IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.,	*	
Petitioners/Appellants	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE BOARD OF EDUCATION (Opinion No. 07-30)	*	Civil Action No. 284980
IN THE CASE OF	*	
CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.,	*	
vs.	*	
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al.,	*	
Respondents/Appellees.	*	

* * * * * * * * * * * * * *

MONTGOMERY COUNTY PUBLIC SCHOOLS ET AL.
OPPOSITION TO PETITIONERS' MOTION FOR STAY

There is a fundamental flaw in Petitioners' motion for a stay pursuant to Md. Rule 7-205. That Rule does not authorize the remedy that Petitioners seek. Md. Rule 7-205 grants this Court the discretion to stay the decision of the Maryland State Board of Education ("State Board"); it does not grant this Court the power to enjoin the Montgomery County Board of Education ("County Board") from implementing revisions to its health education curriculum (the "Revised Lessons"). Cf. Motion for Stay at 1.

A stay is intended to maintain the status quo as it existed prior to the agency decision under review in this Court. The County Board approved implementation of the Revised Lessons

before the State Board ruled, and the State Board upheld the County Board. Therefore, a stay to maintain the status quo is unnecessary.

Petitioners effectively are asking this Court to use Md. Rule 7-205 to alter the status quo and enjoin the County Board because their view of good educational policy differs from that of the elected members of the County Board, who are statutorily authorized to adopt curriculum, and from that of the State Board, which the General Assembly has vested with the last word on educational policy. This Court should reject Petitioners' attempt to employ Md. Rule 7-205 in a way that is not authorized and for a purpose that is unavailing.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

The Revised Lessons challenged by Petitioners include the following additions to the health education curricula for Montgomery County Public Schools ("MCPS"):

(1) Two 45-minute lessons for the Family Life and Human Sexuality unit of the Grade 8 health education curriculum, which (a) defines terms such as gender identity, sexual identity, and sexual orientation, and (b) examines the components of a healthy relationship, the effects of stereotyping and harassment, and the positive results of respect and tolerance for individuals and the school environment.

(2) Two 45-minute lessons for the Family Life and Human Sexuality unit of the Grade 10 health education curriculum, which builds on the Grade 8 Revised Lesson with material appropriate for the higher grade, including discussion of laws designed to prevent harassment and discrimination based on sexual orientation, gender identity, and sexual identity, and the challenges some adolescents face regarding sexual orientation.

(3) One 45-minute lesson on condom use, including a brief demonstration video, for the Disease Prevention and Control unit of the Grade 10 health education curriculum.

See Exhibits 2, 6, and 9, attached to Petitioners' Motion for a Stay. The Revised Lessons were formulated in consultation with experts in pediatric medicine and adolescent health and vetted by a Citizens' Advisory Committee on Family Life and Human Development ("CAC") as required

by Code of Maryland Administrative Regulations ("COMAR") 13A.04.18.03(D)(1) (2007). 1/ MCPS also developed alternative lessons for students who do not have informed, written parental consent, as required by COMAR 13A.04.18.03(B)(3)(b), to participate in ("opt-in") the health education units affected by the Revised Lessons.

On January 9, 2007, the County Board approved field testing of the Revised Lessons for Spring 2007. Petitioners filed an appeal with the State Board challenging the Revised Lessons; they also urged the State Superintendent of Schools to issue a stay pending State Board review. The State Superintendent refused to issue the stay. See Exhibit B (Citizens for a Responsible Curriculum v. Montgomery County Bd. of Educ. (Order of State Superintendent, Mar. 7, 2007)) [hereinafter State Superintendent Op.].

The results of the field test were overwhelmingly positive. Significantly, MCPS received parental consent forms for over 91% of the students involved. See Exhibit C (Superintendent Weast, Memorandum, June 12, 2007). Accordingly, on June 12, 2007, the County Board approved, by a vote of 6-1, with minor modifications, system-wide implementation beginning with the 2007-08 school year. See State Bd. Op. at 2. On June 27, the State Board upheld the decision of the County Board to adopt the Revised Lessons and, thus, granted the County Board's motion for summary affirmance. Id. at 16. On July 26, Petitioners sought review of the State Board's decision in this Court.

ARGUMENT

I. A STAY OF THE STATE BOARD'S DECISION IS UNAUTHORIZED AND UNNECESSARY

This Court should deny the requested stay of the State Board decision on two grounds.

1/ Two of the Petitioners here were members of the CAC and actively participated in review of the Revised Lessons.

First, decisions of the State Board are entitled to heightened deference, particularly where the agency upholds a quasi-legislative policy judgment of a local board of education. Second, a stay is not necessary to maintain the status quo prior to issuance of the State Board's decision.

A. Petitioners Ignore the Deferential Standard of Review of State Board Decisions

Petitioners argue that there is no "compelling reason" for this Court not to issue a stay. See Motion to Stay at 4. But it is, in fact, Petitioners who need to demonstrate a compelling reason to issue the stay under Md. Rule 7-205, not the other way around, and Petitioners utterly fail to do so. The text of Md. Rule 7-205 makes clear that filing a petition for judicial review does not automatically stay the order or action of the administrative agency; rather, Md. Rule 7-205 places the burden on Petitioners to persuade this Court that a stay is warranted:

> The filing of a petition [for judicial review] does not stay the order or action of the administrative agency. Upon motion and after hearing, the court may grant a stay, unless prohibited by law, upon the conditions as to bond or otherwise that the court considers proper.

Md. Rule 7-205.

In placing the burden on Petitioners to demonstrate the need for a stay, Md. Rule 7-205 is consistent with the cardinal principles of Maryland law that the decision of an administrative agency is presumed correct and that courts should not infringe on judgments within the presumed expertise of the decision-makers at the agency. Dep't of Labor, Licensing & Regulation v. Woodie, 128 Md. App. 398, 406 (1999); Dep't of Econ. & Employment Dev. et al. v. Jones, 70 Md.App. 531, 535 (1989). Moreover, decisions of the State Board are entitled to special deference. Baltimore City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch., et al., 400 Md. 324, 929 A.2d 113, 124 (2007) ("SBE [State Board of Education] rulings must be given heightened, not less, deference.").

Petitioners entirely ignore that the decision under review in this Court is an order of the State Board. 2/ Instead, they reassert in this Court the same arguments that were presented to and decided by the State Board. Yet, pursuant to Md. Code, Educ. § 2-205(e)(3) and a legion of cases, "[t]he Maryland State Board of Education . . . is vested with the last word on matters of educational policy or the administration of the system of public education." Bd. of Educ. of Howard County v. McCrumb, 52 Md. App. 507, 514 (1982). Ignoring this controlling legal authority, Petitioners invite the Court to decide ab initio the merits of their position without regard to the decision of the state agency that has the "last word" on these matters.

Still further deference is warranted where, as here, the State Board has upheld a quasi-legislative decision of a County Board on a matter of local educational policy. State Bd. Op. at 12-14. Maryland courts have repeatedly held that "'[i]n those instances where an administrative agency is acting in a manner which may be considered legislative in nature (quasi-legislative), the judiciary's scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries[.]'" Weiner v. Md. Ins. Admin., 337 Md. 181, 190 (1995) (quoting Dep't of Natural Res. v. Linchester Sand & Gravel Corp., 274 Md. 211, 224 (1975)); accord Adventist Health Care, Inc. v. Md. Health Care Comm'n, 392 Md. 103, 117 n.12 (2006). Petitioners assert no challenge to the State Board's determination that the County Board was, in fact, acting in a quasi-legislative (rather than a quasi-judicial) capacity when it approved the Revised Lessons, a conclusion fully supported by Maryland law. See Armstrong v. Mayor & City Council of Baltimore, 169 Md. App. 655, 668-71 (2006). Accordingly, this Court, like the State Board below, is not authorized to "second guess the appropriateness of the local board's decision governing curriculum, unless, of course, that decision is illegal." State Bd. Op. at 16.

2/ Petitioners mention the State Board decision once only, in the first paragraph of their 15-page Motion, stating that they filed a timely Petition for Judicial Review of Opinion No. 07-30.

B. A Stay is Unnecessary to Preserve the Status Quo Prior to Issuance of the State Board's Decision

Petitioners do not dispute the general proposition that a stay pursuant to Md. Rule 7-205 operates to preserve the status quo pending resolution of an administrative appeal. See Motion for Stay at 5. Appellants simply misconstrue what constituted the status quo prior to issuance of the State Board's June 27 decision. Before the State Board ruled, the status quo was that the County Board had approved the Revised Lessons for system-wide implementation in the MCPS Grade 8 and Grade 10 health education curriculum.

Once the Revised Lessons were approved by the County Board, MCPS was fully entitled to put them into effect without any further action by the State Board. The Maryland General Assembly has provided the County Board with the specific authority and responsibility to adopt curriculum. Md. Code, Educ. §§ 4-101, 4-111(a). Moreover, development of a "comprehensive health education instructional program" is an obligation directly imposed upon "each local school system" by the State Board. See COMAR 13A.04.18.01(A)-(B). It is not necessary for the State Board to endorse a local board's curricular revisions before those changes are implemented.

Curricular decisions are subject to State Board review only where, as here, some person or organization protests that the County Board has violated federal or state laws or regulations or acted contrary to sound educational policy. See COMAR 13A.01.05.02. Even when such an appeal is filed, it does not necessarily interfere with the County Board's curriculum implementation; the State Board would be required to overturn the County Board's decision in order to prevent it from proceeding. See COMAR 13A.01.05.05. The State Board decision which Petitioners have asked this Court to review found that the County Board acted within its statutory authority, consistent with its obligations under law and the rules and regulations of the

State Board. The State Board decision did not change the status quo. Therefore, a stay of that decision is unnecessary.

II. PETITITIONERS HAVE NOT DEMONSTRATED A COMPELLING CASE FOR A STAY OF THE COUNTY BOARD'S DECISION

Petitioners effectively request that this Court use Md. Rule 7-205 to alter the status quo as it existed at the time that the State Board ruled and instead stop implementation of the Revised Lessons by the County Board. Md. Rule 7-205, however, does not authorize such relief, and Maryland courts do not permit expansive readings of the state's Rules of Civil Procedure. See Colonial Carpets, Inc. v. Carpet Fair, 36 Md. App. 583, 584 (1977) (Maryland Rules "are not to be considered as mere guides or Heloise's helpful hints to the practice of law but rather precise rules that are to be read and followed[.]"). Md. Rule 7-205 authorizes only a stay of the "order or action of the administrative agency" under review. Here, the order of the administrative agency under review is neither the County Board's decision on January 9, 2007 to field test the Revised Lessons nor the County Board's decision on June 12, 2007 to approve system-wide implementation of the Revised Lessons. Petitioners' administrative appeal solely concerns the decision of the State Board on June 27, 2007 to "uphold[ ] the decision of the local board to adopt the three additional lessons." State Bd. Op. at 16. Md. Rule 7-205 is, thus, an improper vehicle for enjoining any action by the County Board regarding the Revised Lessons.

Even if Md. Rule 7-205 authorized the Court to reach beyond the State Board and enjoin the County Board from implementing the Revised Lessons as part of the health curriculum in Grade 8 and Grade 10, Petitioners do not present a compelling case to do so. Cf. LOOC, Inc. v. Kohli, 347 Md. 258, 265-66 (Md. 1997) ("[A] court 'order mandating or prohibiting a specific act'" is a request for injunctive relief even if it is styled as a motion for a stay). Courts have used

the familiar four preliminary injunction factors as a guide in exercising the discretion afforded by Md. Rule 7-205. See Berkshire Life Ins. Co. v. Md. Ins. Admin., 142 Md.App. 628, 643 (2002). The four-factor test for injunctive relief requires Petitioners to prove that: (1) they will be irreparably harmed if injunctive relief is not granted; (2) the injury that Petitioners would suffer is greater than the harm to the County Board that would result from issuance of injunctive relief; (3) there is a likelihood that Petitioners' petition for review will succeed on the merits; and (4) injunctive relief would not harm public interest. See Eastside Vend Distrib. Inc. v. Pepsi Bottling Group, Inc., 396 Md. 219, 240 (2006). 3/

If the Court were to use these factors, Petitioners still would fail to meet their burden. "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original). Petitioners' scattershot motion fails to make a clear showing with respect to any of the four preliminary injunction factors. Thus, under Maryland law, even a motion for preliminary injunction would be denied because "[t]he failure to prove the existence of even one of the four factors will preclude the grant of injunctive relief." Fogle v. H & G Rest., 337 Md. 441, 456 (1995).

Indeed, Petitioners have an even less compelling argument for halting system-wide implementation of the Revised Lessons than they did in the spring of 2007 when they unsuccessfully urged the Maryland State Superintendent of Schools to stop the County Board's field test of the Revised Lessons. See State Superintendent Op. at 1. The State Superintendent's

---

3/ Even if the Court's sole consideration here is whether to stay the State Board's order, this four-factor test would be highly relevant. Courts in Maryland and elsewhere are guided by such factors in determining whether to stay a prior agency or court ruling pending review. See, e.g., O'Brien v. Brown, 409 U.S. 1, 2 (1972) (weighing irreparable harm, likelihood of success on merits, and public interest in determining that a stay of an appellate court judgment should be granted pending Supreme Court review).

refusal to stay field testing of the Revised Lessons was later supported by the State Board when, on June 27, 2007, it rejected Petitioners' efforts to stop implementation of the Revised Lessons on a system-wide basis. See State Bd. Op. at 1. Petitioners now ask this Court to do what the State Superintendent and the State Board of Education refused to do.

A. Petitioners Fails to Demonstrate Irreparable Harm from the Revised Lessons

The three Appellant organizations fail to show any irreparable injury will result from implementation of the Revised Lessons pending judicial review of the State Board decision. 4/ Petitioners cannot be irreparably harmed by implementation of a curriculum that does not meet their individual preferences because, as courts have often noted, "[w]hile 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." Blau v. Fort Thomas Public Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005) (emphasis in original).

Moreover, the opt-in structure of the health education curriculum undercuts any claim of irreparable harm. Parental consent is required before any student enters a class where the Revised Lessons will be taught. See COMAR 13A.04.18.03(B)(3)(b). Any parent who objects to the content of the lesson for any reason can simply decline to provide written consent and their children are not exposed to these lessons. 5/ Courts have declined to find an educational, much less a constitutional, harm where a school offers students such an opportunity to forego participation in courses to which they object. See, e.g., Grove v. Mead Sch. Dist. No. 354, 753

4/ As a threshold matter, there is no evidence in the administrative record that any of these three organizations has even a single member who is a student, or the parent of a student, enrolled in MCPS Grade 8 or Grade 10 for the 2007-08 school year, and Petitioners may not demonstrate irreparable harm based on the Revised Lessons' impact on non-members.

5/ Further mitigating any possible harm, alternative lessons have been developed to provide comparable education opportunities to students who do not opt-in to the Revised Lessons.

F.2d 1528, 1533 (9th Cir.1985).

Petitioners also exaggerate any alleged harm by overestimating the length of time that students who do not opt-in will be out of their regular classroom. Cf. Motion for Stay at 13-14. In Grade 8, a child who does not opt-in to the Family Life and Human Sexuality unit will participate in alternative lessons for up to seven 45-minute class periods, which is a little more than a week of instruction in regular class schedules and less than one week in block schedules. See Exhibit D (Affidavit of Betsy Brown, Director, MCPS Department of Curriculum and Instruction, Mar. 5, 2007). In Grade 10, a child who does not opt-in would receive alternative lessons for up to fifteen class periods, which is about three weeks of instruction in regular class schedules and possibly less than a week and a half in block schedules. See id. 6/

If the harm is so great, why didn't Petitioners ask this Court for a stay when it filed its notice for judicial review on July 26, 2007, instead of waiting until September 4, 2007? Such an unexplained delay by the moving party weakens a claim of irreparable harm because it demonstrates a lack of urgency to the request for relief. See Quince Orchard Valley Citizens Assoc., Inc. v. Hodel, 872 F.2d 75, 79-80 (4th Cir. 1989); Wright & Miller, Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm, 11A Fed. Prac. & Proc. Civ.2d § 2948.1.

B. The Balance of Harms Weighs Strongly in Favor of MCPS

If the Court employs the preliminary injunction factors to guide its decision on whether to grant a stay, it should find that the balance of harm prong favors Respondent. While there is no harm to Petitioners, halting implementation of the Revised Lessons undermines the statutory

6/ Parents can also decide that their Grade 10 children should not participate in the three-week Disease Prevention and Control unit, which includes the condom demonstration lesson, but this is an entirely separate decision from the choice to opt-in to the Family Life and Human Sexuality unit.

authority of the County Board to determine curriculum, ignores the deference to be accorded State Board approval of the material, places little value on the extensive curricular development process, and denies the vast majority of students whose parents decided to opt-in the right to receive important information about the need for tolerance and protection against sexually transmitted infections and unplanned pregnancy. See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) ("We are therefore in full agreement with petitioners that local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values.") (quotation marks and citations omitted); Parker v. Hurley, 474 F.Supp.2d 261, 264 (D. Mass. 2007) ("[I]t is reasonable for those educators to find that teaching young children to understand and respect differences in sexual orientation will contribute to an academic environment in which students who are gay, lesbian, or the children of same-sex parents will be comfortable and, therefore, better able to learn."); Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 429 (N.Y. 1989) ("Education regarding the means by which AIDS is communicated is a powerful weapon against the spread of the disease and clearly an essential component of our nationwide struggle to combat it.").

The hearing in this matter is scheduled for January 16, 2008, two days before the end of the semester. See MCPS, Current School Year Calendar: 2007-2008, available at: http://www.mcps.k12.md.us/info/calendars/ (last accessed Sept. 18, 2007). Thus, even if the Court ruled immediately after the hearing, approximately half of current Grade 8 and Grade 10 students would be denied access to the Revised Lessons. It would work a significant hardship upon MCPS —and may, in fact, be impossible — to rearrange student and staff schedules so that all Grade 8 and Grade 10 students whose parents have opted-in could receive the information in the second semester.

Accordingly, the balance of hardships clearly weighs in favor of the County Board. Petitioners seek to deny the majority of local students access to a comprehensive health education curriculum vetted by medical experts, approved with broad community support, and upheld by the State Board simply because they object to some content, notwithstanding their ability to avoid any exposure simply by not opting-in.

C. Petitioners Have Little Chance of Success on the Merits of Their Administrative Appeal

Under the four-prong preliminary injunction test, when there is little chance of irreparable injury to Petitioners, their burden to demonstrate likelihood of success on the merits is correspondingly greater. See Lerner v. Lerner, 306 Md. 771, 784 (1986). Petitioners have the burden of establishing "'a real probability of prevailing on the merits, not merely a remote possibility of doing so.'" Ehrlich v. Perez, 394 Md. 691, 708 (2006) (quoting Fogle, 337 Md. at 456) (emphasis in original). Petitioners, however, fail to demonstrate even a "remote possibility" of success. As previously stated, see supra at 4-5, where, as here, "'an administrative agency is acting in a manner which may be considered legislative in nature (quasi-legislative), the judiciary's scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries[.]'" Weiner v. Md. Ins. Admin., 337 Md. 181, 190 (1995) (quoting Dep't of Natural Res. v. Linchester Sand & Gravel Corp., 274 Md. 211, 224 (1975)); accord Adventist Health Care, Inc. v. Md. Health Care Comm'n, 392 Md. 103, 117 n.12 (2006).

Here, the State Board was plainly acting within its legal boundaries. Petitioners wholly ignore the extremely deferential standard of review that this Court must apply when it reviews State Board decisions. The only legal claim asserted in Petitioners' Motion for a Stay that is not subject to extreme deference — the contention that the Revised Lessons violate the Establishment Clause — is without merit, as the State Board persuasively concluded. Cf.

Motion for Stay at 10.

Petitioners cite no objection to the legal standard the State Board used to review Petitioners' Establishment Clause claim. Indeed, they can make no such claim. The State Board properly invoked controlling legal authority:

> To withstand an Establishment Clause challenge, a state action (1) must have a secular purpose, (2) must, as its primary effect, neither advance nor inhibit religion, and (3) must not foster an excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); accord Brown v. Gilmore, 258 F.3d 265, 275 (4th Cir. 2001), cert denied, 534 U.S. 996 (2001). In addition, state action "would violate Establishment Clause principles by sending a message of government endorsement of religious activity," Child Evangelicalism Fellowship of Maryland, Inc. v. Montgomery County Public Schs., 373 F.3d 589, 594-95 (4th Cir. 2004) (citing County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989)), or by "coercing participation in religious activity." Id. at 595 (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)).

State Bd. Op. at 9. Applying these principles, the State Board concluded correctly that the Revised Lessons: (1) "are secular in nature;" (2) "do not advance or inhibit religion nor do they foster an excessive entanglement in religion;" and (3) "do not inhibit [Petitioners] from practicing their religion or from adhering to their religious beliefs about homosexual acts." Id. at 10.

Petitioners ignore the State Board's well-reasoned analysis and, instead, reassert before this Court their flawed argument that the Revised Lessons advance "the religious view of secular humanism." Motion for Stay at 10. Yet, as the State Board recognized, the Establishment Clause is not violated where, as here, there is no hint that the County Board's curriculum development process or its outcome was tainted by animosity toward any religion, or by the desire to promote one religion over another. See State Bd. Op. at 9 (citing Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994); Smith v. Bd. of Sch. Comm'rs of Mobile County, 827 F.2d 684, 690-95 (11th Cir. 1987)). As the State Board concluded, the Revised Lessons' stated goals — promoting the physical and mental health of students, combating

negative attitudes that lead to bullying and an unsafe learning environment, and transmitting tolerance and other civic virtues — constitute legitimate secular purposes under controlling Supreme Court authority. See State Bd. Op. at 9-10 (citing Plyler v. Doe, 457 U.S. 220, 221 (1981); Pico, 457 U.S. at 864). These goals are clearly distinguishable from a government effort to "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." Sch. Dist. of Abingdon Twp. 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.3d 265, 274 (4th Cir. 2001). 7/

Contrary to Petitioners' claim, cf. Motion for Stay at 11, the Revised Lessons are carefully tailored to avoid value judgments about any sexual orientation or beliefs about particular sexual orientation. It is Petitioners — not the County Board — who attempt to impose a religious meaning on the Revised Lessons' purely secular message of tolerance. Id. 8/ Petitioners' Establishment Clause allegations boil down to a complaint that community values do not coincide perfectly with their opinions. Yet, the principal bulwark against an improvident curriculum — or any ill-conceived government message — is the democratic process. See

---

7/ Appellants' sole citation is to Torcaso v. Watkins, 367 U.S. 488 (1961), and specifically, to a footnote in that opinion listing "Secular Humanism" among the "religions in this county which do not teach what would generally be considered a belief in the existence of God," id. at 495 n.11. Courts, however, have repeatedly held that "Torcaso does not stand for the proposition that 'humanism' is a religion, although an organized group of 'Secular Humanists' may be." Alvarado v. City of San Jose, 94 F.3d 1223, 1229 n.2 (9th Cir. 1996) (internal citations and quotation marks omitted); accord Kalka v. Hawk, 215 F.3d 90, 99 (D.C. Cir. 2000).

8/ Nor is there any merit to Petitioners' suggestion, see Motion for a Stay at 3-4, that the Revised Lessons contain any of the material that troubled the federal district judge who issued a temporary restraining order ("TRO") to prevent implementation of a prior effort by MCPS to revise its health education curriculum. See Citizens for a Responsible Curriculum v. Montgomery County Pub. Schs., No. 8:05-CV-01194, 2005 WL 1075634 (D. Md. May 5, 2005). After the TRO issued, the County Board rescinded the curriculum, entered into a settlement agreement ending the federal district court litigation, and reconstituted the CAC so the curriculum development process could begin again with a clean slate.

Boring v. Buncombe City Bd. of Educ., 136 F.3d 364, 371-72 (4th Cir. 1998) (Wilkinson, then-C.J., concurring) ("The curricular choices of the schools should be presumptively their own — the fact that such choices arouse such deep feelings argues strongly for democratic means of reaching them."). The Revised Lessons were subject to extensive input from community members, including Petitioners as CAC members and in testimony before the County Board. Accordingly, there is no possibility that Petitioners will prevail on their Establishment Clause claim. 9/

Petitioners' other allegations of illegality involve the State Board's own regulations. Recognizing an agency's superior ability to understand its own rules, Maryland law mandates that "a great deal of deference is owed an administrative agency's interpretation of its own regulation[s]." Md. Transp. Auth. v. King, 369 Md. 274, 288 (2002). "[T]his is especially true in matters involving public education." Resetar v. State Bd. of Educ., 284 Md. 537, 554 (1979) (internal citations and quotation marks omitted).

The first regulatory provision that, in Petitioners' view, the State Board incorrectly construed is COMAR 13A.04.04.01, which prohibits religious education in the public schools. Cf. Motion for Stay at 10. For the same reasons that it rejected Petitioners' Establishment Clause claim, see supra at 12-14, the State Board concluded that the Revised Lessons did not violate this regulation. See State Bd. Op. at 12. The State Board's reasonable, non-arbitrary regulatory determination that COMAR 13A.04.04.01 should be construed consistently with the Establishment Clause is entitled to deference. See Resetar, 284 Md. at 554.

9/ Petitioners' motion presents no challenge to the State Board's rationales for rejecting the numerous other federal constitutional claims raised below. Nonetheless, for the reasons persuasively set forth in the State Board's opinion, Appellants have no greater probability of prevailing on the merits of their Free Speech, Free Religious Exercise, Equal Protection, and Substantive Due Process challenges than they do on their Establishment Clause claim. See State Bd. Op. at 5-11.

Second, Petitioners claim that "teaching impressionable students about anal intercourse runs contrary to the prohibition in Maryland law that erotic techniques of human intercourse may not be taught." Motion for Stay at 12-13 (citing COMAR 13A.04.18.03(B)(3)(b)). This claim is meritless. The State Board reasonably interpreted the term "erotic" by relying on a standard dictionary definition that the material must be "sexually arousing or suggestive symbolism, settings or allusions." State Bd. Op. at 13 (quoting Random House Dictionary of the English Language 659 (2d ed. unabridged)).

Third, Petitioners contend that the Grade 10 condom lesson constitutes unsound education policy in violation of COMAR 13A.01.05.05(B) because it "fails to warn students that the risk of contracting HIV/AIDS and other sexually transmitted diseases through anal intercourse has not been proven to be significantly reduced by the use of condoms." Motion for Stay at 12. The State Board properly concluded, however, that the health curriculum as a whole provided ample opportunity for students' questions about HIV/AIDS and sexually transmitted diseases. State Bd. Op. at 14. Moreover, the Grade 10 health education curriculum repeatedly emphasizes that abstinence is the only completely effective method to protect against sexually transmitted diseases and infection.

Fourth, Petitioners claim that the County Board "den[ies] the existence of other sexual variations such as those who are ex-gay or attempting to overcome unwanted same-sex attractions or gender confusions." In Petitioners' view, this deficiency violates the requirement in COMAR 13A.04.18.03(B)(3)(c) "that 'sexual variations' be taught and not just the ones the appellees/respondents favor." Motion for Stay at 8-9. The Revised Lessons, however, make clear that all students should be treated with respect, regardless of their sexual orientation. 10/

10/ Petitioners also contest the soundness of the County Board's decision to include the

Fifth, Petitioners allege that inconsistencies between the Grade 8 and Grade 10 Lessons regarding sexual orientation violate COMAR 13A.04.18.03(C)(2), which requires curricular materials "to be factually correct." See Motion for Stay at 7. This claim, too, is wholly without merit. Petitioners misconstrue — and take out of context — statements in the Revised Lessons in an attempt to manufacture inconsistencies that do not, in fact, exist. Cf. Motion for Stay at 6. Surely, the expression of an "innate" characteristic, the term used in a published textbook excerpt in the Grade 10 Lesson, can be influenced by "the interaction of other cognitive, environmental, and biological factors," as the Grade 8 Lesson explains. There are many innate factors in human beings that do not necessarily express themselves absent certain environmental or psychological triggers. Innate intelligence, for example, may or may not find expression in academic success. In sum, Petitioners present no compelling reason why this Court should not defer to the State Board's conclusion that it was reasonable for the County Board to exercise its quasi-legislative judgment to adopt Revised Lessons reviewed by an expert medical panel as accurate and age-appropriate.

D. A Stay Would Be Detrimental to the Public Interest

Halting implementation of the Revised Lessons does not advance the public interest. It would deny many current Grade 8 and Grade 10 students access to necessary and potentially life-saving information, as described above. See supra at 10-11. Both the State Superintendent and the State Board commended the Revised Lessons for addressing "[o]ne of [the] serious problems

---

narrative of a transgender student, named "Portia," as one of four hypothetical situations in the Grade 10 Revised Lesson. See Motion for Stay at 9-10 (asserting that this curricular choice violates COMAR 13A.01.05.05(B)(1)). Petitioners miss the point of the lesson and of this narrative. The lesson is intended to promote tolerance and understanding regardless of sexual variations; the narrative acknowledges that variations can include students who are transgender. Including this story is patently reasonable as part of a lesson designed to promote the valid educational goal of tolerance for all students. Cf. COMAR 13A.01.05.05(B)(1).

in our schools today": bullying and harassment of students. State Superintendent Order at 5; accord State Bd. Op. at 10-11. They further noted that the Revised Lessons' emphasis on promoting tolerance and reducing bullying meshes well with state law requiring school systems to report all incidents of harassment, including those based on sexual orientation and gender identity. See id. (citing Md. Code, Educ. § 7-424 (2006)). It is difficult to see how the public interest is served by halting lessons that address these vital concerns.

Moreover, Maryland courts have long recognized that it is not in the public interest to second guess school administrators' expert judgments in any but the most exceptional cases:

> If every dispute or contention among those entrusted with the administration of the [school] system, or between the functionaries and the patrons or pupils of the schools, offered an occasion for a resort to the courts for settlement, the working of the system would not only be greatly embarrassed and obstructed but, such contentions before the court would necessarily be attended with great costs and delays, and likely generate such intestine heats and divisions as would, in a great degree, counteract the beneficent purposes of the law.

Bd. of Sch. Comm'rs of Baltimore City v. James, 96 Md. App. 401, 417 (1993) (quoting Wiley v. Bd. of County Sch. Comm'rs, 41 Md. 401, 406 (1879)); cf. McCollum v. Bd. of Educ., 333 U.S. 203, 235 (1948) ("Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."). Here, there were no exceptional circumstances. Petitioners simply seek to use judicial review as a mechanism to re-fight policy disagreements that they lost in the inclusive and considered process of curriculum development at the local level and again before the State Board. A stay is a singularly inappropriate vehicle to achieve the result they have twice failed to attain after full opportunity to present their arguments.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' request for a stay pursuant to Md. Rule 7-205.

Respectfully submitted,

REESE & CARNEY, LLP

_____

Judith S. Bresler
10715 Charter Drive, Suite 200
Columbia, Maryland 21044
(410) 740-7600

Counsel for Appellees/Respondents Montgomery County Board of Education, Montgomery County Public Schools, and Jerry D. Weast, in his official capacity as Superintendent

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2007, a copy of the foregoing Motion in Opposition to Petitioners' Motion for a Stay was sent by first class mail, postage prepaid to:

John R. Garza
17 West Jefferson Street
Rockville, MD 20850

Edward L. White III
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48015

Counsel for Petitioners

Jackie LaFiandra
Office of the Attorney General
200 St. Paul Place, 19th Floor
Baltimore, MD 21202

Counsel for the Maryland State Board of Education

Daniel H. Squire
Jonathan J. Frankel
Kenney A. Wright
Daniel J. Matheson
Brian Simmons
Ryan P. Phair
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 2006

Hayley Gorenberg
Lambda Legal
120 Wall Street, Suite 1500
New York, NY 10005

Counsel for Parents, Families and Friends of Lesbians and Gays of Metropolitan Washington, DC

_____
Judith S. Bresler

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.,	*	
Appellants/Petitioners	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE BOARD OF EDUCATION (Opinion No. 07-30)	*	Civil Action No. 284980
IN THE CASE OF	*	
CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.,	*	
vs.	*	
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al.,	*	
Appellees/Respondents.	*	

* * * * * * * * * * * * * *

INDEX OF SELECTED PORTIONS OF THE ADMINISTRATIVE RECORD
ATTACHED AS EXHIBITS TO
MONTGOMERY COUNTY PUBLIC SCHOOLS ET AL.
OPPOSITION TO PETITIONERS' MOTION FOR STAY

Exhibit A — Citizens for a Responsible Curriculum v. Montgomery County Bd. of Educ., No. 07-30 (Order of the Maryland State Board of Education, June 27, 2007).

Exhibit B — Citizens for a Responsible Curriculum v. Montgomery County Bd. of Educ., No. 07-30 (Order of the Maryland State Superintendent of Schools, Mar. 7, 2007).

Exhibit C — Jerry D. Weast, Superintendent of the Montgomery County Public Schools, Memorandum to the Montgomery County Board of Education, June 12, 2007, attached to J. Bresler, Letter to Maryland State Board of Education, filed June 13, 2007.

Exhibit D — Affidavit of Betsy Brown, Director, MCPS Department of Curriculum and Instruction, Mar. 5, 2007, attached to the Montgomery County Board of Education's Surreply in Opposition to Request for a Stay, filed Mar. 5, 2007.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.,	*	
Appellants/Petitioners	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE BOARD OF EDUCATION (Opinion No. 07-30)	*	Civil Action No. 284980
IN THE CASE OF	*	
CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.,	*	
vs.	*	
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al.,	*	
Appellees/Respondents.	*	

* * * * * * * * * * * * * *

PROPOSED ORDER DENYING MOTION FOR STAY

On September 4, 2007, Petitioners Citizens for a Responsible Curriculum, et al., filed a Motion for a Stay pursuant to Md. Rule 7-205. On September 24, 2007, Respondents Montgomery County Public Schools, et al., filed a brief in opposition to Petitioners' Motion.

Upon consideration of Petitioners' motion and Respondents' opposition, it is on this _____ day of _____, 2007, by the Circuit Court for Montgomery County, Maryland, ORDERED that the Motion for Stay be DENIED.

_____
JUDGE, Circuit Court for
Montgomery County, Maryland