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May 22, 2009

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ALAMEDA UNIFIED SCHOOL DISTRICT
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RE: Liability Regarding LGBT Curriculum

Dear Members of the Board of Education,

The purpose of this letter is to briefly discuss and answer certain legal questions raised by the board at the May 18th meeting. The essence of the concern is whether the proposed LGBT curriculum is required by law and what will be the legal consequences for adoption or rejection. In sum, the LGBT curriculum is not required under California law and implementation, in its current form, is inconsistent with legal requirements and will likely result in liability if a suit is brought.

California law does not require this specific curriculum. An exhaustive search of the statutes and regulations has unearthed no requirements relative to the implementation of the proposed LGBT curriculum. It should be noted that proponents of the curriculum have provided no such authority to suggest otherwise. Hence, the District is not subject to liability if it declines to adopt the proposed LGBT materials. But this does not end the inquiry. The next question that must be addressed is whether the proposed materials are consistent with the law.

The document entitled Ensuring Safe Schools In Alameda Unified School District cites to the Student Safety and Violence Prevention Act of 2000 which it refers to its bill number, AB 537. The language in that law states that “*all* persons in the public schools, regardless of their disability, gender, nationality, race or ethnicity, religion, sexual orientation” have the right to equal opportunities and access to educational institutions. (Educ.C. §200). Similar expressions are used in the other statutes revised under AB 537.

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In like manner, the California Constitution states that “*all* students and staff have the inalienable right to attend campuses that are safe, secure and peaceful.” (Art. I, sec. 28(f)(1)). (Emphasis in the above provisions have been added.)

A plain reading of the Student Safety and Violence Prevention Act of 2000 and the California Constitution reveal that the emphasis is on inclusion of **all** pupils regardless of their status in one of the six identified groups. An overview of the Education Code’s sections on diversity, tolerance, and safe schools reveals that sexual orientation is never discussed in isolation. It is universally listed among the other protected classes (i.e. “disability, gender, nationality, race or ethnicity, religion, sexual orientation”) and is used in the context of providing benefits to all pupils.

For example, the California Department of Education’s publication entitled Bully at School is consistent with this reading. Bully at School cites the same legal provisions that proponents of the LGBT curriculum rely on and are discussed above. However, in contrast to the LGBT curriculum, Bully at School never speaks of sexual orientation in an isolated manner but properly includes it as one of the six suspect classes that the legislature has identified. In sum, because the proposed LGBT curriculum monopolizes on harassment instruction, it is inconsistent with the legislative scheme to protect all students. Therefore, adoption of the LGBT materials in current form would subject the school to liability because it fails to provide instruction calculated to protect the other six classes in equal proportion. When a student from one of the other five classes is harassed (e.g. a student who is enrolled in special education classes and thus has a “disability”), the District would be liable because it could have provided specific instruction but willfully ignored that class of persons.

In addition to being inconsistent with the inclusive requirements of the Education Code, the District may also have liability if the proposed curriculum is adopted because it does not provide for an opt-out provision. Although the curriculum purports to address harassment, the bulk of the lessons deal with family life. As per the Health Education Content Standards for California Public Schools, Kindergarten Through Grade Twelve, “family life” includes, but not limited to, the following:

- (1) Description of the characteristics of families; and,
- (2) Descriptions how members of a family have various roles, responsibilities, and individual needs.

Because the proposed LGBT curriculum clearly falls within the above enumerated items, the law requires a provision for parents to exercise their right to opt-out their child. “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.” Educ.C. §51240.

To redeem the proposed curriculum, the Board could decline to adopt the materials and direct that they be sent back to include:

1. instruction consistent with the general District policies against harassment and bullying;
2. lessons that include all six protected classes in equal proportion; and,
3. parental opt-out for children to the extent the lessons fall within instruction on "family life."

The above recommendations will place the District in a safe harbor and thus prevent litigation. On the other hand, passing the LGBT curriculum in its current form will expose the District to significant legal liability.

Very truly yours,



Kevin Snider
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