assertions. The Revised Lessons expressly instruct that "[j]ust as stereotyping others based on sexuality is not an acceptable behavior, stereotyping others based on personal beliefs also is not acceptable." Grade 8, lesson 1 at 17.

The Appellants maintain that "MCPS is still advocating the moral viewpoint that homosexuality is a natural and morally correct lifestyle." Appeal at 24. Appellants do not and cannot cite to any part of any lesson to support this assertion. Finally,

Appellants' argue that "[t]he Additional Lessons treat certain MCPS students differently" and that "gays, lesbians, and bisexuals [are told] that their 'sexual orientation' is healthy and normal, while denying the existence of those who are ex-gay or attempting to overcome same-sex attractions." Appeal at 28. Appellants do not and cannot point to any part of any Revised Lesson that support this contention. The Revised Lessons make clear that all students are to be treated equally. All students who "opt-in" receive the same lessons and all students who do not "opt-in" receive the same alternative lessons. MCPS has no way of knowing, and does not seek to know, which students are gay, lesbian, or bisexual and which are ex-gay or attempting to overcome same-sex attractions. Thus, there is no basis on which MCPS could treat students differently based on those characteristics. Significantly, for example, Grade 8, lesson 1, specifically states that : "[e]very person is unique and is worthy of respect as an individual." Grade 8, lesson 1, at 17.

III. APPLICABLE LAW

Appellants do not raise any valid legal basis for concluding that the curriculum violates either federal or state law. Appellants' First Amendment objection completely mischaracterizes the content of the Revised Lessons and relies on selective quotations from federal cases while ignoring controlling authority. The Revised Lessons do not infringe on students' rights to free speech or free exercise of religion and do not violate

the Establishment Clause. Appellants' reliance on the Equal Protection Clause of the U.S. Constitution is equally flawed, as are their assertions that the Revised Lessons violate the Maryland Declaration of Rights and COMAR.

A. First Amendment - Free Speech

Appellants erroneously contend that a public school curriculum must be viewpoint neutral. Based on this mistaken contention, Appellants argue that wherever a particular viewpoint is expressed in the curriculum on a given topic, the competing viewpoint on that topic must also be included in the curriculum. On this ground, Appellants contend that the curriculum impermissibly infringes upon their free speech rights. Appeal at 16-18.

Appellants' allegations of viewpoint discrimination are premised on a flawed interpretation of the Supreme Court's opinions in Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995). In Rosenberger, the Court distinguished between a forum in which the government permits speech by members of the public, on the one hand, and circumstances in which the government itself speaks, on the other. Whereas, it is impermissible for the government to discriminate among viewpoints in any public forum that it established (e.g. by passing a law that permits groups with certain views to hold events in a park but not others), the government need not be viewpoint neutral with respect to its own speech. See id. at 833, ["W]hen the State is

the speaker, it may make content-based choices."). "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker." Id. at 833. Appellants fail to distinguish those parts of Rosenberger that relate to government regulation of student speech in public, which must be viewpoint neutral, and those parts of Rosenberger that relates to the University's speech in the process of implementing school curricula, which is not so restricted.

In Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, 457 F.3d 376 (4th Cir. 2006), the U.S. Court of Appeals for the Fourth Circuit clearly recognized this distinction. In holding that the County Board had established a public forum by permitting various groups to send fliers home in students' backpacks, the Court made sure to acknowledge: "Of course, when the government alone speaks, it need not remain neutral as to its viewpoint." Id. at 381 n.2 (4th Cir. 2006). Appellants conveniently ignore this reaffirmation of the pertinent distinction set forth in Rosenberger.

Schools make curricular choices. None of these choices run afoul of the First Amendment:

> The whole range of knowledge and ideas cannot be taught in the limited time available in public school. This is especially true as to any given year or to any given course. Additionally, it is important that a student's program fit together and it

> therefore becomes necessary to make certain choices. The authorities must choose which portions of the world's knowledge will be included in the curriculum's programs and courses, and which portions will be left for grasping from other sources, such as the family, peers or other institutions.

Mercer v. Michigan State Bd. Of Educ., 379 F.Supp. 580,586 (E.D.Mich. 1974).

It is for this reason that the Supreme Court has held that First Amendment questions in the curricular setting (as opposed to extracurricular or non-curricular settings, such as student social interaction in hallways or in the lunchroom) must be answered with deference "to the prerogative of educators to assure that participants learn whatever lessons the activity is designed to teach." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988). In short, "[a]n arm of local government-such as a school board-may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives." Downs v. Los Angeles Unified School Dist., 228F.3d 1003, 1014 (9th Cir. 2000) (upholding school officials' refusal to permit teacher to offer differing viewpoints on a school billboard regarding gay and lesbian awareness month).

Appellants rely on Epperson v. Arkansas, 393 U.S. 97 (1968), but that case provides no support for Appellants' misguided viewpoints discrimination argument. Appeal at 14. In Epperson, the Supreme Court invalidated Arkansas statutes that

prohibited the teaching of evolution in public school and universities. In Epperson, however, the First Amendment violation at issue was unequivocally a violation of the Establishment Clause violation, not Free Speech Clause. Id. at 106 ("There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma"). Thus, Epperson had nothing to do with Appellants' arguments about viewpoint discrimination. See id. at 108. If anything, it should be considered with respect to their Establishment Clause argument. Yet, as explained further in the section below addressing that claim, the challenged lessons do not proscribe a viewpoint; rather, the lessons are based on the desire to inculcate community values of tolerance and, thus, represent a valid exercise of schools' "undoubted right to prescribe the curriculum." Id. at 107. Indeed, the legal irony is that, here, in direct contrast to Epperson, it is Appellants, not the school board members, who want to tailor the teaching and learning to particular religious beliefs[3].

In sum, just as our biology classes including the theory of evolution need not also include theories of "creationism" and "intelligent design," see e.g., Kitzmiller v. Dover

3 Board of Educ. v. Pico, 457 U.S. 853 (1982), is also inapposite. Although the Pico plurality did limit a school's ability to remove books form its library, it was careful to restrict its holding so as to preserve schools' rights to select among curricular topics. Id. at 869. Nothing in *Pico* suggests that a school curriculum might violate the First Amendment by neglecting to raise a topic or any facet of a topic. Appellants' attempt to suggest otherwise is a blatant distortion of the case.

Area Sch. Dist., 400 F.Supp.2d 707 (M.D. Pa. 2005), a health education curriculum need not also include contrary "viewpoints" of Appellants.

Appellants' compelled speech argument is equally as problematic as their allegations of viewpoint discrimination. The First Amendment forbids the government from forcing individuals to convey its message. See Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297, 1309-1310 (2006); Hurley v. Isish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 573 (1995); Wooley v. Maynard, 430 U.S. 705, 713 (1977); West Virginia Board of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

Appellants allege that the curriculum violates the First Amendment's proscription against compelled speech by forcing students to present viewpoints they do not hold. Appeal at 14, 17. This argument is factually incorrect. There is no free speech violation because the curriculum does not *compel* speech at all. For example, in the Grade 8 lesson, session 1, on "Respect for Differences in Human Sexuality," teachers are instructed to ask for student *volunteers* to share their examples and then teachers are instructed to do the following: "If the class agrees that the example fits, place it on chart paper or an overhead transparency. If students disagree, ask them to explain their thinking." Teachers are specifically guided to expect that student "answers will vary."

Appellants' also argue that the County Board compels students to reveal their moral, ideological or religious views because "the only way for students to escape the

bias, non-facutual disscusion of sexual orientation is to ‘opt-out’ of the ongoing comprehensive health education course.” Id. at 17. This claim that students must “opt-out” of the ongoing health education course is simply false. The curriculum actually requires an opt-in: No student under the age of 18 may take the lessons objected to by Appellants unless the student receives specific permission from the parent or guardian. COMAR 13A.04.18.03B(3). Moreover, it is the purest conjecture to opine on what it is that motivates parents to decide whether to have their children “opt-in” or not. Assuming the decision reveals anything about the belief system of the student or the student’s parents, it is a parental decision and not one that is compelled by the school board.

Accordingly, Appellants’ free speech arguments are without merit.

B. First Amendment - Free Exercise

Appellants raise the discredited argument that curricular content, that some community members find to be inconsistent with their religious views, violates "the right to direct the religious upbringing of one's children." (Appeal at 19) In Mozert v. Hawkins County Board of Education, 827 F.2d 1058, 1063 (1987), the U.S. Court of Appeals for the Sixth Circuit framed the issue as follows: "The first question to be decided is whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment." The Court held it did not.

> Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.
>
> (Citation omitted) The lesson is clear: governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required.
>
> In short, distinctions must be drawn between those government actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion.
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> *******
>
> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a

> discrediting of the public school system can result from subjecting it to constant law suits.
> *Id.* at 1068-1069.

The First Circuit ruled that parents do not have the right "to dictate the curriculum at the public school to which they have chosen to send their children."

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to create a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems . . . .
> Brown v. Hot, Sexy and Safer Prods, Inc., 68 F.3d 525, 533, 534 (1995)

More recently, the Second Circuit Court of Appeals upheld a school district's decision to refuse to excuse a student from a mandatory health education course in the face of allegations that attending the class burdened the family's free exercise of their religion. The federal court in Leebaert v. Harrington and Fairfield Board of Education, 332 F.3d 134, 140, 141 (2003) noted that the First and Tenth Circuits had held that the parental right to direct the upbringing and education of children did "not include a right to exempt one's child from public school requirements" and that U.S. Supreme Court precedent did "not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."

The Sixth Circuit Court of Appeals, in Blau v. Fort Thomas Public School Dist., 401 F.3d 381, 395-396 (1975), made the same point, quoting Goss v. Lopez, 419 U.S. 565, 578 (1975):

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or . . . a dress code, these issues of public education are generally 'committed to the control of state and local authorities.'

The Fourth Circuit Court of Appeals affirmed: "[T]he fundamental right to raise one's children as one sees fit is not broad enough to encompass the right to re-draft a public school curriculum." Myers v. Loudoun County School Board, 251 F.Supp. 2d 1262, 1275-1276 (E.D.Va 2003), *aff'd*, 418 F.3d 395 (4th 2005).

Accordingly, Appellants' free exercise claims are groundless.

C. First Amendment - Establishment Clause

Appellants entire Establishment Clause argument is predicated on the notion that the Revised Lessons' promotion of tolerance is not a valid secular purpose, but instead constitutes a "moral viewpoint" identified with the "religion" of "Secular Humanism." Appeal at 23-24. Again, Appellants are factually and legally incorrect.

As a factual matter, Appellants cannot substantiate the assertion that the Revised Lessons teach that homosexual conduct is normal and morally

unobjectionable. The Revised Lessons do not identify homosexuality as "normal" or "abnormal" and the lessons are silent on the moral correctness of homosexuality.

As Appellants correctly note, the Establishment Clause prohibits government from preferring one denomination over another or promoting non-religion over religion. Appeal at 23. In the instant circumstances, however, the purpose of the curriculum is to promote tolerance. Unquestionably, school districts have the right to inculcate community values, including tolerance. In Parker v. Hurley, No. 06-10751 (DMass Feb.23, 2007), Slip Op. at 4-5, the court said: "It is reasonable for public educators to teach elementary school students about individuals with different sexual orientations. . . to reaffirm our nation's constitutional commitment to promoting mutual respect among members of our diverse society."

This goal of inculcating tolerance is clearly distinguishable from a government effort to "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." School Dist. Of Abingdon Township v. Schempp, 374 U.S. 203, 225 (1963)(quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). See also Brown v. Gilmore, 258 F.3rd 265, 274 (4th Cir. 2001). In any event, the e.g. contention that Secular Humanism is a religion has been rejected by federal courts. See, Peloza v. Capistrano School District, 37 F.3d 517 (9th Cir. 1994) (requiring a public school teacher to teach the "religion" of "evolution" did not violate Establishment Clause

because neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes").

Thus, Appellants' Establishment Clause claim really boils down to a complaint that community values do not perfectly coincide with their opinions. This is no hint that the process or its outcome was tainted by animosity toward religion or by a desire to promote one religion over another. The Revised Lessons do not disparage religion or disadvantage any particular group of believers. Appellants do not and cannot point to any part of any lesson that shows hostility to any particular religion.

Accordingly, Appellants' Establishment Clause arguments must be rejected.

D. Equal Protection

In Appellants' view, the Revised Lessons discriminate against "ex-gays" in violation of the Equal Protection Clause of the Fourteenth Amendment. While Appellants are correct that the Revised Lessons do not include "ex-gays" in its definition of sexual orientation or contain any discussion of this group at all, Appeal at 28, these omissions do not violate the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment states that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." As a threshold matter, it is worth noting that Appellants have not contended that any students in the school system are, in fact, ex-gay or attempting to overcome same-sex

attractions. Thus, it is not clear that the failure to mention these purported categories in the curriculum causes any actual harm to discrete individuals. The school system has no way of knowing which students are gay, lesbian, or bisexual and which are ex-gay or attempting to overcome same-sex attractions. Therefore, the County Board could not be treating students differently, based on those characteristics, in violation of the Equal Protection Clause.

The Equal Protection Clause does not compel the County Board to adopt Appellant's view that "ex-gay" is a sexual orientation and the failure to do so does not constitute discrimination.

E. Article 36 of the Maryland "Bill of Rights"

Although Appellants conclude that the curriculum violates Article 36 of the Maryland Declaration of Rights because "students are not being equally protected in their religious liberty," they do not state any facts to support the statement. Rather, they allege that Article 36 is breached by permitting students who have objection to the revised lessons to receive alternative instruction. Appeal at 31. Typically, such actions are seen as an accommodation of an individual's religious beliefs, not a violation as Appellants assert.

Appellants also contend that "[f]orcing students to attend classes where the Additional Lessons are taught is causing them to 'frequent' a 'ministry' and is therefore

unconstitutional." Appeal at 31. Factually, no student is "forced" to attend the revised lessons; parents have to sign permission forms for their children to allowed to attend these classes.

Hence, there is no factual predicate for Appellants' legal contention that the curriculum violates Article 36. Indeed, Appellants were unable to find even one case to support this point.

F. COMAR

Appellants allege violation of various provisions of COMAR based predominantly on unfounded characterizations about the revised lessons or misrepresentations of the COMAR requirements. For example, the allegation that the County Board violates COMAR 13A.04.04.01 "which provides that religious education is not to be part of the State's school curriculum" depends on acceptance of Appellants' characterization of tolerance and respect is teaching a religion. As discussed above, this characterization if legally flawed.

Appellants further contend that the Revised Lessons violate the specific requirement in COMAR 13A.04.05 that instruction and instructional materials include consideration of "diversity of religion." In fact, religion is listed as a "diversity factor" in multicultural education, but is not included in the criteria for instructional resources. COMAR 13A.04.05.05.

Finally, Appellants offer their view that the Revised Lessons, including the condom video, “violate” a myriad of State Board bylaws dealing with health and infectious disease because they fail to include additional information about the increased risk of infection from anal intercourse. The video is to be used as a transition to the subject of sexually transmitted disease. Appellants want information on sexually transmitted diseases presented as part of the lessons on sexual orientation, rather than as a separate unit or lesson. Appellants have no legal right to dictate where in a sequence information is presented and State Board bylaws are not “violated” by addressing health topics and sexually transmitted diseases in other parts of the curriculum.

IV. CONCLUSION

Appellants are not likely to succeed on the merits of their Appeal. The Appellants simply disagree with the contents of the Revised Lessons and want them re-written to include *their* views on sexual orientation. The fact that Appellants believe that the revised lessons should contain additional information is not a reason to stay field testing of the revised lessons.

It is important to note that CRC and PFOX were actively involved in review of the revised lessons and video as members of the CAC. Representatives of both groups

offered numerous changes to the lessons which were rejected by the CAC as not being appropriate for the curriculum.

The lessons provide definitions and information; they permit discussion; they encourage students to think; and, hopefully, they promote tolerance and respect for individuals regardless of their sexual orientation. There is no reason, factually or legally, to stay these revised lessons.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY, that on this 26th day of February, 2007, a copy of this Memorandum was sent Federal Express Next Day Delivery prepaid, to John R. Garza, Esquire, 17 West Jefferson Street, Rockville, Maryland 20850.

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Judith S. Bresler