

May 25, 2009

VIA EMAIL

Mike McMahon, Board President
Ron Mooney, Board Vice President
Tracy Jensen, Trustee
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Board of Education
Alameda Unified School District
2200 Central Avenue
Alameda, CA 94501

RE: *Uncontroverted Legal Concerns Regarding "Safe Schools" Curriculum Addressing Sexual Orientation and Gender Identity*

We are in receipt of a letter dated May 21, 2009 written by Alameda attorneys in Support of the Board of Education's Adoption of Proposed Caring Schools Community Curriculum Lesson 9 ("Supporting Letter"). While the Supporting Letter accuses us of making "unsupportable" arguments (Supporting Letter, at p. 1), the reality is that our original letter dated May 11, 2009 ("Original Letter") cited to California Education Codes and Board of Education standards verbatim. After a thorough review of the Supporting Letter, we respectfully submit the following reply and request that the Board of Education ("Board") reject the proposed curriculum ("Curriculum").

I. THE CURRICULUM FALLS WITHIN THE DOMAIN OF HEALTH EDUCATION UNDER THE EDUCATION CODE.

A. *The Supporting Letter Ignores The Expressed Language Of The Statute.*

The Supporting Letter attempts to argue in a round-about manner that this Curriculum does not constitute health education. The attorneys claim that the Curriculum is not health education "under any commonly understood meaning of the word." (Supporting Letter, at p.3.) The attorneys, however, never actually cite to the actual language of the Education Code in their analysis. Instead, in their attempt to ignore the language of the statutes and the Board of Education standards, which are authorized by statute, the Supporting Letter relies heavily on

legislative history as their main source of support.¹ Such an approach is facetious at best and disingenuous at worst.

Instead of listening to the fanciful arguments of these attorneys, we invite the Board to look to the Education Code. “As with any question of statutory interpretation, [a proper] analysis begins with the plain language of the statute.” (*Jimenez v. Quarterman* (2008) 129 S. Ct. 681, 685; *Lamie v. United States Trustee* (2004) 540 U.S. 526, 534.) “When the statutory language is plain, [courts] must enforce it according to its terms. (*Ibid*; see, e.g., *Dodd v. United States* (2005) 545 U.S. 353, 359.) Any argument that ignores the language of the statute cannot stand.

Applying *Jimenez* and its predecessors, the proper standard for defining health education is the plain language of the California Education Code. Education Code section 51210, subdivision (f) provides that health education includes “instruction in the principles and practices of individual, *family*, and community health.” Section 51210.8 specifically authorized the State Board of Education to “adopt content standards in the curriculum area of health education,” which “shall provide a framework for instruction that a school may offer in the curriculum area of health education.” To reiterate, some of the adopted standards include:

- “Describe the characteristics of families.”²
- “Discuss how to show respect for similarities and differences between and among individuals and groups.”³
- “Demonstrate the ability to support and respect people with differences.”⁴
- “Examine the effects of bullying and harassment on others.”⁵

As stated in the Original Letter, the Curriculum clearly covers these topics. In fact, the major emphasis of much of the Curriculum is to teach children that all types of families are “equally viable.” (See Curriculum, Grade 3 Lesson.) Thus, under Education Code section 51240, the Curriculum is illegal without an opt-out clause.⁶

¹ The Supporting Letter does cite to Section 51890. However, the letter does not cite the language of the statute, and for good reason.

² CALIFORNIA STATE BOARD OF EDUCATION, HEALTH EDUCATION CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS, KINDERGARTEN THROUGH GRADE TWELVE, at 4 (2008), <http://www.cde.ca.gov/be/st/ss/documents/healthstandmar08.pdf> (Mental, Emotional, and Social Health Standard 1.2.M for Kindergarten).

³ *Id.* at 12 (Mental, Emotional, and Social Health Standard 1.7.M for Grade Two).

⁴ *Id.* at 16 (Mental, Emotional, and Social Health Standard 8.3.M for Grade Three).

⁵ *Id.* at 19 (Injury Prevention and Safety Standard 1.4.S for Grade Four).

⁶ As cited in the Original Letter, we provide the language of Section 51240 again for the convenience of the Board:

(a) If any part of a school’s instruction in health conflicts with the religious training and beliefs of a parent or guardian of a pupil, the pupil, upon written request of the parent or guardian, shall be excused from the part of the instruction that conflicts with the religious training and beliefs.

(b) For purposes of this section, “religious training and beliefs” includes personal moral convictions.

(Educ. Code § 51240, subds. (a)-(b).)

B. Section 51890, Cited To By The Supporting Letter, Specifically Includes Families And Family Life As Part Of Health Education.

The Original Letter cited specifically to Education Code Sections 51240, 51210.8, and 51210(f) in support of the claim that the Curriculum constitutes health education. We are grateful to our colleagues for bringing Section 51890 to our attention. (See Supporting Letter, at p. 3) Section 51890 states:

(a) For the purposes of this chapter, "comprehensive health education programs" are defined as all educational programs offered in kindergarten and grades 1 to 12, inclusive, in the public school system, including in-class and out-of-class activities designed to ensure that:

(1) Pupils will receive instruction to aid them in making decisions in matters of personal, family, and community health, to include the following subjects:

(D) *Family health* and child development, including the legal and financial aspects and *responsibilities of marriage and parenthood*.

(Educ. Code, § 51890, subd. (a)(1)(D) (emphasis added).) On top of that, the statute further emphasizes that health instruction is supposed to be as comprehensive as possible:

To the maximum extent possible, the instruction in health is structured to provide comprehensive education in health that includes all the subjects in paragraph (1).

(Educ. Code, § 51890, subd. (a)(2).)

Responsibilities of family and child development fall squarely within the ambit of the Curriculum. The Grade 1 lesson, "Who's In a Family?", teaches children to "identify what makes a family" and "describe a variety of families . . ." The Grade 2 lesson asks about "[w]hat makes a 'good' parent" and "what is most important in a family . . ." Even the book, *Tango Makes Three*, speaks specifically about responsibilities of parenthood for gay penguins.

Section 51890 supports the proposition that the Curriculum is health education and requires an opt-out for parents who find the lessons contrary to their religious beliefs. (See Educ. Code § 51240, subd. (a).)

C. The Supporting Letter Can Only Point To Legislative History To Argue that Section 51240 Does Not Apply To The Matters At Hand.

The Supporting Letter argues that the legislative history of Education Code 51240 "suggests" that the Legislature intended there to be no opt-out for such Curriculum. (Supporting Letter, at

p. 4.) The letter claims that the Legislature must have intended to leave “family life education” out of the opt-out process because of the 2004 revision of the Code.

As argued earlier, the plain language of the statute cannot be ignored. The Education Code specifies that topics such as family characteristics and family roles are part of health education. Furthermore, it must be remembered that the Legislature specifically granted the California Board of Education the power to define the scope of topics that constitute health education. The actual intention of the Legislature to omit “family life education” from health education is mere speculation. Section 51210.8, however, clearly intends that the California Board of Education be delegated that authority. Absent contradicting statutory language, one must assume that this Curriculum clearly constitutes health education under a plain reading of the Education Code.

D. The Supporting Letter Relies on Faulty Logic And Inappropriate Analogy To Argue That The Curriculum Is Not Health Education.

First, the Supporting Letter shoots itself in the foot by arguing that the Board of Education standards “should involve discussion of LGBT issues.” (Supporting Letter, at p. 3.) If the standards did include LGBT issues explicitly, then there would be an *even stronger* case that this Curriculum constitutes health education, which requires an opt-out clause. Just because the standards omit LGBT issues, however, does not mean that the Curriculum is now outside the realm of health education. This argument has no bearing on the current state of the Curriculum and the proper standards to evaluate health education curriculum. As such, the reasoning in this section of the Supporting Letter is fundamentally flawed.

Second, the letter tries to analogize the LGBT Curriculum to a discussion of “food”, which should not automatically qualify it as “part of the health curriculum” merely because it is about food. (*Id.* at p. 4.) This does not apply to the proposed Curriculum. The Curriculum is specifically tailored to discuss the characteristics of families, the roles of members of a family, and such topics. (See Original Letter, at pp. 4-5.) The Curriculum’s discussion of families is not done in a cursory, careless manner. On the contrary, the discussion of families is one of the major themes woven throughout the Curriculum and appears in a majority of the lessons. Under the Board of Education’s adopted standards, this constitutes health education.

Unfortunately, the authors of the Supporting Letter conveniently ignore the actual content of the Curriculum, showing that either they have not reviewed the materials, or even worse, cannot comprehend the main themes that are included in the proposed curriculum for K-5 children. If our colleagues, trained attorneys, cannot understand this Curriculum, then it is safe to assume that our children will be even more confused. This analogy is fatally flawed because it ignores the entire content of the Curriculum.

For these reasons, the Curriculum violates the California Education Code by omitting an opt-out. Because the Board is voting on this Curriculum without an opt-out provision, it must reject it and head back to the drawing board, or suffer potential lawsuits from frustrated parents.

II. THE ALAMEDA UNIFIED SCHOOL DISTRICT WILL NOT BE SUBJECT TO LEGAL LIABILITY FOR REJECTING THE CURRICULUM.

The attorneys point out that the district may be subject to legal liability for future harassment suits. (Supporting Letter, at p. 2.) Unfortunately, there is no legal authority in support of their proposition. That is because none exists. In fact, no school board has ever been held liable for *not* passing LGBT curriculum. The Supporting Letter only raises the specter of legal liability to scare the Board into approving this Curriculum without any legal or substantive grounds.

The only case that has been wielded as a sword against school districts that would reject such curriculum is the case *Nabozny v. Podlesny* (7th Cir. 1996) 92 F.3d 446, which has already been discussed at length in the Original Letter. There is simply no precedent for legal liability short of the very outrageous circumstances that Jamie Nabozny faced. In all likelihood, the school district in *Nabozny* would have suffered legal liability whether any LGBT curriculum existed or not. We do not believe that Superintendent Vitale runs the Alameda Unified School District (“AUSD”) in the same way as the school in the *Nabozny* case did.

Second, the Supporting Letter states that that the AUSD has a serious problem with anti-LGBT harassment and discrimination. (Supporting Letter, at p. 2.) No authority except for anecdotal reports support such a claim. (*Ibid.*) Further, the AUSD already has policies in place that prevent all types of bullying and harassment for any reason. District administrators merely need to enforce the standing policies to allay the fears of the LGBT community. Finally, a variety of parents and citizens representing various racial/ethnic, social, and religious viewpoints have already expressed their dismay that the Board has never attempted to deal with more pressing problems facing the other protected categories. The AUSD should deal with all problems by enforcing existing policies or devising a more comprehensive lesson plan.

Third, Assembly Bill 537 specifically does not require any school board to pass specific curriculum:

Nothing in the California Student Safety and Violence Prevention Act of 2000 requires the inclusion of any curriculum, textbook, presentation, or other material in any program or activity conducted by an education institution

The Supporting Letter ignores the Assembly Bill and relies on empty threats and flattery toward the Board for taking measures that are neither required nor prudent. As a clear majority of speakers during the two prior school board meetings have expressed, this Curriculum is not praiseworthy. Psychologists, social workers, and teachers have found that the Curriculum is not

only poorly written and designed, but that it is an ineffective way to deal with (1) bullying, (2) tolerance, and (3) discrimination. The Board would be well-advised to heed the advice of a multitude of viewpoints and experts in rejecting this Curriculum and design one that clearly deals with the problems at hand. Unfortunately, this Curriculum does not do so.

III. CONCLUSION

We incorporate all of the arguments presented in the Original Letter and believe that each argument is credible in a court of law. Due to the last minute submission of the Supporting Letter by its authors before a holiday weekend, we have not had a full and complete opportunity to analyze the claims made by our esteemed colleagues. As a result, we have no recourse but to submit the aforementioned points and authorities in support of our request for the rejection of the Curriculum, or in the alternative, an opt-out provision.

We want to reiterate our desire to see the AUSD remain a safe and tolerant learning environment for all students, as well as our gratitude for the Board's tireless work to achieve that goal. For the aforementioned reasons, we urge the Board to reject the revised Curriculum.

Best Regards,

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