

CITIZENS FOR A RESPONSIBLE CURRICULUM, et al.

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Appellants

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Order of the Superintendent

v.

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MONTGOMERY COUNTY BOARD OF EDUCATION

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Appellee

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ORDER

The Appellants in this case have requested that I, in my role as State Superintendent of Schools, issue a stay “of all [Montgomery County Public School System] MCPS field testing of the Curriculum Additional Lessons...” Appeal at 53. On February 26, 2006, The Montgomery County Board of Education (local board)opposed the request for stay. On March 2, 2006, the Appellants filed a Reply to the local board’s response.

Pursuant to COMAR 13A.01.02.01, I have the authority “to order a stay, not to exceed 60 days in duration, of any action taken by any local board of education, provided, however, that the stay be issued within five (5) days of the date notice of the action is received by the State Board from the local board.” That regulation does not provide the legal criteria I should use in exercising the discretion to grant or deny the stay. Certainly, however, my discretion is not unfettered. Both parties appear to agree that the factors courts use in deciding whether to issue preliminary injunctions are appropriate here.

In reviewing those factors, I point out that granting a stay, just like granting a preliminary injunction, involves “the exercise of a very far reaching power to be [used] only sparingly and in limited circumstances.”*See In Re Microsoft Corp. Antitrust Litigation*, 333 F.3d 517, 524 (4<sup>th</sup> Cir. 2003). When courts exercise that power, they carefully consider four factors: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm to the plaintiff if the stay is denied; (3) the likelihood of harm to the defendant if the stay is granted;(4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 530 F.2d 189, 194-96 (4<sup>th</sup> Cir. 1977); *DMF Leasing, Inc. v. Budget Rent-a-Car of Maryland, Inc.*, 161 Md. App. 640, 648 (2005).

FACTUAL BACKGROUND

On January 9, 2007, the local board approved for field testing four lessons for the family life sections of 8<sup>th</sup> and 10<sup>th</sup> grade health education curriculum and a lesson video on the use of a

condom for the 10<sup>th</sup> grade health curriculum. Specifically, as set forth in the Superintendents' Recommendation to the Board, the local board approved for field-testing:

- A two-part lesson in Grade 8 on "Respect for Differences in Human Sexuality". Each part of the lesson provides 45 minutes of instruction, a total of 90 minutes for the entire lesson over the course of two days. In the first session, students examine negative effects of stereotyping and harassment and positive results of respect, empathy, and tolerance on individuals and the school environment. In the second session, students consider how people respond to differences in gender identity, sexual identity, and sexual orientation.
- A two-part lesson in Grade 10 on "Respect for Differences in Human Sexuality" that builds on the Grade 8 lesson with information and materials appropriate for the higher grade level. Each part of the lesson provides 45 minutes of instruction, for a total of 90 minutes for the entire lesson over the course of two days. In the first session, students learn the vocabulary of human sexuality and build on their understanding with factual information, including references to laws and schools must follow to prevent harassment and discrimination based on sexual orientation, gender identity, and sexual identity. In the second session, students examine sexual orientation and the challenges related to human sexuality that some adolescents may face.
- A single-session lesson in Grade 10 on "Condom Use Demonstration" for the disease prevention and control portion of the curriculum. The 45-minute lesson includes a brief video that demonstrates the correct examination, use, and disposal of a condom. The lesson serves as a bridge between the unit of Family Life and Human Sexuality, which includes information about contraception, and the unit on Disease Prevention and Control, which includes information on sexually transmitted disease and infection. The lesson emphasizes abstinence from sexual activity as the most effective method to prevent unwanted pregnancy and to protect against sexually transmitted disease and infection. (Response, Ex. A).

Only those students with written parental permission on file will attend the classes at issue in this case.(Response, Ex. A). It was my understanding that the field test was to begin in mid-March in three (3) middle schools and three (3) high schools. I learned on March 6, 2007 that the field test began in one middle school on that date.

## LEGAL ANALYSIS

### **A. Likelihood of Success on the Merits**

I have read and considered the Appeal Brief which argues that the lessons at issue violate students' First Amendment rights, including their free speech rights and the right to exercise their religious beliefs freely. The Appellants also argue that the lessons violate the Establishment

Clause; the Equal Protection Clause, Article 36 of the Maryland Constitution, several education regulations. I have also read and considered the local board's arguments that the Appellants raise no valid legal basis for concluding that the curriculum violates either federal or state law. It is my view that the Appellants arguments are equally matched by the local board's response. In my view, the likelihood of success on the merits, at best, rests in equipoise.

## **B. Balance of Harm**

I have considered whether the students that the Appellants seek to protect will be irreparably harmed by the field-testing of the lessons at issue here. The Appellants assert that field testing the two 90 minute lessons in the 8<sup>th</sup> and 10<sup>th</sup> grades in the selected schools will cause "real harm to students". (Appeal at 54). I point out, however, that only those students with written parental permission can attend the classes. Therefore, by not submitting the written permission, parents with objection to the content of the lesson can protect their children from harm.

The Appellants believe that the permission system itself is harmful to students. They state, "the only way for students to escape the biased, non-factual discussion of sexual orientation is to 'opt-out' of the on-going comprehensive health education course. And it is clear that the opt-out is not really an option for students who want to avoid looking conspicuous; instead, it is a traumatic matter which is no option at all." (Appeal at 17). I do not agree. First, as I understand from the record, students will not have to "opt-out" of the whole health education course. They will just not attend the two lessons at issue. They will receive alternative lessons. (Response at 10). Appellants contend, however, that their children will be "constrained to the library for six weeks of independent study ...[d]uring that six weeks period, they have no teacher, no class, and are fully isolated. (Reply at 6). The local board has clarified that such is not the case. (See Surreply).

Second, I do not view opting in/opting out as a "traumatic" matter. I view this more like choosing or not choosing to take a two-lesson mini-course in a controversial subject. Some students and parents will decide to do so; some will not.

The Appellants assert that the field test will inflict a constitutional injury on the students which "all courts agree...is irreparable harm." (Reply at 2). I recognize that in 2004, when the Appellants sought a temporary restraining order from the federal court to halt the field testing of the then proposed sexual orientation lessons, the court found that field testing those particular lessons posed "an imminent threat to Plaintiff's First Amendment rights" which thus constituted irreparable harm. *Citizens for a Responsible Curriculum v. Montgomery County Public Schools*, Civ. Action No. AW-05-1194 (D.C. Md. 2004), Opinion at 14. It based that conclusion on a long list of statements in the curriculum that, the court concluded, offended the Plaintiff's First Amendment rights. *See* Opinion at 3-8. There have been significant changes in the curriculum since then. It is my view that the merits of the First Amendment arguments here are balanced equally on each side. I do not have a degree of certainty that constitutional injury causing irreparable harm is present here.

The Appellants also argue that “[c]hildren’s lives are at stake here” because students will not be taught the dangers of anal intercourse. (Reply at 5-6). The local board responds that such information is contained in other parts of the health curriculum. (Response at 24). Appellants disagree. (Reply at 5). On this issue of harm I am guided by the words of the federal court in its decision in 2004:

“Moreover, the harm that Plaintiffs posit is highly speculative and attenuated. It would require more than a few logical leaps for this Court to find that MPCS students presented with the Revised Curriculum would suddenly choose to engage in promiscuous, unprotected, homosexual sex— adhering to the Revised Curriculum’s message of gay tolerance but somehow overlooking the even more forceful message of safe sex within the confines of a monogamous relationship. This is not the type of “actual and imminent” harm sufficient to demonstrate irreparable injury for the purposes of a temporary restraining order.” *Id.* at 15.

The Appellants also assert that the lessons that will be taught in the two sessions will negatively stereotype them as homophobic. (Appeal at 26). The local board adamantly disagrees asserting that the two lessons are designed to promote tolerance and respect for everyone, and that “The Revised Lessons expressly instruct that ‘just as stereotyping others based on sexuality is not acceptable behavior, stereotyping others based on personal beliefs is also not acceptable.’” (Response at 9).

That issue is just one of the types of issues that field testing can address. Indeed, that is one purpose of a field test – to identify problems and to decide how to fix them. While I fully understand that the Appellants believe strongly that certain students will be harmed, I cannot conclude that they will be irreparably harmed by this field test in which they may decline to attend the 90 minutes of lessons at the 8<sup>th</sup> grade level and the 125 minutes of lessons at the 10<sup>th</sup> grade level.

I have balanced the possible harm to students against the harm to the local board if this field test were stayed and have concluded that staying this field test would be detrimental to the students, teachers and parents of the Montgomery County Public School System. The lessons at issue here have been under development since May of 2005. Four medical consultants worked with the MCPS staff in developing the lessons. A 15 member Community Advisory Committee reviewed the lessons and provided feedback. They met nine times, for many hours, to review and revise the lessons. (Response, Ex. A). It is important for all of them to know whether a sufficient number of parents will provide permission for student participation; whether the lessons actually work in the classroom; whether the lessons are balanced and fair; how students react to the content of the lessons; and, ultimately, based on the field test results, whether to move forward toward full implementation.

In the meantime, this appeal can move forward for a State Board decision on the merits prior to the start of the new school year. To that end, I encourage the State Board to expedite this matter, if necessary, to assure that a final decision is rendered no later than the July 2007 Board

meeting.

### **C. Public Interest**

One of serious problems in our schools today is bullying and harassment. Indeed, in 2005 the General Assembly directed school systems to report all incidents of harassment against students based on race, native origin, marital status, sex, sexual orientation, gender identity, religion, or disability. Md. Educ. Code Ann § 7-424. The lessons at issue here address harassment problems as they relate to sexual orientation and gender identity. They emphasize tolerance and acceptance. They address ways to deal with bullying and harassment and how to prevent it. I believe it is in the public interest to field test those lessons to determine whether to move forward with full implementation of a curriculum designed, in part, to reduce bullying and harassment.

### **CONCLUSION**

In my view, the Appellants' arguments on the merits are equally matched by the local board's response to those arguments. Therefore, harm and the public interest are the deciding factors in whether to grant or deny the request for stay. I have concluded that, because participation in these classes is entirely voluntary, the harm to those students that the Appellants want to protect is virtually non-existent.

The Appellants argue that the content of the lessons is inherently harmful because it violates their First Amendment rights. I have read the lessons, and I am not convinced of the certainty of such violations. I am convinced, however, of the value of going forward with the field test. The educational community in Montgomery County has invested hundreds of hours in developing the lessons and needs to know whether or not they work in the classroom. A field test in three middle schools and three high schools appears to me to be a reasonable way to find out. Finally, I believe it is in the public interest to field test these lessons because they focus, in part, on the significant problems of bullying and harassment.

Therefore, for these reasons and for the reasons stated herein, the Request for Stay is Denied.

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Date

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Nancy S. Grasmick  
State Superintendent of Schools