

QUESTIONS PRESENTED

1. Whether Respondents implementation of the human sexuality lessons violate Maryland law or administrative policy, or were arbitrary, capricious, illegal, unreasonable, or constitute a real and significant danger, either imminent or potential, to children enrolled in the curriculum? Specifically:
 - a. Respondents policy of teaching as fact that homosexuality is “innate,” i.e. inborn, when such a proposition is not supported by credible scientific evidence;
 - b. Respondents failure to warn students during presentation of materials regarding condom use, of medical and scientific findings and manufacturer’s warnings, that condoms do not offer substantial protection against the risk of contracting a sexually transmitted disease during anal intercourse and that such condom use is substantially different than during vaginal intercourse;
 - c. Respondents failure to warn students during presentation of materials regarding condom use, of medical and scientific findings that condoms do not offer substantial protection against the risk of contracting a sexually transmitted disease during vaginal intercourse;
 - d. Respondents refusal to provide instruction regarding accepted medical and scientific evidence and studies, including the classification of transgenderism as a mental disorder, and refusing to warn students of the health risks associated with maintenance of a transgender lifestyle.
 - e. Despite their stated educational objective of all-inclusive tolerance, Respondents admitted refusal to present viewpoint neutral information, thereby selecting persons or

lifestyles for exclusion from their own tolerance objectives, contributing to possible erroneous self-identity regarding gender issues, and eroding family contributions to the moral formation of students.

f. Respondents failure to provide an “equal educational experience” for students not opting into the health education curriculum by failing to assign appropriately qualified instructors and failing to teach appropriate alternative lessons.

g. Respondents, through their acts, policies, practices, and/or customs have caused Petitioners and students to suffer irreparable harm, including the loss of their rights, in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983, by imposing viewpoint based restrictions on speech, by infringing on free exercise rights, by violating the Establishment Clause, and by depriving equal protection of the law.

STATEMENT OF FACTS AND ARGUMENT ON QUESTIONS PRESENTED

1. Pursuant to Maryland Rules 7-201 et. seq., Petitioners, all parties to the agency proceeding at issue with proper standing, seek judicial review of Respondents final determination denying Petitioners challenge to Respondents curriculum outlined herein.

2. The lessons at issue included in the health education program consist of (1) a two-part, 90 minute lesson for Grade 8 on “Respect for Differences in Human Sexuality,” (2) a two-part, 90 minute lesson for Grade 10 on “Respect for Differences in Human Sexuality,” and (3) one 45 minute lesson for Grade 10 on condom use (hereinafter referred to collectively as the “human sexuality lessons”). **[Exhibit FROM STAY.]**

3. On or about July 26, 2007, Petitioners filed a timely petition seeking judicial review of Opinion No. 07-30, dated June 27, 2007, that the Maryland State Board of Education had issued regarding the human sexuality lessons.

4. In November 2004, the Montgomery County Public Schools (MCPS) voted to approve certain changes to the health curriculum for Grade 8 and Grade 10. These changes were the predecessor to the human sexuality lessons. In May 2005, Petitioners filed a lawsuit in the United States District Court for the District of Maryland, Case No. 8:05-CV-01194, to enjoin the MCPS Board from implementing the curriculum. The Federal District Court granted a temporary injunction and prevented the implementation of the human sexuality lessons. After the injunction was issued in 2005, Respondents, in light of the Federal Judge's actions and analysis of the issues and rather than proceeding to trial, began teaching their health education program without the human sexuality lessons. Since that time, Respondents again revised the health education curriculum to include the human sexuality lessons. Respondents began teaching the post-injunction human sexuality lessons on about October 15, 2007.

5. The Federal litigation regarding Respondent's curriculum was dropped following settlement negotiations between the parties to that action. Respondents agreed not to implement the federally challenged curriculum after the Federal District Court Judge found it to be in violation of, among other things, the Establishment Clause, under the First Amendment to the United States Constitution. Respondents' subsequent modifications to the federally enjoined curriculum likely removed certain constitutional

violations; however, Respondents present rewrite of the curriculum presents both new and overlap issues regarding its compliance with law and policy. **(Exhibit 1).**

6. Petitioners assert that there are significant problems with the latest revisions to the human sexuality lessons—in both creation and content—that run contrary to governing law and policy. It is critical to note that, for 10th grade students, the health education course is a graduation requirement. **(Exhibit 2).**

7. This appeal addresses, among other things, Respondents decision to abdicate their responsibility to educate students, choosing instead to indoctrinate them, by presenting as fact a particular ideological viewpoint regarding a controversial social issue—a viewpoint that is, contrary to assertions contained within the lessons, not fact, but the subject of significant scientific debate and controversy.

8. The human sexuality lessons were created in violation of State laws concerning the development and instruction of a comprehensive health education curriculum. In particular, Respondents acted arbitrarily, unreasonably, and illegally in developing and approving the human sexuality lessons in violation of COMAR 13A.01.05.05. The local board’s decision was arbitrary and unreasonable, which means that the decision was (1) “contrary to sound educational policy” or (2) a “reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached,” COMAR 13A.01.05.05(A)-(B), and was illegal, which means it was one or more of the following: “(1) unconstitutional; (2) exceeds the statutory authority or jurisdiction of the local board; (3) misconstrues the law; (4) results from an unlawful procedure; (5) is an

abuse of discretionary powers; or (6) is affected by any other error of law.” COMAR 13A.01.05.05(C).

9. Prior to October 10, 2007, Respondents held a public meeting making the revised human sexuality lessons available for citizen review. Public curriculum review allows citizens to make an educated decision on whether to opt their child into the presentation of the curriculum. At this time, the revised human sexuality lessons presented to the parents did not teach Grade 8 that homosexuality is “innate,” but that “[a]lmost certainly there is no single reason why some people are homosexual, heterosexual, or bisexual.” Conversely, in Grade 10, students were to be taught that sexual orientation, which would include homosexuality, is “innate” and unchangeable. This disparity was a subject of controversy addressed in both Petitioners and Respondents memorandums regarding Petitioners requested stay pending at that time before this court

10. On October 9, 2007, this court denied Petitioners motion to stay the implementation of Respondents revised human sexuality lessons during the pendency of this appeal.

11. On October 10, 2007, the day after this court denied Petitioners request for a stay, Respondents yet again revised the already revised human sexuality lessons, instructing teachers that, despite variation from the curriculum previously presented to Montgomery County citizens, they were now to teach both Grade 8 and Grade 10 students that homosexuality is innate. The human sexuality lessons teach students that innate is defined as “determined by factors present in an individual from birth.” Furthermore, teachers are instructed to “read and define the components of human sexuality for the

students as needed. Say to the students, “Sexual orientation is innate and a complex part of one’s personality.”” (**Exhibit 3**).

12. Following the October 10, 2007, revision, Respondents did not hold a public meeting affording parents and other concerned citizens the opportunity to review the newly revised content of the human sexuality lessons. Such a review is required to take place at least two weeks prior to implementation of the new curriculum. **Exhibits 4 & 5** (MCPS Memoranda dated July 2 & July 13, 2007).

13. Additionally, parents were not afforded the opportunity to review their decisions to opt their children into the human sexuality instruction, as ultimately formulated by Respondents, following the October 10, 2007, revision **Exhibit 6** (email from Frieda Cooney).

14. The human sexuality lessons were implemented district-wide by Respondents during the week of October 15, 2007, and will continue during the spring 2008 semester of the Montgomery County public school system. (**Exhibit 7**) (**email from Freda Cooney**).

15. By mandating in the human sexuality lessons that sexual orientation (for example, homosexuality, lesbianism, transgenderism) is “innate,” and therefore immutable and unchangeable, the respondents are not adhering to fact but are relying on a theory that is at odds with credible scientific evidence. Clearly, in the majority view of appropriate professionals, if there is any credible explanation for the underlying causes of a particular sexual orientation such as homosexuality, is not that it is “innate,” but rather a result of

complex and only partially understood factors, such as the interaction of cognitive, environmental, and biological factors. **(Exhibit 8).**

16. Under Maryland law, the unfounded “innate” assertion, taught as fact, has no place in a curriculum required to be factually accurate. COMAR 13A.04.18.03(C)(2). In addition, MCPS Policy IFA(D), dealing with curriculum, states that a focused curriculum should be one that is “well-balanced and appropriate” and “reflects current research.” **(Exhibit 9).**

17. Petitioners have violated law and policy, and have acted unreasonably, arbitrarily and capriciously by implementing the human sexuality lessons. A reasonable mind could not have concluded that a highly controversial theory, unsupported by scientific evidence, should be taught as fact to impressionable students. COMAR 13A.01.05.05(B)(2).

18. Respondents intend to teach Maryland’s children, as fact, that homosexuality is innate. At the same time, based on scientific unreliability and lack of information, evidence supporting this “fact” would not be admissible as evidence in a Maryland court. Last month, Maryland’s highest Court, the Maryland Court of Appeals, based on currently available sociological and scientific evidence (and the lack thereof), refused to take judicial notice that homosexuality is innate. The Maryland Court of Appeals would not even intimate that homosexuality was innate or an immutable characteristic because of the absence of “some generally accepted scientific conclusion” supporting such a proposition. The Maryland Court of Appeals went as far as saying that based on the lack of credible science supporting the assertion that homosexuality is innate, that court would not admit evidence of such a proposition under either: 1) the standards of Frye v. United

States, 293 F. 1013 (D.C. Cir. 1923), applicable to Maryland courts, requiring that for expert testimony to be admissible in court, it must be generally accepted in its particular field, or 2) the gate keeping function regarding the admissibility of scientific evidence applicable to federal and sister state courts under a Daubert v. Merrell Dow, 509 U.S. 579 (1993)/Kumho Tire v. Carmichael, 526 U.S. 137 (1999)/Federal Rule of Evidence 702 analysis. Conaway v. Deane, 2007 WL 2702132 (Md.).

19. Furthermore, by teaching that homosexuality is innate, Respondents are showing intolerance and hostility toward the ex-gay community. Respondents teach that the sexual orientation of gays, lesbians, transgenders, and bisexuals is innate, healthy, and normal. However, Respondents refuse to acknowledge the existence of other sexual variations such as those who are ex-gay or those attempting to overcome unwanted same-sex attractions or gender confusions—despite factual evidence of their existence and repeated appearances before the school board by ex-gays and former transgenders.

Exhibit 10.

20. The MCPS Board instructed the curriculum committee to provide teachers and students with comprehensive instruction about human development, including information that “promotes tolerance and understanding towards *all people* regardless of sexual orientation.” *See* MCPS Board Memorandum Discussion/Action, dated July 27, 2005 (emphasis added). However, Respondents are instructing that it is normal to change their birth sex (transgender) but that it is not normal to change their unwanted same-sex attractions (former homosexual) because sexual orientation is innate from birth. Respondents pick and choose which sexual orientation they favor, in violation of their

own instructions to the curriculum committee and their own policies mandating tolerance and non-discrimination for all sexual orientations. Respondents' actions also violate State law requiring that all "sexual variations" are taught—not just those favored by Respondents. COMAR 13A.04.18.03(B)(3)(c). Therefore, Respondents' curriculum development decisions were arbitrary, unreasonable and illegal. COMAR 13A.01.05.05.

21. In addition, the human sexuality lessons inaccurately portray "transgender" as a "sexual variation" when, transgenderism, gender dysphoria, and gender identity disorder actually constitute mental illness. American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). The human sexuality lessons fail to mention this scientific and medical fact, baldly asserting their non-scientific factually unsupported viewpoint instead.

22. Grade 10 human sexuality lessons contain a fabricated story about a boy who wants to be known as a girl. The boy calls himself "Portia," receives a new student ID, which identifies him as a girl, and is given a key to a private unisex restroom by the principal. The human sexuality lessons fail to include information on counseling available to students like "Portia" who experience gender confusion. However, the lessons implicitly support treatment of persons afflicted with gender identity disorders with steroids and radical surgery without mentioning the medical risks or alternative psychiatric therapy. The human sexuality lessons also refer to "Portia" as a "she" when the law classifies him as a "he." The human sexuality lessons also fail to recognize the classification of "Portia's" condition as DSM-IV classified mental disorder. Amazingly, instead, despite the utter lack of scientific foundation and contrary to existing law, the

lessons force students to acknowledge that “Portia” is a female when he is not. Thereby, Respondents, through their human sexuality lessons, create gender confusion for the students. Therefore, the curriculum is contrary to sound educational policy in violation of COMAR 13A.01.05.05(B)(1).

23. In order to expose students to different viewpoints regarding transgender issues, Petitioners submitted curriculum appropriate, factual accurate accounts regarding transgender issues; however, Respondents arbitrarily denied inclusion of these examples into the health education curriculum. Respondents state as justification that the school board “necessarily discriminates among the viewpoints that it wishes to convey.” Respondents’ laughable basis for engaging in viewpoint discrimination is that they are “instilling civic virtues;” however, information regarding exactly which civic virtues are being instilled is not provided. Respondents’ actions are an arbitrary and unreasonable refusal to teach accurate transgender accounts that might undermine the viewpoint they wish to convey. Respondents instead choose to present the “Portia” fable. **[Exhibit 11]**.

24. The human sexuality lessons, without exception, communicate to students a positive moral view of homosexuality, lesbianism, transgenderism, and the like, portraying these lifestyles as natural, morally correct, and medically safe. Such presentation runs contrary to the Establishment Clause, because it presents as truth the religion of secular humanism. Secular humanism is a religion that condones homosexual conduct while condemning contrary religious views as intolerant. The United States Supreme Court stated, “neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion. Neither can constitutionally

pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against *those religions founded on different beliefs.*” Torcaso v. Watkins, 367 U.S. 488, 495 (1961). Among the “religions founded on different beliefs” that were listed by the Supreme Court was the religion of secular humanism. *Id.* at 495 n. 11. Not only does the federal constitution prevent religious indoctrination in the classroom, but so does Maryland law, which does not allow religious education to be included in a school’s curriculum, as is occurring through the human sexuality lessons. COMAR 13A.04.04.01.

25. The Grade 10 human sexuality lessons communicate a strongly negative stereotype of anyone whose religious beliefs are not supportive of homosexual conduct. Anyone who takes a negative moral view of homosexual conduct is chastised by the human sexuality lessons as being “prejudiced,” “uneducated” and “homophobic.” This is demonstrated by the vocabulary definitions used in the human sexuality lessons. The term “prejudice” is defined as a “preconceived opinion, not based on *reason or experience*. . . .” The term “homophobia” is defined as “any range of *negative attitudes* toward or about gays, lesbians, bisexuals or transgender people. . . . Like any other *prejudice*, homophobia is learned.” Based on these definitions, a student with religious beliefs that homosexual conduct is immoral and sinful, will deduce from the human sexuality lessons that he has a “negative attitude,” is “prejudiced” and is a “homophobe.” The human sexuality lessons classify religious people as “homophobes” without any consideration that their religious faith may condemn the homosexual act but not the homosexual person. Contrary to Respondents asserted all-inclusive tolerance objective,

the human sexuality lessons actually teach intolerance toward anyone who does not subscribe to the Respondents chosen viewpoint advanced through the human sexuality lessons. **[Exhibit 12].**

26. Furthermore, the Grade 10 condom lesson endangers students' lives and health. This lesson creates a misleading impression that condoms are similarly effective in preventing disease transmission during both anal and vaginal intercourse—which runs contrary to all credible medical evidence. According to the United States Surgeon General, “Condoms provide some protection, but anal intercourse is simply too dangerous to practice.” **[Exhibit 13].**

27. This lesson 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. In fact, it contains information likely to mislead students into believing that anal intercourse can be made safe by the proper use of a condom—something which is not true. In fact, even condom manufacturers include a warning on condom packages directing that condoms are intended to be used during vaginal intercourse only. Respondents' inclusion of this lesson was arbitrary and unreasonable in that it runs contrary to sound educational policy. No reasoning mind could have reached the conclusion that it is proper to provide students with false information that could endanger their lives. COMAR 13A.01.05.05(B).

28. Furthermore, teaching impressionable students about anal intercourse runs contrary to the prohibition in Maryland law that “erotic techniques” of human intercourse may not be taught. COMAR 13A.04.18.03(B)(3)(b). Anal intercourse is an erotic

technique—it is clearly not done for any procreative purpose. Moreover, discussing anal intercourse without providing information about the risk of disease transmission, runs contrary to State law, which requires health education programs to have students adopt “sound personal health practices,” to develop an understanding of behavior and skills that promote safe living, to identify and attempt to prevent hazardous situations, to analyze risk-taking behaviors and their consequences, and to develop and use skills to make responsible decisions about sexual behavior based on its consequences to the student and others. COMAR 13A.04.18.02.

29. Although the human sexuality lessons are being portrayed by Respondents as only “opt-in” courses, where parents have to want their children to attend, this system assumes participation. Thereby, this policy serves to punish those who do not want to participate in the human sexuality lessons but want to participate in other aspects of the health education program. **[Exhibit 14].**

30. If a parent denies her child permission to participate in the Family Life and Human Sexuality unit—a multiple-week unit within a semester-long health education program—then her child cannot participate in health education at all. Not opting into the health education curriculum punishes the parent and child by denying other information presented during the multiple-week unit. **[Exhibit 15].**

31. Respondents made a deliberate decision to discuss highly controversial social issues regarding sexual orientation—including homosexuality, bisexuality, lesbianism, transgender, intersexual, “coming out” for gays, and gender identity in their health education program. Yet, Respondents refused to include information from reputable

sources, including the United States Center for Disease Control, discussing the substantial and unique health risks associated with same-sex sexuality activity.

32. Respondents decided to introduce the subject of “sexual orientation” and “sexual identity” by presenting one viewpoint—that same-sex attractions are normal, healthy and innate. However, Respondents fail to address increased health risks associated with homosexual activities, sexual reassignment surgery, or administering steroids and other drugs for the gender confused individual. Additionally, Respondents refuse to explain the existence of former homosexuals and the issues affecting them, which flies in the face of their mission to preach all-inclusive tolerance. Rather, Respondents lessons serve to exclude selected persons from tolerance discussions and only indoctrinate students into believing that homosexuality is “innate,” a proposition without factual, legal, or scientific support.

33. Respondents alternative lesson curriculum for students opting out of health education violates State law and Respondent’s own policies, mandating that “Alternative units will be implemented under the supervision of professional school staff in an instructional school setting.” Therefore, an instructional setting requires an instructor to INSTRUCT. However, unlike the health education curriculum instructors, the “supervising professionals” assigned to the alternate lessons are not even required to be certified to teach at all, let alone screened against objective criteria to ensure their qualifications to instruct students not opting into health education classes. The supervising professionals may be “media specialists, counselors, administrators or teachers.” **[Exhibit 16].**

34. Because of the failure of the school to require the assignation of a qualified professional to teach the alternate health lessons, they are not creating an “equal educational experience” as required by law and policy. Regarding health education, Respondents state that “because the teacher is a vital factor in the program qualifications such as the following shall be considered: a) two years teaching experience; 2) appropriate specialized training; 3) good rapport with the students; and 4) respect and trust of parents/guardians.” However, relating to the alternate lessons for students not opted into the health curriculum, Respondents authorize assignment of a “media specialist” or similarly unqualified instructor. Such a scenario cannot create the necessary learning environment required by law and policy. Accordingly, Respondents have not created the required “equal educational experience.” **[Exhibit 17].**

RELIEF REQUESTED

35. That this court, because Petitioners’ constitutional and substantial rights have been violated and prejudiced by Respondents actions, administrative findings, inferences and decisions, as laid out herein, reverse and/or modify Respondents findings and decisions, and exercise its power to require Respondents to implement a curriculum in accord with applicable law and policy. Bernstein v. Real Estate Commission of Maryland, 221 MD. 221 (1959); Department of Human Resources v. Thompson, 103 Md. App. 175 (1995); Montgomery County v. Buckman, 333 Md. 516 (1994); State Administrative Bd. Of

Election Laws v. Billhimer, 72 Md. App. 578 (1987); Cardon Investments v. Town of New Market, 55 Md. App 573 (1983).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of October 2007, a true and correct copy of the foregoing, along with all Exhibits, was caused to be sent to the following by U.S. Mail, first-class postage prepaid:

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