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2009-05

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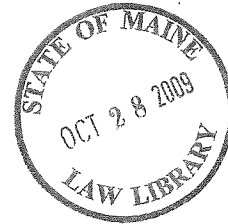
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AUGUSTA, MAINE 04333-0006

October 15, 2009

Susan A. Gendron, Commissioner
Maine Department of Education
23 State House Station
Augusta, ME. 04333-0023



RE: Referendum Question 1

Dear Commissioner Gendron:

You have asked about the implications of LD 1020, PL 2009, ch. 82, "An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom," on the development of school curricula in our state. My office's analysis of the issue reveals no impact on the curricula of Maine's public schools.

LD 1020, as enacted by the Legislature and signed into law by the Governor on May 6, 2009, expands the availability of civil marriage to couples of the same gender. It also reaffirms the strict prohibitions on marriage by related parties, marriage by persons under disability and multiple marriages. It then allows a specific religious conscience exception, prohibiting any court or state or local governmental entity from interfering with any religious institution's policy or teachings.

The provisions of this new law pertain expressly to Title 19-A, which defines in what instances the state will recognize a couple's marriage, when a premarital agreement is authorized, how a marriage is dissolved by the court through divorce or separation, how married individuals are obligated to support one another and their children, the rights of children and the division of marital property upon dissolution of a marriage and many other rights and responsibilities surrounding the legal institution of marriage.

The status of marriage as legally defined in Title 19-A also incidentally determines rights of inheritance, rights to tort claim damages, right to medical information, the right of privilege against disclosure of private communications, the right of priority as guardian or conservator or custodian of a deceased's remains and other rights and responsibilities under Maine's civil laws.

I have scoured Maine laws relating to the education of its children for any references to marriage in the public school curricula. I have found none.

As you are well aware, the guidelines for Maine's public school curricula are established by the "Maine Learning Results," which set out educational standards for mathematics, reading, science and technology, as well as minimum graduation requirements in English, math, science and other

core subjects. These guidelines are then reviewed at the local level as locally elected school boards determine the exact content of each district's curricula. Nothing in state law dictates that any particular text books or other reading materials should be used or made available in the public schools.

In fact, for parents concerned about educational practices in Maine, safeguards for persons with religious beliefs are already provided in the law: The Maine Learning Results statute, 20-A M.R.S.A. sec. 6209, requires "accommodation provisions for instances where course content conflicts with sincerely held religious beliefs and practices of a student's parent or guardian."

Thus, if parents with religious beliefs which do not permit them to vote do not wish their children to be taught about their duty to vote in civics classes, for instance, they could seek accommodation under this law. Likewise, parents with religious beliefs which prohibit dancing might seek accommodation for their child regarding physical education classes that involved dancing. (See Dept. of Educ. 05 071 CMR 127-3.07, which requires the local superintendent to make accommodations before asking the Commissioner for assistance.).

The political process, to which the courts often refer, also provides a recourse for families who wish to participate in the development of curricula in their local schools. See 20-A M.R.S.A. secs. 1001(6) & (10-A) (duty of the school board to "approve educational materials").

I have reviewed the one Massachusetts case cited by certain advocates in opposition to the marriage measure passed by our legislature. That case, Parker v. Hurley, 514 F.3d 87 (1st Cir.2008), *cert. den.*, 129 S.Ct. 56 (U.S.2008), does not stand for the proposition that any particular educational materials must be taught, used or referred to in that state's public schools. That case declared, regardless of that state's definition of marriage, that there is no federal *First Amendment* right to prior review of books made available in the public schools. The case does pointedly make reference to the parents' political recourse through the local school board.

Importantly, there was no allegation in the Parker case of "a formalized curriculum requiring students" to read books "affirming gay marriage" or anything that constituted "coercion" or any viable claim of "indoctrination," according to the court, *ibid*, 105-07; any such practices which offend religious beliefs would probably have been struck down. Nor did the decision turn on any provision of state law relating to either marriage or education.

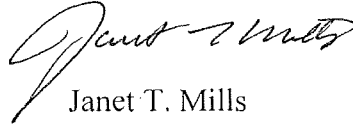
The holding of the Parker case would apply to any parents who might not want their child to be exposed to certain viewpoints in a public school, whether it be discussions limited only to traditional heterosexual marriage; or depictions of adoption families, foster care and other nontraditional family situations; or discussions of differing theories of government, religion, philosophy, science or history. Parker simply states that there is no *automatic federal* judicial remedy for such objections to educational materials.

Whatever the benefits and burdens of the civil institution of marriage, the state's definition of marriage has no bearing on the curricula in our public schools, either under current law or under LD 1020. Neither the Parker decision nor passage of LD 1020 "requires" or "allows" the teaching of any particular subject in our schools, in answer to the citizen question attached to your letter.

What is taught in private or religious schools, of course, may include the principles and religious tenets of those organizations regarding family institutions and other subjects, and nothing in LD 1020 would change that prerogative of private or religious institutions to instill those beliefs in their children either at home or at their schools.

I trust this letter adequately addresses your question and the concerns of citizens who have sought advice from your department.

Very truly yours,

A handwritten signature in black ink, appearing to read "Janet T. Mills". The signature is fluid and cursive, with the first name being the most prominent.

Janet T. Mills
Attorney General

JTM/ms