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LEGAL UPDATE

October 9, 2009

To: Superintendents, Member School Districts (K - 12)

From: Loren W. Soukup, Schools Legal Counsel 

Subject: Free To Be - Sex Education Program
Memo No. 25-2009

As you may already be aware, the American Civil Liberties Union (“ACLU”) has been contacting numerous school districts informing them that their use of the Free To Be program as part of the school district’s sexual health and HIV/AIDS prevention education is in violation of the *California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act* (“Act”) ¹. The ACLU has stated that every program presented as a part of the sex education curriculum must be complete and balanced in and of itself. Since the Free To Be program stresses abstinence as a part of its curriculum, it is the ACLU’s position that school districts are not permitted to use the program. This position was bolstered by Sharla E. Smith, HIV/STD Prevention Education Consultant with the School Health Connection Office at the California Department of Education (“CDE”), who has publicly stated that California public schools will be in violation of California law should they chose to continue to use the Free To Be agency.

In response to the statements from the ACLU, Free To Be has hired James Allen, attorney at law, to defend the legality of its program. Not surprisingly, it is Mr. Allen’s legal opinion that the Free To Be program is in compliance with the Act and school districts are not in violation of the law if they continue to use the program.

In light of these varying interpretations of the law, our office asked the California Department of Education (“CDE”) to issue a legal opinion clarifying the use of the Free To Be program in the California schools. Initially, the CDE legal department indicated that they would address this issue. However, more recently they have indicated that they may not provide a legal opinion but rather permit each school district to individually decide whether to use the Free To Be program.

¹ Education Code 51930 et seq.

Until a formal opinion is issued by the CDE, each school district must ensure that it is providing a balanced and comprehensive sexual health education program to its students pursuant to the requirements under the Act. Our office is of the legal opinion that Free To Be can be a part of such a comprehensive program, so long as it is one component of a variety of other educational approaches and curriculum.

Additionally, please be advised that the ACLU and Mr. Allen have begun sending out public records requests, pursuant to the California Public Records Act², to school districts requesting copies of curricula materials used in any program presented as part of school districts' Comprehensive Sexual Health and HIV/AIDS Prevention Education program. Please contact our office if you need assistance responding to such a request or if you have any questions concerning the above information.

Please contact me if you have any questions concerning the above information or any other matter.

² Government Code 6250 et seq.