



November 2, 2007

John Coyne, Chairperson
Portland School Committee
111 Saugus St.
Portland, Maine 04103
coynejo@portlandschools.org

VIA FEDERAL EXPRESS AND E-MAIL

Re: Parental Rights at King Middle School

Dear Chairperson Coyne:

The American Center for Law and Justice (ACLJ) has been contacted by several Portland parents who want to know their legal rights concerning the Portland, Maine School Committee's ("Committee") recent decision to offer prescription birth control to students as young as 11 years old at King Middle School's health center. Under that program, parents who have granted permission for their children to receive medical treatment at the health center would have no way of knowing whether their children are receiving prescription contraception.

Moreover, according to published reports, the health center has violated Maine law by not reporting all illegal sexual activity involving children 13 years old or younger. Many parents and members of the community in Portland, as well as the rest of the country, are stunned and appalled by the health center's permissive attitude toward sexual activity by children.

By way of introduction, the ACLJ is a public interest law firm. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving constitutional freedoms. Additionally, the ACLJ has filed *amicus curiae* briefs in support of parental rights in key cases such as *Troxel v. Granville*, 530 U.S. 57 (2000), and *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006).

The ACLJ is deeply concerned about the preservation of parental rights in this situation. We are writing this letter on behalf of the thousands of ACLJ members in Maine and across the country that have expressed to us their outrage and disgust over the Committee's usurpation of parental responsibility to protect the health and morality of their children. After discussing the relevant

facts, this letter explains Maine's mandatory reporting requirements for illegal sexual activity involving children. The letter also urges the Committee to respect the authority of parents by changing its policy on offering prescription birth control to young children. We urge the Committee to revise its policies for King Middle School's health center to ensure that sexual activity involving young children is reported to law enforcement rather than facilitated.

STATEMENT OF FACTS

King Middle School in Portland, Maine includes grades 6 to 8, and the students range in age from 11 to 15.¹ The Portland School Committee recently voted to offer prescription birth control to students at the School's health center.² Under the new policy, "King Middle School will become the first middle school in Maine, and apparently one of only a few in the nation, to make a full range of contraception available, including birth-control pills and patches."³

The Committee's decision would allow children as young as 11 years old to obtain prescription birth control pills without their parents' knowledge.⁴ While children need parental permission to receive treatment at the School's clinic, parents have no way of knowing whether their children are receiving contraception.⁵ The current parental consent form "allows students to receive any kind of treatment at the school health center [and] does not clearly define the services being offered."⁶

Many parents in the Portland community—and across the nation—were outraged by the Committee's decision. One former nurse commented on the decision by saying, "[w]e are dealing with children. . . . I am just horrified at the suggestion."⁷ Another person has noted, "[w]hen talking about children so young, the idea that parents would have no say is galling; they can be pulled over by police if their 11-year-old is not wearing a seat belt, but have no right to know whether she's taking the Pill."⁸ The Committee's decision improperly usurps parental responsibility to deal with issues of health and morality affecting children.

In addition, it has been reported that King Middle School's health center and other Portland area student health centers have been violating Maine law by not reporting all illegal sexual activity

¹ Kelley Bouchard, *School Health Centers Didn't Report Underage Sex*, Portland Press Herald, Oct. 26, 2007, <http://pressherald.maintoday.com/story.php?id=143117&ac=PHnws>.

² *Id.* The School's health center has provided condoms to students since 2000. *Id.*

³ Jerry Harkavy, *Maine School to Offer Contraceptives*, Oct. 18, 2007, http://www.examiner.com/a-997257~Maine_School_to_Offer_Contraceptives.html.

⁴ *Id.*

⁵ *A Maine School Board to Consider Plan to Limit Contraceptives*, Boston Globe, Oct. 24, 2007, http://www.boston.com/news/local/articles/2007/10/24/a_maine_school_board_to_consider_plan_to_limit_contraceptives/.

⁶ *Maine Middle School to Offer Birth Control*, CNN, <http://www.cnn.com/2007/HEALTH/10/18/middleschool.contraception.ap/index.html>.

⁷ *Id.*

⁸ Nancy Gibbs, *Birth Control for Kids?*, Oct. 18, 2007, <http://www.time.com/time/nation/article/0,8599,1673227,00.html>.

involving minors.⁹ Maine law prohibits sexual activity with children 13 years old or younger, regardless of the age of the other person.¹⁰ All health care providers are required by law to report any known or suspected incident of sexual activity involving children 13 years old or younger.¹¹ While some city officials have stated that the health centers will report all illegal sexual activity from now on, there is still some confusion regarding when and whether employees are required to report such activity.¹²

The Committee has an important opportunity to revise its health center policies.¹³ A proposal currently being considered would allow parents to enroll their children in the clinic while withholding their consent for their children to access prescription contraceptives.¹⁴ This proposal would also ensure that children 13 years old or younger would *not* have access to prescription contraceptives at the health center.¹⁵ The Committee should also ensure that all health center employees are aware of their duty and responsibility to report all incidents of sexual activity involving children 13 years old or younger to the appropriate authorities. The Committee should seize the opportunity to return the ultimate authority for the upbringing of children to their parents.

STATEMENT OF LAW

The protection of children from physical and sexual abuse is one of the highest duties of parents and society. The Maine State Legislature has recognized that protecting the health and safety of children is of paramount concern.¹⁶ The failure of health center personnel to report all instances of sexual activity involving young children endangers the safety of those children and must be corrected. Moreover, the Committee's decision to offer prescription birth control to children as young as 11 years old tramples upon parental rights and has the effect of promoting illegal sexual activity.

I. Maine Law Establishes that *All Sexual Activity Involving Children 13 Years of Age or Younger is Illegal in All Circumstances.*

Section 253 of Maine's criminal code states that engaging in any "sexual act" with a child 13 years old or younger constitutes the crime of gross sexual assault (unless the parties are a married couple).¹⁷ This statute applies without any qualifier for the age of the other person and, by the ordinary and common reading of its terms, applies even where both parties are 13 years old or

⁹ Bouchard, *supra* note 1. "[I]f a child under age 14 was having consensual sex with someone of a similar age, health center employees weren't reporting it to the proper authorities, said City Attorney Gary Wood." *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Harkavy, *supra* note 3. "Sex with a nonspousal minor under 14 is considered gross sexual assault in Maine, and officials said it was unclear whether nurses at the health center would be required to report such activities." *Id.*

¹³ Bouchard, *supra* note 1.

¹⁴ *A Maine School Board*, *supra* note 5.

¹⁵ *Id.*

¹⁶ *See, e.g.*, Me. Rev. Stat. Ann. tit. 22, § 4003 (2007).

¹⁷ Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(B) (2007).

younger.¹⁸ This reading of Section 253 is bolstered by the fact that numerous other Maine criminal statutes expressly provide minimum ages for the perpetrator of the offense.¹⁹ Cumberland County District Attorney Stephanie Anderson has also stated that sexual activity involving a person aged 13 or younger is against the law, regardless of the other person's age.²⁰ Thus, any evidence that a child 13 years old or younger has been involved in sexual activity is, by definition, evidence that a crime has been committed.

This understanding of Section 253 has been confirmed by the Supreme Judicial Court of Maine. In *State v. Edward C.*, the Court applied Section 253 in a case in which a thirteen-year-old boy had sexual intercourse with an eight-year-old girl that he was babysitting.²¹ The Court affirmed his conviction under Section 253, stating “the plain language of the statute compels us to hold that a child under fourteen years of age can be prosecuted for gross sexual misconduct.”²² The Court later reaffirmed its interpretation of Section 253 in *State v. Danny A.*²³ The Maine State Legislature has had ample opportunity to add an age restriction for the perpetrator under Section 253 if it so desired, but it has chosen not to do so.

The Legislature has properly determined that *all* sexual activity is injurious for children aged 13 or younger, regardless of the age of the other person involved. In fact, the Legislature's view of the seriousness of sexual activity involving young children is revealed by the fact that the following activities are also criminalized in Section 253:

- drugging a person to then have sex with the person;
- forcing a person to have sex by threatening the person;
- having sex with a person who is so mentally impaired so as to not understand what is happening;
- having sex with someone who is unconscious;
- a supervisor having sex with someone who is a prisoner or parolee;
- a teacher having sex with a minor student;
- sex between a child at a children's home and an employee of that home;
- sex between a “parent, stepparent, foster parent, guardian” and a child; and
- sex between a psychologist and a patient.²⁴

The fact that sexual activity involving children aged 13 or younger is included among the foregoing criminal acts confirms the Legislature's view of the harm that such activity causes to young children.

¹⁸ *Id.*

¹⁹ *See, e.g.*, Me. Rev. Stat. Ann. tit. 17-A, §§ 254, 255-A, 256, 258, 259, 260 (2007).

²⁰ Bouchard, *supra* note 1.

²¹ *State v. Edward C.*, 531 A.2d 672 (Me. 1987).

²² *Id.* at 673.

²³ *State v. Danny A.*, 536 A.2d 1136 (Me. 1988) (declining an invitation to overrule *Edward C.* and stating that “a juvenile under fourteen years of age can be prosecuted for gross sexual misconduct”).

²⁴ Me. Rev. Stat. Ann. tit. 17-A, § 253 (2007).

II. Maine Law States that Health Care Providers Must Report Any Known or Suspected Sexual Activity Involving Children 13 Years of Age or Younger.

According to Maine's Child and Family Services and Child Protection Act, a health care provider, while acting in a professional capacity, *must* report to the District Attorney when he or she "knows or has reasonable cause to suspect" that a child has been abused.²⁵ The statute *does not* grant discretion for individuals to decide whether to report a particular case of abuse; it states that "the person *immediately shall report* or cause a report to be made"²⁶ There are also additional reporting requirements when the perpetrator is a person "responsible for the child."²⁷

The kind of abuse covered by the reporting statute includes Section 253's prohibition of sexual activity involving children 13 years old or younger. For reporting purposes, abuse includes "sexual abuse or exploitation. . . ."²⁸ Gross sexual assault, as defined by Section 253, is certainly a form of "sexual abuse or exploitation" for reporting purposes. Since any evidence that a child 13 years old or younger has been involved in sexual activity is evidence that gross sexual assault has occurred, it is also evidence of sexual abuse which triggers the statutory reporting requirement.

While some health care providers might not believe that sexual activity between two children that are both 13 years old or younger warrants a report, Section 253 and the reporting statute leave no room for discretion on this issue. Cumberland County District Attorney Stephanie Anderson has explained, "When it's somebody under age 14, it is a crime and it must be reported. . . . The health care provider has no discretion in the matter. It's up to the district attorney to decide."²⁹ In other words, it is the health care provider's job to report sexual behavior involving young children; it is the district attorney's job to review the case and determine when and whether criminal charges are warranted.

Reporting *all* adolescent sexual activity is all the more vital given these troubling statistics:

Among 14-year-olds, 30% of girls and 73% of boys whose oldest "serious boyfriend or girlfriend" was 2 or more years older were sexually experienced, compared to 13% of girls and 29% of boys whose oldest partner was no more than one year older.³⁰

²⁵ Me. Rev. Stat. Ann. tit. 22, § 4011-A(2) (2007).

²⁶ *Id.* (emphasis added).

²⁷ See Me. Rev. Stat. Ann. tit. 22, §§ 4002(1), 4011-A(1) (2007).

²⁸ Me. Rev. Stat. Ann. tit. 22, § 4002(1). While this definition refers to abuse "by a person responsible for the child," Section 4011-A(2) creates a reporting requirement for abuse perpetrated by a person that is *not* responsible for the child.

²⁹ Bouchard, *supra* note 1.

³⁰ The Nat'l Campaign to Prevent Teen Pregnancy, *14 and Younger: The Sexual Behavior of Young Adolescents (Summary)* 11-12 (B. Albert, S. Brown, & C. Flannigan, eds., 2003), <http://www.teenpregnancy.org/resources/reading/pdf/14summary.PDF>.

Thirteen percent of girls in [a national survey] who first had sex at age 14 or younger described it as nonvoluntary, clearly a cause for great concern. Even among those who classified their first sexual experience as voluntary, girls who had sex at age 14 or younger were significantly more likely to say that it was relatively unwanted, compared to girls who had sex for the first time at age 15 or older.³¹

Addressing the same adolescent age group, the National Campaign to Prevent Teen Pregnancy has reported that sexual relationships between adolescents and older partners are far too common:

Romantic relationships with older partners were much more likely to include intercourse—13% of relationships between same age partners included intercourse, compared to 26% of relationships with a partner who was 2 years older, 33% of relationships with a partner who was 3 years older, and 47% of relationships with a partner who was 4 or more years older. [In one survey], only 8% of girls who first had voluntary sex at age 14 or younger did so with a partner who was the same age or younger, compared to 24% of girls who first had sex at age 15 or older. One in six girls who had voluntary sex at age 14 or younger reported that her first partner was 5 or more years older.³²

The Committee should ensure that the health center's employees tread lightly and investigate each case carefully where a student requests condoms or birth control. This is especially true because 13% of girls under age 14 *reported* that sexual activity was not voluntary; this percentage is certainly higher given the existence of unreported cases.

Published reports stating that Portland-area student health centers have failed to report all incidents of illegal sexual activity involving young children are deeply troubling.³³ The Committee should adopt and enforce a clear policy stating that all health center employees are required by law to file a report with law enforcement anytime that they know or have reasonable cause to suspect that a child has been abused. This includes (but is not limited to) cases where a child aged 13 or younger has been involved in sexual activity.

III. The Committee's Decision to Offer Prescription Birth Control to Students as Young as 11 Years Old Undermines the Right of Parents to Direct The Upbringing of Their Children.

The Committee should revise its policies regarding prescription contraceptives at King Middle School's health center to bolster rather than undercut parental authority in matters of sex and morality. The current policy effectively substitutes the Committee's opinion regarding the appropriate manner to deal with issues of sexuality for the viewpoint of parents.

³¹ *Id.* at 12.

³² *Id.* at 11.

³³ *See, e.g.,* Bouchard, *supra* note 1.

Parental rights have a pedigree unmatched in constitutional law. As one of the only pre-constitutional rights recognized by the Supreme Court of the United States under the Due Process Clause of the Fourteenth Amendment, parental rights have been deemed one of the most sacred liberties in our nation. The Supreme Court first noted the great significance of parental rights in 1923 and has consistently reaffirmed parental authority to the present day.³⁴

The law's protection of parental rights is due, in part, to the fact that children lack sufficient capacity to make important decisions for themselves and need adult guidance. The Supreme Court has noted that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves."³⁵ The Court has explained that American society acknowledges that children "are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified."³⁶ "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."³⁷

While public school officials assume the responsibility to ensure that the health and well being of students are not jeopardized while they are on school premises, this does not provide a justification for overriding the judgment of parents regarding the moral upbringing of their children. Parents have an obvious and important interest in shaping the attitudes and behavior of their children regarding issues of sexuality. These matters are infused with profound religious and moral significance that call for parental involvement.

Providing prescription contraceptives to children as young as 11 years old without direct parental involvement raises serious health and medical concerns. Except for the newborn and early infant years, no period of the human lifespan encompasses more dramatic changes than adolescence. There exist *no published medical studies* that definitively assess the risks of hormonal contraceptives in women under the age of sixteen.³⁸

Even when oral contraceptives are prescribed for adolescents, their compliance patterns are generally poor.³⁹ The frequency of missed pill doses ranges from 20-30% in this age group,⁴⁰

³⁴ See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality); *Michael H. v. Gerald D.*, 491 U.S. 110 (1991); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³⁵ *Schall v. Martin*, 467 U.S. 253, 265 (1984).

³⁶ *Id.* at 265, n.15 (citations omitted).

³⁷ *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

³⁸ See, e.g., http://www.merckmedicus.com/pp/us/hcp/frame.jsp?pg=/pp/us/hcp/hcp_pdr_desk_reference.jsp (prescribing information for drospirenone/ethinyl estradiol). Under the "Precautions" section, manufacturers of oral contraceptives and contraceptive patches include this warning: "Safety and efficacy of [hormonal contraceptives] have been established in women of reproductive age. Safety and efficacy are expected to be the same for postpubertal adolescents under the age of 16 and for users 16 years and older. Use of this product before menarche is not indicated."

³⁹ Therese Zink, *High-Risk Teen Compliance With Prescription Contraception*, J. Pediatric & Adolescent Gynecology, 15(1), Feb. 2002, at 15; L.R. Clark, *Will the Pill Make Me Sterile?*, J. Pediatric & Adolescent

increasing the risk of unintended pregnancy as well as fetal injury when pills are resumed after an unsuspected conception.

“Confidential prescribing” to minors also poses the additional risk of unanticipated drug reactions or interactions. For example, consider the young girl who develops a medical problem and is taken by her parents to another physician. The child might not reveal contraceptive use; the second physician would be prescribing “in the dark” and might unknowingly provide medications with a risk of serious drug interactions with hormonal contraceptives. This is not a theoretical proposition: a very recent study demonstrated that less than half (43%) of polled adolescents would tell their parents if they had a serious or sensitive reproductive health care problem.⁴¹

The Maine State Legislature has agreed that parents should be directly involved in important decisions regarding the medical care, sexuality, and morality of their minor children. For example, a Maine statute provides that, in most circumstances, a pregnant girl that is under 18 years of age must obtain the written consent of a parent or a court order before receiving an abortion.⁴² The Supreme Court of the United States recently noted that virtually every state, including Maine, has a parental consent or notification law of some kind.⁴³ In *Ayotte v. Planned Parenthood*, the Court unanimously reaffirmed that “[s]tates unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their ‘strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.’”⁴⁴ In a similar vein, the Committee should redesign its policies regarding the operation of student health centers to ensure that parental knowledge and involvement is encouraged.

Moreover, distributing prescription and other contraceptives to children aged 13 or younger has the effect of facilitating or encouraging criminal sexual activity. As discussed previously, *all* sexual activity involving children aged 13 or younger constitutes gross sexual assault. Providing contraceptives to young children sends the message that sexual behavior is acceptable for a person their age. It is akin to providing students with hypodermic needles to ensure that those that choose to engage in illegal drug use do so in the safest manner possible. Providing contraceptives to young children also helps to conceal criminal sexual activity by making it less likely to be detected. Health care providers should discourage and report criminal sexual behavior rather than facilitating it by providing contraceptives to young children. The Committee should seriously consider that its birth control and condom distribution program comes dangerously close to promoting the violation of state law.

Gynecology, 14(4), Nov. 2001, at 153; M. Kwiecien, *Bleeding Patterns and Patient Acceptability of Standard or Continuous Dosing Regimens of a Low-dose Oral Contraceptive*, *Contraception*, 67(1), Jan. 2003, at 9.

⁴⁰ Zink, *supra* note 39, at 15; see also Matim Omar, *Extended Use of the Oral Contraceptive Pill—Is It an Acceptable Option?*, *J. Pediatric & Adolescent Gynecology*, 18(4), Aug. 2005, at 285.

⁴¹ Sarah Lerand, *Communication With Our Teens: Associations Between Confidential Service and Parent-Teen Communication*, *J. Pediatric & Adolescent Gynecology*, 20(3), June 2007.

⁴² Me. Rev. Stat. Ann. tit. 22, § 1597-A (2007).

⁴³ *Ayotte*, 546 U.S. at 326, n.1.

⁴⁴ *Id.* at 326 (citations omitted).

CONCLUSION

The Committee's recent decision to offer prescription birth control to students as young as 11 years old at King Middle School's health center is deeply troubling. The Committee is not only fostering criminal activity and child abuse, but is usurping parental authority and subjecting children to all kinds of health risks as well. Furthermore, the failure of health center employees to report all sexual activity involving children 13 years old or younger is also disturbing. We urge the Committee to put an end to this illegal activity, or the ACLJ will assist parents in bringing legal action against the Committee.

In addition, if the Committee does not entirely abandon its policy of having the King Middle School health center distribute prescription birth control, then the Committee should require express written permission from parents of students 14 years and older before dispensing such medications. Failure to institute an "opt in" policy will violate parents' constitutional rights and expose the Committee to civil liability.

Sincerely,

Jay Alan Sekulow
Chief Counsel
American Center for Law and Justice
201 Maryland Ave., N.E.
Washington, D.C. 20002

Stephen Whiting
Maine Director
American Center for Law and Justice, N.E.
75 Pearl St., Suite 207
Portland, ME 04101

cc: Portland School Committee members:

Susan Hopkins
Sarah J. Thompson
Ellen Alcorn
Ben Meiklejohn
Rebecca Minnick
Robert O'Brien
Peter Eglinton
Lori Gramlich