

May 21, 2009

VIA EMAIL

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Ron Mooney, Board Vice President
Tracy Jensen, Trustee
Trish Spencer, Trustee
Niel Tam, Trustee
Board of Education
Alameda Unified School District
2200 Central Avenue
Alameda, CA 94501

Kirsten Vital, Superintendent
Alameda Unified School District
2200 Central Avenue
Alameda, CA 94501

Re: Letter from Alameda Attorneys In Support of the Board of Education's Adoption of Proposed Caring Schools Community Curriculum Lesson 9 Without Parental Opt-Out or Notification Provisions.

Dear Members of the Board of Education and Superintendent Vital:

This letter, signed by attorneys who live in Alameda, establishes the lawfulness of the Alameda Unified School District's proposed Lesson 9 of the Caring Schools Community (CSC) curriculum, which should be adopted without parental opt-out or notification provisions. The contrary claims made in the May 11, 2009, letter written by several lawyers opposing the addition of Lesson 9 ("Opposition Letter") are unsupportable. As discussed below, Lesson 9 constitutes neither "instruction in health" nor "sex education," the only aspects of public school education for which the state Legislature has authorized parental opt-out. In addition, Lesson 9 does not infringe the First Amendment rights of students.

A. Lesson 9—Without Parental Opt-Out and Notification—Helps Satisfy the District's Obligation to Combat Bias Based on Sexual Orientation or Gender Identity.

All California school districts have an affirmative obligation to combat bias based on sexual orientation and gender identity. *See* Cal. Ed. Code §§ 200 et seq. And the federal constitution requires school districts to take further steps to redress harassment once it becomes apparent that existing remedial measures are inadequate. *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1136 (9th Cir 2003).

As the Board is well aware, Alameda Unified School District continues to have a serious problem with anti-LGBT harassment and discrimination. Research shows that when LGBT people and issues are included in the curriculum, schools are safer for LGBT

children.¹ Failing to adopt a policy that promotes meaningful inclusion of LGBT people and issues in the curriculum may expose the District to liability in future harassment suits. The District is to be praised for taking remedial measures to improve the climate in its schools, but it cannot do so if it eviscerates the proposed program by including a discriminatory opt-out or parental-notification policy that makes learning about the existence of LGBT people and issues optional – unlike any other aspect of the District’s curriculum.

B. Parents in California Have the Right to Opt Their Children Out of Instruction in Health and Sex Education; Lesson 9 is Neither.

Federal and state law grant parents no general right to opt their children out of portions of the public school curricula for religious, moral, or other reasons. And parents have no right to dictate the content of public-school instruction:

“[T]he state cannot prevent parents from choosing a specific educational program, but [case law does] not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense. Parents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so.”

Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005).

California law provides for limited parental opt-outs for “comprehensive sexual health and HIV/AIDS prevention education” (Cal. Ed. Code § 51938) and for “instruction in health” (Cal. Ed. Code § 51240). But the proposed LGBT-inclusive curricular material fits within neither of these categories.

1. Lesson 9 Does Not Constitute Sex Education.

Education Code § 51938 allows parents or guardians to “excuse their child from . . . comprehensive sexual health education.” But, as the Opposition Letter concedes, that section is within a chapter of the Education Code whose first article explicitly states that the chapter: “does not apply to instruction or materials that discuss gender, sexual orientation, or family life and do not discuss human reproductive organs and their functions.” (Cal. Ed. Code § 51932(b).)² Nothing in proposed Lesson 9 involves any discussion of reproductive organs and their functions.

The Opposition Letter attempts to evade this clear legislative limitation by arguing that Lesson 9 is sex education because “its subject matter, LGBT conduct or behavior, is inherently sexual” and that it “may be impossible to teach students about LGBT

¹ <http://www.casafeschools.org/FactSheet-curriculum.pdf>.

² Both sections come from Chapter 5.6 of Part 28 of Division 4 of Title 2 of the Education Code, which comprises sections 51930 to 51939.

relationships without some discussion of sex.” These claims are belied by the proposed curriculum itself, and the vigorous public debate about the curriculum, both of which have included discussions about LGBT people and same-sex couples without any reference to sex. And they are flatly contradicted by the terms of § 51932(b), which reflect both the Legislature’s careful restriction of the right to opt out and its considered recognition of the fact that non-sexual discussions about “gender, sexual orientation, or family life” are not only possible but an appropriate part of the regular school curriculum.

Discussions about families with two fathers or two mothers can occur *exactly the same way* that discussions about families with a father and a mother occur. There is absolutely no reason that either discussion must include a discussion of sexual acts.

To the extent the curriculum discusses LGBT people at all,³ it is about the existence of LGBT people and families. LGBT people and families engage in the full range of human behaviors – not just sex. The curriculum does little more than provide information about various family structures in our community and about respectful use of terms that describe LGBT people. LGBT issues are not, as claimed in the Opposition Letter, “inherently sexual.” As a federal district court recently found, messages and symbols supporting LGBT rights are “clearly not sexual in nature;” rather, “[t]he innocuous expressions of tolerance and acceptance inherent in the [] expressions are far less inappropriate for middle school students than . . . the sexual content to which children are exposed daily in the popular culture.” *Gillman v. School Board*, 567 F. Supp.2d 1359, 1374 (N.D. Fla. 2008).

2. Lesson 9 Does Not Constitute Instruction in Health

Section 51240 of the Education Code, adopted in 2004⁴, allows parents to excuse their children from “any part of a school's instruction in health” if it “conflicts with the religious training and beliefs of a parent or guardian of a pupil.” Proposed Lesson 9 does not constitute “instruction in health.” The lessons describe and explore different family structures, discourage bullying, and increase awareness of LGBT stereotypes; this is not instruction in “health” under any commonly understood meaning of the word.

The Opposition Letter contends that Lesson 9 constitutes “instruction in health,” because regulations containing content standards for health education, adopted by the California State Board of Education in 2008, include items such as “[d]escribe the characteristics of families,” “[d]escribe how members of a family have various roles, responsibilities, and individual needs,” and “[r]ecognize that there are individual differences in growth and development, physical appearance, and gender roles.” Opposition Letter at pp. 3-4. These content standards for the health curriculum, part of the “comprehensive health education programs” authorized by section 51890, include topics—such as supporting and respecting people with differences—that should involve discussion of LGBT issues. But the fact that the recommended health curriculum includes LGBT issues does not mean

³ Much of the curriculum is about diversity more generally and doesn’t even mention LGBT people.

⁴ Stats.2004, c. 896 (A.B.2525), § 49.

that *other* curricular inclusion of LGBT people or issues somehow becomes part of the health curriculum. Including a discussion of nutrition in the health curriculum does not make all discussion of food part of the health curriculum.

The history of section 51240, moreover, suggests that the Legislature intended there be no opt out for the family structure sorts of lessons that partially make up Lesson 9. A former version of section 51240 enacted in 1976 provided an opt out for “instruction in health, family life education, and sex education.”⁵ In 2003, the Legislature repealed former section 51240 in its entirety when it adopted the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act, which created the opt-out provision for “sexual health education” and “HIV/AIDS prevention education” found in section 51938.⁶ The next year, in 2004, the Legislature enacted the current section 51240, reviving the opt out for “instruction in health,” but not reviving the opt out for “family life education.” Cal. Ed. Code § 51240. This evinces an intent on the part of the Legislature to not re-enact the opt-out provision for curricula, like Lesson 9, which touch on the structure of families and the roles individuals play in families, but which do not include health- or sex-education components.

Lesson 9 is not health education and no opt out provision is required.

C. Parental Notification Would Impede the Goals of Lesson 9

We note that the AUSD legal counsel has recommended “providing notice to parents and to not allow an opt out of the instruction.”⁷ Singling out lessons that address LGBT people and issues as the only material that require special parental notice sends a discriminatory message that directly contradicts the purpose of Lesson 9. Parental notification will function as an opt out system, rendering Lesson 9 inherently contradictory and self-defeating.

Adopting a parental notification requirement will make it more difficult for teachers to talk about LGBT people and issues in anytime lessons or teachable moments when it is critical to address bullying on the spot. A parental notification rule may disarm teachers of the tools to improve their capacity to discuss LGBT people and issues.

The proposed curriculum recognizes that failing to talk about LGBT people sends the message that there is something wrong with being LGBT. Allowing an opt-out or providing special notification sends the same message. It teaches children that there is something so dangerous, wrong, bad or different about LGBT people that schools cannot even reflect their existence in the curriculum without a special notice to parents that will allow them to avoid the lesson – either officially under an opt-out policy or unofficially as the result of date-specific parental notification.

⁵ Stats.1976, c. 1010, § 2.

⁶ Stats.2003, c. 650 (S.B.71), § 9.

⁷ <http://www.mikemcmahon.info/BOE051209Lesson9.pdf#page=5>

D. Nothing in Lesson 9 Unlawfully Restricts Student Speech.

The free speech of students in California's public schools is protected by the First Amendment, our state constitutional free exercise clause, and California Education Code § 48907. Under those protections, students who wish to speak out against the content of the LGBT-inclusive curriculum at school will be free to do so after its adoption to the same extent they are able to do so now.

E. Teaching a Particular Viewpoint Does Not Violate Individual First Amendment Rights.

By its very nature, the selection of material for a curriculum involves promoting certain viewpoints over others. The government “does not violate the First Amendment rights of individuals by expressing a particular viewpoint.” *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) (citing *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1013 (9th Cir. 2000)). In *Downs*, Los Angeles Unified School District created a policy recognizing June as “Gay and Lesbian Awareness Month” and provided posters and materials to schools. *Id.* at 1006. Leichman High School created a bulletin board on which faculty and staff posted relevant materials. *Id.* Mr. Downs, an LAUSD teacher, objected to the recognition of Gay and Lesbian Awareness Month and created his own bulletin board across from his classroom expressing a differing viewpoint focusing on religious condemnation of “homosexual behavior.” *Id.* at 1007. LAUSD removed Downs's materials because members of the school community deemed them “disrespectful,” “offensive,” “upsetting,” “objectionable,” and “derogatory” and because school officials considered Downs's material inconsistent with the purposes of the Gay and Lesbian Awareness month: promoting tolerance and diversity. *Id.*

Downs held that “a school board may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and [to] restrict the contrary speech of one of its representatives.” *Id.* at 1013. Indeed, the United States Supreme Court has acknowledged that selection of a public school curriculum by its nature favors particular viewpoints: “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.” *Id.* (citing *Forbes*, 523 U.S. 666, 674 (1998) (emphasis added)).

The Ninth Circuit's reasoning in *Downs* applies equally here: “Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.” *Id.* at 1013. LAUSD was permitted under the First Amendment to prevent Downs from changing its message. *Id.* The adoption of curricular material like Lesson 9 – whether at the Board level or the District level – is government speech; parents have no First Amendment right to alter or to restrict the material the District decides is important to teach.

Conclusion

Because the District has an obligation to combat bias and because the proposed curriculum works toward that goal without infringing the First Amendment rights of children or parents, we urge the addition of Lesson 9 to the Caring Schools Community curriculum. Because opt-out and parental-notification provisions are not legally required and would actually impede the goals of the curriculum, we urge the adoption of Lesson 9 without any opt-out or notification requirements.

Sincerely,

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