

MARYLAND STATE BOARD OF EDUCATION

CITIZENS FOR A RESPONSIBLE CURRICULUM,)
)
PARENTS AND FRIENDS OF EX-GAYS AND)
GAYS, and)
)
FAMILY LEADER NETWORK)
)
Appellants)
) Appeal No.
v.)
)
MONTGOMERY COUNTY PUBLIC SCHOOLS,)
MONTGOMERY COUNTY PUBLIC SCHOOLS)
BOARD OF EDUCATION, and JERRY WEAST,)
in his official capacity as Superintendent,)
)
Appellees)

Appeal and Request for Stay

Citizens for a Responsible Curriculum (“CRC”), Parents and Friends of Ex-Gays and Gays (“PFOX”), and Family Leader Network, by undersigned counsel appeal the decision of the Montgomery County Board of Education (“MCPS Board”) approving on January 9, 2007, (“Board Approval”) certain curriculum Additional Lessons (“Additional Lessons”) to the 8th grade and 10th grade health education in Montgomery County Public Schools (“MCPS”) to include lessons on “Respect for Differences in Human Sexuality” in Grade 8 and Grade 10 and a lesson on “Condom Use Demonstration” in Grade 10 for field testing in the second semester of the 2006-2007 school year, with later evaluation to occur prior to system-wide implementation for the 2007-2008 school year. Appellants further request that the State Board request the State

Superintendent of Schools (“State Superintendent”) to immediately issue a stay of the Board Approval pending this Appeal, pursuant to COMAR Section 13A.01.02.01.

The majority of the Additional Lessons are attached hereto as Exhibit A and were obtained from the MCPS BOE webpage; other additional and highly significant last minute Additional Lessons which were also approved on Jan. 9, 2007, and are part of those Additional Lessons and are contained in Exhibit B (obtained for the first time in writing from MCPS on February 2, 2007 only after many diligent efforts by Appellant). Together Exhibit A and Exhibit B represent the Additional Lessons.

In support of its appeal and request for stay, Appellants submit as follows:

The Parties

Citizens for a Responsible Curriculum (“CRC”) is a non-profit organization formed out of concern for some aspects of the school health curriculum in MCPS. Members of CRC include students and parents of students enrolled in MCPS, as well as taxpayers and other members of the community concerned about the MCPS revisions of its Health Curriculum and who have united in their opposition to the curriculum set forth in the Additional Lessons.

Parents and Friends of Ex-Gays and Gays (“PFOX”), is a non-profit organization, based in Virginia, with a chapter in Montgomery County, Maryland. PFOX promotes an inclusive environment for the ex-gay community, and works to eliminate negative perceptions and discrimination against former homosexuals and lesbians.

Family Leader Network is an IRC 501(c) (4) organization with Maryland chapters and Montgomery County resident members which promotes public policy regarding school curriculum and advocates on behalf of family issues.

Together Appellants demonstrate below that MCPS in the Additional Lessons are seeking to promote one moral viewpoint on a controversial and sensitive moral subject to the exclusion of all other moral views. The province of the family to teach morality to children is being seriously compromised and disrupted. Appellants take the firm position on which our nation was founded and which is clearly enunciated in the United States Constitution as well as the Maryland Constitution Bill of Rights: religious freedom is a fundamental guarantee in our country and any government interference with that freedom for the purpose of promoting one exclusive moral view is unconstitutional, particularly when it interferes with the right of parents to direct the education of their children. Further, Appellants hope that, as end result of this Appeal process, the MCPS will enter into a sincere and fruitful dialogue with the Appellants seeking to promote the welfare and support of homosexual and lesbian students, and former homosexual and lesbian students, while at the same time not compromising or causing injury to the sincere religious moral beliefs regarding homosexual conduct held by the students in Appellants' families. Appellants would like some recognition in the curriculum that one can be morally opposed to homosexual conduct but not alienated from his homosexual brethren. Appellants seek also some recognition that tolerance means acceptance of others whom one does not agree with; it does not mean agreeing with everyone.¹

Appellants maintain that teaching respect for persons with same-sex attraction is appropriate and right, but that the revised materials go beyond the ethic of teaching respect by demanding affirmation of a homosexual behavior, and in fact teach only one

¹ MCPS believes that all viewpoints are equally valid. However, any viewpoint which disputes MCPS beliefs is considered by MCPS not equally valid, but rather, "intolerant." The contradiction is readily apparent. Appellants believe that all people are equal, but that viewpoints are not. For example, the viewpoint that pedophilia is wrong is a better viewpoint than one that accepts "intergenerational sex" as acceptable. Presumably, even MCPS would agree that such viewpoints are not equal.

side of this controversial topic, ignoring substantial health risks associated uniquely with same-sex sexual activity. Appellants oppose the Additional Lessons insofar as they do not include reference to the ex-gay perspective, that students can overcome same-sex attractions, or that there is another perspective on the issue of sexual orientation, and because it was passed, and is being implemented, in violation of federal and state laws, and MCPS Board (district) policies. Appellants also oppose the Additional Lessons because they present incomplete and misleading information concerning human sexuality and because they discriminate against heterosexuals who were former homosexuals.

INTRODUCTION

This case presents an example of the significant constitutional and legal implications of a local school board'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 and to violate specific provisions of Maryland law.

Appellees made a deliberate decision to include discussion on the highly controversial social issue of sexual orientation, including homosexuality, bisexuality, lesbianism, transgender, intersexual, gender identity, 'coming out' for gays, and gender identity 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 former homosexuals or former transgenders or that people have had success in overcoming unwanted same-sex attractions and gender confusion. With this new curriculum, MCPS plans to intentionally mislead our students. 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 COMAR policies require curriculum to contain objective, factually accurate information and require discussion of differing viewpoints on controversial issues.

MCPS has purposely chosen to exclude from the comprehensive health education the substantial health risks uniquely associated with homosexual sexual activity and transgender behavior. 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 are innate and cannot be changed; and that there are no increased health risks associated with homosexual activities, sexual reassignment surgery, and administering steroids and other drugs for the gender confused individual. Appellants repeatedly provided MCPS with definitions, terms and resources discussing the ex-gay perspective. Appellees 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. Appellees were presented with materials explaining the unique health risks for gender identity confusion. Nevertheless, the CAC uniformly rejected those materials. Instead, MCPS has chosen a path that poses substantial health risks for the students, infringes on constitutional rights of the students and violates specific provisions of COMAR and MCPS Board policies. Appellees have violated their policies prohibiting discrimination and mandating objective factual

presentation of issues. The revisions to the curriculum were made in violation of state laws concerning development and instruction of comprehensive health education curriculum. Accordingly, Appellees acted arbitrarily, unreasonably, or illegally in developing and approving the curriculum.

FACTUAL BACKGROUND

On January 9, 2007, the MCPS BOE approved for field testing the Additional Lessons at issue here. This approval was the last effort in a process which began on November 2002, when the Montgomery County Public Schools Citizens Advisory Committee Family Life and Human Sexuality (the “CAC”) recommended to the MCPS Board that the Health Education Curriculum for Grade 8 and Grade 10 be revised to include information addressing “sexual variation.” Prior to that time, it was the policy of MCPS not to discuss homosexuality within the health education curriculum, and that if a student asked a question regarding sexual orientation; the staff was to respond in only a perfunctory manner.

2004 REVISIONS AND COURT-ORDERED INJUNCTION:

On November 9, 2004, the MCPS Board voted to approve certain changes to the Health Curriculum for 8th and 10th graders (“2004 Revisions”) formulated by a Citizens Advisory Committee on Family Life and Human Development (“First CAC”) and recommended to the MCPS Board by the MCPS Superintendent. .

Those 2004 Revisions 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 (2004 Revisions attached as

Exhibit C). These 2004 Revisions purported to teach students about homosexuality and other sexual variations within a curriculum framework and the use of certain teacher resources which were in many ways non-factual and biased toward one particular moral viewpoint which presents homosexuality as natural and morally correct to the exclusion of the opposing viewpoint. Those Revisions were openly critical of religions which did not endorse homosexuality.

On May 1, 2005, CRC and PFOX brought an action in the United States District Court for the District of Maryland Southern Division, *Citizens for a Responsible Curriculum, et. al., v. Montgomery County Public Schools, et. al.*, (CASE 8:05-CV-01194) (“Federal Lawsuit”). The Federal Lawsuit sought to enjoin the MCPS Board from implementing the curriculum and other actions that violated students’ constitutional rights. The suit also asserted that the curriculum unconstitutionally endorsed a homosexual lifestyle. CRC and PFOX alleged in their suit that the MCPS sexual orientation education classes violated the First Amendment Protections to Free Speech, Equal Protection of Laws, and Due Process guarantees of the United States Constitution. State laws, COMAR, and MCPS District Policies were also alleged to have been violated.

On May 5, 2005, the Court held a hearing on plaintiffs request for a temporary restraining order halting MCPS from implementing the Revised School Curriculum. That day the Court granted plaintiff’s request for a temporary restraining order enjoining the Montgomery County Public Schools (MCPS), the Board of Education, and the Superintendent from implementing a pilot program in six schools that would have modified the Health Education curriculum for Grade 8 and Grade 10 and issued a Memorandum Opinion attached hereto as Exhibit D (“Memorandum Opinion”). In so

doing, the Court stated and held that implementation of the 2004 Revisions in pilot classes in ten percent of the school district would cause, if not stopped, “irreparable injury to the Plaintiffs on the basis of potential restrictions to their First Amendment liberties” (Opinion at 15).

In granting plaintiff’s request for a temporary restraining order, the Court found it unnecessary to examine all of Plaintiffs’ claims (including COMAR claims and limited its discussion and holdings to Plaintiffs’ federal First Amendment Constitutional claims based on the Establishment Clause and Free Speech. The Court was satisfied that the matter was “fair ground” for litigation and therefore satisfied the “Likelihood of Success on the Merits” element for an injunction. (Opinion at 16).

With respect to the Establishment Clause issues, the Court stated:

The Court is extremely troubled by the willingness of Defendants to venture — or perhaps more correctly bound — into the crossroads of controversy where religion, morality, and homosexuality converge. The Court does not understand why it is necessary, in attempting to achieve the goals of advocating tolerance and providing health-related information, Defendants must offer up their opinion on such controversial subjects as whether homosexuality is a sin, whether AIDS is God’s judgment on homosexuals, and whether churches that condemn homosexuality are on theologically solid ground. As such, the Court is highly skeptical that the Revised Curriculum is narrowly tailored to serve a compelling government interest and finds that Plaintiff’s Establishment Clause claim certainly merits future and further investigation.” (Opinion at 19).

With respect to the Free Speech viewpoint discrimination issues, the Court stated:

Viewpoint discrimination consists of state action in which “there is no ban on a general subject matter, but only on one or more prohibited perspectives.” *Warren*, 988 F. Supp. at 966 (citing *Rosenberger v Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831 (1995)). When government restrictions “target not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.” *Rosenberger*, 515 U.S. at 829 (“the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”)

In this case, Defendants open up the classroom to the subject of homosexuality, and specifically, the moral rightness of the homosexual lifestyle. However, the Revised Curriculum presents only one view on the subject – that homosexuality is a natural and morally correct lifestyle – to the exclusion of other perspectives. Indeed, the Revised Curriculum advises teachers that the information concerning homosexuality is to be presented to students as facts and that “no additional information, interpretation or examples are to be provided by the teacher.” As such, the Court is deeply concerned that the Additional Lessons violates Plaintiffs’ free speech rights under the First Amendment, and believes that Plaintiffs’ free speech allegations merit future and further investigation. (Opinion at 20-21).

In discussing the public interest to be served by the issuance of an injunction, the Court stated:

The Court finds that the public interest is clearly served by protecting the First Amendment rights of Plaintiffs. Additionally, the public interest is served by preventing Defendants from promoting particular religious beliefs in the public schools and preventing Defendants from disseminating one-sided information on a controversial topic. (Opinion at 21).

In conclusion, the Court stated that:

The wisdom of approving a curriculum which prohibits students from discussing one viewpoint of a controversial subject goes to the very essence of that First Amendment faith. The merit of Plaintiffs’ viewpoint — be it right, wrong, discriminatory, or just — is of no consequence. Rather, the Court is concerned with ensuring that Plaintiffs’ free speech rights are not restricted merely because they voice an unpopular viewpoint. No matter the importance of an idea to its believers, or how objectionable it may be to its detractors, the diversity of our democratic fabric is sewn together by the belief that the path to freedom lies in the opportunity for rival positions to be equally heard and discussed. (Opinion at 22).

Having lost the Federal Lawsuit, on May 23, 2005, the MCPS Board of Education, among other actions, withdrew the challenged curriculum revisions and associated resource materials and instructed the Superintendent of Schools to develop new revisions of the Grade 8 and Grade 10 Sex Education Curriculum and develop a new Condom Use video and Condom Use lesson plan for approval by the Board of Education

On June 27, 2005, the MCPS Board of Education approved, and the parties thereafter entered into, a settlement agreement (the “2005 Settlement Agreement”) (attached as Exhibit E) which was accepted by the Court and a dismissal of the action was entered. Pursuant to the terms of the 2005 Settlement Agreement, the MCPS Board agreed to the development of new sex education lessons, condom use video and condom use lesson which would be reviewed by a newly appointed committee that included representatives from PFOX and CRC.

Section 2 of the 2005 Settlement Agreement presumes that future revisions or Additional Lessons would be viewpoint-neutral in keeping with Judge Williams’ ruling. It also states in part that MCPS agrees that the revisions to the Grade 8 and Grade 10 Comprehensive Health Education curriculum as well as associated resource materials, **will not discuss religious beliefs.... This would not preclude a general acknowledgment that there may be differing religious views** on some of the topics discussed in the Revisions without discussion of what those differing beliefs are....” (2005 Settlement Agreement, p.20).

POST SETTLEMENT AGREEMENT HISTORY

On April 21, 2006 the MCPS BOE approved a Health Curriculum Framework which was to provide the foundation for the development of curriculum blueprints and instructional guides by MCPS Superintendent and his staff. The MCPS Superintendent thereafter prepared a draft curriculum and instructional guides. Around that time, another CAC was formed (“Second CAC”) to work in an advisory capacity to review the work of the MCPS Superintendent and submit comments and propose revisions.

As more fully articulated in the attached affidavits of Dr. Ruth Jacobs (Appellants' Exhibit F), Mr. Sprigg (Appellants' Exhibit G), and the affidavit of a Second CAC member selected from the public at large Maria Pena Faustino (Appellants' Exhibit H) (who had no membership or connection to CRC or PFOX), the overwhelming majority of the members eventually selected by the MCPS Board to serve on the Second CAC are of the moral view that fully endorses homosexuality and some were openly hostile to the several CAC members who took a contrary, albeit tolerant and truly concerned, moral view. Many on the Second CAC are related to the abortion industry as well, certainly a beneficiary of increased teen sexual activity.

Efforts of Dr. Jacobs, Mr. Sprigg, and Ms. Faustino to make contributions to the CAC or to find a response to their views from the MCPS Board and MCPS Supervisor were ineffective as shown in those affidavits. Efforts by Dr. Jacobs to ensure that homosexual students and other students would be fully informed of the very serious health risks of homosexual sexual practices were totally rebuffed. In short the Second CAC represented the views of one viewpoint in its majority and the minority had no voice. Evidence submitted by those minority members was ignored or voted down or members refrained from voting thereby not reaching a quorum. (See aforesaid Affidavits). For example, Dr. Jacobs submitted a Petition to the MCPS Board signed by 163 local medical doctors urging MCPS to disclose the high health risks of anal intercourse (said Petition now has 273 signatures and is attached as Exhibit I), MCPS personnel lost it. The MCPS Board web cast shows Dr. Jacobs giving the petition in a bright green folder to an MCPS employee. The petition was never permitted to be presented in full to the Second CAC and was effectively ignored by the MCPS. (See Dr.

Jacob's Affidavit). In November 2007 Ms. Faustino wrote a speech to the MCPS concerning her experience of bias on the part of the Second CAC (Faustino letter attached to Faustino Affidavit).

Upon request by the CRC, psychologist Dr. Dean Byrd, PhD, MBA and MPH, prepared a letter critiquing the Additional Lessons dated October 31, 2006 (attached hereto as Appellants' Exhibit J) which notes serious flaws in the Additional Lessons and which was provided to the MCPS BOE prior to January 9, 2007 with no response.

The three Second CAC minority members, Appellants CRC and PFOX and, additionally, Maria Pena Faustino, wrote an independent report of their views which report was entitled "Minority Report," dated December 12, 2006, and is attached hereto as Appellants' Exhibit H. This report details concerns that a moral viewpoint on homosexual conduct is being presented and on an exclusive basis. It further details the many defects in the proposed Additional Lessons, concerning the fact that the pronounced desire to portray homosexual conduct in an exclusively positive light was causing health risk information vital to students' health to be suppressed. There was no response to said Minority Report. Rather, the Second CAC refused to accept it.

On January 9, 2007, the BOE approved the Additional Lessons for field testing and later evaluation during the spring of 2007. These Additional Lessons add certain lessons to the existing curriculum on Health Education and instructional materials for the 8th Grade Lesson, with said additional lessons being entitled "Respect for Differences in Human Sexuality" (with the additional wording that "Sexual Orientation is innate as further described below); and add certain lessons to the existing the 10th grade lessons with the added lessons being entitled "Respect for Differences in Human Sexuality" and

adds the use of a Condom Use video and a Condom Use lesson for the 10th grade. The additional wording in the 8th grade lesson was never mentioned before and was never submitted to the Second CAC for review. It was submitted by MCSP upon a spontaneous recommendation by the MCPS staff. Nonetheless, the BOE approved the last-minute additional wording to be added to the 8th Grade Lesson. This additional wording instructs teachers to tell students that “Sexual orientation is innate and a complex part of one’s personality.” Further, the word “innate” would be included in the vocabulary list for both lesson one and two in that grade. The definition for “innate” would come from Webster’s Dictionary and, although that definition was not provided at the time the BOE voted to approve the Additional Lessons, information now obtained from MCPS defines innate in its usual meaning: “Innate determined by factors present in an individual from birth.” (See Appellants’ Exhibit B). Despite the fact there is no sound scientific basis for such an assertion.

Appellants Arguments:

First Amendment Violations

United States Constitution Bill of Rights First Amendment (Establishment Clause, Freedom of Speech, Freedom of Religion)

The First Amendment to the Constitution of the United States provides in relevant part as follows:

. . . no law [shall be made] respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...

The Additional Lessons Violate 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 are 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 focused “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.

Judge Alex Williams in the Federal Lawsuit, with respect to the Free Speech Viewpoint discrimination issues raised by the First Revisions stated:

“Viewpoint discrimination consists of state action in which “there is no ban on a general subject matter, but only on one or more prohibited perspectives.” *Warren*, 988 F. Supp. at 966 (citing *Rosenberger v Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831 (1995)). When government restrictions “target not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.” *Rosenberger*, 515 U.S. at 829 (“the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”)

In this case, Defendants open up the classroom to the subject of homosexuality, and specifically, the moral rightness of the homosexual lifestyle. However, the Revised Curriculum presents only one view on the subject – that homosexuality is a natural and morally correct lifestyle – to the exclusion of other perspectives. Indeed, the Revised Curriculum advises teachers that the information concerning homosexuality is to be presented to students as facts and that “no additional information, interpretation or examples are to be provided by the teacher.” As such, the Court is deeply concerned that the Revised Curriculum violates Plaintiffs’ free speech rights under the First Amendment, and believes that Plaintiffs’ free speech allegations merit future and further investigation. (Opinion at 20-21) (emphasis added).

What has changed? Here the MCPS again has a carefully scripted lesson plan which “opens up the classroom to the subject of homosexuality and, specifically the moral rightness of the homosexual lifestyle.” And, once again, the lessons “present only one view of on the subject – that homosexual conduct is a natural and morally correct lifestyle- to the exclusion of other perspectives.” And, once again, no real deviation is permitted – nor would there be time for any substantial deviation given the material that has to be covered in the time limits of the class. Once again, MCPS has foreclosed the

acquisition of knowledge as well as set up a system that compels students to speak. The Additional Lessons prohibit discussion of homosexuality, bisexuality, lesbianism, sexual orientation and gender identity; instead, they require teachers to provide a biased definition of those terms and does not convey the message that heterosexuality is the norm. The Additional Lessons convey the message that homosexuality and cross dressing is as normal as heterosexuality, but fails to inform students of the very serious and unique health risks associated with same-sex sexual activity or that there are recognized contrasting points of view on the subject. Appellees' are intentionally stifling the acquisition of accurate information.

Appellees 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. And it is clear that the opt-out is not really an option for students who want to avoid looking conspicuous; instead, it is a traumatic matter which is no option at all. (See Jamison Affidavit, Appellant's Exh. K). Compelled speech is as offensive to the First Amendment as stifled speech.

Appellees' actions also constitute impermissible viewpoint and content 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).

Appellees 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 or transgender is as normal as being left-handed. Appellees 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 very serious health risks associated with same-sex sexual conduct. The First Amendment prohibits such viewpoint based discrimination.

The Additional Lessons make value statements concerning homosexuality, including unverified statements that homosexuality is innate and that students who show an extreme or irrational aversion to homosexual behavior are practicing the unscientific and highly ideological term “homophobia.” Appellees failed to show respect for varying opinions on this controversial issue by rejecting Appellants’ recommendation that the curriculum include the statement that “Civil expressions of disapproval of homosexual behavior out of sincere religious, moral, or health-related concerns should not be labeled as homophobia.” The dictionary definition which MCPS chose to include instead is

inadequate to protect freedom of thought and freedom of speech. In contrast, Appellee refused to include the term “heterophobia,” although they approved the term ‘homophobia.’²

The Additional Lessons recommend students to GSA (Gay Straight Alliance) school clubs, but rejected Appellants’ request for inclusion of GSC (Gay to Straight) school clubs. The Additional Lessons include personal stories celebrating the lives of transgender, homosexual, and bisexual students, but rejected Appellants’ submission of the story of Charles, an ex-gay student. The First Amendment prohibits such viewpoint based discrimination.

The Additional Lessons Violate the Free Exercise of Religion Clause

Right to Free Exercise

It is well settled that the First Amendment the United States Constitution protects a person’s free exercise of religion included specifically, “the right to direct the religious upbringing of one’s children.” *Bienfeld v. Bennett-White*, 605 A2d. 172, 181-183 (Md. Ct. Spec. App, 1992). In that case the Court of Special Appeals quotes approvingly *Thomas v. Allegheny County Bd. Of Education*,² 51 Md.App. 312, 316 (Md. 1982) for the principle that the First Amendment protection to free exercise of religion “bars government regulation of religious beliefs” and also bars “interference with the dissemination of religious ideas”. *Id*, 605 A2d. at 183. In keeping with established doctrine, the court recognized that there could be valid justification for state interference which outweighed the free exercise claim. Quoting the *Thomas* case, the court stated that:

² Plaintiffs had submitted the following term for inclusion in the curriculum: Heterophobia – the fear or hatred of the ex-gay community and homosexuals who seek to fulfill their heterosexual potential.

To meet the constitutional mandates established by the free exercise clause, the application of a rule either (1) must not interfere with, burden, or dent the free exercise of legitimate religious belief or (2) must be justified by a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause. *Id.*, at 182.

Further, there is authority for the proposition that when parents are asserting a free exercise claim in connection with their children's education, added weight is given to the parent's claims. The fundamental interest of parents to direct the education of their children when coupled with a free exercise of religion claim has been recognized as being stronger than a free exercise claim unconnected with any parental right, in fairly recent *dicta* by the U.S. Supreme Court. *See Employment Div. Or. Dept. Of Human Res. v. Smith*, 494 U.S. 872, 882-883 (1990). *Dicta* in that decision recognizes the coupling of such an interest with such a right may bar the application of even a "neutral generally applicable law." *Id.*, at 882-883.

In this case the Appellants seek to protect their legitimate, albeit unpopular, religious belief that views the homosexual sex acts as sinful³ from being refuted to their children in classes teaching the Additional Lessons. This view rests on a long standing religious tradition, and counts as its adherents many hundreds of thousands of followers in many Evangelical and some other Protestant Christian denominations, Mormons Catholics, Muslims, Orthodox Jews and others.

No Legitimate State Purpose

No legitimate state purpose outweighing Appellants' constitutional rights can be shown. Clearly it is not a legitimate state purpose to promote one particular moral view

³ For example, homosexual conduct is decreed sinful in the Christian Bible as is cheating on one's taxes, gossip, or not loving your enemies and those who persecute you.

over another in a controversial moral matter if that is the primary purpose or effect of the government action. See *Truitt v. Board of Public Works*, 221 A. 2d 370 (Md. 1966).

Here the Additional Lessons present the homosexual lifestyle in a totally rosy light and make several mentions of anal intercourse while omitting very serious medical information on the health risks of homosexual sexual practices of anal intercourse (see Affidavit of Dr. Jacobs, Appellants Exhibit F; see references to anal intercourse in Condom Lesson and Video). This is solid proof that there is no legitimate government interest deserving to outweigh Appellants' free exercise claims.

MCPS cannot advance its own religious views surreptitiously when it endangers the students. The Additional Lessons discuss condoms as being effective barriers against disease transmission (HIV/AIDS and STDs) but fail to warn the students that condoms have not been shown to be effective in preventing disease in anal intercourse at the same rate as in vaginal intercourse is proof that the government interest in protecting the health of its students militates against these lessons. (See Dr. Jacob's Affidavit, Exh. F).

Additionally, these lessons discuss both vaginal and anal sex but make no mention to the students that a single episode of anal intercourse is 20 times more likely to transmit HIV/AIDS than a single episode of vaginal intercourse. (Dr. Jacob's Affidavit, Exh. F).

This, again, is solid proof that the government interest must be in protecting the students from these lessons.

Danger to children can even defeat a parent's right to have custody of her children when her religious views are seen as being advanced in a harmful manner. In the case of *Bienfeld v. Bennett-White*, 605 A2d. 172, 181-183 (Md. Ct. Spec. App, 1992) the Maryland Court of Special Appeals upheld the decision of a chancellor removing

children from the custody of a mother where the Chancellor had based his decision, in part, on his findings that the mother's religious views and training of her children was causing unhealthy emotional turmoil in her children stemming from conflict between the mother and father caused by the mother's strenuous efforts to see that the children were brought up in her religion. *Id* at 182. The mother appealed this on the basis, *inter alia*, that the chancellor's decision was direct interference with her right to the free exercise of her religion- specifically the right to bring her children up in her religion. *Id* at 183. The court ruled that even assuming the Chancellor's decision constituted an interference with the mother's right to free exercise of religion; the custody order was justified by the government's state interest in protecting the safety of the children. *Id* at 183. The court stated:

...even assuming the chancellor did interfere with the mother's right to free exercise of religion... we would conclude that such interference was justified. As we have already stated, **courts may not ignore evidence of a parent's religious views or practices which endanger the secular welfare of a child. While a parent has the right to inculcate religious beliefs in a child, that right is not immune from interference where, as here, there is evidence that the chosen method of such inculcation poses a threat to the child's secular well-being. Id, at 183.**

If a parent can lose custody of their children by teaching them legitimate religious views in a situation which causes them anxiety, should not the MCPS be stopped, like that custodial parent, from also causing the students health risks as shown above? HIV/AIDS are a serious matter and MCPS students deserve to see the whole picture of homosexuality, especially the very serious health risks. Also we note that there is a real prospect of anxiety being generated during these Additional Lessons to students holding

moral views opposing homosexual sexual practices. Why can't the school come up with a lesson plan that is safe, reasonable and fair to everyone?

The Additional Lessons Violate the Establishment Clause

The Additional Lessons violate the Establishment Clause because the government is directly involved in preferring one set of religious beliefs over another. In *Larson v. Valence*, 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 . . . affect no favoritism among sects . . . and that it work deterrence of no religious belief.” *Larson*, 456 U.S. at 246.

Can it be contended that a moral view is not being taken by the Appellee? No. The First Additional Lessons on their face promote homosexual conduct as normal and morally unobjectionable. This is a clear case of a government action made for the primary purpose of promoting certain religious beliefs and as such, where there is no proper secular purpose, it offends the Establishment Clause. *See Truitt v. Board of Public Works*, 221 A2d 370, 387 (Md. App. 1966). “Tolerance” is not a valid secular purpose. MCPS operates under a irrational definition of tolerance. MCPS believes that anyone who disagrees is “intolerant.” This view itself is “intolerant” by MCPS standards and is

circular reasoning. Members of CRC have been called “judgmental” and, in response ask if this is the speaker’s judgment? Such thinking is not rational.

Replacing the overt religious discrimination directed at identified religious sects with covert politically correct code talk does not avoid the unconstitutionality of the lesson. We note that the views expressed with the Additional Lessons are clearly in the realm of morality, and can be identified specifically with the religions mentioned in the First Revisions and generally with the morality of Secular Humanism (identified as a “religion” by Justice Black in fn.11, *Torcaso v. Watkins*, 367 U.S. 388 (1961)).

Significantly, in its memorandum opinion, Judge Williams said, in determining that an establishment clause violation was credible enough to deserve full litigation and the issuance of an injunction, described the courts’ concerns with the First Revisions in words which are just as true of the Additional Lessons:

In this case, Defendant opens up the classroom to the subject of homosexuality, and specifically, the moral rightness of the homosexual lifestyle. However, the Revised Curriculum presents only one view on the subject – that homosexuality is a natural and morally correct lifestyle – to the exclusion of other perspectives.” Exhibit D at 20.

Being sanctioned with a federal injunction, the MCPS agreed in Section 2 of the 2005 Settlement Agreement that future revisions or Additional Lessons would **not** discuss religious beliefs.... This would not preclude a general acknowledgment that there may be differing religious views on some of the topics discussed in the Revisions without discussion of what those differing beliefs are.... One clear look at the Revisions shows that nothing has changed. MCPS is still advocating the moral viewpoint that homosexuality is a natural and morally correct lifestyle. In fact it is worse. Where before Appellees at least acknowledged that there was diversity of moral views on the subject, it

now simply and directly omits the acknowledgment that there is any diversity of moral views entirely, As such, this is a clear case of the government impermissibly teaching religion.

In the Additional Lessons, any idea that there might be a legitimate moral offense to homosexual conduct is gone. Now, any opponents of the MCPS' moral view, that being anyone who takes a negative moral view of homosexual conduct, are castigated in the Additional Lessons as "prejudiced" . . . "uneducated" . . . "homophobic" and engaging in "stereotyping." Appellants are even blamed for the suicide rate and other ills suffered by homosexuals in society. This is patent throughout the Additional Lessons. It is perhaps most clearly demonstrated in the vocabulary definitions used in the lesson plans:

First is the definition of "Prejudice":

**"Prejudice - "preconceived opinion, not based on reason or experience; ..."
Lesson 10.1, at 2.**

Where does faith figure in here? It is belief (opinion) based on neither reason nor experience. It is belief (opinion) based, first and foremost, on faith. Since it is not based on reason or experience, it is, by MCPS definition, prejudice. The clear message in the context of the Additional Lessons:

Next, the definition of "Homophobia":

**"Homophobia is Used broadly to describe any range of negative attitudes toward or about gays, lesbians, bisexuals or transgender people.... Like any other prejudice, homophobia is learned."
Lesson 10.1 at 8.**

It would be easy to see how a student could deduce that people who believe that homosexual conduct is immoral and sinful have a “negative attitude” toward homosexuals and are therefore homophobes. Clearly there is a failure here to exclude people of religious faith morally opposed to homosexuality from this definition. We note also that the term “phobia” relates to extreme fear, not intolerance. As well demonstrated in a highly respected book written by two eminent psychologists long supportive of the homosexual community, the term “homophobia” is now being used to negatively stereotype persons opposed to the homosexual lifestyle. As such its scientific validity is being compromised. See, Destructive Trends in Mental Health, Wright and Cummings, Routledge, New York, 2005, at 65-83.

There simply isn’t any legitimate place in the MCPS paradigm for religious conservatives. No, by lumping them in with people who really are violent toward homosexuals, MCPS is teaching that there is only one good view on this. In fact, MCPS is teaching INTOLERANCE when it teaches that people who *morally disagree with the homosexual lifestyle* are homophobic⁴ and prejudiced. In so doing these lessons are also negatively stereotyping people opposed to the active homosexual lifestyle.

Does it matter that while the conservative religious groups believes that homosexuality is sinful, they also believe that homosexuals, like every other human being on earth, deserve to be treated and looked upon with good will, with respect and with real tolerance? Does it matter that many of them have friends and relatives who they are close to and who they care deeply about despite their differing moral outlook?

Wouldn’t the students benefit from being taught that *real tolerance* is **not born of moral**

⁴ The term “homophobia” is not a scientific word. This term is used by the politically correct to beat down and intimidate those who disagree with their viewpoint.

agreement, but **of acceptance** of others *despite moral disagreement*. True tolerance includes respect and good will, friendship and commonality based on our status as fellow humans created in the image of God, especially **when** we hold radically different moral views. As such it is the product of efforts toward wisdom, humility and good will. People who believe that homosexual conduct is immoral can still be, and frequently are, tolerant of homosexuals, and, more to the point frequently have them as their dear children, friends and relatives. Yes, real tolerance means not throwing insults back and forth, no refusals to listen to the others' point of view, and no calling the other side bad names, including words insulting to homosexuals, and words like "homophobe" and "prejudiced" against people who hold a contrary moral view.

Finally, we note that teaching tolerance could have been just as easily done in a non-offensive manner if the Appellees had not entrenched themselves so firmly in the moral rightness and naturalness of homosexuality, but simply and truly promoted tolerance, and provided students with sufficient medical warnings, and not castigated those people with religious objections to its practice

Violation of Equal Protection of the Laws Guaranteed Under the U.S. Constitution

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 intent to discriminate on the basis of impermissible considerations. Plaintiffs easily satisfy their burden.

The Additional Lessons treat certain MCPS students differently. Appellees 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 or gender confusion, while, on the other hand, openly accepting and embracing those who have accepted, or are acting out, on their same-sex attractions and gender confusion. Although Appellees 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. Appellees define "sexual orientation" in the Additional Lessons to include homosexual, lesbian, bisexual, transgender, questioning and intersexed, but refused to include reference to "ex-gay." Appellees 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. *The message is loud and clear – ex-gays and those overcoming same-sex attraction are not valued and respected in MCPS schools.*

Appellees 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 MCPS has no legitimate basis for implementing the revised curriculum. In 2002, when the MCPS Board first 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 MCPS view that non-heterosexuals can live healthy and happy

lives, “fostered . . . the emotional distress and physical violence” some of the students suffered. Thus, *Appellees’ 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 for the sake of argument that MCPS stated goal was premised on factually accurate information, the Additional Lessons directly violate those goals. Appellees adopted a curriculum that isolates certain students based on their “sexual orientation.” In MCPS own words, their failure to reassure and support ex-gays and those 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, MCPS cannot articulate a legitimate basis for the curriculum because it is full of factual inaccuracies. State law and district policies require all curriculums to be factually accurate. *See* COMAR 13A.04.18.03 (C) (2) (review proposed curriculum for factual content). MCPS is also under an obligation to present opposing viewpoints on controversial issues. *See* JFA-RA (“assure the presentation of a variety of viewpoints on controversial topics”). Its refusal to include factually accurate information concerning the substantial health risks associated with homosexual and transgender sexual activity, including materials from the U.S. Centers for Disease Control, violate Appellees’ obligation to present factually accurate information.

Third, MCPS 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 Additional Lessons will create separate educational opportunities for 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, thus such an opt out is not realistic and precludes graduation) (See Exhibit V *Washington Examiner Article*, Dena Levitz), 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, i.e. that they are homophobic. Attached are 96 Affidavits of concerned parents concerning this problem. (Exhibit L attached).

Maryland Constitutional Violations

Maryland Constitution Bill of Rights Article 36 provides as follows in relevant part:

Article 36. Freedom of Religion

... All persons are equally entitled to protection in their religious liberty; wherefore, no person ought to any law to be molested in his person....on account of his religious persuasion....;

....nor ought any person to be compelled to frequent, or maintain....to maintain,...any ministry...;

Acts 1970, c. 558, ratified Nov 3, 1970.

A simple reading of Article 36, in light of the foregoing constitutional principles and facts, reveals clear constitutional violations:

1. The students are not being equally protected in their religious liberty.
- 2 Students are being molested on account of their religious beliefs by being forced with the NO-CHOICE of either leaving the class and sitting in a library doing independent work (see Affidavit of Susan Jamison, Ex.K) or having to listen to negative stereotyping and epithets (homophobe and prejudiced) being directed at them as members of a group holding a moral view antithetical to the viewpoint espoused by MCPS. The force of this pressure and molestation must be viewed as exceedingly great considering the weight held by teachers in a classroom, the student's strong interest in staying on good terms with the teacher, and the peer pressure which is exhibited toward unpopular and conservative moral views.
3. Forcing students to attend classes where the Additional Lessons are taught is causing them to "frequent" a "ministry" and is therefore unconstitutional.

Code of Maryland Regulations ("COMAR") EDUCATION

A. Section 13A.01.05.0, Chapter 05 Appeals to the State Board of Education

.05 Standard of Review

- A. General. ...the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.
- B. A decision may be arbitrary or unreasonable if it is one or more of the following:
 - (1) It is contrary to sound educational policy;
- C. A decision may be illegal if it is 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 other error of law.

E. State School Laws and Regulations. The State Board shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations.

We begin by noting that the Appellees are not free to interpret COMAR as they wish but, instead their discretion, and most particularly their discretion over the curriculum is fully subject to, and canalized by, the standards set forth in COMAR. See *Truitt v. Board of Public Works*, supra, at 379.

Appellants contend as follows:

1. The Additional Lessons, insofar as they clearly teach morality for all the reasons previously discussed, directly contravene the clearly enunciated policy of Section 13A.04.04.01 Chapter 04 Religious Education which provides that religious education is not to be part of the State's school curriculum.
2. Pursuant to the goals of affording multicultural education as set forth in COMAR Section 13A.04.05, diversity of religion is specifically cited for school inclusion and materials are to be selected which "avoid stereotyping, discrimination, bias, and prejudice."

For all the reasons previously discussed, the Additional Lessons defeat the multicultural goal of diversity of religion (insofar as only one religious view is promulgated) and fail to avoid, and instead promote, stereotyping, discrimination, bias, and prejudice

3. Pursuant to COMAR Section 13A.04.18.01, each local school system “shall offer a comprehensive health education program in grades 9-12 that shall enable students to meet graduation requirements and to select health education electives. The failure of Appellees to offer the Alternative Lessons in a health education elective course violates this provision. Furthermore, pursuant to COMAR Section 13A.04.18.03 (B) ((3) (b) (2) (b), “focus area three areas”, including specifically the topic of “sexual variations” are to be offered in an “identifiable elective course.” By placement of these Additional Lessons in mandatory courses, rather than as part of an identifiable elective course, the Appellees are violating these provisions. The opt-in program, which is demonstrably hostile to the student (See Jamison Affidavit Ex K), does not cure this defect. The standard is clear: the MCPS has, no discretion to refuse to conform to it. See *Truitt*, id.

4. Pursuant to COMAR Section 13A.04.18.03 (B) (3): “Erotic techniques of human intercourse may not be discussed. Discussion of anal and oral sex in the condom lessons and video clearly and patently violate this standard.

5. The Maryland Comprehensive Health Education Program goals are set forth in

COMAR Section 13A.04.18.02(C) which provides in relevant part:

To adopt sound personal health practices and makes appropriate use of health care products, services, and community resources which includes to:

(1) Evaluate personal health habits.

The introduction of the topic of anal intercourse but concomitant failure to provide information on risk of disease transmission during anal intercourse, including risk with condom use, is inconsistent with the goal and therefore contrary to sound educational

policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors, Appellants Exhibits F and I.) Also, the introduction of the topic of homosexuality without disclosure of the very serious health risks and other adverse factors associated particularly with homosexual sexual practices is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors, Appellants Exhibits F and I.) The Condom Lesson creates a misleading impression that condoms are similarly effective in preventing disease transmission in anal intercourse episodes as in vaginal intercourse and is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Affidavit of Dr. Jacobs, Appellants' Exhibit F).

6. The Maryland Comprehensive Health Education Program goals are set forth in

COMAR Section 13A.04.18.02 (E) which provides in relevant part:

To develop an understanding of behavior and skills that promote safe living in the home, school, and community, and which includes to:

(1) Identify and attempt to eliminate hazardous situations and prevent injuries...

(3) Analyze risk taking behaviors and their consequences,

The introduction of the topic of anal intercourse but concomitant failure to provide information on risk of disease transmission during anal intercourse, including risk with condom use, is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors, Appellants Exhibits F and I.) Additionally Appellees introduction of the topic of homosexuality without disclosure of the various health risks and other

adverse factors associated particularly with homosexual sexual practices is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors, Appellants Exhibits F and I.) The Condom Lesson creates a misleading impression that condoms are similarly effective in preventing disease transmission in anal intercourse episodes as in vaginal intercourse and is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Affidavit of Dr. Jacobs, Appellants' Exhibit F).

7. The Maryland Comprehensive Health Education Program goals are set forth in

COMAR Section 13A.04.18.02 (F) which provides in relevant part:

To recognize the family as a basic unit of society that perpetuates life and promotes healthy growth and development, which includes to?

(8) Develop and use skills for making responsible decisions about sexual behavior based on its consequences for the individual and others...

The introduction of the topic of anal intercourse but concomitant failure to provide information on risk of disease transmission during anal intercourse, including risk with condom use, is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors, Appellants Exhibits F and I.) Additionally Appellees introduction of the topic of homosexuality without disclosure of the various health risks and other adverse factors associated particularly with homosexual sexual practices is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors,

Appellants Exhibits F and I.) The Condom Lesson creates a misleading impression that condoms are similarly effective in preventing disease transmission in anal intercourse episodes as in vaginal intercourse and is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Affidavit of Dr. Jacobs, Appellants' Exhibit F).

8. Section 13A.04.18.04 (A) HIV/AIDS Prevention Education announces a clear policy declaring that AIDS is a "major health problem for which no cure or effective treatment has been found: and that "AIDS education is critical in preventing the spread of the human immunodeficiency virus (HIV) that causes AIDS... (6) Pursuant to instructional guidelines developed by the State Department of Education and as appropriate for the age of the students, curricular topics shall include:

(c) Means by which HIV is transmitted....

(e) Methods for prevention of the spread of HIV/AIDS; and

The introduction of the topic of anal intercourse but concomitant failure to provide information on risk of disease transmission during anal intercourse, including risk with condom use, is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors, Appellants Exhibits F and I.) Additionally the introduction of the topic of homosexuality without disclosure of the various health risks and other adverse factors associated particularly with homosexual sexual practices is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Dr. Jacobs Affidavit and Petition Signed by 273 Area Medical Doctors, Appellants Exhibits F and I.) The Condom Lesson creates a misleading impression that condoms are

similarly effective in preventing disease transmission in anal intercourse episodes as in vaginal intercourse and is inconsistent with said goal and therefore contrary to sound educational policy and arbitrary and capricious. (See Affidavit of Dr. Jacobs, Appellants' Exhibit F).

9. In developing the Lesson Plans, Appellees use information derived from a gay advocacy group in order to attempt to provide "statistics" to students on the number of incidents of anti-homosexual behavior in public schools.⁵ This gay advocacy group, Gay Lesbian and Straight Education Network (GLSEN), relies on a small internet survey of gay youth that it conducted in 2003 in order to promote biased statistical data favoring a high incident of harassment against gay, bisexual and transgender students. GLSEN's conflict of interest in conducting its own survey is self-evident. GLSEN's survey was not published in any peer-reviewed professional journal and its methodology remains suspect. MCPS rejected Appellants' submission of statistics derived from a neutral viewpoint source such as the U.S. Department of Education, which contradicts the GLSEN statistics.⁶ By inviting an advocacy oriented outside speaker like GLSEN into the classroom, Appellees converted the classroom from a non-public forum into a limited public forum.⁷ Regardless, regulations on both non-public and limited public forums must be viewpoint neutral, and that is not the case here. Appellees' actions constitute impermissible viewpoint-based and content-based restrictions of constitutionally protected expression. Further, such actions are also contrary to sound educational policy.

⁵ Page 9, 10th grade lesson 1. The GLSEN statistics are used in the curriculum as statements of fact for students to memorize and repeat.

⁶ Institute of Education Sciences, U.S. Department of Education: National Center for Education Statistics, Indicators of School Crime and Safety 2005.

⁷ *Citizens for a Responsible Curriculum and Parents and Friends of Ex-Gays & Gays v. MCPS*, 2005 WL 1075634 (D. Md. 2005) at p. 10, n 4.

10. Appellees’ refusal to include any mention of former homosexuals is arbitrary or unreasonable. It also violates Appellees’ obligation to present opposing viewpoints on controversial topics. MCPS policies require it to present opposing viewpoints on controversial issues.⁸ Further, state law mandates that such instruction be objective.⁹ The Additional Lessons teach students about homosexuals, bisexuals, lesbians, transgenders, ‘coming out’ for gays, gender identity, homophobia, and intersexual, but not about ex-gays. MCPS rejected any mention of the ex-gay community yet define and support every other sexual orientation (intersexed, homosexual, bisexual, transgendered, etc.) in its curriculum.¹⁰ MCPS refused to mention that heterosexuals include former homosexuals. Appellees also refused to include the term ‘heterophobia,’ although they approved the term ‘homophobia.’

11. Appellee’s own non-discrimination policies prohibit disparate treatment and require staff to promote a positive learning environment that holds mutual respect for others.¹¹ The Additional Lessons treat certain MCPS students differently. Although

⁸ JFA-RA requires teachers to “[a]ssure the presentation of a variety of viewpoints on controversial topics within the limitations imposed by state or county curriculum documents.” *See* MCPS Policy JFA(III)(F)(1)(a)(1).

⁹ *See* COMAR 13A.04.18.03(B)(3)(b).

¹⁰ Defendants rejected the following definition submitted by Plaintiffs: Ex-Gay -- “Someone who once experienced same-sex attractions, but now chooses not to act on those feelings, not to embrace a homosexual identity, and/or chooses to affirm and develop his or her heterosexual desires.” Source: National Education Association (NEA) Ex-Gay Educators Caucus, 12097 E. Washington St. 1E, Colton, CA 92313.

¹¹ MCPS Policy ACB—Nondiscrimination

A. Purpose

“To affirm the Board of Education’s commitment to maintaining an environment where all students and staff members conduct themselves in a manner built on mutual respect”

“To affirm the Board of Education’s position that it regards all acts of hate/violence and illegal discrimination to be unacceptable and intolerable and in particular those based on race, color, national origin, religion, gender, age, marital status, socio-economic status, sexual orientation, physical characteristics or disability”

MCPS Policy ACA—Human Relations

MCPS has non-discrimination policies that prohibit discrimination based on sexual orientation, blatantly refuse to treat equally ex-gays and those overcoming same-sex attractions.¹² 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.”¹³ Yet contrary to its own Instruction, MCPS includes homosexual, lesbian, bisexual, transgender, questioning and intersexed in the curriculum, but refuses to include reference to ‘ex-gay’ or former homosexual despite the presence of an ex-gay organization on the committee. MCPS approved for inclusion in the Additional Lessons the other sexual orientation groups presented by the other committee members. Its actions are arbitrary or unreasonable.

12. MCPS maintains that Maryland state curricular requirements mandate that it teach “sexual variations,” and that said sexual variations be taught as “sexual orientation.”¹⁴ MCPS instructs students that homosexual orientation is innate and inborn, while refusing to include reference to the ex-gay community despite factual evidence of

2. Commitments

a) Promote an atmosphere of respect and nondiscrimination

Each MCPS employee shall be responsible for establishing and maintaining an educational atmosphere in which students and staff can develop attitudes and skills for effective, cooperative living, including:

- (1) Respect for the individual regardless of race, color, national origin, religion, gender, age, marital status, socio-economic status, intellectual ability, sexual orientation, physical characteristics, or disability
- (2) Respect for cultural and language differences
- (3) Respect for personal rights of others
- (4) Respect for the right of others to seek and maintain their own identities with dignity

MCPS Policy ACA-RA

Discrimination is either treating one person unfairly over another, or disparate treatment, based on legally identified factors unrelated to their ability or potential, such as race, color, gender, religion, ancestry, national origin, marital status, age, disability, or sexual orientation.

¹² *Id.*

¹³ *See* Exhibit N for MCPS Board Memorandum Discussion/Action dated July 27, 2005.

¹⁴ *See* COMAR 13A.04.18.03(B)(3)(c)(iii).

their existence and repeated appearances before the school board by ex-gays and former transgenders.¹⁵ MCPS tells gays, lesbians, transgenders, and bisexuals that their “sexual orientation” is healthy and normal, while denying the existence of other sexual variations such as those who are ex-gay or attempting to overcome unwanted same-sex attractions or gender confusion. MCPS teaches students that it is normal to change your birth sex (transgender), but that it is not normal to change your unwanted same-sex attractions (former homosexual) because sexual orientation is innate from birth. Appellees refuse to include inclusive information to students that heterosexuals include former homosexuals, despite the presence of an ex-gay group on the committee as representative of the community. MCPS discriminates against former homosexuals while favoring other sexual orientations and relegate ex-gays to second class citizenship. It picks and chooses which sexual orientations to favor, in violation of its own Instruction to the curriculum committee and non-discrimination policies which mandate tolerance and non-discrimination for all sexual orientations, and in violation of state law which requires that sexual variations be taught and not just the ones Appelles favor. MCPS actions are arbitrary, unreasonable, or exceed its statutory authority.

13. The Additional Lessons were adopted, at least in part, for the purpose of eliminating any discrimination or hostility toward people based on their sexual orientation. The Additional Lessons are entitled "**Respect for Differences in Human Sexuality**" and promote tolerance of homosexuals, lesbians, bisexuals, transgenders, crossdressers, and the intersexed. Yet the only sexual orientation in MCPS which receives no respect or tolerance is that of ex-gays. Three of the curriculum committee

¹⁵ There is no medical or DNA test to determine if a person is homosexuality, heterosexual, or bisexual. Sexual orientation is a matter of self-affirmation and public declaration.

members showed outright disrespect and intolerance of the ex-gay community by public emails, statements, and blogs continually written against PFOX and former homosexuals. These committee members continually stereotyped former homosexuals and misrepresented PFOX's mission to the public, the MCPS Board, and the CAC. For example, one of the CAC members, an organization named 'Teach the Facts,' compared PFOX's representation of the ex-gay community to the Klan and child molesters, despite PFOX's mission of tolerance for both ex-gays and gays.¹⁶ They also helped to organize a picket against an ex-gay conference in Montgomery County last summer where they labeled the ex-gay community a "cruel hoax."¹⁷ Another CAC member falsely claimed that ex-gays are subjected to ice baths, electric shock therapy, and viewing pornography.¹⁸ Another CAC member, Parents, Families and Friends of Lesbians and Gays (PFLAG) continually stereotyped former homosexuals and misrepresented PFOX's mission.¹⁹ Yet these same members promoted tolerance for gays, the intersexed, crossdressers, and transgenders, and most of their curriculum recommendations on tolerance for their favored sexual orientation groups were accepted by MCPS while Appellants' recommendations on tolerance for former homosexuals or former transgender individuals were rejected. Nor did MCPS eject the biased and prejudiced members from the curriculum committee, or admonish them in any way, despite Appellants' objections. Indeed, MCPS blocks student's access to PFOX's website on school computers while permitting student access to PFLAG's website. Thus,

¹⁶ See excerpts from Teach the Facts blog and Plaintiffs' letter, written by Dr. Ruth Jacobs, M.D., advising MCPS of harassment of CAC members at Exhibit O.

¹⁷ See Exhibit P for Plaintiff's June 14, 2006 letter to the editor published in the Montgomery Gazette. Plaintiff PFOX assisted in organizing the conference, which was attended by over 1,000 members of the ex-gay community and their families and friends.

¹⁸ See Exhibit Q for pertinent excerpts of email from CAC member.

¹⁹ See Exhibit R for copy of November 23, 2007, PLAG letter to the editor published in Washington Post.

Appellants' viewpoint was not seriously considered, in violation of district and COMAR regulations mandating that the MCPS Board appoint curriculum advisory committees balanced by geographic area, race, ethnicity, gender, and a range of viewpoints; and that local citizen advisory committees broadly represent the views of the community, respectively.²⁰ In this discriminatory and hostile environment, the recommendations of the CAC were biased and unreasonable.

14. In response to Appellant's FOIA request, MCPS admits that they have not received any complaints of sexual orientation intolerance or discrimination against gays, bisexuals, transgenders, or the intersexed.²¹ But former homosexuals are subjected to ridicule and prejudice within MCPS. Although Appellants and ex-gays repeatedly testified about this discriminatory and intolerant conduct, MCPS refused to include former homosexuals in its "Respect for Differences in Human Sexuality" curriculum.²² Thus the "Respect for Differences in Human Sexuality" portion of the Additional Lessons does not serve its purpose **and cannot be considered curriculum, and therefore is not entitled to deference as such.**

The "curriculum" affirms students who consider themselves "gay" or "lesbian" and boys who consider themselves girls, yet it does not even acknowledge the existence of those students or their relatives who identify themselves as former homosexuals or former transgenders. This can only be considered discrimination, pure and simple, and creates a hostile learning environment in violation of state law and district policies.²³

²⁰ See MCPS Policy BMA(C)(2)(b) and COMAR 13A.04.18.03(D)(1), respectively.

²¹ See Exhibit S for copy of MCPS letter.

²² See Exhibit T for transcript of some of the speeches made before the MCPS Board and a sample email from MCPS teachers.

²³ See COMAR 13A.01.04.03 (School Safety). All students in Maryland's public schools, without exception and regardless of race, ethnicity, region, religion, gender, sexual orientation, language,

Appellee’s’ message is loud and clear – ex-gays and those overcoming same-sex attractions are not valued and respected in MCPS schools like the other sexual orientation groups the Appellees favors, in direct violation of Appellees own non-discrimination policies and state law. Appellees decision to not include former homosexuals in its “teach respect” curriculum is arbitrary, unreasonable, or illegal.

15. Appellees voted to insert a statement in the 10th grade curriculum that “*Sexual orientation is innate and a complex part of one’s personality.*” To ensure that the students know what “innate” means, they will also be given the Webster’s dictionary definition of “innate” – “*determined by factors present in an individual from birth.*” Unlike the 10th grade curriculum, which only includes this “innate” statement, the 8th grade curriculum includes the “innate” statement along with the following excerpt:

“What causes sexual orientation? Almost certainly there is no single reason why some people are homosexual, heterosexual, or bisexual. According to the American Psychological Association, sexual orientation results from an interaction of cognitive, environmental, and biological factors.”

The statement that sexual orientation is innate and inborn, and the statement that sexual orientation results from a combination of various factors, contradict each other. Teaching

socioeconomic status, age, or disability, have the right to educational environments that are: A. Safe; B. Appropriate for academic achievement; and C. Free from any form of harassment.

State law explains that the comprehensive health education curriculum shall provide for the diversity of student needs and shall include statutorily identified goals and subgoals. *See* COMAR 13A.04.18.02

Pursuant to JFA-RA, Student Rights and Responsibilities, school staff and administration must promote a positive learning environment that is safe and holds mutual respect as an expectation. *See* MCPS Policy JFA-RA(III)(B)(1)(a)(1).

conflicting statements is unreasonable on its face, regardless of the subject matter, and thus contrary to sound educational policy.

Further, the “innate” statement was added by MCPS staff as an addition to the proposed curriculum on the day the MCPS BOE voted on the curriculum. Thus, the statement was adopted without any review from the curriculum advisory committee or citizens, in violation of their established procedures for evaluating and selecting instructional materials, district policy, and state law.²⁴

16. The Additional Lessons convey to students the factually incorrect message that homosexuality is innate or present in an individual from birth. State law prohibits the teaching of factually incorrect information.²⁵ There are no DNA or medical tests to determine if an individual is heterosexual, homosexual, or bisexual. Evidence of an individual’s sexual orientation is dependent on his or her self-affirmation and public

²⁴ POLICY IFB (C)

Citizen Review of Curricular and Instructional Materials

A. PURPOSE

To provide an opportunity for citizens to examine curriculum materials in use or proposed for Board of Education adoption and to make available to the public the textbooks now in use in the schools and those that have been recommended by the superintendent for adoption

1. Newly developed curriculum documents shall be presented to the Board of Education for consideration approximately one month prior to the date on which approval will be sought, and the superintendent of schools may extend this period to allow further time for citizen reaction to curriculum documents dealing with sensitive topics.

2. At the recommendation of the superintendent of schools, information sessions, public hearings, or other mechanisms shall be instituted to inform citizens about instructional programs and to solicit their reactions to them.

See COMAR 13A.04.18.03(C)(2). (Local school districts are required to appoint a joint committee of educators and representatives of the community that shall examine all instructional materials proposed to be used in the schools.)

See COMAR 13A.04.18.03(D)(1). (State law requires that the curriculum shall be developed by professional educators within the local school system, in consultation with a local citizen advisory committee.)

²⁵ *See* COMAR 13A.04.18.03(c)(2).

declaration, and not upon any medical test administered at birth. The Additional Lessons fail to cite any source verifying the veracity of its ‘innate’ statement.

The finding that there is no evidence that homosexuality is an immutable characteristic is in keeping with legal precedent and with conclusions reached by scientists. The Supreme Court has consistently identified as immutable characteristics such things as race, gender, or ethnic background, as well as “height or blindness.”²⁶ The Ninth Circuit Court of Appeals has held that “[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage”²⁷ Similarly, the Washington Supreme Court very recently found that there is no evidence that homosexuality is an immutable characteristic.²⁸ Gender and race are readily identifiable physical characteristics that clearly set one person apart from another. By contrast, sexual orientation has no readily identifiable physical characteristics. Medical studies publicized as “proof” of a genetic component are either methodologically unsound or misreported as to their significance. For example, in 1993, Columbia University psychiatry professors Drs. William Byne and Bruce Parsons examined the most prominent “gay gene” studies on brain structure and on identical twins. Their results were published in the Archives of General Psychiatry. They found numerous methodological flaws in all of the studies, concluding that:

There is no evidence at present to substantiate a biological theory...[T]he appeal of current biological explanations for sexual orientation may derive more from dissatisfaction with the present status of psychological explanations than from a substantiating body of experimental data.²⁹

²⁶ See *Holland v. Illinois*, 493 U.S. 474, 496 (1990); *Lockhart v. McCree*, 476 U.S. 162, 175 (1986).

²⁷ *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990).

²⁸ See *Anderson v. King County*, 138 P.3d 963, 974 (Wash. 2006).

²⁹ William Byne and Bruce Parsons, Human Sexual Orientation: *The Biological Theories Reappraised*, 50 Archives of General Psychiatry, 228-239 (March 1993).

Scientists such as Simon LeVay, who have attempted to find a genetic link to homosexuality, have been unable to do so. Mr. LeVay himself stated that, “I did not prove that homosexuality is genetic, or find a genetic cause for being gay. I didn’t show that gay men are born that way, the most common mistake people make in interpreting my work.”³⁰

Similarly, geneticist Dean Hammer, who was quoted as claiming to have found a gene that formed the basis for homosexuality, refuted that claim and stated that:

The pedigree study failed to produce what we originally hoped to find: simple Medelian inheritance. In fact, we never found a single family in which homosexuality was distributed in the obvious sort of pattern that Mendel observed in his pea plants...We knew also that genes were only part of the answer. We assumed the environment also played a role in sexual orientation, as it does in most if not all behaviors.³¹

The “twin studies” by J. Michael Bailey and Robert C. Pillard compared male identical twins, fraternal twins, non-twin brothers and adopted brothers. Messres. Bailey and Pillard reported a coordinance rate among homosexuality for identical twins at 52 percent, for fraternal twins at 22 percent, for non-biological brothers at nine percent and adopted brothers at 11 percent.³² More refined studies have shown that where one twin is homosexual, only 10 percent of the time the other twin is homosexual.³³ Since identical twins have identical genes, if homosexuality were a biological condition, then if one identical twin were homosexual, his brother would also be homosexual 100 percent of the time, not

³⁰ A. Dean Byrd, Stony Olsen, *Homosexuality: Innate and Immutable?*, 14 Regent U. L. Rev. 383, 388 (2001-2002).

³¹ Dean Hammer, *The Science of Desire* 82 (New York, New York: Simon & Schuster, 1994).

³² Byrd and Olsen, *Homosexuality: Innate and Immutable?*, at 388-390.

³³ Whitehead, *What is the Genetic Contribution to Homosexuality?*, NARTH Bulletin 22 (December 1999).

52 percent or 10 percent as the twin studies showed.³⁴ In short, there is no scientific evidence that homosexuality is genetic.³⁵

Indeed, ex-gays (former homosexuals) are living proof that homosexuality is not innate.³⁶ Several studies on the efficacy of change of sexual orientation have been published in scientific journals.³⁷ Psychologists who treat individuals in overcoming unwanted same-sex attractions can testify to the fact that the sexual orientation of a person is not an inborn or innate characteristic of that person; and that homosexuality is caused by a number of factors, including environment and experience, and is potentially changeable.³⁸

By mandating in the Additional Lessons that sexual orientation (e.g. homosexuality) is “innate,” meaning “inborn” and therefore immutable and unchangeable, and deliberately forbidding mention of any other explanation, Appellees are not adhering to facts but relying on a theory that is at odds with credible scientific evidence. Clearly, if there is any credible explanation for the underlying causes of particular sexual orientations such as homosexuality, it is that homosexuality is not “innate,” but rather is the result of complex, only partially understood factors, such as the interaction of cognitive, environmental

³⁴ See Whitehead, *The Importance of Twin Studies*, NARTH Bulletin 26 (April 2001).

³⁵ See Bronski, *Blinded by Science*, The Advocate 64 (February 1, 2000).

³⁶ See affidavit of Richard Cohen attached as Exhibit U.

³⁷ See *Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays* in the American Psychological Association journal *Professional Psychology: Research and Practice* (June 2002); *Motivational, Ethical, and Epistemological Foundations in the Clinical Treatment of Unwanted Homoerotic Attraction* in the Journal of Marital and Family Therapy, 29, 13-28 (2003); *Can Some Gay Men and Lesbians Change Their Sexual Orientation?* in the Archives of Sexual Behavior, Vol. 32, No. 5, 403-417 (October 2003); *Efforts to Modify Sexual Orientation* in Journal of Mental Health Counseling, 20, 283-304 (1998); and “*Young Women’s Relinquishment of Lesbian/Bisexual Identities Over a 5-Year Period*” in the Journal of Personality and Social Psychology, 84, 352-3649 (2003).

³⁸ See affidavits of therapists attached as Exhibit M.

and biological factors, as stated in the 8th Grade Additional Lessons. Under state law, the “innate statement” taught as fact has no place in student curriculum. In addition, MCPS Policy IFA states that a focused curriculum should be one that is “well-balanced” and “reflects current research.” That is not the case here.³⁹ Appellee’s hasty decision to insert the fictitious “innate statement” to the proposed curriculum is contrary to sound educational policy. At the very least, the “innateness” has yet to be proven, while the current studies show just the opposite. A reasoning mind could not have reasonably reached the conclusion that a highly controversial theory should be taught as fact to impressionable students.

17. Other Factors establishing that the Additional Lessons are against sound educational policy and therefore arbitrary and capricious:

A. the Additional Lessons, without exception, communicate a strongly negative stereotype of anyone whose faith beliefs are not supportive of homosexuality.

B. the Condom Lesson creates a misleading impression that condoms are similarly effective in preventing disease transmission in anal intercourse episodes as in vaginal intercourse. (See Affidavit of Dr. Jacobs, Appellants’ Exhibit F).

C. The Additional Lessons go beyond the ethic of teaching respect and tolerance and intimidate or threaten to intimidate students into moral affirmation of homosexuality.

D. The Additional Lessons negatively stereotype and negatively label students and their families who have religious convictions that define homosexual conduct as sinful.

³⁹ See MCPS Policy IFA(D)(1) and (3).

E. The Additional Lessons take the unproven and inflammatory position that the feelings of isolation which may be experienced by homosexuals and the negative behaviors exhibited by homosexuals of suicide, drug and alcohol abuse are caused by disapproval by others.

F. The Additional Lessons take a strong and exclusive moral viewpoint that homosexuality and other sexual variations should be free of all negative moral censure while at the same time teaching that people with moral beliefs that homosexual conduct is sinful are prejudiced, biased, and homophobic, and negatively stereotype homosexuals,

G. The Additional Lessons fail to teach that homosexuality correlates more strongly than heterosexuality on factors of depression, drug abuse, promiscuity, HIV/AIDS and other STDs.

H. The Additional Lessons fail to warn students that early sexual experience in homosexuality is highly correlated with increased risk of disease.

I. The Additional Lessons teach the students that sexual variation is “innate” (meaning something that one is born with which is immutable) as a scientific fact while in fact it is a theory, not a fact. Further the weight of scientific evidence refutes that theory and there is no credible study supporting such a theory. All evidence that the cause of sexual variation has not been established (except to rule out that it is innate) is caused by other factors.

J. The Additional Lessons fail to warn students that the risk of contracting HIV/AIDS and other STDs through anal intercourse has not been proven to be significantly reduced by the use of condoms and in fact contain information which is likely to mislead students

into believing anal intercourse can be made effectively safe by the proper use of a condom. (See Jacobs Affidavit, Ex. F)

K. The Additional Lessons introduce 8th graders to the concept of sexual variations despite the fact that they are not mature enough to receive instruction in this area without negative consequences and without any specific justification in COMAR which only specifies that sexual variations are to be taught in the school system (not grade specific) in optional courses. Also, encouraging children to self label their sexual identity with out parental input or support and then teach them that said identity is innate and lifelong violates sound educational policy.

L. In the 8th grade lesson, insofar as homosexuality is unscientifically defined as “attraction’ to members of the same sex, with no reference to age, or maturity, or strength or frequency of attraction, and with no reference to the component of active self-identification in sexual orientation, the Additional Lessons highly likely to confuse 8th graders and cause likely cases of spurious self-identifications into homosexuality and other non-heterosexual variations. In fact several resources contained in the First Revisions ADMITS that an attraction at that age is not indicative of homosexual orientation.

M. The Additional Lessons fail to promote tolerance and respect for homosexuals in a manner which does not obfuscate the fact that heterosexuality is the norm and that only very small part of the population is identified as non-heterosexual.

N. The Additional Lessons employment of the concept of “innate” prevents students from realizing their own potential to actively participate on a cognitive and emotional level in their own choice of sexual self-identification, even though current research and

scientific thought demonstrate the reality and validity and value of such effort and even though the concept of self-determined self-identification of sexual orientation may help interested students avoid the health risks associated with homosexual behavior.

O. The Additional Lessons bias against the potential of the individual to actively participate in the choice of his or her own sexual orientation sexual causes the further failure of the Additional Lessons to recognize and teach that both heterosexuals and homosexuals may benefit from choosing to master sexual impulse and attraction to obtain desired outcomes such as the avoidance of high risk sexual behaviors, protection of self-esteem, and the achievement and protection of a valued monogamous sexual relationship under the terms and conditions acceptable to the individual.

R. The Additional Lessons fail to promote tolerance and respect for homosexuals in a manner which does not minimize the value of self-determined sexual self-definition into monogamous heterosexuality in terms of the avoidance of high risk sexual practices associated with homosexuality and avoidance of increased risk of depression, drug addiction, partner abuse, multiple partners and poor self esteem issues associated with homosexuality.

S. The Additional Lessons, without exception, communicate a positive moral view of homosexuality and portray it as a natural and morally correct lifestyle.

T. the Additional Lessons, without exception, communicate a negative moral view of anyone whose faith beliefs are not supportive of homosexual conduct.

U. The Additional Lessons, without exception, communicate a strongly negative stereotype of anyone whose faith beliefs are not supportive of homosexual conduct.

V. The Additional Lessons included as an opt-in portion of a mandatory health education course and are not offered in or as part of an elective course. Students who are taking the mandatory Health curriculum are forced to leave their normal class to avoid it. This normally means sitting in the library by oneself doing independent study work and may mean checking in with the teacher in front of the normal class every day before going to the library. (See Affidavit of Susan Jamison, attached hereto as Appellants Exhibit K) .

W. The Additional Lessons fail to provide students with current scientific studies and current government warnings to permit them the opportunity to evaluate their sexual practices from the perspective of a fully informed person. (See Affidavit of Dr. Jacobs, Appellants' Exhibit F).

X. The Additional Lessons are entirely or nearly entirely scripted and students are not permitted to discuss the matters being taught in order to express contrary views.

Y. "Transgender" is portrayed as sexual variation when in fact transgenders are classified as having mental disorder. Transgenderism, gender dysphoria, and gender identity disorder constitute mental illnesses according to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). The Additional Lessons fail to mention this fact, despite Appellant's request for same. Instead, the Additional Lessons contain a personal story about a boy who wants to be known at school as a girl. In the lesson plan, boy calls himself "Portia," receives a new student ID identifying him as a girl, and is given a key to a private unisex restroom by the principal. The Additional Lessons fail to include information on counseling for students like "Portia" who experience gender confusion. The Additional Lessons refer to "Portia" as a "she" when the law classifies her as a "he." This forces students to acknowledge that

“Portia” is a female when he is not and creates gender confusion for our children. This is not sound educational policy.

Z. No positive vignettes are offered to reflect the experiences of former homosexuals or former lesbians or heterosexuals.

CONCLUSION OF APPEAL

In light of the foregoing facts, statutes and case law, appellants respectfully request the State Board to reverse the MCPS Board Action.

STAY REQUEST

Appellants request that the State Superintendent issue an immediate stay of all MCPS field testing of the Curriculum Additional Lessons pending this appeal. We note the discretion of the State Superintendent to do so pursuant to COMAR Section 13A.01.02.01 which provides in relevant part that the State Superintendent “shall have the authority, either at the request of the President of the State Board of Education, or on his or her own motion, to order a stay... of any action taken by any local board of education ...provided, however, that the stay be issued within 5 days of the date of the notice of the action is received by the State Board of Education from the local board...”
Id.

First, we note that, pursuant to this regulation, the State Superintendent has full discretionary power in issuing stays pursuant to this regulation on the sole basis of notice of action taken by the local board and no evidentiary hearing of any kind is required beyond notice of the offending action. The Additional Lessons on their face along with the affidavits and other evidence presented herein, satisfy the usual equitable considerations supporting the issuance of a stay: that field testing will result in

irreparable injury, including constitutional level harm; that *no substantial harm* will result from imposition of a stay to MCPS, that a stay would be in the *public interest*, and the *likelihood of success* on the merits. In this case, the facts clearly warrant a finding that there is sufficient evidence to satisfy the threshold for a stay. This Appeal can not be heard in full before the field testing is slated to occur, now set for early March 2007 (see Dr. Jacobs Affidavit, Appellants' Exhibit F). As demonstrated in this Appeal brief, equity supports a stay where the Additional Lessons being field tested will cause real harm to students, contravene sound educational policy, are contrary to COMAR in various significant respects, and, most significantly, are unconstitutional under the Constitutions of both the United States Constitution and the State of Maryland Constitution. The Additional Lessons deserve the consideration of the Board *before* they are implemented in any classroom and before it is necessary for the Appellant to seek injunctive relief in court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 7th day of February, 2007 a copy of the foregoing was mailed first class, postage prepaid to:

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