

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

CITIZENS FOR A RESPONSIBLE
CURRICULUM, *et al.*

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Plaintiffs

:

vs.

:

Civil No. 284980

MONTGOMERY COUNTY
PUBLIC SCHOOLS, *et al.*

:

:

Defendant

MEMORANDUM OPINION

This matter came before the Court as an appeal from a decision of the Maryland State Board of Education ("MSBE"). On June 27, 2007, the MSBE issued an Opinion in favor of Respondents, the Montgomery County Public Schools ("MCPS") Jerry Weast ("Weast"), in his capacity as superintendent, and Parents, Families and Friends of Lesbians and Gays of Metro DC ("PFLAG"). The Petitioners, Citizens for a Responsible Curriculum, Parents and Friends of Ex-Gays and Gays, and the Family Leader Network appealed the decision to this Court. A hearing took place on January 16, 2008 and the Court took the matter under advisement. For the reasons set forth herein, the decision of the MSBE shall be affirmed.

BACKGROUND

In November 2004, MCPS voted to approve certain changes to the health curriculum for Grades 8 and 10. In May 2005, Petitioners filed suit against MCPS in the United States District Court for the District of Maryland to enjoin MCPS from implementing the curriculum. The Federal Court granted a temporary injunction and

prevented the implementation. During the summer of 2006, MCPS began revising the curriculum into the human sexuality classes that are now at issue. Those included in the drafting were MCPS staff and a panel of experts in pediatric medicine and adolescent health recommended by the Maryland Chapter of the American Academy of Pediatrics. The new human sexuality classes consisted of: (1) a two-part, 90 minute lesson for Grade 8 on "Respect for Differences in Human Sexuality," (2) a two-part, 90 minute lesson for Grade 10 on "Respect for Differences in Human Sexuality," and (3) one 45 minute lesson for Grade 10 on condom use (collectively, "the lessons"). These lessons were designated as "opt-in" lessons that would require written parental consent for the student to participate. Also drafted were alternative lesson plans for those students who did not have parental consent. The alternative lessons included instruction on age-appropriate topics such as health and wellness, nutrition, violence prevention, addiction and recovery, decision making, communication and conflict resolution. The federal litigation was dropped following settlement negotiations between the parties to that action.

During the fall of 2006, the drafted curriculum was reviewed by a Citizens Advisory Committee ("CAC") on Family Life and Human Development as required under COMAR 13A.04.18.03(D)(1). The CAC was comprised of fifteen members appointed by the County Board; specifically, eight members at large and seven members representing organizations, including two from Petitioner organizations. Members

of the CAC proposed numerous changes to the lessons and presented them to the superintendent.

On January 9, 2007, the curriculum was presented to the County Board for approval with the recommendation of the superintendent, MCPS staff, the medical advisory panel and the CAC. At this time, the County Board approved two changes: (1) it defined the term "innate" as "determined by factors present in an individual from birth" and (2) it directed teachers to say that "sexual orientation is innate and a complex part of one's personality." At this meeting field testing was approved for the second semester of the 2006-2007 school year in three middle schools and three high schools.

Petitioners filed an appeal challenging the curriculum and urged the State Superintendent of Schools to stay the field testing pending the MSBE review of the appeal. On February 7, 2007, the State Superintendent refused to issue a stay.

During the spring of 2007, feedback was received from the field testing. More than 91% of parents gave consent for their children to take the classes. The results of the field testing were reported to the County Board who voted to approve the lessons on June 12, 2007 with minor modifications and to implement them in the 2007-2008 school year. On June 27, 2007, the MSBE upheld the County Board's decision by granting the County Board's Motion for Summary Affirmance.

Petitioners then filed a timely appeal in this Court on July 26, 2007 seeking review of the MSBE's decision and written

memorandum opinion. Petitioners also sought a stay of the implementation of the classes pending the appeal, which was denied by this Court on October 9, 2007. The following narrowed questions were presented for review at the oral argument:

1. Did the MSBE properly determine that it is legal to present instruction including the term "anal intercourse" where instruction of "erotic techniques" is prohibited under Maryland law?
2. Did the MSBE properly determine that it is legal to present instruction that homosexuality is "innate?"

Petitioners asked this Court in oral argument to make the determination that the answers to the above questions are "no," finding that both types of instruction are illegal, and to remand the case to the MSBE.

STANDARD OF REVIEW

The MSBE's opinions must receive a heightened level of deference when being reviewed by a Court. Decisions and statutory interpretations of administrative agencies in general are entitled to a significant amount of weight on review. The Court of Appeals stated, however, that "the paramount role of the State Board of Education in interpreting the public education law sets it apart from most administrative agencies." *Baltimore City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch.*, 400 Md. 324, 343 (2007). In fact, the State Board is entitled to even more deference. *Id.* "The SBE has very broad statutory authority over the administration of

the public school system in this State." *Id.* at 342. "The totality of its statutory authority constitutes a visitatorial power of such comprehensive character as to invest the State Board with the last word on any matter concerning educational policy or the administration of the system of public education, that this power is one of general control and supervision, that it authorizes the State Board to superintend the activities of the local boards of education to keep them within the legitimate sphere of their operations..." *Id.* COMAR and a consistent line of cases have held that "decisions of a local school board involving a local policy or dispute regarding rules or regulations of the local board shall be considered by the [MSBE] as prima facie correct, and [the MSBE] will not substitute its judgment for that of the local board in such cases unless the local decision is arbitrary, unreasonable or illegal." *Id.* at 343-4. COMAR 13A.01.05.05. However, the "[MSBE] shall exercise its independent judgment on the record before it in the explanation and interpretation of the State public school laws and State Board regulations." *Id.* "A local board decision will be regarded as arbitrary or unreasonable if it is contrary to sound educational policy and it will be regarded as illegal if it misconstrues the law or is an abuse of discretionary powers." *Id.* It matters not this Court's individual view, nor does this Court sit as a fact finder in the matter under review. The Court's role here is to determine if the State Board exceeded its broad visitatorial power to superintend the activities of the local boards to keep them

within the legitimate sphere of their operations. This Court must only reverse the decision of the MSBE if it was arbitrary, unreasonable or illegal.

DISCUSSION

I. Did the MSBE properly determine that it is legal to present instruction including the term "anal intercourse" where instruction of "erotic techniques" is prohibited under Maryland law?

Petitioners argue that the lessons including the term "anal intercourse" are instruction of "erotic techniques" and prohibited under Maryland law. COMAR 13A.01.05.05. Thus, the findings of the Board of Education were illegal and should be reversed.

There is no definition of "erotic techniques" under Maryland law, however, the State Board of Education determined it to mean "sexually arousing or suggestive symbolism, settings, allusions" in their Opinion of June 27, 2007, consistent with a dictionary definition of the term. This Court, acting in an appellate capacity, must give heightened deference to the MSBE's interpretation of statutes governing its area of expertise.

Baltimore City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch., 400 Md. 324 (2007). The Petitioners also argued that there are various definitions of "erotic techniques" in different Counties of the State. The Respondents answered that it is appropriate to have various definitions of a term of such nature to reflect community standards. The Court agrees with Respondents and believes that it is appropriate for various Counties in the State to have different definitions of a term of that nature depending on the demographics

of that County's population. The Montgomery County School Board may not agree with Worcester County's definition of "erotic techniques" and vice versa. In fact, the Supreme Court of the United States uses community standards in determining whether something is "obscene." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 678 (2004) (citing *Miller v. California*, 413 U.S. 15, 24 (1973) (stating that "material is legally obscene if ... the average person, applying **contemporary community standards**, would find that the work ... appeals to the prurient interest ..." (emphasis supplied))). The Board of Education determined that it was within the local school board's role to determine that the lessons did not contain erotic techniques. This Court finds that there is nothing to demonstrate that the Board of Education's determination was arbitrary, unreasonable or illegal.

As a sub-argument contained in the papers, Petitioners argued that the lessons that include the term "anal intercourse" inaccurately instruct that condoms successfully protect during anal intercourse, which they argue is a factually inaccurate statement. Thus, Petitioners claim that the instruction is illegal under COMAR 13A.04.18.03(c)(2). This section of COMAR states: "The local school system shall use its existing procedures for evaluating reading levels, *factual content*, and general suitability of material for different levels of instruction." (Italics added). The lessons in the health curriculum were prepared by a committee including medical

professionals, namely four medical consultants affiliated with the Children's National Medical Center in Washington, D.C., who are citizens of Montgomery County, Maryland. Additionally, this issue has been reviewed by the local Montgomery County School Board and the State Board of Education. The Board of Education's Opinion stated that the lessons regarding the origins of sexual orientation are not open to an evidentiary hearing and are within the legal purview of the school to include or not include in the lessons. Therefore, this Court finds that there is nothing to demonstrate that the Board of Education's Opinion is arbitrary, unreasonable or illegal.

II. Did the MSBE properly determine that it is legal to present instruction that homosexuality is "innate"?

Petitioners present several justifications for their argument that instruction teaching that homosexuality is innate is factually inaccurate and, therefore, unfit to be taught in Montgomery County Public Schools. They argue that there is substantial medical testimony showing that homosexuality has not been established as a characteristic that one has from birth. Additionally, they note that the Maryland Court of Appeals, in *Conaway v. Deane*, refused to take judicial notice that homosexuality was, in fact, innate. 2007 WL 2702132 (Md.). Petitioners argue that, therefore, the lessons are violative of Maryland law, specifically, COMAR 13A.04.18.03(c)(2). Respondents answered that the lessons were created by a

committee including medical professionals, namely four medical consultants affiliated with the Children's National Medical Center in Washington, D.C., who are citizens of Montgomery County, Maryland, and therefore, argue that the lessons were medically accurate.

In addition, Respondents noted that the lessons did not teach that homosexuality was innate, but that "there is no single reason why some people are homosexual, heterosexual, or bisexual" but that "according to the American Psychological Association, sexual orientation results from an interaction of cognitive, environmental and biological factors," and that "sexual orientation is innate and a complex part of one's personality." Finally, simply because the Court of Appeals failed to apply the stringent standard needed to take judicial notice of a fact does not mean that it is inappropriate to teach that fact in a school setting. The Board of Education's Opinion stated that the lessons regarding the origins of sexual orientation are not open to an evidentiary hearing and are within the legal purview of the school to include or not include in the lessons. Therefore, this Court finds that there is nothing to demonstrate that the Board of Education's Opinion is arbitrary, unreasonable or illegal.

