

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TAMER MAHMOUD, *et al.*,

Plaintiffs,

v.

MONIFA B. MCKNIGHT, *in her official
capacity as Superintendent of the
Montgomery Board of Education, et al.*,

Defendants.

Case No. 8:23-cv-01380-DLB

**PLAINTIFFS'
SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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Plaintiffs (the “Parents”) respectfully submit this brief to provide the Court with additional information regarding the School Board’s Health Education on “family life and human sexuality” instruction.

At the August 9 hearing on the Parents’ motion for preliminary injunction, the Court inquired about whether the contents of the School Board’s Health Education and the Pride Storybooks were comparable under *Tandon v. Newsom*. Comparability is determined by “the asserted government interest that justifies the regulation at issue.” 141 S. Ct. 1294, 1296 (2021); *see also* Br. 19; Reply 9. Here, the School Board’s own Policy ACA on Nondiscrimination, Equity, and Cultural Proficiency makes promoting diversity and equity an interest for all “[i]nstructional materials used in MCPS schools” that goes “beyond meeting the letter of the law.” Reply 10 (quoting Opp. Ex. 1 at 2, 5, 7). Below, the Parents explain how the substance of the Health Education instruction is comparable to the substance of the Pride Storybooks, further evidencing how both activities advance the same inclusivity and safety interests.

First, the School Board’s own website documents the inclusivity and safety efforts underlying the gender and sexuality topics taught in family life and human sexuality instruction. By Grade 5, students will know how to “[d]escribe male and female stereotypes and their impact on the individual and a diverse society.” *Comprehensive Health Education in Grade 5: Family Life and Human Sexuality*, Montgomery County Public Schools, <https://perma.cc/W6N5-2TY7>. By Grade 7, students will: discuss “sexual orientation,” “gender identity,” and “teasing, bullying, and intolerance related to all aspects of sexuality”; “[d]emonstrate respect for individual differences in all aspects of sexuality”; “[a]ccess research-based information about gender identity, gender expression, and sexual orientation”; “[c]ommunicate respectfully with and about all people”; “[a]dvocate to promote dignity and respect for all people”; and “[p]ersuade others to avoid teasing, bullying, or stigmatizing others based on their personal characteristics or aspects of their sexuality.” *Comprehensive*

Health Education in Grade 7: Family Life and Human Sexuality, Montgomery County Public Schools, <https://perma.cc/8QRK-3SGR>. And in high school, students are expected to: “[j]ustify the benefits of respecting individual differences in aspects of sexuality”; “[i]dentify how school and community programs and policies can promote dignity and respect for people of all sexual orientations and gender identities and expressions”; “[e]xamine the impact of gender expression and gender identity on members of marginalized communities”; and “[a]nalyze ways systemic oppression and intersectionality impact the sexual agency of communities of color and other marginalized groups.” *Health Education in High School: Health Education A Scope and Sequence*, Montgomery County Public Schools, at Unit 4: Family Life and Human Sexuality, <https://perma.cc/HB3Y-P7A8>; *Health Education in High School: Health Education B Scope and Sequence*, Montgomery County Public Schools, at Unit 8: Family Life & Human Sexuality, <https://perma.cc/9H26-5DJZ>. These objectives are stated in language more appropriate for middle- and high-school-level instruction, but the same interests motivate the Pride Storybooks elementary school mandate. Opp. at 25-27.

Second, the Maryland Comprehensive Health Education Framework also confirms that gender identity and sexuality are taught in Health Education classes, under the rubric of family life and human sexuality, and advances the School Board’s asserted inclusivity and safety interests. *Maryland Comprehensive Health Education Framework: Pre-Kindergarten Through High School*, Maryland State Department of Education (June 2021), <https://perma.cc/UT6W-8FWN>. Specifically, the Maryland Framework was “updated ... in 2020” to “implement the [2019] regulation” and “reflect statutory changes in health education, anti-bullying and harassment, and ensuring educational equity.” *Id.* at 6. Per the Framework, “[l]ocal educational professionals should ensure that lessons and content are age appropriate and reflect educational equity,” while “[l]ocal education agencies develop the curricula to

implement the regulations ... aligned with the framework.”¹ *Id.* As part of family life and human sexuality instruction, students in Grades 2 and 3 are expected to “[d]emonstrate ways to treat people of all gender identities and expressions with dignity and respect.” *Id.* at 30. In Grades 6-8, students are expected to: “[d]efine sex assigned at birth, gender identity, and gender expression”; “[c]ompare sex assigned at birth and gender identity and explain how they may or may not differ”; “[e]xplain sex assigned at birth and gender identity and explain how they may or may not differ”; “[e]xplain sexual orientation”; “[d]efine sexual identity and explain a range of identities related to sexual orientation”; and “[d]escribe sexual identity and explain a range of identities related to sexual orientation.” *Id.* at 33. By high school, students are expected to “[i]dentify” and “[a]nalyze how school and community programs and policies can promote dignity and respect for people of all sexual orientations and gender identities and expressions.” *Id.* at 37.

In sum, the inclusivity and safety interests underlying the Pride Storybooks are present in the School Board’s Health Education curriculum on family life and human sexuality. Those comparable interests are confirmed by the comparable substance of Health Ed objectives and the Pride Storybooks. Yet opt-outs are allowed for the former while denied for the latter. Teaching the same objectives in a different class period under a different label changes nothing. Reply 9 (citing *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020)).² The School Board’s disparate treatment is not generally applicable, and therefore warrants strict scrutiny under *Tandon*.

¹ Local education agencies are also required to “establish policies, guidelines, and procedures for parents to opt-out their students from family life and human sexuality instruction in all grades, except for HIV and AIDS prevention,” which “reflects the State Board’s and MSDE’s respect for individual parents’ values and beliefs concerning family life and human sexuality instruction.” Framework at 6.

² See also *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2176 (2023) (“[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,’ and [a constitutional] prohibition ... is ‘levelled at the thing, not the name.’” (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867))).

Dated: August 10, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2023, the foregoing brief was served on counsel for all parties by means of the Court's ECF system in compliance with Fed. R. Civ. P. 5.

Dated: August 10, 2023

/s/ Eric S. Baxter
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