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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

American Academy of Pediatrics, California District IX, Gay-Straight Alliance Network, Aubree Smith, and Mica Ghimenti,

Plaintiffs and Petitioners,

vs.

Clovis Unified School District,

Defendant and Respondent.

Case No. 12CECG02608 DSB

Assigned to: Hon. Donald S. Black
Dept.: 502

NOTICE OF ENTRY OF ORDER GRANTING, IN PART, PLAINTIFFS'/PETITIONERS' MOTION FOR ATTORNEYS' FEES AND GRANTING PLAINTIFFS'/PETITIONERS' MOTION TO STRIKE MEMORANDUM OF COSTS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on April 28, 2015, Department 502 of the Fresno County Superior Court entered its ORDER GRANTING, IN PART, PLAINTIFFS'/PETITIONERS' MOTION FOR ATTORNEYS' FEES AND GRANTING PLAINTIFFS'/PETITIONERS' MOTION TO STRIKE MEMORANDUM OF COSTS, attached hereto as Exhibit A.

Dated: May 4, 2015

SIMPSON THACHER & BARTLETT LLP

By _____
Simona G. Strauss, 203062

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Exhibit A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

B.F. SISK COURTHOUSE, CIVIL DIVISION

AMERICAN ACADEMY OF PEDIATRICS, et al., Plaintiffs and Petitioners, vs. CLOVIS UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	Case No. 12CECG02608 ORDER GRANTING, IN PART, PLAINTIFFS'/PETITIONERS' MOTION FOR ATTORNEYS' FEES AND GRANTING PLAINTIFFS'/PETITIONERS MOTION TO STRIKE MEMORANDUM OF COSTS

I.

INTRODUCTION

Plaintiffs and petitioners, including the parents of children who attended schools in defendant and respondent, Clovis Unified School District ("defendant" or "District"), sued over defendant's failure to provide comprehensive, medically accurate, objective and bias-free sexual health and HIV/AIDS prevention education ("sex ed") in violation of California law. After the litigation was filed, plaintiffs determined that defendant had improved its sex ed instruction by revising its curriculum, policy and practices and so in 2014 voluntarily dismissed the case without prejudice. Now plaintiffs seek fees under the private attorney general statute, Code of

Civil Procedure[1] section 1021.5, on a catalyst theory. Plaintiffs claim they are the successful party because they were the catalyst in motivating the District to provide the relief sought.

Characterizing this action as a "costly nuisance," the District opposes the motion claiming the changes to the seventh grade sex ed curriculum were in place nearly a year prior to the filing of the litigation and that the changes to the ninth grade sex ed curriculum were already scheduled to take place when plaintiffs filed suit. Therefore, according to the District, plaintiffs were not the catalysts for change they now claim to be.

Also, the District contends that it is the prevailing party under section 1032, the standard costs statute because it is a defendant in whose favor a dismissal was entered, and seeks costs against plaintiffs. Disputing this, plaintiffs filed a motion to strike the District's memorandum claiming the District is not the prevailing party in the case.

In characterizing the suit as a "costly nuisance," the District seems to ignore the fact that its sex ed curriculum violated California law for many years before the plaintiff parents began to complain and that even years after the complaints began the District still had not changed its sex ed curriculum. Because the changes to the seventh grade curriculum were motivated not by the litigation but by the parent plaintiffs' pre-litigation complaints and other activity, the court will deny the motion as to attorneys' fees related to the seventh grade sex ed curriculum. However, the court will find that the litigation motivated all of the changes to the District's sex ed curriculum for the ninth grade. Thus the court will grant plaintiffs motion for attorneys' fees, in part. The court will also find that, despite their voluntary dismissal of the action, plaintiffs are the prevailing parties and will therefore grant the motion to strike the District's memorandum of costs.

[1] Unless noted, all further references are to the Code of Civil Procedure.

II.

SUMMARY OF FACTS

California adopted the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act (the Act") in 2003. It was effective January 1, 2004. Its stated purposes are to "provide a pupil with the knowledge and skills necessary to protect his or her sexual and reproductive health from unintended pregnancy and sexually transmitted diseases" and to "encourage a pupil to develop healthy attitudes concerning adolescent growth and development, body image, gender roles, sexual orientation, dating, marriage, and family." (Educ. Code § 51930.)

Under the Act, "school districts may provide comprehensive sexual health education, consisting of age-appropriate instruction, in any kindergarten to grade 12, inclusive, using instructors trained in the appropriate courses." (Educ. Code § 51933, subd. (a).) If a school district opts to provide this education, then all of the following requirements apply:

1) Instruction and materials shall be age appropriate.

2) All factual information presented shall be medically accurate and objective.

3) Instruction shall be made available on an equal basis to a pupil who is an English learner, consistent with the existing curriculum and alternative options for an English learner pupil as otherwise provided in this code.

4) Instruction and materials shall be appropriate for use with pupils of all races, genders, sexual orientations, ethnic and cultural backgrounds, and pupils with disabilities.

5) Instruction and materials shall be accessible to pupils with disabilities, including, but not limited to, the provision of a modified curriculum, materials and instruction in alternative formats, and auxiliary aids.

6) Instruction and materials shall encourage a pupil to communicate with his or her parents or guardians about human sexuality.

7) Instruction and materials shall teach respect for marriage and committed relationships.

8) Commencing in grade 7, instruction and materials shall teach that abstinence from sexual intercourse is the only certain way to prevent unintended pregnancy, teach that abstinence from sexual activity is the only certain way to prevent sexually transmitted diseases, *and provide information about the value of abstinence while also providing medically accurate information on other methods of preventing pregnancy and sexually transmitted diseases.*

9) Commencing in grade 7, instruction and materials shall provide information about sexually transmitted diseases. This instruction shall include how sexually transmitted diseases are and are not transmitted, the effectiveness and safety of all federal Food and Drug Administration (FDA) approved methods of reducing the risk of contracting sexually transmitted diseases, and information on local resources for testing and medical care for sexually transmitted diseases.

10) Commencing in grade 7, instruction and materials shall provide information about the effectiveness and safety of all FDA-approved contraceptive methods in preventing pregnancy, including, but not limited to, emergency contraception.

11) Commencing in grade 7, instruction and materials shall provide pupils with skills for making and implementing responsible decisions about sexuality.

12) Commencing in grade 7, instruction and materials shall provide pupils with information on the law on surrendering physical custody of a minor child 72 hours or younger, pursuant to Section 1255.7 of the Health and Safety Code and Section 271.5 of the Penal Code.

(Educ. Code § 51933, subd. (b))(emphasis added.)

HIV/AIDS prevention education, by contrast is mandatory; pupils must receive this instruction once in middle school and once in high school. (Educ. Code § 51934, subd. (a).) This education "whether taught by school district personnel or outside consultants, shall satisfy

all of the criteria" set forth below above with respect to sex education and "shall accurately reflect the latest information and recommendations from the United States Surgeon General, the federal Centers for Disease Control and Prevention, and the National Academy of Sciences, and shall include the following:

1) Information on the nature of HIV/AIDS and its effects on the human body.
2) Information on the manner in which HIV is and is not transmitted, including information on activities that present the highest risk of HIV infection.
3) Discussion of methods to reduce the risk of HIV infection. This instruction shall emphasize that sexual abstinence, monogamy, the avoidance of multiple sexual partners, and abstinence from intravenous drug use are the most effective means for HIV/AIDS prevention, but shall also include statistics based upon the latest medical information citing the success and failure rates of condoms and other contraceptives in preventing sexually transmitted HIV infection, as well as information on other methods that may reduce the risk of HIV transmission from intravenous drug use.
4) Discussion of the public health issues associated with HIV/AIDS.
5) Information on local resources for HIV testing and medical care.
6) Development of refusal skills to assist pupils in overcoming peer pressure and using effective decision making skills to avoid high-risk activities.
7) Discussion about societal views on HIV/AIDS, including stereotypes and myths regarding persons with HIV/AIDS. This instruction shall emphasize compassion for persons living with HIV/AIDS.

(Educ. Code § 51934, subd. (b).)

Pursuant to the District's Board of Education's Policy No. 3206, and accompanying Administrative Regulation 3206, the District has elected to teach a combined course in sexual health education and HIV/AIDS prevention education. It does so once in the seventh grade and once in the ninth grade. (Strauss Decl. Board Policy 3206, Exhibit A.) According to the notations in the lower left corner of the Board policy, the Policy was originally adopted in 1979,

then amended in 1991, 1993 and 1994, then only reviewed in 2007, 2008, and 2009, before being revised in 2011. In fact, according to plaintiffs, until 2011, the District made no attempt to modify its sex education policy to conform to the requirements of the Act.

According to the "blackline" versions of the 2009 Policy and Regulation from 2009 which show the changes from the 2009 documents to the 2011 documents, the District retained a policy and curricula that: 1) did not refer to the Act, citing instead repealed Education Code sections; 2) required materials to "stress" sexual abstinence "as the only 100% effective pregnancy and sexually transmitted disease prevention method"; 3) discussed contraceptives only with respect to preventing disease, not contraception; did not require medically accurate information on the methods of prevention of pregnancy and prevention of sexually transmitted diseases; and 4) required parent to give affirmative assent to HIV/AIDS education (i.e., "opt-in".) (See Strauss Decl., Blackline versions of Policy and Admin Reg. 3206, Exhibits C & D.)

Plaintiffs claim that the District approved and used a variety of "egregiously inaccurate and biased videos", including *Sex still has a Price Tag* and *No Apologies: The Truth about Life, Love and Sex*;[2] in 2007 it engaged an outside agency, Teen Choices, Inc., to provide instruction in intermediate school using a curriculum that was "replete with inaccurate, biased, and outdated information";[3] it approved another agency, the Pregnancy Care Center, to provide instruction despite the fact that its instructors did not have the required expertise in comprehensive sexual health education, and as it representative later admitted its presentation did not meet the requirements of the Act;[4] and it adopted textbooks that failed to mention condoms or other contraception.[5]

The first documented request in evidence between one of the plaintiffs and the District is a letter by Mica Ghimenti to Sandra A, Bengal dated December 4, 2009, complaining that the sexual education at both the high school and intermediate school levels were not in compliance

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[2] See Strauss Decl. October 2012 Family Living Education District Approved Supplementary List, Exhibit E.

[3] Strauss Decl. 11/24/10 Consultant Service Agreement, Exhibit F.

[4] Strauss Decl., Belman Depo. 38:11-41:2.

[5] Strauss Decl. at ¶¶ 4-5.

with the act. (Straus Decl., Letter dated December 4, 2009, Exhibit H.) In early 2011, other Clovis parents joined Ms. Ghimenti, including plaintiff Aubree Smith, who expressed their concerns and requested concrete changes through letter, emails, and in-person meetings.[6] According to plaintiffs, the parents requested that the District review its sexual education related Board Policy and curricula and come into compliance with the Act for the 2011-2012 school year. (Straus Decl. Letter from Ghimenti and Smith to Watson dated June 7, 2011, Exhibit Q.; Meeting Notes Clovis Parents for Responsible Sex Education dated March 25, 2011, Exhibit L.) According to the District, the communications from March 15, 2011 to June 1, 2011, the communications between Ghimenti and Smith and the District were "Laser focus[ed]" over the use of *Teen Choices* in seventh grade curriculum. (Simmons Decl. Exhibits C-K.)

In early 2010, the District maintained that its sex education policy and instruction complied with state law in all respects, and that *Teen Choices* in particular was "unbiased, medically accurate and uses credible up-to-date resources." (Strauss Decl. Letter from Watson to Ghimenti dated January 14, 2010, Exhibit S) In May 2011, the District announced that it would convene a committee to review District approved seventh grade materials in response to parents' complaints about Teen Choices.[7] The District characterizes this May 2011 meeting as regularly scheduled and part of the organic regular review of curriculum. At any event, Ghimenti attended the May 12, 2011 meeting and voiced objections to *Teen Choices*. (Simmons Decl. Exhibit XX.)

According to plaintiffs, the District made no commitment to any timeline, or any outcome of its review of *Teen Choices*, and remained silent in response to the parents' request about the rest of its sex education policy and instruction. According to the District, this is false.

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[6] Strauss Decl., Letter from Ghimenti to Davis Cash, dated March 4, 2011 Exhibit J; Public Records Act Request from Aubree Smith to Superintendent David Cash dated March 16, 2011, Exhibit K; Meeting Notes for Clovis Parents for Responsible Sex Education dated March 25, 2011, Exhibit L; email from Rick Watson to Ghimenti dated April 8, 2011, Exhibit M; email from Watson to Ghimenti dated April 13, 2011, Exhibit N; Letter from counsel Alexis Coll-Very and Strauss to Steve Ward Interim Superintendent dated August 4, 2011, Exhibit O; Ghimenti Depo. At 34:13-20, Exhibit P.

[7] Strauss Decl. Family Life Advisory Committee Meeting Agenda and Minutes dated May 12, 2011, Exhibit T; Robin Castillo Depo. at 68:4-69-19, Exhibit U; email from Watson to Rees Warne dated October 11, 2011, Exhibit V; Watson Depo. at 106:19-107:3.

On June 1, 2011, Ghimenti and Watson exchanged emails about how much Teen Choices was being paid by the District. (Simmons Decl. at K.) On June 7, 2011 Ghimenti and Smith sent a letter to Watson, reiterating their problem with "abstinence-only-until-marriage instruction provided in Clovis schools, particularly the *Teen Choices* curriculum. (Simmons Decl. Exhibit L.) The letter requested that Teen Choices be eliminated; that the District amend Board Policy/Administrative Regulation 3206 and establish an opt-out parental notification practice along with other substantive changes; the District evaluate all sex education materials and remove those that are outdated, specifying *Angels Watch Over Me* and *Sex Lies and the Truth*; ensure that all sex education instructors are trained annually and for a clear structure for communicating polices and information about informational materials and speakers to schools and teachers. (*Ibid.*) The letter also charged that the Holt textbook presents abstinence only until marriage information ad is not compliant with Education Code requirements. (*Ibid.*) Watson replied June 22nd. (Simmons Decl. Exhibit M.) He stated that the Administrative Regulation 3206 had been revised and policy changes would be dependent on the Board's schedule. Curriculum changes were dependent on the meetings of the Family Life Subcommittee on Curriculum, whose recommendations would be reviewed by the Family Life Committee and the Governing Board Subcommittee before going to the Governing Board for approval. This was on track for the 2011-2012 school year. A "number of videos and materials have been removed" including *Sex, Lies and the Truth*, but *Angels Watch Over Me* was part of *Teen Choices*, which was also being reviewed. In the future there would be a preview night for parents to view all sex education materials. The administrative regulation was being revised for "periodic" rather than annual training, i.e., every other year, with an annual bulletin on the most up-to-date Board approved materials and procedures,

The plaintiffs feared that when the July 2011 school board meeting took place without any discussion of policy or instructional changes for the new school year,[8] their concerns would

[8] Strauss Decl. CUSD Board Agenda for July 13m 2011, Exhibit X.

remain unaddressed. They retained counsel and, along with the American Academy of Pediatrics, California District IX, issued a formal demand letter on August 4, 2011. (Strauss Decl. letter from Coll-Very and Strauss to Ward dated August 4, 2011, Exhibit O.)

The August 4, 2011 demand letter is six pages long. It sets forth the dialog between the parents and the District that had been ongoing between 2009 and July 13, 2011, set forth 12 sections of the Education Code that the District was allegedly violating, and presented six demands to take place before the beginning of the 2011-2012 academic year:

1. Remove the Teen Choices curriculum from all District schools and replace it with a curriculum that complies with the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act, Education Code §§ 51930-51939.

2. Revise Board Policy 3206 and Administrative Regulation 3206 relating to Family Life/Sex Education to ensure compliance with the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act. Such changes must include: (a) updating the references to Education Code §§ 51559, 51553 and 51820, which are no longer in the Education Code; (b) ending the "opt-in" policy created in the "Parent/Guardian Notification and Involvement" section, which violates Education Code §§ 51938(a)(4) and 51939(a); and (c) modifying the policy goals to deemphasize the District's unwavering focus on abstinence until marriage and negative approach toward contraception.

3. Evaluate all Family Life/Sex Education and HIV/AIDS prevention curricula and supplemental materials (such as videos and handouts) that have been approved for use in District classrooms for compliance with state law, and remove and replace those that do not meet state law.

4. Ensure that all sexual health education and HIV/AIDS prevention education teachers (including outside providers) are adequately trained in the appropriate courses, with the most recent and medically accurate information, so that the

District can support them in providing current, science-based, comprehensive instruction.

5. Ensure that there is a clear structure and process for communicating the policies and information about District-approved instructional materials and speakers to school sites and teachers. Although the District has represented that an annual communication about procedures and approved materials would be sent to teachers, it did not indicate whether teachers would be required to use only the materials listed.

6. Ensure that Clovis students have the information that they need to protect their sexual health by establishing supplemental classes for those who have taken the legally noncompliant and inadequate curricula.

The letter sought a response by August 18, 2011, with a notification of the Districts intent to take all of the steps outlined before the start of the 2011-2012 academic year. (Strauss Decl. letter from Coll-Very and Strauss to Ward dated August 4, 2011, Exhibit O.)

The District characterizes the August 4, 2011, demand letter as coming out of nowhere and ignoring the continuing dialog between Ghimenti and Smith and Watson regarding the seventh grade curriculum or the status of the seventh grade review efforts.

Plaintiffs contend that the District agreed to make some changes to its sex education policy and instruction in response to their letter, but also ignored many of plaintiffs' demands entirely.

In the fall of 2011, the District revised its board policy,[9] removed Teen Choices as an outside provider of sex education, and adopted a new seventh grade sex education curriculum. However, the District failed to: (1) make any changes to its ninth grade curriculum; (2) ensure that instructors were trained to provide sex education in compliance with the Act; or (3) ensure that the teachers understood which the District approved materials they were supposed to be teaching, and how, for sex education. In addition, although the District corrected the wording of

[9] See Strauss Decl., Blackline versions of Policy and Admin Reg. 3206, Exhibits C & D.

its illegal opt-in policy for HIV/AIDS prevention education, it did not do so for sexual health education,[10] and its practice remained opt-in for both subjects. (Strauss Decl. email from Rosemary Graff to Nick Boris dated May 18, 2012, Exhibit Y.)

The District also repeatedly refused to engage in any meaningful dialog with the plaintiffs about the sex education policy and instruction. In fact, in January 2012, plaintiffs resorted to filing a Public Records Act request to determine the District's sex education policy, high school sex education curriculum and materials, the adoption and implementation of new seventh grade curriculum, and teacher training in sex education. (Strauss Decl. Public Records Act request dated January 6, 2012, Exhibit Z.)

A. The Suit.

A year after the plaintiff's demand letter, plaintiffs decided to file suit because the District had failed to address the majority of their concerns. The suit initially challenged the District's ninth grade sex education, including the curriculum, the materials, as well as the District's opt-in consent procedure for both seventh and ninth grade students.

Over the course of the next year, plaintiffs learned through formal discovery that the new seventh grade curriculum materials and implementation also failed to comply with the law. For example, although the District had added a one page supplement on contraception to its abstinence-only-until-marriage textbook the supplement was restricted to teacher use, failed to provide required information about STD prevention, and was inconsistently taught by teachers such that some students were denied this information altogether while others were taught medically accurate information. (Strauss Decl. McLean Depo. at 56:4-11, 77:11-78:17, Exhibit BB; Lopez Depo. at 38:5-10, Exhibit CC; Dean Depo. at 49:2-23, Exhibit DD.) Accordingly, plaintiffs amended their complaint in August 2013 to challenge the implementation of the District's seventh grade sex education instruction as well.

[10] (*Ibid.*)

B. Changes In The District's Ninth Grade Sex Education Instruction Since The Lawsuit.

At the time plaintiffs filed their lawsuit the instruction and materials being provided in the District's ninth grade class rooms was an ad hoc, inconsistent and unmonitored curriculum consisting primarily of Holt's *Lifetime Health* textbook, which was supplemented with various videos and a presentation from the Pregnancy Care Center. (Strauss Decl. October 2012 District Approved List, Exhibit E; email from Watson to Ghimenti dated April 13, 2011, Exhibit N.) The curriculum violated the Act by failing to include the required STD and pregnancy prevention information, by promoting and reinforcing bias based in gender and sexual orientation, and by containing medically inaccurate information. For example, one approved video, *Go A.P.E.*, compared a woman who was not a virgin to a dirty shoe,[11] and another *Real People: Teens Who Choose Abstinence*, was specifically cited by the California Department of Education as non-compliant and a video that "may not be used due to medical inaccuracies." (Strauss Decl. email from Smith at Cal. Dept. of Ed. To Fremont Unified School Dist. Dated September 11, 2008, Exhibit EE.)

Plaintiffs claim that after the lawsuit was filed, steady progress was made to modify the curriculum to meet plaintiffs' demands. By the time plaintiffs dismissed the lawsuit in February 2014, the District had taken the following steps, all of which had been demanded by plaintiffs:

1. The District reviewed all ninth grade curricular materials. The Monday after the filing of the complaint, the Associate Superintendent of School Leadership directed the Administrator for Professional Development and Curriculum Innovations to initiate a review of the high school sec education curriculum, mirroring the review of the intermediate level during the summer of 2011. (Strauss Decl. email from Castillo to Watson dated August 28, 2012, Exhibit FF.) One week later, the District began

[11] Coll-Very Decl. ¶ 31.

recruiting teachers to participate in the review,[12] and within two months, a subcommittee started reviewing curricular materials. (Strauss Decl. High School Health Curriculum Audit dated October 2012, Exhibit HH.)

2. The District adopted a ninth grade curriculum that included information about condoms contraception and sexual orientation. Following its review the District adopted a new ninth grade curriculum, which it then revised to remove videos found objectionable by plaitniffs. (Strauss Decl. District's response to Special Interrogatory 35, Exhibit II.) Although the final curriculum retained the abstinence-only Holt textbook *Lifetime Health*, it now incorporated medically accurate information about FDA-approved methods of pregnancy and STD-prevention from other sources. (Strauss Decl. Comprehensive Sexual Health Education & HIV/AIDS Prevention Education Grade 9 Health Curriculum & Teacher Guide, December 13, 2013, Exhibit JJ.) The District also included sections of the Red Cross published curricula, *Positive Prevention* and *Positive Prevention Plus*, that plaintiffs had suggested as resources to address bias. (Straus Decl. Comprehensive Sexual Health Education & HIV/AIDS Prevention Education Grade 9 Health Curriculum & Teacher Guide, December 13, 2013, Exhibit JJ; Castillo Depo. at 257:2-259:22, Exhibit KK.) District high school teachers also received additional information for students about local resources for testing and treatment of HIV and other STDs[13] and instructional guidelines for setting an unbiased tone in the classroom when addressing gender roles and sexual orientation. (Strauss Decl. Setting the Tone, Exhibit MM.)

3. The District removed inaccurate and biased supplementary materials and disallowed problematic guest speakers. When the District adopted the new ninth grade curriculum in June 2013, it removed most of the inaccurate supplementary materials that had been the subject of plaintiff's complaint. However, the new curriculum still

[12] Strauss Decl. email from Castillo to All Area Superintendents dated September 6, 2012, Exhibit GG.
[13] Strauss Decl. Local Resources, Exhibit LL.

contained several non-complaint videos: *Sex Still Has a Price Tag*, which espouses extreme and biased viewpoints against women and teaches that condoms provide no protection from the transmission of STDs, that hormonal birth control makes women ten times more likely to contract an STD, and that the only legitimate relationship is a monogamous heterosexual marriage;[14] *No Apologies: The Truth about Life, Love and Sex* exaggerates condom failure rates and incorporates biased religious values and gender stereotypes;[15] *and AIDS/HIV: Answers for Young People*, a 1989 video with outdated and medically inaccurate information about HIV/AIDS. After further complaints about these videos, the District removed them from the approved list. (Strauss Decl. Letter from Weder to Coll-Very dated August 2, 2013, Exhibit NN.) The District also informed its teachers that the Pregnancy Care Center was no longer an approved guest speaker. (Strauss Decl. Parra Depo. at 86:4-88:12, Exhibit PP.) The District supplied teachers with a set of page-by-page updates for the outdated statistics and other inaccurate information contained in the Holt textbook largely based on necessary updates identified by Plaintiffs. (Strauss Decl. Lifetime Health and Decisions for Health Updates, Exhibit QQ.)

C. Changes In The Seventh Grade Sex Ed Curriculum After The Lawsuit Was Filed.

Plaintiffs contend that before they filed their amended complaint, the seventh grade curriculum did not include the full range of medically accurate information required by law. The curriculum relied primarily on Holt's *Decisions for Health* textbook, which the District adopted in 2005, and contained no information whatsoever about condoms or other contraception and instead promoted abstinence until heterosexual marriage. (Strauss Decl. Family Life Advisory Committee Agenda dated October 19, 2005 Exhibit RR.) The only contraceptive information in

[14] Coll-Very Decl. ¶ 32.
[15] Coll-Very Decl. ¶ 32.

the seventh grade curriculum was contained in a chart that the District forbade teachers from handing out to students. (Strauss Decl. Comprehensive Sexual Health Education & HIV/AIDS Prevention Education Grade 7 Science/Health Curriculum & Teacher Guide adopted October 2011, Exhibit AA; Lopez Depo. at 38:5-10, Exhibit CC.) Moreover, the instruction provided varies from teacher to teacher resulting in incomplete and inadequate information being provided to students. (Strauss Decl. McLean Depo. at 56:4-11, 77:11-78:17, Exhibit BB; Lopez Depo. at 38:5-10, Exhibit CC; Dean Depo. 49:2-23, Exhibit DD.) The materials also lacked Education Code required information on STD prevention methods and did not include specific information about local resources for testing and medical care for HIV and STDs. (Strauss Decl. ¶ 6.) Finally, due to their lack of training, teachers were also inserting their personal values into their lessons that often resulted in gender and sexual orientation bias. (Strauss Decl. Campbell Depo at 46:18-47:22, 61:11-15, Exhibit SS; Hall Depo. at 107:2-108:18, Exhibit TT; Lopez Depo. at 94:24-95:9, Exhibit CC.)

After the plaintiffs filed suit:

1. The District provided teachers with essential additional materials, including a new PowerPoint presentation on FDA approved methods of birth control and STD prevention. (Straus Decl. FDA-Approved Pregnancy and STI Risk Reduction Guide, Exhibit UU; District's Response to Special Interrogatory No. 36, Exhibit II.)
2. The District added information regarding local resources for testing and treatment of HIV and other STDs. (Strauss Decl. Local Resources, Exhibit LL.)
3. Teachers received instructional guidelines for setting an unbiased tone when addressing gender roles and sexual orientation. (Strauss Decl. Setting the Tone, Exhibit MM.)
4. The District also supplied the teachers with a set of page by page updates for outdated statistics and other inaccurate information in the Holt textbook. Strauss Decl. Lifetime Health and Decisions for Health Updates, Exhibit QQ.)

D. Other Changes after the Plaintiffs Filed Suit.

1. The district implemented an opt-out parental consent policy on sexual education. Although the District had revised the language of the standard sexual education parental notification letter sent home with students to indicate that consent was opt-out following the August 2011 demand letter, the District's practice was to use the same opt-in consent procedure for HIV prevention education and sex education in both seventh and grade and ninth grade that it used at the time plaintiffs filed the original complaint. (See Strauss Decl. Williams Depo. at 28:24-30:1, WW; Dean Depo. at 107:11-15.) Also, on May 3, 2013 and August 16, 2013, the District issued "Instructional Reminders" to provide specific guidance to teachers to require only passive consent to participation in both HIV prevention and sex education and making it clear that teachers were not to exclude and student from class for failing to turn in a letter. (Strauss Decl. Instructional Reminders, Exhibit XX.)
2. The District improved the training for its sexual education teachers, both substantively and in terms of how to use the curricula. Plaintiffs' complaint asserted that the teachers were not adequately trained. (See Supplemental and First Amended Complaint for Injunctive and Declaratory Relief and Writ of Mandate ¶¶ 53-55, 57, 67.) The District's practice was to provide training to its sex education teachers only once every other year at the time the suit was filed. (Strauss Decl. Watson Depo. at 139:20-22, Exhibit FF.) When the District adopted the new seventh grade curriculum in 2011, before the suit was filed, it provided only a single morning of instruction on how to implement the new curriculum. (Strauss Decl. email from Rick Watson dated October 26, 2011, Exhibit ZZ.) Because the new curriculum was pieced together from various sources, discovery revealed confusion among the teachers as to how the curriculum was to be used, which materials were mandatory, as opposed to permissive, and whether any outside materials were permitted, (Strauss Decl. Watson

Depo. at 24:25-28:15, Exhibit W; Lopez Depo. at 30:4-11; Dean Depo. at 42:13-18, 44:5-11, Exhibit DD.) After the plaintiffs filed suit, the District implemented a an annual two day training, with one day to focus on specific instructional guidance, and the other to on sexual health and STD prevention content. (Strauss Decl. District's Response to Special Interrogatory Nos. 31-32, Exhibit II.)

Their demands met, plaintiffs dismissed the suit.

III.

DISCUSSION

A. Attorney's Fees.

1. Whether Plaintiffs Qualify As Private Attorneys General.

Section 1021.5 codifies the private attorney general doctrine, which provides an exception to the "American rule" that each party bears its own attorney fees. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147.) The fundamental objective of the private attorney general doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 (*Graham*).) Under section 1021.5, the court may award attorney fees to (1) a successful party in any action (2) that has resulted in the enforcement of an important right affecting the public interest (3) if a significant benefit has been conferred on the general public or a large class of persons, and (4) the necessity and financial burden of private enforcement are such as to make the award appropriate. (Ibid.) The burden is on the claimant to establish each prerequisite to an award of attorney fees under section 1021.5. (*Serrano v. Stefan Merli Plastering Co., Inc.* (2010) 184 Cal.App.4th 178, 185.)

a. Successful Party.

A party seeking an award of section 1021.5 attorney fees must first be "a successful party." A favorable final judgment is not necessary; the critical fact is the impact of the action. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2010) 187 Cal.App.4th 376, 382.) "[A] party who does not obtain any judicial relief may be entitled to section 1021.5 attorney fees under what is known as the 'catalyst theory,' which permits an award of attorney fees 'even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation.' [Citations.]" (*Marine Forests Society v. California Coastal Commission* (2008) 160 Cal.App.4th 867, 877.) As the California Supreme Court explained in *Graham*, *supra*, 34 Cal.4th 553, " '[i]n determining whether a plaintiff is a successful party for purposes of section 1021.5, "[t]he critical fact is the impact of the action, not the manner of its resolution." [Citation.]' " (*Id.*, at p. 566.) Accordingly, even if the plaintiff did not obtain judicial relief, " 'an award of attorney fees may be appropriate where "plaintiffs' lawsuit was a catalyst motivating defendants to provide the primary relief sought...." [Citation.] A plaintiff will be considered a "successful party" where an important right is vindicated "by activating defendants to modify their behavior." ' [Citation.]" (*Id.* at p. 567.)

To obtain an award of attorney fees on a catalyst theory, "a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense, as elaborated in *Graham*; and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." (*Tipton–Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 (*Tipton–Whittingham*); see also, *Graham*, *supra*, 34 Cal.4th at pp. 575, 577.)

i. Primary Relief.

Under the first prong of the three-part test announced in *Graham* and restated in *Tipton–Whittingham* for application of the catalyst theory, the trial court determines whether "the lawsuit was a catalyst motivating the defendants to provide the primary relief sought." (*Tipton–Whittingham*, supra, 34 Cal.4th at p. 608.)

The original Verified Complaint and Petition only addressed the substantive deficiencies in the ninth grade curriculum. (Complaint at ¶¶ 56-57.) While it noted that changes had been made to the intermediate school curriculum, it concluded that such changes "continue[d] to raise concerns about its compliance with the Education Code." (Complaint ¶ 52.) The first cause of action for violation of the Education Code for providing a non-compliant curriculum mentions only high schools. The second cause of action for violation of the Education Code concerning excusal procedure concerns both high schools and intermediate schools. The third cause of action for writ of mandate asks for relief common to both the first and second causes of action, i.e., curricular relief for high school, excusal reform for both grades. The original Verified Complaint and Petition sought a preemptory writ ordering the District to "comply with the Act by adopting a compliant high school HIV/AIDS prevention and sexual health curriculum and a compliant sexual health education excusal procedure", as well as declaring that the high school HIV/AIDS prevention and sexual health curriculum violate the Act. It further sought a declaration that the Districts intermediate and high school sexual health education excusal procedures violate the Act. Finally, the original Complaint sought injunctive relief to the same effect.

The Verified Supplemental and First Amended Complaint and Petition added allegations that the seventh grade curriculum was inadequate. First, it challenged the adequacy of the Holt 2004 textbook *Decisions for Life* which promotes an abstinence-only policy abandoned by passage of the Act in 2003. The text provides no information about contraceptives and espouses abstinence as the only way to prevent STDs. Plaintiff claimed that the effect of the Holt

textbook was not alleviated by supplemental materials. The supplemental materials on contraception were limited to a single page of information marked for Teacher Use Only and were not distributed to students. Likewise the entire instructional materials on STD prevention were the single page on contraception. The materials failed to provide information on actual local testing and treatment center for HIV and STDs. The materials promoted and reinforced bias based on sexual orientation. The District failed to provide more than one morning of training and teachers were confused about what parts of the materials were mandatory and what were optional, resulting in wildly inconsistent instruction on the same subjects from classroom to class room. (VSFAC ¶¶ 44-57.)

The Prayer for Relief in the Verified Supplemental and First Amended Complaint and Petition seeks a preemptory writ ordering the District "to comply with the Act" "by adopting compliant intermediate school and high school HIV/ADIS prevention and sexual health curricula and a compliant sexual health excusal procedure," plus declaring that the current intermediate and high school HIV/AIDS prevention, sexual health education curriculum, and excusal procedures for both violate the Act.

Because both the District and the plaintiffs agree that the seventh and ninth grade education curricula now both comply with the act, and the excusal procedure is not explicitly opt-out by both procedure and practice, plaintiffs have achieved the primary relief sought as defined by their complaints. The District focus on the specific charging allegations of the complaint describing the deficiencies of the curricula and the various demands and proposing solutions to argue that plaintiffs primary relief sought was the discontinuation of the use of the Holt textbooks and use of *Positive Prevention* and/or *Positive Prevention Plus*. Thus, the District argues, the plaintiffs did not achieve success on their primary relief requested. This is incorrect. As the District acknowledges, the District has substantial discretion in how to establish and apply its curriculum. (Cal. Const. Art. IX, § 14; *Dawson v. East Side Union High School District* (1994) 28 Cal.App.4th 998, 1017-1018.) Plaintiffs could only insist upon compliance with the law, not use of one resource over another, and that is what they litigated for.

Plaintiffs did not fail to achieve their primary relief because the failed to dictate what materials could and could not be used.

ii. Causation.

The requirement that "the lawsuit was a catalyst motivating the defendants to provide the primary relief sought" is a causation requirement: the lawsuit must have caused the change in the defendant's behavior in order for the plaintiff to be entitled to an award of attorney fees incurred in pursuing the litigation. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 353.) "The question of whether plaintiff's action is causally linked to achieving the relief obtained is a question of fact. [Citation.]" (*Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 967.)

To satisfy the causation prong of the catalyst theory, the plaintiff need not show the "litigation [was] the only cause of defendant's acquiescence. Rather, [the] litigation need only be a substantial factor contributing to defendant's action." (*Hogar v. Community Development Commission of the City of Escondido* (2007) 157 Cal.App.4th 1358, 1365.) "Put another way, courts check to see whether the lawsuit initiated by the plaintiff was 'demonstrably influential' in overturning, remedying, or prompting a change in the state of affairs challenged by the lawsuit. [Citations.]" (*Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 363.)

In conducting the causation analysis, " ' "[t]he appropriate benchmarks are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." ' " (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291.)

With respect to the issue of causation, it is clear that the seventh and ninth grade curricula must be examined separately. It is evident that the 2011 initial review of the grade sexual education curriculum was undertaken, at least in significant part, because of plaintiff Ghimenti's

and Smith's efforts. This is documented in various exhibits. (Strauss Decl., Ex. U, Castillo Depo. at 58:4-59:19.) [cycle of review initiated in part due to plaintiffs' efforts, and changes made as part of that review]; Ex. V, email from Watson to various ["What lead us to this point is some ongoing concerns from some community members about the outside consultant we have used over the past several years … Now that we'll no longer use Mac, the concerns have been directed toward the perceived lack of sensitivity to Gender Identity, Gender role, and Sexual Orientation."]; and Ex. W, Watson Depo. at 106:19-107:3 [Comments and concerns taken into consideration during review process of curriculum].) This evidence is particularly compelling in light of the evidence that after the change in the California law by virtue of the adoption of the Act in 2003, Clovis had done nothing to comply with the Act until 2011, and to the contrary had expressly reviewed its non-compliant policies and Administrative Procedure, which referred to the outdated Education Code sections, and readopted them without change, on three different occasions. (Coll-Very Decl., Ex. BB, BP; Straus Decl., Ex. A. AR 3206 & Ex. B BP 3206.)

It appears to the court that the adoption of the seventh grade curriculum was achieved by virtue of pre-litigation activity. "[T]here must be a causal connection between the plaintiffs' lawsuit and the relief obtained." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291.) The issue is whether "*the lawsuit* was a catalyst motivating the defendants to provide the primary relief sought." (*Tipton–Whittingham*, supra, 34 Cal.4th at p. 608 (emphasis added).)

However, plaintiffs argue that after the litigation the District continued to make changes to the seventh grade curriculum, eventually bringing it into compliance with the Act. On October 25, 2013 and October 28, 2013, after plaintiffs had made their intentions to file the Verified Supplemental and First Amended Complaint and Petition known, the District held training for its seventh and ninth grade teachers. Plaintiffs point out that teacher training was one of the areas which plaintiff attacked in their complaint. (Strauss Decl., Ex. YY, Supplemental and Amended Complaint at ¶¶ 53-55, 57, 67.) However, The District's past practice was to provide sexual education training to instructors every other year when plaintiffs filed suit. (Strauss Decl., Ex. FF, Watson Depo. 139:20-33.) Moreover, when the new

curriculum was adopted for seventh grade only one morning session was devoted to training on how to implement it. (Strauss Decl., Ex. ZZ, email from Watson re: training for comprehensive sexual education and HIV/AIDS prevention education units.) At this October 2013 two-day training the District also released new materials, which when combined with the other materials made the seventh grade curriculum compliant with the Act. Specifically, the materials given to the instructors in October 2013 included a list of local resources for HIV and STD test and treatment (Strauss Decl., Ex LL); a handout on "Setting the Tone" which mandated recognition, respect and tolerance of all forms of sexual relationships, orientations, identity, and expressions (Strauss Decl., Ex. MM) and a PowerPoint entitled "FDA Approved Pregnancy and STI Risk Reduction Guide" (Strauss Decl., Ex UU). Finally, the October 2013 two day training marked the beginning of a commitment to annual two day training, rather than the biannual training that had gone before. (Strauss Decl. Ex. II, District's 10/4/13 response to special interrogatory Nos. 31-32.)

It thus does not appear to the court that the litigation was the cause of the changes to the seventh grade curriculum. The process of planning the October 2013 training began long before plaintiff filed their motion for leave to amend to add the allegations concerning the inadequacies of the seventh grade curriculum.

Although, plaintiffs attempt to distinguish *Suter v. City of Lafayette* (1997) 57 Cal. App.4th 1109, it is applicable to the seventh grade situation. In *Suter*, the plaintiffs filed suit challenging the validity of a city ordinance placing restrictions on firearms dealers. Prior to any judicial ruling on the matter, the city amended the ordinance, mooting the plaintiffs' action. (*Id.* at p. 1117.) The trial court sustained the defendant's demurrer without leave to amend and dismissed the action. The plaintiffs then sought attorney fees pursuant to section 1021.5, asserting their action was the catalyst for the amendment of the ordinance. (*Id.* at p. 1117.) The court upheld the denial of the plaintiffs' request for attorney fees. It noted that "'success' does not necessarily require that the litigant actually receive a favorable result at trial. It is enough that the lawsuit acted as a catalyst speeding the defendant to act in the sense that the plaintiff's

lawsuit was a material factor, or contributed in a significant way, to the result achieved." (Id. at p. 1136.) The evidence, however, demonstrated the city had been in the process of amending the ordinance, and had so informed the plaintiffs' counsel, before the plaintiffs filed their lawsuit. Accordingly, the court upheld the trial court's conclusion "that neither the lawsuit nor the threat of the lawsuit acted as a catalyst in [the city's] decision to amend the ordinance." (*Id.* at p. 1137.)

Westside Community, *supra*, 33 Cal.3d 348, is also applicable. In Westside, the California Supreme Court considered a suit demanding the defendant Secretary of the Health and Welfare Agency establish guidelines implementing legislation that would prohibit various types of discrimination by state-funded programs. The high court found no causal connection between the lawsuit and the eventual issuance of those regulations, the process of which was already well underway when the lawsuit was filed. The majority rejected the dissent's argument that the lawsuit expedited the issuance of the regulations, but went on to state that even if that were true, attorney fees should not be awarded: "[A]warding attorney fees to plaintiffs on the basis of the expedited [promulgation of regulations] would have detrimental consequences for the public in future lawsuits involving similar causes of action against public agencies. Once an agency was sued, it would refrain from taking any steps that it would normally take to accelerate the promulgation process, for fear that its actions would be perceived by the court as having been induced by the litigation. To avoid the possibility of having to pay attorney fees, the agency would strictly adhere to the original timetable that it had set for completing its work. This would deprive the public of the benefit to be gained from a speedier promulgation of the regulations." (*Id.* at p. 354, fn. 6.)

The Supreme Court reiterated this theme in *Tipton-Whittingham*: "Attorney fees may not be obtained, generally speaking, by merely causing the acceleration of the issuance of government regulations or remedial measures, when the process of issuing those regulations or undertaking those measures was ongoing at the time the litigation was filed. When a government agency is given discretion as to the timing of performing some action, the fact that a lawsuit may

accelerate that performance does not by itself establish eligibility for attorney fees." (*Tipton–Whittingham*, supra, 34 Cal.4th at p. 609.)

Here, plaintiffs have not demonstrated that anything they did in the litigation with respect to the seventh grade made the District change their practices with respect to the seventh grade. The seventh grade was essentially a done deal, thanks to plaintiffs' prelitigation efforts, prior to the filing of the lawsuit. Nor has there been any correlation of litigation activity to the various amendments to the seventh grade curriculum to the lawsuit. While it could be said that the litigation may have caused the District to work out the flaws in the seventh grade curriculum more quickly than it would have without the litigation, the increased speed is not compensable.

The issue of awarding fees for the ninth grade curriculum is equally difficult. All of the District's employees are careful to say at deposition that the ninth grade curriculum review was always intended to naturally follow and build on the seventh grade review. However, the District does acknowledge that there was a at least a nine month gap from the time the seventh grade teacher received their new materials and were trained in the new materials (November 9, 2011; Simmons Decl., Ex. A at 6-15) and the time the District employees begin to contact teachers and other employees about reconstituting committees to begin the ninth grade review process. The District blames the delay on the absence of Mr. Watson, the Administrator of Curriculum and Instruction due to a new assignment. However, the District was surely aware, due to its recent review of the seventh grade curriculum, that its then extant ninth grade curriculum was not in compliance with the Act, and surely could have found someone on its staff to shepherd the process of reviewing the curriculum through a review, especially since they were just building on what they had already done. Also, the District's claims that the plaintiffs' efforts has no effect on the timing and merits of the ninth grade ring especially hollow based on the evidence before the court. The subject line on email between Dr. Robin Castillo, the new Administrator of Professional Development and Curriculum Innovations at the District, and Mr. Watson, on the email regarding getting in touch and sharing ideas on how to set up the ninth grade curriculum review committees, is entitled "Our Favorite Subject," a clearly sarcastic

reference, which demonstrates an awareness of the outside influences on the curriculum development. (Strauss Decl., Ex. FF, email from Castillo to Watson, 8/28/12.) Also this email was sent less than a week after the plaintiffs file their original complaint. Accordingly, the facts of this case do not fall within the exceptions for the acceleration of already undertaken governmental measures as set forth in *Westside Community*, *supra*, 33 Cal.3d 348, 354, fn. 6 and *Tipton–Whittingham*, supra, 34 Cal.4th at p. 609.

Also, the goals of the plaintiffs in improving the content of the ninth grade curriculum appear to coincide with significant events in the litigation. Just days after the mediation, the District issues new directives about required curricular elements: 1) FDA approved contraceptive methods; 2) varying sexual orientations; 3) varying forms of family units/relationships; 4) relevance of sexual education to LGBT students. (Strauss Decl., Ex. XX Instructional Reminders, 5/3/13.) Within a week of plaintiffs' filing their motion to file Amended complaint, Dr. Parra again issues the Instructional reminders to sexual education seventh and ninth grade teachers. (RFJN Exs. 4, 5, B, Simmons Decl., Ex. AA at 28.)

The court thus finds the litigation was the catalyst that forced the District to revise its ninth grade sexual education curriculum to comply with the Act and awards plaintiffs fees attributable to that effort, as described below.

Finally, there is the issue of the excusal policy. There is no dispute that the written policy before plaintiff's August 4, 2011 demand letter was that positive opt-in parental permission had to be given for sexual education. (Coll-Very Reply Decl. Ex. BB Board Policy 3206 (Current Feb. 25, 2009-Sept. 13, 2011.) After the demand letter, the policy was changed such that the opt-in applied just to sexual health education. (Strauss Decl., Ex. C Blackline Board Policy 3206 rev. 9/13/11.) However, prior to suit, the practice was to require opt-in parental consent for both HIV/AIDS prevention and sexual education. Because the lawsuit challenged the "excusal procedure," i.e., implementation, not just the policy; it is relevant that the deposition testimony of teachers Williams and Dean indicated that they would not let students particulate in classes unless they received a permission slip back allowing participation or unless they called and got

verbal approval from the parent. (Strauss Decl., Ex WW Williams Depo. at 28:24-30:1; Ex. DD Dean Depo. at 107:11-15.) Accordingly, the change in practice implemented by the "instructional reminders" dated May 3, and August 16, 2013, which advised that no child should be refused attended in sexual education of HIV/AIDS prevention for failure to return a permission slip, can be attributed to the litigation. (Strauss Decl., Ex. XX.) When action is taken by the defendant after plaintiff's lawsuit is filed the chronology of events may permit the inference that the two events are causally related. (*Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725, 736.) Here, the May 3, 2013 reminder came less than two months after plaintiffs took the depositions of Williams and Dean in March of 2013. The court thus finds it is causally related.

iii. Merit.

Under section 1021.5, in order to make an award of attorney fees on a catalyst theory, the trial court must "gauge, objectively speaking, whether the lawsuit had merit." (*Graham*, *supra*, 34 Cal.4th at p. 575.) It must "determine that the lawsuit is not 'frivolous, unreasonable or groundless' [citation], in other words that its result was achieved 'by threat of victory, not by dint of nuisance and threat of expense.' [Citation.]" (*Ibid.*) "Attorney fees should not be awarded for a lawsuit that lacks merit, even if its pleadings would survive a demurrer. We believe that trial courts will be able to conduct an abbreviated but meaningful review of the merits of the litigation designed to screen out nuisance suits without significantly increasing attorney fee litigation costs." (*Id.* at p. 576.) "The determination the trial court must make is not unlike the determination it makes when asked to issue a preliminary injunction, i.e., not a final decision on the merits but a determination at a minimum that ' "the questions of law or fact are grave and difficult." ' [Citation.]" (*Id.* at pp. 575–576.)

The District takes the position that, in practice each and every one of the ninth grade teachers deposed testified that he or she was teaching contraception, i.e., not teaching abstinence-only, discussing up-to-date statistics with their students based on information obtained from periodic trainings and through their own independent efforts, and not teaching or creating an environment of bias against non-heretosexual student of family units. "Not one ninth grade teacher questioned on issues relevant to Petitioners' abstinence-only until heterosexual marriage" theory testified that they provided instruction on abstinence only or delivered instruction with intentional gender or sexual orientation bias…" (Opposition at 7:15-23.) This is belied by the deposition testimony. (See Coll-Very Reply Decl., Ex. Z Hall Depo. at 92:17-25 [teacher did not instruct his students on effectiveness of condoms in reducing STD, instead saying they were "not very safe in protecting you against STDs"]; see also Ex. ZZ Campbell Depo. at 94:24-95:2 [ninth grade teacher testified that he did not instruct students on effectiveness rates of condoms and other forms of contraception]; Ex. Z, Hall Depo. at 97:18-98:2 [ninth grade teacher testifying he did not discuss emergency contraception with students in detail because he was not very familiar with it].)

Certain videos originally certified for optional use in high school contained biased information. *Go A.P.E.* compared a woman who is not a virgin to a dirty shoe. The video *Never Regret the Choice* stated boys and men are physically unable to stop themselves once they become sexually excited. A ninth grade teacher reinforced gender stereotypes by passing out a handout which presented a timeline of sexual arousal which asserted that men become aroused at French kissing, but that women become aroused later, at "heavy petting," a distinction with no medical basis. (Coll-Very Reply Decl., Ex. AA, Campbell Depo. at 76:7-26; 77:11-78:13 & Depo. Ex. 7.) Some of the videos perpetuated sexual orientation bias. The video *Never regret the Choice*, taught the students, "something bad will happen" is they had sex outside of marriage and encouraged students to adopt the mantra, "one man, one woman, one life." At least one ninth grade teacher, Beauchamp, instructed students that marriage is between a man and a woman. (Coll-Very Reply Decl., Ex. W Beauchamp Depp. At 103:21-24.)

Certainly, at a minimum the depth of the sexual health instruction presented to the students of the District varied widely and could contain gender and sexual orientation biased information.

iv. Settlement Efforts.

To discourage nuisance suits brought by attorneys hoping to obtain fees by dropping lawsuits upon obtaining some relatively insignificant relief, the California Supreme Court adopted several "sensible limitations on the catalyst theory...." (*Graham*, *supra*, 34 Cal.4th at p. 575.) Not only must the lawsuit have some merit but also "the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." (*Id.* at p. 561.) "Awarding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance that objective and encourages lawsuits that are more opportunistic than authentically for the public good. Lengthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time." (*Id.* at p. 577.)

The District claims that no communication from plaintiffs, not even the August 4, 2011 letter from counsel, should count as a prelitigation demand letter for the purposes of the catalyst theory law because it failed to notify the District of specific grievances with respect to the ninth grade curriculum and propose a remedy on point. However, the August 4, 2011 demand letter did state that the Holt textbook, *Lifetime Health*, presented abstinence only education in violation of the Act. The letter asked the District "to evaluate all Family Life/Sex Education and HIV/AIDS prevention curricula and supplemental materials (such as videos and handouts) that have been approved for use in District classrooms for compliance with the Act and remove and replace those that do not meet the law", specifically citing the Act. Also, the October 10, 2011 letter from Ghimenti to the District Board, while primarily addressing the seventh grade

curriculum to be voted on in the near future, also expresses grave concern with the high school curriculum and urges adoption of *Positive Prevention* or *Positive Prevention Plus* in their entirety as curriculum for both grades. (Coll-Very Supp. Decl., Ex. KK.)

During the year leading up to the filing of the original complain in August, 2012, plaintiffs continued to seek information about what, if anything, the District was doing with its ninth grade sex ed program, but the District refused to engage either plaintiffs or their counsel. Indeed, the District and plaintiffs' counsel corresponded over many months about the District's claim that it could not share any of the sex ed instructional materials it was using in the ninth grade because such materials were subject to copyright protection. Only after plaintiffs were able to determine the District had not made any changes to its ninth grade sex ed program following their August 4, 2011 letter did plaintiffs initiate this lawsuit.

Finally, the August 4, 2011 letter also includes a demand that the District end the opt-in policy created by Board Policy 3206 and Administrative Regulation 3206 in favor of an opt-out policy. Following the letter the District did make some minor changes to the opt-in language in its board policy; however, at the time the suit was filed, the board's policy explicitly required opt-in consent for sexual health education. Plaintiffs continued to complain about this aspect of the District's policy and also complained that, despite the changed policy, District students in practice were being excluded from both sexual health and HIV/AIDS prevention education for failing to return the parental consent form. The District addressed these complaints only after the lawsuit was filed.

The court thus finds plaintiffs made reasonable prelitigation attempts to settle with respect to the ninth grade sex ed curriculum and the excusal policy.

b. Important Public Right.

In *Woodland Hills*, *supra*, 23 Cal.3d 917, the California Supreme Court stated that both constitutional and statutory rights are capable of qualifying as "important" for purposes of

section 1021.5, but not all statutory rights are important. The court indicated that section 1021.5 "directs the judiciary to exercise judgment in attempting to ascertain the 'strength' or 'societal importance' of the right involved. (*Id.* at p. 935.) The strength or societal importance of a particular right generally is determined by realistically assessing the significance of that right in terms of its relationship to the achievement of fundamental legislative goals. (*Id.* at p. 936; see also *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 393-94; *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 315 [whether plaintiffs' efforts resulted in the enforcement of an important right affecting the public interest is a factual issue].)

The rights enforced in the suit were those granted by the Act, the stated purposes of which are:

> (1) To provide a pupil with the knowledge and skills necessary to protect his or her sexual and reproductive health from unintended pregnancy and sexually transmitted diseases.
>
> (2) To encourage a pupil to develop healthy attitudes concerning adolescent growth and development, body image, gender roles, sexual orientation, dating, marriage, and family.

(Educ. Code § 51930, subd. (b).)

Given the high social cost of teen pregnancy and similar toll on society of HIV/ADIS and other sexually transmitted diseases, the rights vindicated by this suit, access to medically, and socially appropriate sexual education, is an important public right.

c. Significant Benefit Conferred.

"Under the private attorney general doctrine, unlike the separate substantial benefit doctrine, the " 'significant benefit' that will justify an attorney fee award need not represent a 'tangible' asset or a 'concrete' gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." (*Woodland Hills*, supra, 23 Cal.3d at p. 939.) "[T]he public always has a significant interest in seeing that legal strictures are

properly enforced and thus, in a real sense, the public always derives a 'benefit' when illegal private or public conduct is rectified." (*Id.* at p. 939.) "[I]n adjudicating a motion for attorney fees under section 1021.5, a trial court [should] determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." (Id. at pp. 939–940.) "The 'extent of the public benefit need not be great to justify an attorney fee award.'[Citation.]"(*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 894.)

A significant benefit was conferred on the students of Clovis Unified. According to Clovis Unified website (http://www.cusd.com/about/demos.htm) The District has over 40,000 students currently. Ensuring access to consistent, legally appropriate sexual health education is not an insignificant benefit.

d. Necessity of Private Enforcement.

"[T]he necessity and financial burden requirement, involves two issues: '"'"'whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys.'" ' " (*Children and Families Commission of Fresno County v. Brown* (2014) 228 Cal.App.4th 45, 55, internal citation omitted.)

"'In determining the financial burden on litigants, courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. '"'"An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' [Citation.]" ' "This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit."' A party seeking fees under section 1021.5 has the burden of establishing its litigation costs transcend its

personal interests." (*Children and Families Commission of Fresno County v. Brown*, *supra*, 228 Cal.App.4th at p. 55.)

Also, "a litigant's personal nonpecuniary motives may not be used to disqualify the litigant from obtaining fees under section 1021.5." (Conservatorship of Whitley (2010) 50 Cal.4th 1206, 1210.)

Plaintiffs have met the necessity and financial burden prongs of the test, since private enforcement was the only practical way to force the District to undertake a timely review of its ninth grade curriculum and excusal practices. Also, plaintiffs had no financial interest or stake in the litigation, as they did not seek money damages and had no obvious financial motive for challenging the curriculum or excusal practices. Therefore, plaintiffs have met the final prong of the section 1021.5 test, and the court should find that plaintiffs entitled to an award of fees at least as far as the ninth grade curriculum and the excusal policy are concerned.

2. Calculating the Fees.

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48.) Here, defendant seeks a loadstar of $684,751.75. Fees of $557,243.75 are sought for the work of the Simpson Thatcher & Bartlett firm and the ACLU seeks fees of $127,508.00.

As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.' " (*Serrano III*, *supra*, 20 Cal.3d at p. 48, fn. 23.)

a. Hours.

While the fee awards should be fully compensatory, the trial court's role is not to simply rubber stamp the defendant's request. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1133; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361.) Rather, the court must ascertain whether the amount sought is reasonable. (*Robertson v. Rodriguez*, *supra*, 36 Cal.App.4th at p. 361.) However, while an attorney fee award should ordinarily include compensation for all hours reasonably spent, inefficient or duplicative efforts will not be compensated. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The constitutional requirement of just compensation, "cannot be interpreted as giving the [prevailing party] carte blanche authority to 'run up the bill.' " (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 880.) The person seeking an award of attorney's fees "is not necessarily entitled to compensation for the value of attorney services according to [his] own notion or to the full extent claimed by [him]. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 950.)

Here fees of $557,243.75 are requested for Simpson Thatcher & Bartlett LLP attorneys and fees of $127,508.00 are requested for the ACLU attorneys, representing 2,381.3 hours of work. This is an impressive number of hours in a case which generated only two motions, and never went to trial.

"Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' " (*Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 434, citing *Copeland v. Marshall* (1980) 641 F.2d 880, 891 (en banc) (emphasis in original).)

i. Simpson Thatcher & Bartlett LLP's Billing.

One of the problems with Simpson Thatcher & Bartlett LLP's billing is that they bill in .25 increments. It is only appropriate to award fees for time actually spent. When the billing increment is so large (15 minutes) it is reasonably probable that many of the tasks billed for took less time. While this is an issue with .1 billing, the risk of excess charges is lower. Few tasks take less than 6 minutes. It is reasonably certain that the billing contains "overages" just because of the billing increments. Accordingly, the Court makes an across the board 1% reduction from the bill.

ii. Clerical Tasks.

"[P]urely clerical or secretarial tasks should not be billed …, regardless of who performs them." (*Missouri v. Jenkins* (1989) 491 U.S. 274, 288.) Large numbers of entries appear to be for clerical tasks. For example entries relating to clerical tasks relative to the complaint include: 8/14/12 "prepare for filing" Wilcox; 8/15/12 "coordinate filing logistics" Wilcox; 8/16/12 "supervise filing logistics" Coll-Very; 8/17/12 "work with SW re: filing details" Coll-Very; 8/20/12 "attention to filing details" Coll-Very; 8/21/12 "file papers in Fresno Superior Court; circulate papers to opposing counsel" Coll-Very. There is also an 8/21/12 attention to calendaring by Coll-Very. The court deducted .5 hours at a rate of $250.00 and 1.25 at a rate of $400.00 just for the complaint (total $625.00) An additional $643.75 was also deducted for: 8/27/13 "formatting of briefs" .25 Blake ($125); 8/28/13 "file same [reply brief]" .25 Schmidt ($250); 10/4/13 "attention to filing details" .5 Coll-Very ($400); 10/4/13 "prepare motion papers for service" .5 Schmidt ($250); 10/22/13 "execute filings" .25 Coll-Very ($400); 10/22/13 "service of same [reply brief] .25 Schmidt ($250); and 2/28/14 "attention to filing notice of entry [of dismissal]" .5 Blake ($125). The grand total for clerical entries for Simpson Thatcher & Bartlett LLP is $1,268.75.

As for the ACLU, half of the time spent by Attorney Novella Coleman was clerical. It is clear from her declaration that, aside from preparing one of plaintiffs for deposition, she merely facilitated the filing of legal documents in Fresno, tasks that do not require the specialized knowledge of an attorney. Accordingly, the Court deducts 1.8 hours of Attorney Coleman's time at a rate of $345.00 per hours, for a total of $621.00.

iii. Overhead

A July 6, 2011 entry by Ms. Gill for 1.3 hours is for "draft client retainer agreements." Furthermore, two entries by Ms. Coll-Very on July 6 and July 7, 2011, include time for "attention to retention agreement" and "attention to retention letter." Drafting of retainer agreements, like setting up the file are properly charged to overhead, not to the client. Because the Simpson Thatcher & Bartlett LLP firm uses unallocated block billing, the court estimates the proper time allocations. The Court deducts an hour from Ms. Coll-Very's time. The total deduction for the ACLU is $773.50 and for Simpson Thatcher & Bartlett LLP it was $400.00.

iv. Excessive time

The court identifies more than 6 hours of partner research and at least 3 hours of associate time devoted to the issue of "standing." It is curious as to why this was pursued. One would think that the ALCU would be well-versed in the legal basis all the plaintiffs' standing in the instant lawsuit as they have been involved in similar suits. As such, the Court cuts 6 hours of Simpson Thatcher & Bartlett LLP's time at a rate of $400.00 for a total of $2,400.00

The Court identifies at least six entries relating to research on writs of mandate totaling 14.5 hours and $1,875.00. This curious as a firm the size of Simpson Thatcher & Bartlett LLP should know how to go about a Writ of Mandate, or this information should be had from the

ACLU. Accordingly the Court deducts 9.5 hours at a rate of $125 for a total allowed of $625 and a total deduction of $1,250.00 from Simpson Thatcher & Bartlett LLP's time.

It took five attorneys at Simpson Thatcher & Bartlett LLP over 83.75 hours to draft the original complaint: 59.5 hours at an associate's rate of $250.00 and 24.25 hours at a rate of $400.00. The ACLU contributed another 8.4 hours of time at a rate of $595.00. Thus drafting the complaint cost approximately $29,573.00. Admittedly, it is a very factually dense complaint and it takes substantial time to explain the law pertaining to sexual health and education. However, there were separate memos prepared on just on fact research, time spent on reviewing the curricula, and research on writs of mandate. Accordingly, the court deducts $9,573.00, $6,000.00 from Simpson Thatcher & Bartlett LLP and $3,573.00 from the ACLU.

After discovery lead them to believe that that the District's middle school program was not compliant with the Act, the plaintiffs brought a motion for leave to amend the complaint. Amending the complaint itself to include allegations specific to seventh grade took 81.25 hours of attorney time (approximately 18 hours at a rate of $400.00 per hour; 12 hours at a rate of $250.00 per hour and 25.25 hours at a rate of $125.00 per hour) at Simpson Thatcher & Bartlett LLP and an additional 26 hours of time by the ACLU's attorneys at a rate of $595.00. The time spent on amending the complaint had a value of $28,826.25. Because plaintiffs failed to prevail on the seventh grade curriculum issue, and this item relates only to the seventh grade curriculum issue, this item is stricken in its entirety.

It took the Simpson Thatcher & Bartlett LLP attorneys 9 hours of time at a rate of $400.00 per hour, 68.5 hours at a rate of $250 per hour and 40.25 hours at a rate of $125 per hour to prepare the moving papers, analyze the opposition and prepare the reply, for a total of $25,756.25. Because plaintiffs failed to prevail on the seventh grade curriculum issue, and this item relates only to the seventh grade curriculum issue, this item is stricken in its entirety.

The Motion for Leave to Amend was denied on a procedural ground, namely, events occurring after the filing of a complaint must be alleged in a supplemental complaint. To this end, plaintiffs undertook to file a motion for leave to file an amended and supplemental

complaint. Through revising the Amended and Supplemental complaint, drafting the moving papers, reviewing the opposition, preparing the reply, and preparing for oral argument, Simpson Thatcher & Bartlett LLP attorneys spent 15 hours at a rate of $400.00, 58.75 hours at a rate of $250, and 24.5 hours at a rate of $125.00 for a total of $23,750. Because plaintiffs failed to prevail on the seventh grade curriculum issue, and this item relates only to the seventh grade curriculum issue, this item is stricken in its entirety.

Significant numbers of hours are spent preparing outlines prior to the taking of the depositions that, in most cases, seem to double or triple the time spent actually taking the depositions themselves. More time is spent summarizing the depositions, although the case never got near trial. A few examples stand out:

1) "Watson Deposition Outline." Rick Watson was one of the key administrators during the relevant time period. Prior to his March 13, 2013, deposition, 11.25 hours were billed at a rate of $125.00 just for an outline for his deposition and .5 hours were billed at a rate of $400.00, for a total of $1,606.25.
2) "Watson/Castillo Deposition Outline." Robyn Castillo eventually assumed at least some of Rick Watson's duties. Prior to her March 12, 2013, deposition 26.5 hours were spent at a rate of $125.00, 13.75 hours were spent at a rate of $250, and 2.25 hours were spent at a rate of $400.00 preparing outlines of these depositions, for a total costs of $7,650.00.
3) "Teacher Deposition Outline." Generic teacher deposition outlines appeared in the billing with 7 hours billed at a rate of $250.00 per hour and 3.50 hours billed at a rate of $400.00 per hour, for a total of $3,150.00.
4) "Teacher/Administrator Deposition Outline." However, in addition to the teacher outline, another category of outline is found in the billing, that of "teacher/administrator outline." This outline had 6.75 hours billed to it at a rate of $250.00 and 2.25 hours billed to it at a rate of $400.00, for a total of $2,587.50.

5) "Administrator Deposition Outline." A separate outline was apparently prepared for administrators. It had approximately 3 hours billed to it at a rate of $250.00 per hour, for a total of $750.00.

6) "CSUD Board Members Deposition Outline." The outline for the Clovis Unified School Board member's depositions had approximately 14.75 hours billed to its preparation at a rate of $125.00, 2.5 hours at a rate of $250.00 and .7 hours at a rate of $400.00, for a total of $2,737.50.

7) "PCC Deposition Outline." This deposition outline had approximately 19.5 hours billed to its preparation at a rate of $125.00, 1.75 hours at a rate of $250.00, and 1 hour billed at a rate of $400.00, for a total of $3,275.00.

8) "ninth Grade Teachers Deposition Outline." The ninth grade teachers' outline had 10.25 hours billed to its preparation at a rate of $125 per hour, for a total of $1,281.25.

9) "seventh Grade Teachers Deposition Outline." Fewer hours were allocated to the seventh grade instructors, only 2 hours at a rate of $125, for a total of $250.

10) "Belman Deposition Outline." In addition to the generic teacher outlines, some individual instructors also had individual deposition outlines. The outline for teacher Belman had 7.25 hours billed to it at a rate of $125.00 and 4.75 hours billed to it at a rate of $250.00, for a total of $2,093.75. According to the timesheet, the April 17, 2013, deposition took less than 7 hours to take.

11) "Dean Deposition Outline." Dean appears to have been a teacher. Approximately 5.5 hours were billed to the creation of an outline for this deposition at a rate of $125.00 per hour, for a total of $687.50.

12) "Watson Deposition Summary & Digest." After Rick Watson's March 13, 2013, deposition 10.75 hours were billed at a rate of $125.00 for preparing a summary of the deposition, for a total of $1,343.75. An additional 1 hour was billed at a rate of $400.00 for preparing a digest of the deposition.

13) "Troescher Deposition Summary" Troescher is apparently one of the teachers whose deposition was sufficiently short and uneventful not to merit a separate billing entry in the timesheets. Nevertheless 4 hours were billed to the preparation of a deposition summary, 3.5 hours at a rate of $125.00 and .5 hours at a rate of $400.00, for a total of $637.50.

14) "Bengal Deposition Summary." Bengal was another teacher whose deposition did not merit separate attention in the billing entries. Five hours were billed, at a rate of $125 to the preparation of a summary of this deposition, for a total of $625.00.

15) Time billed for deposition preparation by attorneys who do not appear to have taken the subject deposition. For example, on March 11, 2013, Attorney Kahn billed for 4.00 hours of preparation time for the Castillo deposition, when that deposition was actually taken by Attorney Strauss on March 12, 2013. On March 12, 2013, Attorney Schmidt billed for preparation for the depositions of Castillo and Watson for 4.75 hours, when in fact, she only took the deposition of Watson on the next day. On March 14, 2013, Attorney Schmidt billed for 4.25 hours of time to attend the deposition of Jerry Campbell, when that deposition was apparently taken by Attorney Kahn. (Incidentally, attorney Kahn billed 9.5 hours of time to prepare for taking the 4.25 deposition.)

Certainly attorneys must be properly prepared for depositions. But many of the depositions were of teachers who had no specialized knowledge, and the preparation of routine outline was appropriate for them. The Court questions the number of hours necessary for the task. Since the teacher depositions seem to have taken 31.75 hours to complete from what can be determined from the timesheets, the Court disallows the sum of $20,789.00.

A second round of depositions were taken in 2014. The billing entries show general revisions to a general deposition preparation outline, with 17.25 hours spent at a rate of $125.00 and 2.25 hours spent at a rate of $400.00. The Administrator deposition outline received attention as well, having 28.5 hours spent on it at a rate of $125.00. Outlines were made for the

defense of the clients' depositions with 10 hours being spent at a rate of $125.00, 5.25 hours being spent at a rate of $250.00 and 3.25 hours being spent at a rate of $400.00. This is in addition to the approximately 14.25 hours spent at a rate of $250.00 actually preparing for the clients' depositions. Additional administrator and teacher depositions were taken, each showing the lopsided proportionality between preparation and deposition length. Based on the Court's study of the billings, the Court deducts $15,000.00 from Simpson Thatcher & Bartlett LLP's billings for the second round of depositions.

3. Apportionment for lack of Success on seventh Grade Issues:

"Reasonable" fees under private attorneys' general fee statute, Code Civ. Proc., § 1021.5, "should take into consideration the limited success achieved by appellants." (*Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250.) To reduce the fees the court must determine if the success was limited and, if so, the apportionment of time amongst "closely intertwined claims." (*Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2010) 190 Cal.App.4th 217 238.) "California courts applying section 1021.5 in cases of limited success have adopted the [two-step] approach set forth in *Hensley v. Eckerhart* (1983) 461 U.S. 424, 434." (Ibid.) First, the court inquires "whether 'the plaintiff fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded [.]' " (*Id.* at p. 239, citing *Hensley*, *supra*, at p. 434.) There is no certain method for determining when claims are related or unrelated, but Hensley "instructs the court to inquire whether the 'different claims for relief ... are based on different facts and legal theories.' [Citation.] If so, they qualify as unrelated claims. Conversely, related claims 'will involve a common core of facts or will be based on related legal theories.' [Citation.]" (*Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1310–1311.) " '... Under this analysis, an unsuccessful claim will be *un* related to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course

of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.' " (*Id.* at p. 1311.)

Here, although the seventh grade sexual education and the ninth grade sexual education curricula were to some degree similar and the District claimed they stemmed from the from the same plan of action, each stood alone and had to be analyzed separately. Each was implemented at separate times and as a function of separate committees. Each was the subject of separate prayers for relief in the Amended and Supplemental Complaint. Accordingly, the Court concludes that each was a separate course of conduct which gave rise to a separate injury for which relief was sought. As such, apportionment is proper.

Accordingly, not only is it appropriate not to award fees for the amendment of the Complaint and the two motions for leave to amend, but also to apply a downward multiplier to account for the overall lack of success. The Court will apply a very modest multiplier, .15.

4. Reasonable Hourly Compensation.

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (Ketchum v. Moses, supra, 24 Cal.4th at p. 1133.) Ordinarily, "'the value of an attorney's time . . . is reflected in his normal billing rate.'" (Mandel v. Lackner (1979) 92 Cal. App. 3d 747, 761.)

The parties dispute what the reasonable billing rate is for the plaintiffs' counsel. The "experienced trial judge is the best judge of the value of professional services rendered in his court." (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 832.) Based on a consideration of various factors, the trial court may rely on its own expertise and knowledge to calculate reasonable attorney fees. (*Niederer v. Ferreira* (1987) 189 Cal. App. 3d 1485, 1507.) "When the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value." (*In re Marriage of*

Cueva (1978) 86 Cal. App. 3d 290, 300.) The court is not limited to the affidavits submitted by the attorney. (*Melnyk v. Robledo* (1976) 64 Cal. App. 3d 618, 625.)

The billing rates are reasonable for Simpson Thatcher & Bartlett LLP's attorneys. First, they are greatly discounted from their normal rates. Second, they are in line with the usual Fresno rates.

The parties also contest the rates for the ACLU attorneys. They are high. Senior counsel Elizabeth Gill bills at $595.00 per hour, Melissa Goodman bills at $525.00 per hour[16], Novella Coleman (admitted in January 2012) bills at $345.00 per hour and Ruth Dawson (admitted in June 2013) bills at $245.00 per hour. These rates are all high for Fresno. Defendants are arguing that they are out of line for the locale but have not argued that plaintiffs have made no showing that they could not have obtained local counsel.

"[I]n the 'unusual circumstance' that local counsel is unavailable," a trial court may award an out-of-town counsel's higher rates. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 399.) In such rare cases, the justification for awarding the higher rate is that out-of-town rates are needed "to attract attorneys who are sufficient to the cause." (*Ibid.*) At a minimum, therefore, the party seeking out-of-town rates is required to make a "sufficient showing ... that hiring local counsel was impracticable," and the exception is accordingly inapplicable where "no effort was made to retain local counsel." (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1244.)

Here, the Court ACLU is one of few entities that accepts litigation against school districts on these types of cases on a contingent basis. The Court is unaware of any local firm with both the resources and the desire to take on Clovis Unified on the issue of sexual education curriculum.

[16] Although admitted to the California Bar in 2013, Ms. Goodman graduated from law school in 2003 and practiced in New York before joining the California Bar

B. Motion to Strike Costs.

" '[T]he right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered by either party.' [Citations.]" (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439.) Code of Civil Procedure section 1032, subdivision (b), is an authorizing statute, providing that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Defining the term "prevailing party," Code of Civil Procedure section 1032, subdivision (a)(4) states: " 'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034."

In *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 975-977, the court explained that prevailing parties are classified into two distinct groups. The first group is comprised of four categories of litigants who qualify automatically as prevailing parties. The trial court lacks discretion "to deny prevailing party status to a litigant who falls within one of the four statutory categories in the first prong of the provision. 'As rewritten [in 1986], [Code of Civil Procedure] section 1032 now declares that costs are available as "a matter of right" when the prevailing party is within one of the four categories designated by statute. ([Code Civ. Proc., § 1032, subds. (a)(4), (b).)' [Citations.]" (*Wakefield, supra*, at pp. 975-976; accord, *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1338, fn. 4; *Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370, 1375–1376; *Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1197-1198 [prevailing party is 'entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs']; *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105 [costs discretionary when no party

qualifies for mandatory award].) The District cites the many cases that so hold, however none of them involve an award of attorney's fees under 1021.5 on a catalyst theory, or an award of attorney's fees to one who would not otherwise be the prevailing party under section 1032.

One case acknowledges that the definition of prevailing party under section 1032 is not the same as "successful party" under section 1021.5, *Ventas Finance I, LLC v. California Franchise Tax Bd.* (2008) 165 Cal.App.4th 1207 (*Ventas Finance*). However, *Ventas Finance* does nothing more than mention the conflict; it never decides whether costs can be awarded under section 1032 where fees are awarded under a catalyst theory where a dismissal is entered in a defendant's favor. The entire discussion on the subject is as follows:

> Finally, because a "successful party" within the meaning of Code of Civil Procedure section 1021.5 is not the same as the definition of the "prevailing party" pursuant to Code of Civil Procedure section 1032, the partial reversal could conceivably also affect the court's discretionary determination that Ventas is a successful party for the purpose of a fee award.

(Id. at p. 1234.) A second case holds that section 1021.5 does not authorize the recovery of ordinary costs of litigation. (*Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1283.) However, neither case interpreted whether, under section 1032, the court had discretion to deviate from the definitions of prevailing party where inapplicable to the situation at hand.

The language of section 1032, subdivision (a) which is found before prevailing party is defined is specific: "[a]s used in this section, unless the context clearly requires otherwise:" Plaintiffs argue that this means that in cases where, as here, a party prevails for purposes of another statute, the court has discretion to award costs, citing *Mundy v. Neal* (2010) 186 Cal.App.4th 256 and *Donald v. Cafe Royale* (1990) 218.Cal.App.3d 168. Both cases concerned violations of the Americans with Disabilities Act and involved attorney fee motions under Civil Code section 54. Both cases, however, expressly interpreted the language of section 1032, because the availability of attorney's fees depended on the party being a "prevailing party" under section 1032. And both the *Mundy* and *Donald* courts interpreted section 1032, subdivision

(a)(4) as not precluding finding that a plaintiff was the prevailing party for an award of attorney's fees, despite the fact that a dismissal had been entered in the defendant's favor.

> The pivotal question is whether Mundy was the prevailing party. "[U]nless the context clearly requires otherwise," a defendant in whose favor a dismissal is entered is the prevailing party. (Code Civ. Proc., § 1032, subd. (a)(4).) One such context is where a lawsuit pursuant to sections 54 or 54.1 "was the catalyst motivating the defendants to modify their behavior or the plaintiff achieved the primary relief sought. [Citations.]" (*Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168, 185, 266 Cal.Rptr. 804; *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 790, 79 Cal.Rptr.3d 574 (*Molski*).) This rule grew out of cases decided under Code of Civil Procedure section 1021.5, the private attorney general statute. (*Donald*, *supra*, 218 Cal.App.3d at p. 185, 266 Cal.Rptr. 804.)

(*Mundy v. Neal*, *supra*, 186 Cal.App.4th at p. 259.)

Indeed, this seems to be the correct approach in catalyst theory cases; otherwise the initial phrase of section 1032, subdivision (a), "unless the context requires otherwise" would be rendered a nullity and violate the rule of statutory construction that courts should, if possible, " 'give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose....' " (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634, quoting *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.)

Here, if the District's $27,704.16 Memorandum of Costs is not stricken, plaintiffs will be deprived at least in part of their catalyst theory attorney's fees. It makes no sense for the court to declare on one hand that the plaintiffs successfully achieved the primary purpose of the litigation by catalyzing change in the District, conferring an important public right on a substantial number of people by virtue of a meritorious suit, then finding that they nonetheless were not the prevailing parties in the lawsuit simply because the case was dismissed, and offset the attorney's fees awarded by the court with the costs of the District. For these reasons, the court follows the

lead of *Mundy* and *Donald* and finds that the language in section 1032, subdivision (a), "unless the context requires otherwise" permits this court to deviate from strict compliance from the rigid definitions of "prevailing party," in section 1032, where to do so would cause an injustice. Accordingly, the motion to strike the memorandum of costs of the District is granted.

IV.

DISPOSITION

The court grants the motion for attorneys' fees, in part, and awards plaintiffs' attorneys' fees in the amount of $467,433.07 attributable to litigation activity related to the ninth grade curriculum. Plaintiffs' motion to strike defendant's memorandum of costs is granted.

Dated: 4-28-15

Donald S. Black
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

American Academy of Pediatrics, California District IX, Gay-Straight Alliance Network, Aubree Smith, and Mica Ghimenti,

Plaintiffs and Petitioners,

vs.

Clovis Unified School District,

Defendant and Respondent.

Case No. 12CECG02608 DSB

Assigned to: Hon. Donald S. Black
Dept.: 502

PROOF OF SERVICE

PROOF OF SERVICE

I, Christopher James, declare that I am over the age of eighteen (18) and not a party to this action. My business address is 2475 Hanover Street, Palo Alto, California, 94304. My email address is christopher.james@stblaw.com.

On **May 4, 2015**, I served the following document(s):

NOTICE OF ENTRY OF ORDER GRANTING, IN PART, PLAINTIFFS'/PETITIONERS' MOTION FOR ATTORNEYS' FEES AND GRANTING PLAINTIFFS'/PETITIONERS' MOTION TO STRIKE MEMORANDUM OF COSTS

on the interested parties in this action by transmitting the above-named documents by electronic mail on this date to the below listed individuals pursuant to the Stipulation By All Parties Regarding Electronic And Facsimile Service, dated September 13, 2012:

Party	**Attorneys**	**Emails**
Plaintiffs and Petitioners American Academy of Pediatrics, California District IX, Gay-Straight Alliance Network, Aubree Smith, and Mica Ghimenti	Simona Strauss Elizabeth Gill	sstrauss@stblaw.com egill@aclunc.org List-ClovisEservice@lists.stblaw.com
Defendant and Respondent Clovis Unified School District	Greg Wedner Sloan Simmons	gwedner@lozanosmith.com ssimmons@lozanosmith.com

Executed on **May 4, 2015**, at Palo Alto, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Christopher W. James