

Plaintiffs, Citizens for a Responsible Curriculum (“CRC”) and Parents and Friends of Ex-Gays and Gays (“PFOX”), filed a Verified Complaint seeking Declaratory Judgment, a Temporary Restraining Order, and Preliminary and Permanent Injunctive Relief to enjoin Defendants from implementing the revised comprehensive health education curriculum adopted on November 9, 2004 by the Montgomery County Public School Board (“MCPS Board”) in a manner that violates the Equal Protection, Free Speech and Due Process guarantees of the First and Fourteenth Amendments to the United States Constitution, as well as the Establishment Clause. Plaintiffs seek a Temporary Restraining Order against implementation of the revised curriculum, which is scheduled to begin on May 5, 2005.

INTRODUCTION

This case presents a classic example of the significant constitutional implications of a school district’s decision to abdicate its responsibility to educate in order to indoctrinate students with a particular ideological viewpoint on a scientifically-debated, controversial social issue. Defendants made a deliberate decision to include discussion of sexual orientation, including homosexuality, bisexuality and lesbianism in its comprehensive health education. Yet, they refused to include information from reputable sources, including the United States Center for Disease Control, that discussed the substantial and unique health risks associated with same-sex sexual activity. They also refused to even mention the ex-gay perspective or that people have had success through reparative therapy in overcoming same-sex attractions. Beginning May 5, 2005, Defendants plan to intentionally mislead our students.

It’s important to stress at the outset that this is *not* a case challenging the authority of the

school district to discuss issues concerning sexuality, although many parents are opposed to such instruction. Rather, this case concerns the school district's unreasonable exercise of the authority granted to it to develop and implement curriculum in the best interests of the students being served.

Although school districts have wide discretion to create and implement curriculum, there are limits on that authority. ***This case stands for the proposition that when a highly controversial social topic is at issue, and the district has adopted a policy that it will not discriminate against viewpoints on that issue (i.e., through adoption of a non-discrimination policy that includes sexual orientation), then the district cannot misrepresent facts, suppress opposing viewpoints, infringe constitutional rights of students and parents, violate their own rules concerning implementation of curriculum, or indoctrinate our students.*** That is particularly true when state laws and district policies require curriculum to contain factually accurate information, require discussion of differing viewpoints on controversial issues, and establish strict notice requirements that must be followed prior to implementation of new curriculum.

Defendants' curriculum, which is set to be implemented in six schools of May 5, 2005, purposefully misleads our students about the nature of "sexual orientation," and the risks associated with acting out on those feelings of same-sex attraction. Defendants' curriculum also violates the constitutional mandate that government not prefer one religion over another, or demonstrate hostility toward a particular religious belief. The new curriculum portrays those who believe homosexuality is wrong as intolerant, hateful and fearful, while informing readers of those churches that are gay-friendly. The curriculum also prohibits discussion by students in the classroom of opposing viewpoints. Based on well-established Supreme Court precedent, Defendants' actions violate the

First Amendment guarantees of Free Speech, Equal Protection, the Fourteenth Amendment Guarantee of Substantive Due Process, and the Establishment Clause of the First Amendment.

That the students can opt out of the curriculum is not the solution. As discussed below, Defendants' curriculum is flawed at its core. Defendants cannot articulate any legitimate, let alone compelling, basis for (i) violating Equal Protection guarantees by discriminating against those students who are ex-gay or overcoming same-sex attraction (in violation of their own district policies that prohibit discrimination based on sexual orientation), (ii) violating First Amendment Free Speech guarantees by preventing students' from receiving factual information (in violation of state law and district policies requiring factually accurate information), (iii) violating the Establishment Clause by preferring one religious belief over another, or (iv) violating state laws and district policies concerning implementation of new curriculum. Defendants' curriculum cannot stand.

STATEMENT OF FACTS

Plaintiffs rely on those facts set forth fully in the accompanying Verified Complaint.¹ A brief recitation is included here.

In response to a recommendation from the MCPS Citizens' Advisory Committee (the "CAC"), in November 2002, the MCPS Board voted to permit the CAC to develop revisions to the comprehensive health education curriculum in grades 8 and 10 so as to include information about "sexual variations." According to the CAC, the changes were necessary because at that time homosexuality could not be discussed by staff, except in response to specific questions by students,

¹ A full discussion of the resources accepted and rejected by Defendants is set forth in the Verified Complaint. A copy of several of those resources is attached thereto.

and when asked, staff could only respond in a perfunctory manner. The CAC stated that its belief that “the concept of sexual orientation [i]s an essential human quality; that individuals have the right to accept, acknowledge, and live in accordance with their sexual orientation, be they heterosexual, bisexual, gay, or lesbian.”

The CAC created a writing committee to develop a draft of the curriculum. From October 2003 through May 2004, the CAC discussed and considered proposed curriculum changes and teacher resource materials. By resolution, on November 9, 2004, the MCPS Board approved the curriculum revisions, instructional materials and teacher resources evaluated and recommended by the CAC, as submitted in conjunction with the CAC’s June 2004 annual report (collectively, the “Revised Curriculum”; separately, the “Approved Instructional Materials” and the “Teacher Resources”). The MCPS Board also adopted for use the “Protect Yourself” video discussing condom usage. The Revised Curriculum is actually a curriculum outline from which the teachers, using the approved Teacher Resources, develop lesson plans to be used for classroom instruction.

In the first part of April 2005, MCPS announced the six pilot schools in which the Revised Curriculum would be tested. The three pilot high schools are: Bethesda Chevy Chase High School; Seneca Valley High School and Springbrook High School. The three pilot middle schools are: Martin Luther King Middle School; Tilden Middle School and White Oak Middle School. On or about April 19, 2005, MCPS announced May 5 would be the start date for the Revised Curriculum. In implementing the Revised Curriculum, MCPS is *not* complying with notice requirements concerning the required parent information meetings, including sufficient notice to parents in advance of the meetings and the requisite timing of the parent meetings in relation to implementation

of the program. MCPS has failed to (i) notify all affected parents *three weeks* in advance of a parent information meeting, sometimes giving only days' notice, and (ii) hold the parent information meetings two weeks before implementation of the curriculum, sometimes holding it only a few days beforehand. MCPS also has failed to inform parents of the biased, nonfactual Teacher Resources used to implement the curriculum, thus not permitting parents to make an informed decision concerning whether or not to opt their children out of the pilot test for the Revised Curriculum.

The Revised Curriculum included revisions to, among other things: Grade 8 Mental Health Unit Curriculum, Grade 8 Family Life and Human Sexuality Curriculum, Grade 10 Mental Health Unit Curriculum, Grade 10 Safety, First Aid and Injury Prevention, and Grade 10 Family Life and Human Sexuality Curriculum. In the mandatory Grade 8 Mental Health Unit, which does *not* require prior parental permission, students are instructed, without further discussion, that “sexual identity” impacts self-esteem, self-worth, and self-assessment. In the mandatory Grade 8 Family Life and Human Sexuality Curriculum, students are provided, without discussion, with definitions of “Human Sexuality,” “Sexual Identity,” “Gender Identity,” “Gender Role,” “Sexual Orientation,” “Heterosexual,” “Homosexual,” “Lesbian” and “Bisexual.” The students are *prohibited* from asking questions or presenting an opposing viewpoint because the curriculum states that teachers cannot discuss the issue, but must simply present the definitions as fact. (Verified Complaint, Ex. 1 at p.9). The Grade 8 Human Sexuality curriculum also discusses how family values are a factor that influence stereotypes that people hold, and that “different religions take different stands on sexual behaviors and there are different views among people of the same religion.” The Revised Curriculum contains a notation for teachers explaining what “transgender,” “coming out” and “intersexed” mean.

The Revised Curriculum also includes a new section in the Grade 8 Family Life and Human Sexuality Curriculum that purports to dispel “myths” about a variety of topics, including the following: (a) “Myth: Homosexuality is a mental health disorder. Fact: All major professional mental health organizations affirm that homosexuality is not a mental disorder”; (b) “Myth: If you are “straight,” you can become a homosexual. Fact: Most experts in the field have concluded that sexual orientation is not a choice”; (c) “Myth: Children of homosexual parents/guardians will become homosexuals. Fact: Having homosexual parents/guardians does not predispose you to being homosexual”; (d) “Myth: You’re a homosexual if you’ve had sex with, or even had a ‘sexy dream’ about someone of the same gender. Fact: Sex play with friends of the same gender is not uncommon during early adolescence and does not prove long-term sexual orientation.” The curriculum was changed *after* adoption to omit the “sexy dreams” question and replace it with the following: “Myth: A person is a homosexual if he or she has ever been sexually attracted to, or ever had sexual contact with someone of the same gender. Fact: Fleeting attraction or contact does not prove long-term sexual orientation.” (Verified Complaint, Ex. 1 at p.18).

The Grade 10 Family Life Unit contains the same definitions as the Grade 8 curriculum, but adds the definition of a student who is “questioning” his sexual orientation. (Ex. 2). The curriculum also redefines “family” as “two or more people who are joined together by emotional feelings or who are related to one another.” Husband and wife are omitted from the Revised Curriculum. A condom usage video, with an attractive young lady, who appears high school age, demonstrating condom use on a cucumber, explains to students that condoms should be used for “any oral, anal or vaginal sex.”

The Approved Teacher Resources highlight Defendants’ biased agenda and total disregard

for the truth. One of the approved Grade 8 Teacher Resource is entitled Lesson Plan: Sexual Orientation Myths” and is written by Planned Parenthood Association of Edmonton, Canada. (Verified Complaint, Ex. 3). Not only does the lesson have as an objective to identify a “wide range of options for sexual expression,” but in a sample quiz answers the question of whether homosexuality is a sin, by responding that “many religious denominations do not believe this.” Without citation to authority, the resource states that homosexuality is as normal as being left-handed, and that same-sex parents make just as good parents as opposite-sex parents. (Verified Complaint, Ex. 3, at p.4).

While the CAC stated it disapproved of materials from the ex-gay perspective because some were offered by alleged advocacy organizations, some contained links to organizations that held religious beliefs concerning homosexuality, and some were written by non-“mainstream” medical organizations, the CAC and MCPS Board approved several resources from well-known homosexual advocacy organizations, including Parents, Families and Friends of Lesbians and Gays, the Triangle Foundation and the Family Pride Coalition. One such resource listing myths and facts goes so far as to state that “Many homophobic responses are born out of a fear that one’s own sexual orientation may not be entirely heterosexual. People who overplay their cultural gender roles, who react negatively, or even cruelly to any deviation from these ‘roles’, may well be driven by a need to deny their own behavior or feelings.” (Verified Complaint, Ex. 5 at p.1). That same resource also explains that “[r]eligion has often been misused to justify hatred and oppression,” and then cites specific churches that support certain rights for homosexuals. (Id. at p.2).

The Respecting GLBTQ Youth resource, written by Advocates for Youth, tells teachers that

“It is perfectly natural to be gay, lesbian, bisexual, and/or transgender. . . . Assure the young person that he/she is absolutely normal.” Teachers also are instructed to “[d]iscuss sexual behaviors explicitly rather than assuming that everyone defines sexual intercourse in the same way.” Approved Teacher Resources also contain references from homosexual advocacy organizations concerning the number of students harassed based on their sexual orientation. Those statistics, however, are refuted by more recent Hate Crime Statistics by the U.S. government, which resource was rejected by the CAC.

One Grade 10 Teacher Resource, “Lesbian, Gay, and Bisexual Youth Q & A” published in a 2002 volume of *The Prevention Researcher*, states that certain religious groups are more likely to believe people can overcome same-sex attraction, specifically mentioning “fundamentalists” and “evangelicals” and that it is important to refer students with those religious beliefs to “sensitive clergy” who can help them reconcile the students’ religious beliefs and their same-sex attractions. The resource names specific lesbian and gay-affirming religious organizations that would be supportive of homosexuality. (Verified Complaint, Ex. 6 at p.3).

In stark contrast to the resources approved, every proposed teacher resource submitted by the PFOX designee on the CAC, that discussed the ex-gay perspective or that people can overcome same-sex attraction, was rejected by the CAC. The CAC and MCPS Board also rejected every resource submitted from the U.S. Centers for Disease Control that discussed health risks associated with same-sex sexual activity, or the fact that condoms do not prevent transmission of certain sexually transmitted diseases. The CAC also rejected materials from the U.S. Surgeon General and National Institutes of Mental Health discussing suicide factors in youth.

The CAC rejected a submission authored by the National Association for Research and Therapy of Homosexuality (“NARTH”), discussing reparative therapy, which included statements by present and past leaders of the American Psychological Association and American Psychiatric Association that support reparative therapy for those who seek to overcome same-sex attraction. Although Defendants characterize NARTH as not in the “mainstream,” it has grown to more than 1500 members in just a few years.

Plaintiffs have voiced their objections to Defendants concerning the Revised Curriculum, all to no avail. The Revised Curriculum, presenting a one-sided position on a controversial issue, and containing substantial factual inaccuracies, is scheduled to begin in the six pilot schools on May 5, 2005.

ARGUMENT

The standard for issuance of a Temporary Restraining Order under Fed. R. Civ. P. 65 is well established. The court “must balance: (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if it is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.” *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 373 F.3d 589, 593 (4th Cir. 2004); *Newsom v. Albemarle Co. School Bd.*, 354 F.3d 249, 254 (4th Cir. 2003). The facts of this case readily justify imposition of a temporary restraining order.

I.

UNLESS THE TEMPORARY RESTRAINING ORDER IS ISSUED, THERE IS A GREAT LIKELIHOOD OF IRREPARABLE HARM.

The significance of Defendants' actions cannot be overstated. They have purposely chosen to exclude from the comprehensive health education the substantial health risks uniquely associated with homosexual sexual activity. Instead, the school district introduces the subjects of "sexual orientation" and "sexual identity," instructing staff to present only *one* side of the story – that same-sex attractions cannot be changed, that some religions believe homosexuality is normal and acceptable, and that there are no increased health risks associated with homosexual activities. Defendants were provided with numerous reputable resources discussing the ex-gay perspective, including journal articles discussing the success of reparative therapy. Defendants also were presented with materials from the U.S. Centers for Disease Control that explained the substantial and unique health risks associated with same-sex sexual conduct. Those included, for example, CDC reports dated 2002 and 2003 discussing HIV/AIDS among America's youth, that HIV rates are climbing among gay and bisexual men, and the health risks facing women who have sex with women. Nevertheless, the CAC, led by a man with two gay sons, uniformly rejected those materials. Instead, Defendants have chosen a path that poses substantial health risks for the students, infringes on constitutional rights of the students and violates the Establishment Clause. Plaintiffs will suffer irreparable harm absent issuance of the temporary restraining order.

A.

The Increased Health Risks Alone Constitutes Irreparable Harm.

The potential for students to receive this one-sided message, and to act on it, pose substantial health and safety concerns. Once the misinformation is conveyed to our students, it cannot simply be retracted. That is particularly true when resources relied upon by Defendants state that sexual orientation is fixed at an early age. If that is the case, which Plaintiffs do not concede, but which Defendants maintain, then students should be presented with all available information concerning same-sex sexual contact, rather than be misled by school officials that the homosexual lifestyle poses no unique health risks.

These health risks cannot be ignored. Statistical evidence (much of which was presented to Defendants through CDC materials and is echoed in leading homosexual magazines and newspapers) demonstrates that those who engage in homosexual conduct are at increased risk for numerous diseases as compared to heterosexuals. Indeed, medical journals around the world are documenting the fast-paced spread of life-threatening, and potentially life-threatening diseases. The spread of HIV/AIDS, HPV (human papilloma virus), Syphilis and Chlamydia, just to name a few, are often referred to as having reached epidemic levels.

For example, in February 2005, New York City health officials held a news conference to announce that a highly resistant strain of the HIV virus had led to full blown AIDS in just *three* months, something that usually takes 10 years. Officials there also announced that they had diagnosed two recent cases of a unique strain of chlamydia found almost exclusively among gay men, which, if untreated, can cause permanent physical damage.

Previous reports and studies echo these increased and unique health risks. A far-ranging study published in 1978 revealed that 75% of self-identified, white, gay men, admitted to having sex with more than 100 different males in their lifetime, with 28% claiming more than 1,000 lifetime male sex partners. Alan P. Bell and Marin S. Weinberg, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 308, Table 7 (1978). A study published in 1997 produced similar results: of 2,583 homosexuals, only 2.7 percent claimed to have had sex with one partner only; the most common response, given by 21.6 percent of the respondents, was of having 101 to 500 lifetime sex partners. Paul Van de Ven *et al.*, *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, *J. SEX RESEARCH* 34 (1997). The U.S. Centers for Disease Control similarly reported an upswing in promiscuity in San Francisco: from 1994 to 1997, the percentage of homosexual men reporting multiple partners and unprotected anal sex rose from 23.6 percent to 33.3 percent, with the largest increase among men under 25. *See* John R. Diggs, Jr., M.D., *The Health Risks of Gay Sex* (available at www.corporateresourcecouncil.org) (citing *Increases in Unsafe Sex and Rectal Gonorrhea among Men Who Have Sex With Men – San Francisco, California, 1994-1997*, *MORTALITY AND MORBIDITY WEEKLY REPORT*, CDC, 48(3): 45-48, p. 45 (Jan. 29, 1999)); *see also* Erica Goode, *With Fears Fading, More Gays Spurn Old Preventive Message*, *NEW YORK TIMES*, August 19, 2001 (in the past seven years, while the practice of anal sex had increased, with multi-partner sex doubling, condom use had declined 20 percent). A 1994 survey of 2500 homosexual men published in the August 23, 1994 issue of *THE ADVOCATE* revealed that in the past five years 48% of the men had engaged in “three-way sex” and 24% had engaged in “group sex (four or more).” www.forthchildreninc.com/issues/homosexuality/TheAgenda/InTheirOwnWords.html.

Although nearly 64% of men with AIDS were men who have had sex with men, *Basic Statistics*, CDC DIVISION OF HIV/AIDS PREVENTION, June 2001 (available at www.cdc.gov/hiv/stats.htm), the list of diseases found with higher incidence among those engaged in homosexual conduct does not stop there. “Reports at a national conference about sexually transmitted diseases indicate that gay men are in the highest risk group for several of the most serious diseases.” Bill Roundy, *STD Rates on the Rise*, NEW YORK BLADE NEWS 1, Dec. 15, 2000 (“the increased number of sexually transmitted diseases (STD) cases is the result of an increase in risky sexual practices by a growing number of gay men who believe HIV is no longer a life-threatening illness”); *see also* Jon Garbo, *Gay and Bi Men Less Likely to Disclose They Have HIV*, GAYHEALTH NEWS, July 18, 2000 (researchers from the University of California, San Francisco found that 36% of homosexuals engaging in unprotected oral, anal or vaginal sex failed to disclose that they were HIV positive to casual sex partners) (available at www.gayhealth.com/templates/0/news?record=136).

The list of diseases found with extraordinary frequency among male homosexual practitioners as a result of anal sex include: anal cancer, chlamydia trachomatis, cryptosporidium, giardia lablia, herpes simplex virus, HIV, HPV, isospora belli, microsporidia, gonorrhea, viral hepatitis types B & C, syphilis. John R. Diggs, Jr., M.D., *The Health Risks of GaySex* 3 (available at www.corporateresourcecouncil.org). “*Sexual transmission of some of these diseases is so rare in the exclusively heterosexual population as to be virtually unknown.*” *Id.* at 3 (emphasis added). Another disease found almost exclusively among homosexual practitioners is “Gay Bowel Syndrome” – “sexually transmitted gastrointestinal syndromes.” *STD Treatment Guidelines: Proctitis, Procto-colitis, and Enteritis*, (Centers for Disease Control and Prevention 1993) (available

at www.ama-assn.org/special/std/treatmnt/guide/stdg3470.htm); *see also* Jack Morin, ANAL PLEASURE AND HEALTH: A GUIDE FOR MEN AND WOMEN 22 (1998) (explaining that homosexual sexual activities “provide many opportunities for tiny amounts of contaminated feces to find their way into the mouth of the sexual partner . . . the most direct route is oral-anal contact”).

As for the diseases that are also found among heterosexuals, individuals engaged in homosexual conduct constitute the largest percentage of many of those diseases, including anal cancer, HIV, HPV (a collection of viruses that can cause warts, or papillomas, on various body parts) and syphilis. For example, 85% of the syphilis cases reported in the Seattle area of Washington in 1999 were among self-identified homosexual practitioners. Diggs, *supra*, at 3-4. Syphilis among male homosexual practitioners is at epidemic levels in San Francisco. *Id.* HPV also is “almost universal” among those men. Bill Roundy, *STDs Up Among Gay Men: CDC Says Rise is Due to HIV Misperceptions*, THE WASHINGTON BLADE, Dec. 8, 2000 (available at www.washblade.com/health/a). While the incidence of anal cancer in the United States is only .9/100,000, the number soars to 35/100,000 for those engaged in homosexual conduct. Bob Roehr, *Anal Cancer and You*, BETWEEN THE LINES, Nov. 16, 2000 (available at www.pridesource.com/cgi-bin/article?article=3835560).

Lesbians are also at increased risk for certain diseases, including cancer, hepatitis C, and bacteria vaginosis, predominantly because they are “significantly more likely to report past sexual contact with a homosexual or bisexual man and sexual contact with an IDU (intravenous drug user).” Katherine Fethers *et al.*, *Sexually Transmitted Infections and Risk Behaviors in Women Who Have Sex with Women*, SEXUALLY TRANSMITTED INFECTIONS 345-47. Although rare, a Philadelphia

woman recently tested positive for HIV as a result of “shared sex toys” with her HIV-positive bisexual female partner. *See* www.advocate.com/new_news.asp?ID=7628&sd=01/31/03.

When viewed objectively, there is no dispute that homosexual sexual contact poses significant health risks. In an effort to advance a particular ideology, Defendants are placing MCPS students in harms way – arming them only with the statement that homosexuality is as normal as heterosexuality. Defendants cannot be permitted to convey such harmful, non-factual information to our students. This reckless betrayal of our youth cannot be defended by Defendants’ occasional reference in the Revised Curriculum and Protect Yourself Video that abstinence is the only way to be 100% safe.

B.

Deprivation of Constitutional Rights Constitutes Irreparable Harm.

Irreparable harm also will result from deprivation of the students’ constitutional rights. As discussed below, Defendants’ intentional decision to present one side on a controversial subject, forbidding presentation of the opposing view, is virtually identical to the anti-evolution teaching statutes long ago held unconstitutional. The Supreme Court has emphasized that it is the “duty of federal courts ‘to apply the First Amendment’s mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry.’” *Board of Ed. v. Pico*, 457 U.S. 853, 865 (1982). The “State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. . . . [T]he Constitution protects the right to receive information and ideas.” *Pico*, 457 U.S. at 866-67 (quoting *Stanley v. Georgia*, 394 U.S. 557 (1969)). The “right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own

rights of speech, press, and political freedom.” *Pico*, 457 U.S. at 867.

Relying on *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Northern District of Mississippi explained that “[a]ll interested parties, whether they be textbook editors, teachers, parents, or students, have a fundamental interest in maintaining a free and open educational system that provides for the acquisition of useful knowledge.” *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1153 (N.D. Miss. 1980). Our courts “have not failed to apply the First Amendment’s mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. . . . the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Epperson*, 393 U.S. at 104-105.

There is no dispute here that in violation of the students’ First Amendment rights, Defendants are preventing the acquisition of useful and essential knowledge. Defendants also are essentially compelling the students to reflect on, adopt and speak out on a sensitive, controversial issue. In order to avoid the one-sided, factually inaccurate presentation, the students and their parents must opt out of that portion of the ongoing health education class (a class, by the way, that by state law is required to be an elective course) and be segregated from their peers. Compelled speech violates the First Amendment in the same manner as preventing speech. *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001). The Supreme Court has repeatedly held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Wallace v. Jaffree*, 472 U.S. 38, 44 n.22 (1985); *New York Times Co. v. United States*, 403 U.S. 713 (1971). “The First Amendment guarantee that the

freedom of speech shall not be abridged protects the free flow of ideas in a democratic society. When a citizen exercises her freedom of speech, she is exercising a right that the Supreme Court has characterized as ‘lying at the foundation of free government by free men.’” *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The deprivation of such protected rights constitutes, *a priori*, irreparable harm and injury. Because Defendants’ actions deprive students of their constitutional rights, irreparable harm will result absent issuance of a temporary restraining order.

II.

DEFENDANTS WILL NOT SUFFER HARM IF A TEMPORARY RESTRAINING ORDER IS ISSUED.

Defendants will not suffer harm if the temporary restraining order is issued. Defendants can simply instruct students in the six pilot schools using the prior health education curriculum, which will be taught in the remaining 54 schools. There are a total of 36 middle schools and 24 high schools in the district, with only 6 slated to receive instruction pursuant to the Revised Curriculum. If the prior curriculum were itself harmful to students, Defendants would not be limiting implementation of the Revised Curriculum to 10% of the schools. Defendants will suffer no harm by utilizing the old curriculum for the remainder of this school year. That is particularly true where Defendants have violated their own notice, procedural and substantive requirements for creation and implementation of the curriculum. The temporary restraining order will protect Plaintiffs’ federal constitutional rights, while causing Defendants no harm.

III.

PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS.

A.

The Revised Curriculum Violates Students' Free Speech Rights.

The "First Amendment protects 'both the right to speak freely and the right to refrain from speaking at all.'" *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Requiring an individual to present a viewpoint not his own is, in terms of the First Amendment values at stake, the equivalent of forbidding him to say what he wishes to say. The government cannot require an individual to become an 'instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001). In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court explained that

Our courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values. On the other hand . . . the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."

Epperson, 393 U.S. at 104-105. "All interested parties, whether they be textbook editors, teachers, parents, or students, have a fundamental interest in maintaining a free and open educational system that provides for the acquisition of useful knowledge." *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1153 (N.D. Miss. 1980) (quoting *Meyer v. Nebraska*, 262 U.S. 390 (1923)). "Academic freedom,

it can be argued, is the adaptation of those specific constitutional rights to protect communication in the classroom as a special market place of ideas.” *Loewen*, 488 F. Supp. at 1154.

In *Loewen*, the court held that a statutory scheme that provided for the appointment of textbook approval committee, which committee exercised its authority to make sure that opposing ideas did not enter the classroom, deprived authors, school districts, superintendents, teachers and students of their constitutionally protected rights of freedom of speech and rights to due process under the Fourteenth Amendment. In *Loewen*, the court pointed out that the textbook was not rejected for any “justifiable reason.” 488 F. Supp. at 1154.

In *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court reaffirmed that it is the “duty of federal courts ‘to apply the First Amendment’s mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry.’” 457 U.S. at 865.

[W]e think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focuses “not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.”

Pico, 457 U.S. at 867. The “State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.” *Pico*, 457 U.S. at 866. The Court has held that ““the Constitution protects the right to receive information and ideas.”” *Pico*, 457 U.S. at 867 (quoting *Stanley v. Georgia*, 394 U.S. 557 (1969)). The “right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.” *Pico*, 457 U.S. at 867. Madison admonished that:

“A popular Government, without popular information, or the means of acquiring it,

is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

Pico, 457 U.S. at 867. “[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.” *Pico*, 457 U.S. at 868.

Here, Defendants have foreclosed the acquisition of knowledge as well as set up a system that compels students to speak. The Revised Curriculum makes value statements concerning homosexuality, including negative statements concerning those who believe homosexuality is wrong, or believe that people can overcome same-sex attractions. The Revised Curriculum prohibits discussion of homosexuality, bisexuality, lesbianism, sexual orientation and gender identity; instead simply requiring teachers to provide a biased definition of those terms. The Revised Curriculum conveys the message that homosexuality is as normal as heterosexuality, but fails to inform students of the substantial and unique health risks associated with same-sex sexual activity or that there are recognized contrasting points of view on the subject. Defendants’ are intentionally stifling the acquisition of accurate information.

Defendants also have set up a system where students are compelled to speak on a sensitive subject. District policies state that students should not be required to reveal their moral, ideological or religious views on sensitive issues. Yet, the only way for students to escape the biased, non-factual discussion of sexual orientation is to opt-out of the ongoing comprehensive health education course. Compelled speech is as offensive to the First Amendment as stifled speech.

Defendants’ actions also constitute impermissible viewpoint discrimination. Where speech is treated differently than others simply because it espouses a different viewpoint, then the restriction

is unconstitutional regardless of how the difference is characterized by the government. “To rule otherwise would be to elevate form over substance.” *Franchise Tax Bd. of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 339 (1990). In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) the Supreme Court explained

In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not the subject matter, but particular *views* taken by the speakers on the subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when a specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger, 515 U.S. at 828-29 (citations omitted) (emphasis added).

Defendants permit presentation of only one viewpoint on a subject otherwise included in the classroom – the view that people are born gay, cannot change, and that being gay is as normal as being left-handed. Defendants prohibit discussion of the opposing viewpoint – that a person is not defined by their sexuality, they can overcome same-sex attractions, and that there are substantial health risks associated with same-sex sexual contact. The First Amendment prohibits such viewpoint based discrimination.

B.

The Revised Curriculum Violates Federal Guarantees of Equal Protection.

The government cannot “deny to any person within its jurisdiction the equal protection of the laws.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Fourteenth Amendment is “essentially a direction that all similarly situated persons should be treated alike.” *Id.*

An equal protection claim has two essential elements: (a) that the plaintiff was treated differently than others similarly situated, and (b) this differential treatment was motivated by an intent to discriminate on the basis of impermissible considerations. Plaintiffs easily satisfy their burden.

The revised curriculum treats certain MCPS students differently. Defendants are sending a message to those MCPS students who are ex-gay or overcoming same-sex attractions that they don't exist and that it is futile to try and overcome your same-sex attractions, while, on the other hand, openly accepting and embracing those who have accepted, or are acting out, on their same-sex attractions. Although Defendants have a non-discrimination policy that prohibits discrimination based on sexual orientation, they blatantly refuse to treat equally ex-gays and those overcoming same-sex attractions. Defendants define "sexual orientation" in the revised curriculum to include homosexual, lesbian, bisexual, transgender, questioning and intersexed, but refused to include reference to "ex-gay." Defendants explain to students that the "mainstream" medical community believes people are born gay, while refusing to include reference to the hundreds and thousands of people who have achieved success through reparative therapy. Defendants tell gays, lesbians and bisexuals 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. ***Defendants' message is loud and clear – ex-gays and those overcoming same-sex attraction are not valued and respected in MCPS schools.***

Defendants cannot articulate a legitimate basis for its unequal treatment of ex-gays or those overcoming same-sex attractions. First, the MCPS Board's own resolution demonstrates that Defendants have no legitimate basis for implementing the revised curriculum. In November 2002,

when the MCPS Board voted to have revisions made to the comprehensive health education, it explained that “individuals have the right to accept, acknowledge, and live in accordance with their sexual orientation” and that the “deafening silence” in the curriculum concerning Defendants’ view that non-heterosexuals can live healthy and happy lives, “fostered . . . the emotional distress and physical violence” some of the students suffered. Thus, ***Defendants’ stated goal was to create an inclusive curriculum that embraced a student’s decision to live in accordance with their sexual orientation,*** because failure to include such information allegedly contributes to emotional distress of students.

Assuming solely for the sake of argument that Defendants’ stated goal was premised on factually accurate information, which Plaintiffs dispute, the revised curriculum directly violates those goals. Defendants have adopted a curriculum that isolates certain students based on their “sexual orientation.” In Defendants’ own words, their failure to reassure and support ex-gays and those attempting to overcoming same-sex attractions will contribute to emotional distress and harassment of those students. The only logical explanation can be the improper purpose of discrimination based on animus toward ex-gays. *Cf. Romer v. Evans*, 517 U.S. 620 (1996).

Second, Defendants cannot articulate a legitimate basis for the curriculum because it is full of factual inaccuracies. State laws and district policies require all curriculum to be factually accurate. *See* COMAR 13A.04.18.03 (C)(2) (review proposed curriculum for factual content). Defendants also are under an obligation to present opposing viewpoints on controversial issues. *See* JFA-RA (“assure the presentation of a variety of viewpoints on controversial topics”). Defendants’ refusal to include factually accurate information concerning the substantial health risks associated with homosexual

sexual activity, including materials from the U.S. Centers for Disease Control, as well as studies documenting the success of reparative therapy, violate Defendants' obligation to present factually accurate information.

Third, Defendants cannot articulate a legitimate basis for creating separate educational opportunities. In *Brown v. Board of Education of Topeka Shawnee County, Kansas*, 347 U.S. 483 (1954), the Supreme Court declared that "in the field of public education the doctrine of 'separate but equal' has no place." Implementation of the Revised Curriculum will create separate educational opportunities for MCPS students. Students are forced to sit silently (because the curriculum prohibits discussion of the most controversial aspects) while being told by school officials that ex-gays and those overcoming same-sex attractions do not exist, or to opt out of class (which under state law is required to be an elective, not mandatory class) and thereby segregate themselves from their peers based solely on their viewpoint concerning "sexual orientation." Two separate educational opportunities – one filled with value-laden, factually inaccurate information, and another constituting independent study – is not an equal educational opportunity. That is particularly true when those students who remain in the class are receiving factually inaccurate information concerning those who have opted out of the class.

Defendants inability to offer a legitimate basis for the discriminatory Revised Curriculum renders it unconstitutional.

C.

The Revised Curriculum Violates the Establishment Clause.

The Revised Curriculum violates the Establishment Clause because the government is directly

involved in preferring one set of religious beliefs over another. In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court explained that the “clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244. The Establishment Clause guarantees “free competition between religions.” *Id.* at 245. [S]uch equality would be impossible in an atmosphere of official denominational preference.” *Id.* [G]overnment must be neutral when it comes to competition between sects. . . . This prohibition is absolute. . . . The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.” *Larson*, 456 U.S. at 246.

There can be no question that the Revised Curriculum and Teacher Resources prefer one set of religious beliefs over the other. The Teacher Resources portray negatively “fundamentalists” and “evangelicals,” misconstrues what Jesus did and did not say concerning homosexuality, and refers the reader to specific denominations that support the homosexual lifestyle. For example, one Grade 10 Teacher Resource entitled “Lesbian, Gay and Bisexual Youth Q & A,” (verified complaint, ex. 6), answers the question “How can I work with gay and lesbian youth who come from strong religious backgrounds?”

Lesbian and gay youth from strong religious backgrounds, *particularly those that consider homosexuality to be sinful*, have more difficulty integrating and accepting their sexual identity than youth from *more tolerant* religious backgrounds. *Fundamentalists* are more likely to have negative attitudes about gay people than those with other religious views. And *evangelicals* are more than twice as likely as others to believe that homosexuality is a chosen lifestyle (rather than innate) which affects their attitudes about sexual orientation. . . . Providing referrals to *sensitive clergy* . . . can help youth begin to understand and cognitively address the contradictions between their religious training and their sexual identity. Another

important resource is *lesbian and gay religious organizations (such as Lutherans Concerned, Dignity [Catholics], Rainbow Baptists, and More Light Presbyterians)*, that have Web pages, publications and often, local religious services to help gay people celebrate their religious traditions without compartmentalizing their sexual orientation.

Verified Complaint, Ex. 6 at 4 (emphasis added). Another Teacher Resource entitled “Myths and Facts” responds to the question whether homosexuality is a sin by stating that the Bible contains only six passages which condemn homosexuality, that “Jesus said absolutely nothing at all about homosexuality” and that “[r]eligion has often been misused to justify hatred and oppression.” The resource concludes its answer by citing specific churches that support the homosexual lifestyle. (Verified Complaint, Ex. 5 at p.2).

In violation of the Establishment Clause, Defendants plainly are preferring one set of religious beliefs over another. *See Larson*, 456 U.S. at 244-46. In MCPS, there is no free competition among religious – the MCPS Board declares gay-affirming churches the winner.

The preference for one set of religious beliefs over another, with outright hostility demonstrated toward a particular set of beliefs, plainly runs afoul of the endorsement test as well. The Establishment Clause forbids government from demonstrating hostility toward religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 619-22 (1971). In *Lemon*, the Supreme Court set forth three requirements a government activity must meet in order to avoid running afoul of the Establishment Clause: (1) the activity must have a secular purpose; (2) the activity’s primary effect must neither advance nor inhibit religion; (3) the activity must not foster excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. Where governmental action fails to satisfy even one prong of the test, it violates the Establishment Clause. Here, the Revised Curriculum demonstrates hostility toward

particular religious beliefs while promoting a specific set of religious beliefs. More specifically, the Revised Curriculum negatively portrays those who believe that homosexuality is wrong, while promoting those denominations and churches that are affirming of the homosexual lifestyle.

In determining whether state action has a primary effect of advancing or inhibiting religion, or a particular religious belief, the Supreme Court applies a “neutrality” test, i.e., whether the government is being neutral towards religion. A court must determine whether “the challenged action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their religious choices.” *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). A state must not, by its policies or practices, be hostile toward religion. *See Chabad -Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1393 (11th Cir. 1993) (en banc).

The decision in *Selman v. Cobb County School Dist.*, 2005 WL 83829 (N.D. Ga. Jan. 13, 2005) is instructive. There, the court ruled unconstitutional a policy that placed a sticker in science textbooks stating that evolution is a theory, not a fact. The court explained that it had the effect of promoting a particular religious belief. The sticker was constitutionally problematic because it “sends a message to those who believe in evolution that they are political outsiders. This is particularly so in a case such as this one involving impressionable public school students who are likely to view the message on the Sticker as a union of church and state.” *Selman*, 2005 WL 83829, *19. The reasonable observer would interpret the Sticker to convey a message of endorsement of religion. *Id.* The court explained:

Just as citizens around the country have been aware of the historical debate between

evolution and religion, an informed, reasonable observer in this case would be keenly aware of the sequence of events that preceded the adoption of the Sticker. . . . [T]he reasonable observer would be deemed to know, the Court believes these events are key to ascertaining the primary effect of the Sticker. Specifically, the informed, reasonable observer would know that a significant number of Cobb County citizens had voiced opposition to the teaching of evolution for religious reasons. The informed, reasonable observer would also know that despite this opposition, the Cobb County School District was in the process of revising its policy and regulation regarding theories of origin to reflect that evolution would be taught in Cobb County schools. Further, the informed, reasonable observer would be aware that citizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would nevertheless dilute the teaching of evolution, including placing a disclaimer in the front of certain textbooks that distinguished evolution as a theory, not a fact. Finally, the informed, reasonable observer would be aware that the language of the Sticker essentially mirrors the viewpoint of these religiously-motivated citizens.

Selman, 2005 WL 83829, * 20.

In *Epperson*, the Court likewise explained that government

may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Epperson, 393 U.S. at 104.

Here, Defendants' are blatantly preferring one set of religious beliefs over another. The informed reasonable observer would be well aware of the history leading up to the implementation of this curriculum, that Defendants specifically refused to include the ex-gay perspective, and that Defendants chose to discuss favorably certain religious beliefs. In violation of the Establishment Clause, Defendants are endorsing one set of religious beliefs while demonstrating patent hostility toward another set of beliefs. As discussed above, Defendants have no compelling justification for their actions.

D.

The Revised Curriculum Violates Federal Substantive Due Process Guarantees.

Although the MCPS Board is given wide discretion to implement curriculum, substantive due process guarantees under the Fourteenth Amendment prohibit unreasonable exercise of that authority. *See Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 342 (D. Md. 1969). Substantive due process serves as an absolute check on certain governmental actions notwithstanding the fairness of the procedures used to implement those actions. A substantive due process claim is viable only where no post-deprivation process could cure the deficiencies in the governmental action. *Cf. Greenspring Racquet Club, Inc. v. Baltimore Co.*, 70 F. Supp.2d 598 (D. Md. 1999). Here, there are two liberty interests at stake – the fundamental rights of parents to direct the education of their children, and the interest of students to receive information in efforts to learn and acquire knowledge. No amount of process will cure the deprivation caused once the curriculum is implemented.

The Supreme Court has oft repeated that parental interest in the “care, custody, and control of their children” is “perhaps the oldest of the fundamental liberty interests recognized this Court.” *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2059 (2000). The “custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (right of parents to control education of children). The “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition,” particularly in matters of “moral standards, religious beliefs, and elements of good citizenship.” *Wisconsin v. Yoder*, 406 U.S. 205, 232-33

(1972). Because students are required to be in school for a portion of the date, the State also has an interest in those children. That interest, however, is “custodial and tutelary” *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995). “Public schools must not forget that ‘in loco parentis’ does not mean ‘displace parents.’” *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000).

It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the Court’s admonitions that “the child is not the mere creature of the State,” and that it is the parents’ responsibility to inculcate “moral standards, religious beliefs, and elements of good citizenship.”

Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000).

The Fourth Circuit has explained that where the challenged governmental action involves a legislative enactment rather than executive decision, the substantive due process clause requires a court to first determine whether the claimed violation involves a fundamental liberty interest, and if so, then the governmental action must pass strict scrutiny to survive. *See Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999). Admittedly, the state has a legitimate interest in providing students with the capacity to “obtain, interpret and understand basic health information and services” and the “competence to use such information and services in ways that are health enhancing.” *Leebaert v. Harrington*, 193 F. Supp.2d 491, 501 (D. Conn. 2002). However, *Leebaert* suggests that where a curriculum is so value-laden, then it exceed’s the discretion granted to schools concerning selection of curriculum. *Leebaert*, 193 F. Supp.3d at 502. That is precisely what has happened here. MCPS is *not* providing information that will enable students to make healthy decisions. Rather, in an effort to indoctrinate the students with a message that homosexuality is normal and healthy, MCPS ignores

substantial, well-documented health risks associated uniquely with homosexual sexual activity.

“[A]s early as 1923, the Court did not hesitate to condemn under the Due Process Clause arbitrary restrictions upon the freedom of teachers to teach and of students to learn. . . . The Court recognized these purposes, and it acknowledged the State’s power to prescribe the school curriculum, but it held that these were not adequate to support the restriction upon the liberty of teacher and pupil.” *Epperson*, 393 U.S. at 105. The *Epperson* Court discussed the 1923 decision in *Meyer v. Nebraska*, which involved a challenge to a law making it a crime to teach any subject in any language other than English. “The challenged statute it held, ***unconstitutionally interfered with the right of the individual, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge.***” *Epperson*, 393 U.S. at 105 (citing *Meyer*, 262 U.S. 390 (1923) (emphasis added). It bears emphasis that in *Meyer*, the court rejected the state’s proffered justification that the law prohibiting teaching of foreign languages was necessary to protect the child’s health by limiting his mental activities.

Similarly, in *Epperson*, the Arkansas law prohibiting the teaching of evolution was struck down because the state

did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law’s effort was confined to *an attempt to blot out a particular theory* because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

393 U.S. at 109 (emphasis added).

The well-publicized decision in *Brown v. Hot, Sexy and Safer Production*, 58 F.3d 525 (1st Cir. 1995), which rejected a parents’ challenge to materials presented at an AIDS awareness

assembly, is readily distinguishable. In that case, students and their parents alleged that the students were compelled to attend an AIDS and sex education program conducted at their public high school by Hot, Sexy and Safer Productions. The assembly was a 90 minute presentation characterized by the school as an AIDS awareness program. Plaintiffs alleged that the presentation included sexually explicit monologues and sexually suggestive skits with students. The plaintiff students did not participate in the skits, but were forced to attend the assembly. Significantly, the First Circuit applies a different two-part test for substantive due process claims. The first question asked in the First Circuit test is whether defendants engaged in conscience-shocking behavior. In the Fourth Circuit, that question is asked when the challenged action involves an executive decision, but legislative action.

In *Brown*, the court concluded Defendants did not engage in conscience shocking behavior, although recognizing that words alone can satisfy the standard. *Brown*, 68 F.3d at 532. With respect to the parental rights argument, the court held that it does not include the right to dictate curriculum that includes *exposure* to talk or literature on the subject of sexual behavior. *Id.* at 534 & n.6. Exposure to talk or literature on the subject of sexual behavior is not the primary focus of Plaintiffs' substantive due process claim. Rather, the primary objection is that Defendants are filling the students with biased, harmful misinformation.

Curriculum by definition (according to state law and district policies) requires factually accurate information. The Revised Curriculum does not meet the definition.² Thus, unlike *Brown*,

² See *Coleman v. Caddo Parish School Board*, 635 So.2d 1238, 1256-58 (La. Ct. App. 1994) (portions of curriculum relating to moral and spiritual implications of premarital sex violated state

this case does not involve a situation where parents are attempting to dictate curriculum, simply because they disagree with the content, or because they prefer their students not be exposed to certain materials. In fact, Plaintiffs are not objecting to the prior curriculum, which included, for example, discussion of risky sexual behavior, various contraceptives, and sexually transmitted diseases. Rather, this case involves a situation where the school is attempting to revise the curriculum to teach value-laden, factually incorrect, biased information on a highly controversial issue. The Revised Curriculum stifles acquisition of accurate information on an issue as significant as sexuality. More importantly, the curriculum fails to present factual medical information, including the substantial health risks associated uniquely with homosexual sexual activity. Substantive due process guarantees give parents the right to insist that the school district present accurate, factual information, and give students the right to receive accurate, factual information.

There is no legitimate, let alone compelling, justification for Defendants' actions.

IV.

THE PUBLIC INTEREST MANDATES THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER.

Every day in this country, millions of parents entrust their children to the public schools. Some choose the public school system, while some are forced to send their children to public schools

prohibiting inclusion of religious beliefs and inclusion of subjective moral and ethical judgments). There, the state law defined "sex education" as dissemination of factual biological or pathological information that is related to the human reproduction system." *Coleman*, 635 So.2d at 1256. Portions of the curriculum that were stricken by the court included statements concerning the source of AIDs, the physical and psychological effects of abortion, and subjective reasons why students may engage in sexual relations before marriage. *Coleman*, 635 So.2d at 1267-69.

because they cannot afford private school, or stay at home in order to home school their children. Regardless of why they are there, public schools bear an important responsibility. They are given the task of educating our children and inculcating the necessary skills to become productive members of the community. To fulfill that task, administrators are given broad discretion to create and implement necessary curriculum. That discretion, however, is not unfettered. Where schools violate constitutional rights of the students and parents, federal courts can, and do, intervene.

This presents one of those cases where Defendants have acted well outside the scope of their discretion. There can be no dispute that *Defendants do not have the discretion* to place our children in harms way; yet that is precisely what this curriculum does, in failing to inform students of the substantial and unique risks associated with the same-sex sexual activity Defendants characterize as perfectly normal. There can be no dispute that *Defendants do not have the discretion* to provide our students with factually incorrect information; yet that is precisely what this curriculum does, in providing information about “sexual orientation” from primarily homosexual advocacy organizations and rejecting contrary information from such reputable sources as the United States Center for Disease Control. And there can be no dispute that *Defendants do not have the discretion* to promote particular religious beliefs; yet that is precisely what this curriculum does in portraying those religions who believe homosexuality is a sin as hateful, fearful and intolerant, while referring students to those churches that are gay-friendly.

The public interest dictates that this Court issue the Temporary Restraining Order. The school year is nearly over. Defendants will not be harmed by putting off implementation of the Revised Curriculum until after this Court has reviewed the matter. Defendants have other curriculum that

readily can be used. Whether to grant the temporary restraining order is an easy call when this Court weighs the slight administrative shuffling required on Defendants' part against the substantial health risks posed to the students, as well as the significant deprivation of their constitutional rights.

CONCLUSION

Wherefore, Plaintiffs request that this Court issue the temporary restraining order, prohibiting implementation of the Revised Curriculum.

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Respectfully submitted,

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