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REPLY TO FLORIDA

May 30, 2019

Via Email Only

Dr. Bob O'Donnell, Superintendent
State College Area School District
240 Villa Crest Drive
State College, PA 16801
rjo11@scasd.org

Re: Denial of parental curriculum review request

Dear Superintendent O'Donnell:

Liberty Counsel is a national non-profit litigation, education and public policy organization with an emphasis on First Amendment liberties. We provide *pro bono* assistance to our constituents in matters within our mission, in conjunction with our nationwide network of affiliated attorneys. I write on behalf of Liberty Counsel in a matter involving fundamental parental rights.

Liberty Counsel has been contacted by concerned parents residing in the District. The parents desire to review the entire Human Growth and Development/sex education curriculum, including all slides, presentations, and any other materials intended for use in the educational program. Parents have this and other rights, under the U.S. Constitution; federal statutes; Pennsylvania law; and District policies. I understand that in response to the latest parent requests, District representatives have provided curriculum summaries, but not all of the actual material that will be used, and have claimed "copyright" protection for this decision. School districts would not violate copyright laws by providing parental access of materials that will be shown to their children, for purpose of parental review.

Liberty Counsel adds our voice to that of parents, and **requests that the District provide to parents access to all requested curriculum materials.** Liberty Counsel suggests the District provide an electronic portal for that purpose to all District parents. Many school districts provide such portals for this type of curriculum review, in the interests of transparency. The fair use doctrine and the first sale doctrine would both independently permit such lending for purposes of review of the materials by parents.

The United States Constitution vests parents, not agents of the state, with the right to direct the upbringing and associations of minor children. The law presumes that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . The child is not the mere creature of the State;" *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). (Emphasis added). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205 (1972). (Emphasis added).

If "there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). These principles apply to school sex education curriculum, and efforts by some to prescribe a sexual "orthodoxy" or morality inconsistent with parent religious beliefs and parental desires for their children's moral education.

Accordingly, Pennsylvania requires school districts to provide parents the opportunity to review **all** instructional material prior to it being shown to their children. This is particularly important where the material discusses matters of sexuality. Parents have the "right to have their children excused from specific instruction that conflicts with their religious beliefs, upon receipt by the school entity of a written request from the parent or guardians." See 22 Pa. Code § 4.4. Parents cannot meaningfully exercise this right without notice and the opportunity to inspect all curriculum materials, not just summaries or sanitized slide presentations. District personnel cannot avoid their responsibility to respect parental rights. See *also* Pa. Const. Stat. Title 22 § 4.29 ("Prior to the commencement of instruction [on AIDS/HIV prevention], a school district shall publicize that **detailed curriculum outlines and curricular materials** used in conjunction with the instruction **are available to parents and guardians...**"). (Emphasis added).

District [Policy 105.1, Curriculum Review By Parents and Students](#), states that upon "request by a qualifying parent...the district **will make available existing information about the curriculum**, including...**instructional materials** and assessment techniques." "This policy ensures that parents have an opportunity to review **instructional materials...**" "This policy is established to **comply with the requirement of the State Board of Education...**" (Emphasis added). On its face, mere summaries do not comply with this policy, nor with state law.

District [Policy 127, Assessment of Educational Programs](#), further states that the "Board **shall grant requests by parents or guardians to review** the school district, state, and commercial **assessments prior to their administration... [4]**" (Emphasis added). Policy 127 also states the "building administrator **shall grant parents or guardians the right to have their student excused from state assessments that conflict with their religious**

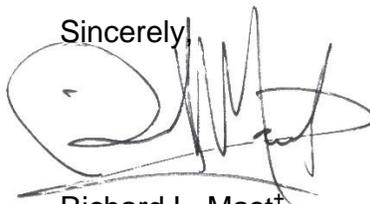
beliefs. Parents must present the request, in writing, to the building administrator.^[4] Moreover, in light of these policies, please be advised that Liberty Counsel is providing parents with a model “Parental Non-Consent Form,” to specify in writing for administrators specific material from which they desire their children exempted.

Finally, regarding the claim of “copyright” and sex-ed curriculum materials: it is laudable that District staff desire to comply with intellectual property law. However, a school district may not raise a claim that “copyright” prevents compliance with a curriculum review request under Pennsylvania law, nor under District policy. Curriculum material, once adopted or under consideration for adoption by the District, constitute public records subject to Pennsylvania’s Right-to-Know Law. A continued denial may result in a lawsuit under the Right-to-Know Law. *See Jihad Ali v. Philadelphia City Planning Comm’n*, 125 A.3d 92 (Pa. Commw. Ct. 2015) (Copyrighted materials not exempt from disclosure under Copyright Act and were thus not exempt from disclosure under Right to Know Law (RTKL); Copyright Act did not expressly make copyrighted material private or confidential, nor did it expressly preclude a government agency, lawfully in possession of the copyright material, from disclosing that material to the public).

The Federal Copyright Act provides copyright owners the “exclusive rights to do and to authorize” reproduction and distribution of their copyrighted works. 17 U.S.C. § 106(1), (3). However, reproduction and distribution by a third party “for purposes such as criticism, comment, ... scholarship, or research[] is not an infringement of copyright;” and is, instead, a lawful and “fair use.” 17 U.S.C. § 107. *See also* 17 U.S.C.A. § 101 et seq.; 65 P.S. § 67.305(a)(3). Under Pennsylvania’s “Right to Know Law,” prevailing plaintiffs are entitled to attorney fees. *See* 65 P.S. § 67.1304. In this case, the District has an affirmative obligation to make sex education materials available to parents for inspection and review, and not hide the ball.

Based on these authorities, please **respond to Liberty Counsel in writing by June 28, 2019, with confirmation that the District will make available to parents the requested sex-ed curriculum materials in their entirety**, including all slides, multimedia presentations, sources, textbooks, and any other supplemental materials (including planned weblinks or videos). If we do not receive this response, Liberty Counsel will take additional action to prevent irreparable harm to cherished liberties.

Thank you for your attention to this request.

Sincerely,

Richard L. Mast[†]

[†] Licensed in Virginia
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Denial of parental curriculum review request
May 30, 2019
Page 4

CC
Via Email Only

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