AMERICAN CIVIL LIBERTIES UNION of LOUISIANA

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EXECUTIVE DIRECTOR

June 8, 2009

VIA U.S. MAIL, OVERNIGHT DELIVERY
Amy B. Westbrook, Ph.D.
Executive Director
State Board of Elementary and Secondary Education
P.O. Box 94064
Baton Rouge, LA 70804-9064
Attn: Nina A. Ford
Board Recorder –Records Supervisor

Re: ACLU comments on Bulletin 741, § 2304, "Science Education"

Dear Dr. Westbrook:

We write, on behalf of ACLU members and supporters in Louisiana, to provide comments and advice regarding Bulletin 741, § 2304, "Science Education." The current version of the proposed regulations, published on April 20, 2009, in the *Louisiana Register*, is problematic from both legal and practical standpoints. We believe that these infirmities, as outlined below, are likely to result in significant violations of students' First Amendment rights and render the authorizing statute, as applied via the proposed regulations, even more susceptible to a constitutional challenge. Accordingly, we urge and advise the State Board of Elementary and Secondary Education ("BESE") to reconsider and rescind recent changes to the proposed regulations.

The State of Louisiana and the school boards of many Louisiana Parishes have a long and unsavory history of trying to inject creationism, creation science, and other religious beliefs pertaining to the origin of life into public-school science curricula under the pretext of fostering academic freedom and critical thinking. The federal courts, however, have swiftly rebuffed these efforts as violating the Establishment Clause of the First Amendment to the U.S. Constitution.[1]

1 Indeed, federal courts across the country have unequivocally and repeatedly rejected any effort to promote creationism and its progeny in the public schools or otherwise undermine the teaching of evolution to bolster and advance religious beliefs regarding the origin of life. *See Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) (holding unconstitutional state law prohibiting the teaching of evolution in public schools because "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man"); *Daniel v. Waters*, 515 F.2d 485, 487, 487, 489 (6th Cir. 1975) (holding that Tennessee statute barring public-school use of any textbook teaching evolution "unless it specifically states that it is a theory as to the origin and creation of man and his world and is not represented to be scientific fact" and unless equal time is devoted to creationism was "obviously in violation of the First Amendment"); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1306 (N.D. Ga. 2005) (striking down Board policy requiring placement of sticker disclaiming evolution as theory not fact, in all science textbooks because the sticker impermissibly "sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, . . . [and] a message to those who believe in evolution that they are political outsiders"), *vacated and remanded on grounds of incomplete trial record*, 449 F.3d 1320 (11th Cir. 2006); *Kitzmiller v. Dover*, 400 F. Supp.2d 707, 765-66 (M.D. 2005) (striking down school board policy promoting the teaching of intelligent design in biology class); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1274 (E.D. Ark. 1982) (enjoining statute authorizing teaching of creation science in public schools and

See, e.g., Edwards v. Aguillard, 482 U.S. 578, 586, 592 (1987) (striking down Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act as unconstitutional, holding that the Act was "was not designed to further" the State's purported goal of "protecting[ing] academic freedom," and concluding that "[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind"); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F. 3d 337, 344-45 (5th Cir. 1999) (overturning school-board policy requiring teachers to read classroom disclaimer questioning validity of evolution and promoting creationist beliefs and holding that the "contested disclaimer does not further the [Board's] first articulated objective of encouraging informed freedom of belief or critical thinking by students . . . [but rather] we find that the disclaimer as a whole furthers a contrary purpose, namely the protection and maintenance of a particular religious viewpoint"); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 829 (E.D. La. 1997), *aff'd* 185 F.3d 337 (5th Cir. 1999) ("[T]his Court cannot glean any secular purpose to this disclaimer. While the School Board intelligently suggests that the purpose of the disclaimer is to urge students to exercise their critical thinking skills, there can be little doubt that students already had that right and are so urged in every class.").

The Louisiana Science Education Act appears to be the latest line of attack against evolution in the State's longstanding campaign to promote creationism in the public schools. Thus, this "historical background . . . cannot be denied or ignored" by BESE, which is charged with the statute's implementation, and, indeed, will likely be considered by any court assessing the law's application in Louisiana's public schools. *See Aguillard v. Edwards*, 765 F.2d 1251, 1253 (5th Cir. 1985) (tracing the history of the pro-creationism, antievolution movement); *see also, e.g., McLean*, 529 F. Supp. at 1263 (noting that "[t]he State of Arkansas, like a number of states whose citizens have relatively homogeneous religious beliefs, has a long history of official opposition to evolution which is motivated by adherence to Fundamentalist beliefs in the inerrancy of the Book of Genesis").

As drafted by the Louisiana Science Education Act Advisory Committee ("LSEAAC"), a council of science-education professionals convened by the Louisiana Department of Education to provide expert advice to BESE, the proposed regulations (while flawed in other respects) accounted for Louisiana's unrepentant history of promoting creationism and its progeny in the public schools. The LSEAAC draft rules (originally set to be presented and considered at December 2, 2008, meeting of BESE's Student/School Performance and Support Committee), provided that (1) "Religious beliefs shall not be advanced under the guise of encouraging critical thinking"; and (2) "Materials that teach creationism or intelligent design or that advance the religious belief that a supernatural being created humankind shall be prohibited for use in science classes." These draft provisions would have conveyed to local school boards and teachers the clear, unadulterated message that they may not use newly authorized supplemental materials to further the pro-creationism, antievolution movement that has plagued Louisiana's public schools for decades and compromised the science education of countless students, while simultaneously violating their First Amendment rights. LSEAAC's proposed regulations also would have given weight to lawmakers' claims that the Science Education Act is not a sheep in wolf's clothing intended to provide cover to school boards and teachers that seek to integrate religious beliefs into science curricula. Yet, in revising LSEACC's draft regulations for publication on April 20, 2009, the BESE inexplicably excised both provisions, suggesting that lawmakers' professed

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holding that "[n]o group, no matter how large or small, may use the organs of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others").

purposes in enacting the law, and BESE's purpose in implementing the statute — to promote academic freedom and critical thinking — are indeed shams intended to mask religious aims.[2] BESE should revert to the LSEACC's language or otherwise revise its policy to be consistent with these recommendations.

What remains, a generic statement that "[c]lassroom instruction and materials shall not promote any religious doctrine" is vague at best and will likely be confusing to parents and schoolchildren, who will be primarily responsible for challenging potentially violative supplemental materials under the proposed regulations since they are the "Louisiana citizen[s]" most likely to know about and/or come into contact with them. *See* Proposed Regulations, April 20, 2009 ("Any Louisiana citizen may challenge materials used by an LEA by submitting a complaint to the Division of Curriculum Standards for the DOE for consideration by BESE."). This blurring of the much clearer and more obvious content standards set forth by the LSEAAC's draft regulations is especially troublesome in light of *another* revision made by BESE, requiring that any person filing a challenge to supplemental materials authorized under the statute must "identify the reasons for the challenge and cite evidence to substantiate the challenge." In short, this new provision effectively requires that schoolchildren and parents who suspect their teachers or school boards are using impermissible supplemental materials become scientific experts themselves in order to write and submit a complaint. And if that were not enough, the revised regulations also provide for a "meeting allowing the complainant, the LEA, and any interested parties adequate time to present their arguments and information and to offer rebuttals," thereby virtually ensuring that any complaint will lead to a *Scopes*-like spectacle. By placing this onus on schoolchildren, parents, and other citizens who might complain regarding the use of impermissible supplemental materials in science classes, the revised regulations create significant disincentives and obstacles to bringing a challenge.

Moreover, the revised regulations do not establish any specific guidelines or rules for carrying out the complaint proceedings. The regulations do not state where and when the DOE "meeting" will be held. A meeting held during business hours in Baton Rouge, for example, could be located hours away from the complainant's home, thereby imposing additional burdens on the complainant by requiring him or her to travel long distances and/or take several days off of work to attend. Nor do the regulations define what constitutes "an interested party," potentially opening up the "meeting" to a wide array of advocates not directly affected by the outcome. In addition, the proposed regulations do not speak at all to whether the challenged materials may continue to be used pending a DOE decision, how quickly such a decision must be rendered, and whether there is a venue for appeal.

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2 While the federal courts are "normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere, and not a sham." *See Edwards*, 482 U.S at 588-89 (holding that Lousiana Legislature's professed purpose to foster academic freedom was a sham). And the Supreme Court and Fifth Circuit have held that amendments to the language of a statute can evince an improper religious purpose. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (holding that Alabama Legislature's amending of public-school moment-of-silence statute to add option of "'voluntary prayer' indicate[d] that the State intended to characterize prayer as a favored practice" and was evidence of an improper religious purpose); *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 294 (5th Cir. 2001) (striking down amended Louisiana statute authorizing morning moment of silence and prayer in public schools as unconstitutional because Legislature's deletion of word "silent" from statute served a clearly religious purpose — "to authorize verbal prayer in schools")

As the Supreme Court explained in *Edwards*, "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. 492 U.S. at 584. At best, BESE's revisions to the LSEAAC's recommendations send the message that BESE does not honor or hold this trust sacred, as it should. At worst, the proposed regulations, as they currently stand, evince an intent to betray this trust. BESE should take the steps outlined above to remedy, as much as possible, the constitutional and practical infirmities of the currently proposed regulations.

If you would like to discuss this matter further or would like additional comment and/or advice, please contact Marjorie Esman at (504) 522-0617.

Sincerely,

Marjorie Esman