

CITIZENS FOR A RESPONSIBLE
CURRICULUM, et al.

Appellant

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 07-30

OPINION

Introduction

On February 7, 2007, the Appellants filed this appeal with the State Board challenging a decision of the Montgomery County Board of Education (local board) to add three lessons related to human sexuality to the health curriculum and to field test those lessons. They also requested that the State Superintendent issue a stay of the local board's decision to field test the additional lessons during the Spring of 2007. On March 7, 2007, the State Superintendent denied the stay.

The local board thereafter filed a Motion for Summary Affirmance on the merits of the appeal. The Appellants filed an Opposition to that Motion. They also simultaneously filed a Petition for Declaratory Ruling. The local board has filed, in one document, a Response to the Opposition and to the Petition for Declaratory Ruling.

Factual Background

On January 9, 2007, the Superintendent of Montgomery County Public Schools (MCPS) requested that the Montgomery County Board of Education approve a field test of three revisions to the health education curriculum. The revisions consisted of three additional lessons: a two part 90-minute lesson for 8th graders on "Respect for Differences in Human Sexuality"; a two part 90 minute lesson for 10th graders on "Respect for Differences in Human Sexuality"; one 45 minute lesson for 10th graders on condom use. (*See Superintendent's Memorandum to Board of Education, Exhibit C, attached to Motion for Summary Affirmance*).

The three additional lessons were the result of work started in May 2005 by the staff of the Montgomery County Public Schools' Department of Curriculum and Instruction. They worked with four physicians recommended by the Maryland Chapter of the American Academy of Pediatrics. The four medical consultants who assisted staff were affiliated with the Children's National Medical Center (CNMC) in Washington, D.C. Three of the physicians were on the faculty of the George Washington University Medical School. *Id.*

The additional lessons were reviewed by the Citizens Advisory Committee (CAC) over the course of nine meetings. The CAC is chaired by a pediatrician on the staff of Shady Grove Hospital and is composed of fifteen representatives from the community. *Id.*

The local board voted to approve the field test of the three lessons. It directed the Superintendent to “inform the Board of the results of the field-testing of the revised lessons and seek its approval at the appropriate time in preparation for systemwide implementation for the 2007-2008 school year.” *Id.*

On June 12, 2007, the Superintendent informed the local board of the results of the field test which were positive. Dr. Weast reported that 91% of the students involved received parental permission to participate in the field test.¹ (See June 12, 2007 Superintendent’s Memo to the Local Board, p. 3, attached to June 13, 2007 letter from Bresler). The local board, by a vote of 6-1, approved the three additional lessons for implementation systemwide beginning in the new school year. See June 13, 2007 letter from Bresler.

The Grade 8 lessons are a two-part lesson on “Respect for Differences in Human Sexuality.” Each part of the lesson provides 45 minutes of instruction, a total of 90 minutes for the entire lesson over the course of two days. In the first session, students examine negative effects of stereotyping and harassment, and positive results of respect, empathy, and tolerance on individuals and the school environment. In the second session, students consider how people respond to differences in gender identity, sexual identity, and sexual orientation.

The Grade 10 lessons are on “Respect for Differences in Human Sexuality” that build on the Grade 8 lesson with information and materials appropriate for the higher grade level. Each part of the lesson provides 45 minutes of instruction, for a total of 90 minutes for the entire lesson over the course of two days. In the first session, students learn the vocabulary of human sexuality and build on their understanding with factual information, including references to laws the schools must follow to prevent harassment and discrimination based on sexual orientation, gender identity, and sexual identity. In the second session, students examine sexual orientation and the challenges related to human sexuality that some adolescents may face.

A single-session lesson in Grade 10 presents a “Condom Use Demonstration” for disease prevention and control. The 45-minute lesson includes a brief video that demonstrates the correct examination, use, and disposal of a condom. The lesson serves as a bridge between the unit of Family Life and Human Sexuality, which includes information about contraception, and the unit on Disease Prevention and Control, which includes information on sexually transmitted disease and infection. The lesson emphasizes abstinence from sexual activity as the most effective method to prevent unwanted pregnancy and to protect against sexually transmitted disease and infection. *Id.*

¹ In order to participate, parental permission was required to “opt-in” to the classes.

The Appellants assert that the three additional lessons violate:

- Students' Free Speech Rights;
- The Free Exercise of Religion Clause;
- The Establishment Clause;
- Equal Protection Clause;
- The Maryland Constitution; and
- Freedom of Religion.

They also contend that the lessons violated numerous provisions of COMAR; are arbitrary and unreasonable; and violate sound educational policy.

In addition, because the Appellants believe that there are genuine disputes of material fact to resolve, they seek a referral of the case to the Office of Administrative Hearings (OAH). To define the parameters of the case they wish to present at OAH, they request this Board to issue a Declaratory Ruling that states:

1. In order to satisfy Appellants' claims that it offends sound educational policy and provisions of COMAR and the Respondents' own District Policies to teach students that homosexuality is "innate" when in fact homosexuality is not innate, it must be shown by a preponderance of the evidence that homosexuality is not innate.
2. In order to satisfy Appellants' claims that it offends sound educational policy and provisions of COMAR and the Respondents' own District Policies to teach students in the same class that homosexuality is innate and that it is not innate at the same time, it must be shown by a preponderance of the evidence that the two definitions used to define the origins and cause of homosexuality are contradictory.
3. In order to satisfy Appellants' claims that the condom lesson and DVD offend sound educational policy and provisions of COMAR, Appellants must show by a preponderance of the evidence that the condom lesson and DVD fail to clearly warn the students that condoms do not offer substantial protection against the risk of contracting HIV/AIDs and STDs in anal intercourse.
4. In order to satisfy Appellants' claims that the condom lesson and DVD offend sound educational policy and provisions of COMAR, Appellants must show by a preponderance of the evidence that the condom lesson and DVD fail to clearly warn

students that condoms do not provide users with a reasonable expectation of not contracting STDs (except HIV/AIDs) in vaginal intercourse.

5. In order to satisfy Appellants' claims that the 10th grade lessons on sexual variances offend sound educational policy and provisions of COMAR, Appellants must show by a preponderance of the evidence that the teachings contained therein individually and taken together pose a substantial threat that they may lead adolescents to erroneously self-identify themselves as non-heterosexuals.

6. In order to satisfy Appellants' claims that the 8th grade lessons on tolerance offend sound educational policy and provisions of COMAR, Appellants must show by a preponderance of the evidence that the teachings contained therein individually and taken together pose a substantial and impermissible interference with the role of the family in the moral formation of the students.

7. In order to satisfy Appellants' claims that the lessons on tolerance offend sound educational policy and other provisions of COMAR, Appellants must show by a preponderance of the evidence that the teachings to tolerance fail to teach tolerance of former homosexuals and that MCPS is intolerant of ex-gays.

Standard of Review

This case involves a decision of the local board concerning a "local policy" -- the decision to adopt systemwide three additional lessons in the health education curriculum. In the past, when this Board has reviewed cases challenging local policy decisions, this Board has pronounced, in a conclusory fashion, that it will dismiss an appeal that attempts to use a quasi-judicial process to force a change in local board policy -- which is a quasi-legislative decision. *See, e.g., Richard Regan v. Montgomery County Board of Education*, MSBE Op. No. 02-29 (June 26, 2002) ("We agree with the local board that the appeal process is not the appropriate vehicle for modifying the curriculum or adopting a new policy governing the teaching of the curriculum.") We take this opportunity to explain the reasoning behind that pronouncement.

That pronouncement rests on the principles of separation of powers that effect the scope of review for quasi-legislative decisions of local boards.² As the Court of Appeals has

² Quasi-legislative decisions include approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy; approving or disapproving an appointment;

recognized, governmental agencies, like this Board and local boards, “perform some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties . . . [and also] “make factual determinations and thus adjudicate . . . in a quasi-judicial capacity.” *Department of Natural Resources v. Linchester Sand and Gravel Corp.*, 274 Md. 211, 222 (1975). When courts review those two types of decisions, they use a different scope of review for each, both of which reflect the fundamental principles underlying the separation of powers doctrine that the three branches of government are separate and respectful of each others powers. See, e.g., *Weiner v. Maryland Insurance Administration*, 337 Md. 181, 189-191 (1995).

When “an administrative agency is acting in a manner which may be considered legislative in nature (quasi-legislative), the judiciary’s scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries . . . [When, however,] an agency is acting in a fact-finding capacity (quasi-judicial), the courts review the appealed conclusion by determining whether the contested decision was rendered in an illegal, arbitrary, [or] capricious . . . manner.” *Linchester Sand*, 274 Md. at 223; accord *Adventist Health Care Inc. v. Maryland Health Care Comm’n*, 392 Md. 103, 117 n.12 (2006); *Fogle v. H&G Restaurant*, 337 Md. 441, 454 (1995); *Weiner*, 337 Md. at 190; *County Council of Prince George’s County v. Offen*, 334 Md. 499, 507 (1994).

That same scope of review, we believe, applies when this Board, acting in its judicial capacity, is called upon to review a decision of a local board. When the local board’s decision is quasi-legislative, the Board will decide only whether the local board acted within the legal boundaries of state or federal law. This Board will not substitute its judgment for that of the local board’s “as to the wisdom of the administrative action.” *Weiner*, 337 Md. at 190. When the local board’s decision is quasi-judicial, this Board will review that decision to determine, not only whether it is illegal, but also whether it is arbitrary, or unreasonable by asking whether a reasoning mind would come to the decision rendered. Even this review does not allow this Board to substitute its judgment for that of the local board’s. COMAR 13A.01.05.05.

Therefore, we turn to the Appellants’ arguments that the local board’s decision to add the three additional lessons to the health education curriculum was illegal.

Analysis

A. Constitutional Challenges

The Appellants assert numerous violations of the United States Constitution including

proposing or ratifying a constitution or constitutional amendment; proposing or ratifying a charter or charter amendment; adopting disapproving, amending, or repealing a rule, regulation, or bylaw that has the force of law; approving, disapproving, or amending a budget; and approving, disapproving, or amending a contract. Md. Code Ann., State Gov’t § 10-502(f) and (i).

that a variety of First Amendment rights are violated by the inclusion of the three additional lessons in the health education curriculum. Underlying almost every constitutional argument is a dispute over the purpose of the three additional lessons. The local board argues that the purpose of the lessons is, in great part, to teach tolerance of sexual diversity. The Appellants argue that teaching tolerance of sexual diversity promotes the immorality of homosexuality which contradicts their religious beliefs. They assert that, the three lessons are intolerant as to them and, thus, violate their First Amendment rights. We address each of the Appellants' arguments below.

(1) Free Speech Rights of Students

The Appellants contend that the three additional lessons violate the free speech rights of students because the lessons express only one viewpoint on homosexuality and do not reflect their viewpoint. (Appeal at 16, 18). The local board argues that the First Amendment free speech clause does not impose viewpoint neutrality on a school's curriculum nor does it require the inclusion of all viewpoints in the curriculum. (Motion at 18-25).

The case law supports the local board's argument. As the Supreme Court has recognized, "local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values." *Board of Education v. Pico*, 457 U.S. 853, 864 (1982). The local board has decided that the three additional lessons transmit community values concerning tolerance of sexual diversity.³ In doing so, the school board necessarily discriminates among the viewpoints it wishes to convey. The Supreme Court has accepted that result recognizing that school curricula are not subject to viewpoint-neutrality analyses: "Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (emphasis added); see also, *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1014-1016 (9th Cir. 2000), cert. denied, 532 U.S. 994 (2001).

As the local board explains, there is good reason for not requiring viewpoint neutrality or the inclusion of all viewpoints in a school curriculum:

[O]ne of the principal purposes of public education is to instill civic virtues. See, e.g., *Plyler*, 457 U.S. at 221. Doing so necessarily requires a school board to make normative decisions all the time - whether in deciding to teach the history of the Holocaust without lending credence to those who deny it or extolling the

³ The President of the local board commented in the press release announcing the approval of the lessons for systemwide implementation, "This curriculum provides important information that our students need to know. All people deserve to be respected regarding sexual orientation, and that's what these lessons teach our children." (Attachment to June 13, 2007 letter from Bresler.)

virtues of democratic rule in civic class without giving equal time to the “virtues” of fascism. A viewpoint-neutrality requirement would force the County Board into a Hobson’s choice: either abandon any lessons on the Holocaust or else address the horrors of that event, but be forced to turn around and tell students that perhaps the Holocaust never happened. While the First Amendment prohibits the government from silencing individuals who argue that the Holocaust never happened, it does not give those same individuals a right to insist that the government convey their views when fashioning a school curriculum.

(Motion at 21).

Of course, a government speaker cannot compel individuals to “speak” in a particular way or to support a particular viewpoint. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S.Ct. 1297, 1308-10 (2006). The local board contends that because parents in Montgomery County can decide whether or not their children should attend the additional lessons through an “opt-in” provision, there is no compulsion of speech. The Appellants contend that the three lessons compel speech because, if students opt-out of the three additional lessons, those students are essentially forced to reveal their moral, ideological or religious views and if they opt-in, those students are forced to speak on a “sensitive subject.” (Appeal at 17).

The opt-in provision requires specific parental consent to attend the additional lessons. Parents do not need to explain to anyone the reasons for their decision not to submit a consent form. In this instance, because there is no compulsion of attendance, we believe there is no compulsion of speech. As Justice Jackson stated in his concurring opinion in *McCollum v. Board of Education of School District No. 71*, 333 U.S. 203 (1948) “The complaint is that when others join (the class) and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress since no compulsion is applied [to attend the class] and no penalty is imposed or threatened from which we may relieve him, we can hardly base [federal] jurisdiction on this ground.” *Id.* at 232-33.

We conclude, for the reasons stated above, that the local board’s decision to add the three additional lessons does not violate the Free Speech Clause.

(2) Free Exercise of Religion

The Appellants argue that the three additional lessons violate the Free Exercise of Religion Clause based on the assertion that they are seeking “to protect their legitimate, albeit unpopular, religious belief that views the homosexual sex act as sinful from being refuted to their children in classes Teaching the Additional Lessons.” (Appeal at 20). The Free Exercise of Religion Clause forbids a governmental entity from adopting laws designed to suppress religious

beliefs or practices unless the laws are justified by a compelling governmental purpose and narrowly tailored to meet that purpose. *See Booth v. Maryland*, 327 F.3d 377, 380 (4th Cir. 2003).

We begin our analysis of the free exercise of religion issue by focusing on what religious exercise the Appellants believe is being suppressed by the three additional lessons. As Appellants have stated, it is their religious belief that the homosexual act is sinful. The three additional lessons do not include that belief, but as we have stated above, a curriculum need not espouse every viewpoint to pass First Amendment muster. The use of the three lessons in the MCPS does not, obviously, preclude the Appellants from espousing their religious beliefs which they recognize are unpopular.⁴ It is difficult to conclude, therefore, the Free Exercise of Religion Clause is actually implicated here.

But, if it were, it is our view that the Free Exercise of Religion Clause is not so broad as to strike down a set of lessons that do not include the Appellants' religious beliefs about homosexuality and about which the Appellants have a religious objection. "Courts have refused to recognize that schools must shelter students from curricular messages to which the students have a religious objection." *See Myers v. Loudoun County School Board*, 251 F. Supp. 2d 1262, 1272 (E.D. Va. 2003), *aff'd* on other grounds, 418 F.3d 395 (4th Cir. 2005).

Indeed, the Supreme Court has stated:

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

Lee v. Weisman, 505 U.S. 577, 598-99 (1992). *See also Leebaert v. Harrington*, 332 F.3d 134, 141 (2nd Cir. 2003) (noting that the free exercise clause was not violated by mandatory health curriculum that the parent disagreed with on religious grounds).

What is clear is that the Appellants seek to protect their children from being exposed to a curriculum that does not espouse their belief in the sinfulness of the homosexual act. This they can do by not submitting the consent form for attendance at the three lessons. In that way, their children are protected.

⁴ If the Appellants are arguing that the additional lessons should teach their religious beliefs on homosexuality, an Establishment Clause issue would likely arise. *See* section (3) *infra*.

Because the three additional lessons are not mandatory and because the Appellants have no fundamental right to control the content of the curriculum on religious grounds, it is our view that the local board's decision to adopt the three additional lessons systemwide does not violate the Free Exercise of Religion Clause.

(3) Establishment Clause

The Appellants assert that the three additional lessons violate the Establishment Clause because the government is directly involved in preferring one set of religious beliefs over another. (Appeal at 23). They describe the Establishment Clause issue as a moral dichotomy between the rightness or wrongness of homosexuality.⁵ (Appeal at 25, 27). They argue that the curriculum is based on the "morality of Secular Humanism" which, they assert is a religion. (Appeal at 24).

The local board argues that the "Appellants' entire Establishment Clause argument is predicated on the notion that the Revised Lesson's promotion of tolerance is not a valid secular purpose, but instead constitutes a 'moral viewpoint' identified with the 'religion' of 'Secular Humanism'." They assert that the Appellants' Establishment Clause argument fails as a matter of law. (Motion at 16).

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

The local board argues that the curriculum has a secular purpose. Its goal, they assert, is to teach tolerance not to advance a religion. Appellants assert that teaching tolerance is Secular Humanism, and Secular Humanism is a religion. Courts have, however, rejected the contention that Secular Humanism is a religion. See, e.g., *Pelozo v. Capistrano Unified School District*, 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995); *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684, 690-95 (11th Cir. 1987). Moreover, as the local board argues, teaching tolerance of diversity is a civic value, and public schools are the main vehicle "for transmitting the values on which our society rests." *Plyler v. Doe*, 457 U.S. 220, 221

⁵ They state that the three additional lessons do not include the views of religious conservatives who have a "legitimate moral offense to homosexual conduct . . ." (Appeal at 25). We have concluded in the previous discussion that a local board is not required by the First Amendment to include all viewpoints in its curriculum.

(1982); *Board of Education v. Pico*, 457 U.S. 854, 864 (1982). The three lessons, in our view, are secular in nature.

The additional lessons, we also conclude, do not advance or inhibit religion nor do they foster an excessive entanglement in religion. Admittedly, the three additional lessons, are offensive, in part, to Appellants' religious beliefs, but as we explained above, the additional lessons do not inhibit the Appellants from practicing their religion or from adhering to their religious beliefs about homosexual acts.

We conclude that the three additional lessons do not violate the Establishment Clause.

(4) Equal Protection

The Appellants argue that the additional lessons treat certain MCPS students differently from others because the additional lessons deal with homosexuals and transgender issues, but not with ex-gay issues.⁶ (Appeal at 27-30). Appellants are correct that the three additional lessons do not include any content related to ex-gays.

The local board argues that, even if the exclusion of ex-gay issues from the content of the additional lessons is "some sort of intentional classification based on sexual orientation," it does not violate the Equal Protection Clause. (Appeal at 29).

The Equal Protection Clause allows for different treatment based on sexual orientation as long as the differences in treatment are rationally related to a legitimate governmental interest." See, e.g., *Thomasson v. Percy*, 80 F.3d 915, 928 (4th Cir. 1995), cert. denied, 519 U.S. 948 (1996). The assessment of whether differences in treatment are rationally related to legitimate government purposes requires great deference to government's choice of interests to address. Indeed, it is not a court's place "to judge the wisdom, fairness, or logic of legislative choices." *Id.*

The local board apparently determined that focusing the additional lessons on homosexuality and transgender issues was directly related to their goal of fostering tolerance for and eliminating discrimination against that population. (Motion at 29). That focus addresses a legitimate governmental interest. As the State Superintendent stated in denying the Appellants' request to stay the field test:

One of serious problems in our schools today is bullying and harassment. Indeed, in 2005 the General Assembly directed school systems to report all incidents of harassment against students based on race, native origin, marital status, sex, sexual orientation,

⁶ For the purpose of the Appellants' argument, we will assume that there are ex-gay students who attend schools in MCPS, although the Appellants do not so assert.

gender identity, religion, or disability. Md. Educ. Code Ann. § 7-424. The lessons at issue here address harassment problems as they relate to sexual orientation and gender identity. They emphasize tolerance and acceptance. They address ways to deal with bullying and harassment and how to prevent it. I believe it is in the public interest to field test those lessons to determine whether to move forward with full implementation of a curriculum designed, in part, to reduce bullying and harassment.

Order of the State Superintendent, March 7, 2007.

For those reasons, we conclude that a failure to address of ex-gay issues does not rise to the level of an equal protection violation.

(5) Substantive Due Process

The Appellants assert that the three additional lessons violate their fundamental right to direct the education of their children.⁷ (Appellants' Opposition at 41).

We recognize that substantive due process prevents the state from acting on rights that are "fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). It is, of course, the fundamental rights of a parent to control the upbringing of his/her child, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), but that right is not absolute. It must bend to the State's duty to educate its citizens. "[T]he fundamental right of parents to guide the upbringing of their children, when juxtaposed with the State's duty to provide for the education of its citizens, [is limited]. Specifically, the parental right is limited to the coarse decision of whether to enroll a child in a public school, private school, or if the child is sufficiently mature, to dis-enroll a child from school altogether. See *Myers v. Loudoun County School Board*, 251 F. Supp. 2d at 1275-76 citing *Pierce*, 268 U.S. at 535; *Yoder* 406 U.S. at 235, 92 S.Ct. 1526;

Decisions about curriculum are essentially left to the school system. See *Boring v. Buncombe County Board of Education*, 136 F.3d 364, 369-71 (4th Cir. 1998), cert. denied, 525 U.S. 813 (1998). "The fundamental right to raise one's children as one sees fit is not broad enough to encompass the right to re-draft a public school curriculum." *Myers v. Loudoun County School Board*, 251 F. Supp. 2d at 1276.

⁷ Appellants also contend that the lessons violate the interest of students to receive accurate and complete information in efforts to learn and acquire knowledge. The answer to concerns about the accuracy of the lessons is that their children need not be exposed to the three additional lessons. The parents need not give consent for their children to attend those classes. Their children need not study materials their parents believe are factually inaccurate.

Therefore, it is our view that the decision of the local board to adopt the three additional lessons does not violate the Appellants' substantive due process right to raise their children as they see fit.

(6) **Maryland Constitution**

The Appellants claim that the three additional lessons violate Article 36 of the Maryland Declaration of Rights, Freedom of Religion which states:

. . . All persons are equally entitled to protection in their religious liberty; wherefore, no persons 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 . . . ;

That provision parallels the United States Constitution's provisions protecting religious freedom. *See Bienenfeld v. Bennett-White*, 91 Md. App. 488, 504, fn. 8 (1992), *cert. denied*, 327 Md. 625 (1992).

For the reasons stated in sections 1-5 above, it is our view that the three additional lessons do not violate Article 36 of the Maryland Declaration of Rights.

B. Challenges Based on State Regulations

The Appellants challenge the three additional lessons as violating a panoply of State regulations. The regulatory challenges fall into two categories - violations based on religious reasons and violations based on the regulatory requirements of a health education curriculum.

The violations based on religious reasons are that the three additional lessons violate:

- (1) COMAR 13A.04.04.01 which precludes religious education in the public schools;
- (2) COMAR 13A.04.05 which calls for education that is multi-cultural including diversity of religious beliefs.

We have already concluded that the three additional lessons are not based on a religion and need not include religious beliefs about homosexuality.

The violations based on the regulations governing the health educational curriculum are discussed below.

(a) **Elective Course**

The Appellants contend that the regulations require that the content presented in the three

lessons be offered only in a stand-alone elective course. The regulations state, however, that the basic health educational curriculum must address “advanced Physiology and Psychology of Human Sexual Behavior.” COMAR 13A.04.18.03(B)(3)(a). The basic health education program must include seven topics:

- (1) Maturation;
- (2) The reproductive process;
- (3) *Sexual variations*;
- (4) Premarital intercourse;
- (5) Marriage and family responsibilities;
- (6) Family planning;
- (7) Sexually transmitted diseases.

COMAR 13A.04.18.03(B)(3)(c) (emphasis added).

Those topics “*may be offered as an elective course.*” COMAR 13A.04.18.03(B)(3)(a) (emphasis added). The permissive nature of that regulation leads to the conclusion that the local board could decide to offer those topics in its general health education course, not just as an elective course.⁸ The regulations state that “[o]ther aspects of sexual behavior . . . shall be offered in an identifiable elective course.” COMAR 13A.04.18.03(B)(3)(b). It is our view that “other aspects of sexual behavior” means topics different from those seven topics that must be included in the basic health education curriculum.

In our view, the Appellants are incorrect that the three lessons, which include discussion of *sexual variations*, must be offered as a stand-alone elective course.

(b) Erotic Techniques

State regulations state that the instructional materials “may not . . . discuss or portray erotic techniques of sexual intercourse.” COMAR 13A.04.18.03c(3)(a). The Appellants state that any discussion of “anal and oral sex in the condom lessons and video clearly and patently violates this standard.” (Appeal at 33). The local board disagrees arguing that teaching students how to use a condom and talking about the anal or oral sex in that context is not a discussion of erotic techniques. (Response at 6).

The regulations do not define “erotic techniques.” While it may be that what is erotic is in the eye of the beholder, to be definitionally classified as “erotic” requires “sexually arousing or suggestive symbolism, settings, allusions.” *See Random House Dictionary of the English Language* (2nd Ed. unabridged) at 659. The local board has concluded that the content of the condom lesson does not contain erotic techniques. It is within their quasi-legislative purview to

⁸ We point out, of course, that the three additional lessons are not mandatory. Parental permission is required to attend the three additional lessons.

do so in the context of the community in which they live.

It is not appropriate for this Board to second guess that conclusion. We return to the proposition that this Board's power to review the local board's decision does not include "the ability to review quasi-legislative decisions by substitution of the court's judgment as to the wisdom of the administrative action . . ." *Weiner v. Maryland Insurance Administration*, 337 Md. at 191. What may be appropriate content in Montgomery County may, in another county, be considered "erotic technique." But that is a local board's decision.

(c) Goals of a Comprehensive Health Education Program

The Appellants contend that the three additional lessons do not achieve a variety of goals for a health education program as set forth in COMAR 13A.04.18.02 because the lessons do not adequately provide information on the risk of disease transmission during anal intercourse, or on the serious health risks of homosexual sexual practices. (Appeal at 33-36).

We point out that the three additional lessons are not the total health education curriculum. Those lessons are focused on sexual variations and the content and goals must be viewed from that perspective. As Dr. Weast explained in his June 21, 2007 Memo to the local board,

In the normal sequence of instruction, the revised lessons are the bridge between Standard 4, *Family Life and Human Sexuality and Standard 7, Disease Prevention and Control*. Due to the timing of the field test, the revised lessons were taught out of sequence. Therefore, many of the questions students submitted could be addressed during the normal course of instruction. For example, the questions about contraception and reproduction address information that typically is presented to students early in the Family Life and Human Sexuality unit. During a full implementation, students will receive this information before the revised lessons. Similarly, during full implementation, questions about STD/Sexually Transmitted Infections and HIV/AIDS will be answered immediately following the condom usage lesson, during the unit on Disease Prevention and Control, when the lessons are taught in the proper sequence.

(Memo at 5, attached to June 13, 2007 Bresler letter).

Appellants are essentially asking this Board to second guess the choices the local board made as to the content of the three lessons. This Board will not use its quasi-judicial role to second guess quasi-legislative acts that are legal on their face.

(d) Disputed Facts

The Appellants allege that there are disputed facts in this case and urge this Board to refer the case to the Office of Administrative Hearings for a full evidentiary hearing. (Appeal at 43-52). The Court of Appeals of Maryland recognizes, however, that a judicial or trial type hearing is not a requirement of due process "where an administrative agency does not act in a quasi-judicial capacity and the facts to be determined are 'legislative' rather than 'adjudicative' in nature." *Montgomery County v. Woodward & Lothrop, Inc.* 280 Md. 686, 711 (1977).

The local board, as we have stated herein, made a policy decision to adopt the three additional lessons systemwide. It did do through a quasi-legislative process. The Appellants cannot turn that process into an adjudicatory process by demanding a hearing on the correctness of the content in the three additional lessons. But that is just what they have requested this Board to do - to refer the case to OAH specifically for a hearing on the following "facts" they assert are in dispute:

- that homosexuality is not innate;
- that the definitions used in the lessons to define the origin and causes of homosexuality are contradictory;
- that the condom lesson fails to warn students about the risk of HIV/AIDS and STDs in anal intercourse; and about the risk of STDs in vaginal intercourse;
- that the lessons pose a serious threat that adolescents will erroneously self-identify as non-heterosexuals;
- that the lessons pose an impermissible interference in the role of family in the moral formation of students; and
- the lessons fail to teach tolerance of ex-gays.

Not only do the Appellants not have a legal right to such a hearing, the "facts" they allege are in dispute are, for the many reasons explained herein, within the legal purview of the school to include or not include in the three lessons.

(e) Declaratory Ruling

The Appellants ask for a series of declaratory rulings defining what they would have to prove at the Office of Administrative Hearings in order to prevail in a contested case hearing. Because this Board will not review a legal quasi-legislative decision through an evidentiary hearing challenging the validity of the curriculum choices made by the local board, we decline to issue the declaratory rulings the Appellants request.

(f) Other Arguments

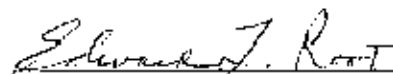
The Appellants set forth a series of arguments on pages 37-43 of their appeal. They are essentially repetitive of the arguments addressed above: viewpoint neutrality; disparate treatment;


and discrimination against ex-gays.


Conclusion

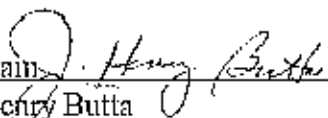
For all the reasons stated herein, we conclude that the three additional lessons do not violate the law. As to the content of the lessons, there may be disparate points of view on whether homosexuality or transgender issues are appropriately included in the curriculum in the way MCPS has chosen to do so. Yet, that decision is a local decision and this Board, acting in a quasi-judicial capacity, will not second guess the appropriateness of the local board's decision governing curriculum, unless, of course, that decision is illegal.

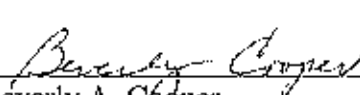
Therefore, this Board upholds the decision of the local board to adopt the three additional lessons solely on the grounds that that decision is not illegal and denies the Appellants' request for declaratory rulings. Four members of this Board abstain in this vote.

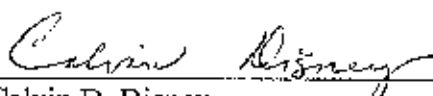
 ^{En K}
Edward L. Root
President

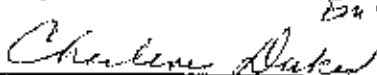
 ^{En K}
Dunbar Brooks
Vice President

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Lelia T. Allen

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J. Henry Butta

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Beverly A. Cooper

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Calvin D. Disney

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Charlene M. Dukes

abstain Richard L. Goodall ^{En K}
Richard L. Goodall

Karabelle Pizzigati ^{En K}
Karabelle Pizzigati

Maria C. Torres-Queral ^{En K}
Maria C. Torres-Queral

abstain David F. Tufaro ^{En K}
David F. Tufaro

June 27, 2007