ACLJ

MEMORANDUM

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PARENTAL RIGHTS IN EDUCATION

Introduction

Almost a century ago, the United States Supreme Court affirmed in two seminal cases, that parents have a fundamental liberty interest under the Fourteenth Amendment[1] in the care, upbringing, control, and education of their children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the right of parents to "establish a home and bring up children"); *Pierce v. Soc'y of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (affirming the liberty interest and right of parents and guardians, protected by the Due Process Clause of the Fourteenth Amendment, "to direct the upbringing and education of children under their control."). And in *Prince v. Massachusetts*, the court was unequivocal that "the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. 158, 166 (1944). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). The Supreme Court has time and again affirmed this foundational principle. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997); *Troxel v. Granville*, 530 U.S. 57 (2000).

As such, there has been a century long battle between parents' right to direct their child's upbringing and education, and public schools' right to determine curricula in the best interest of the children they serve. While today's parents still have a fundamental right to the "custody, care, and nurture of the(ir) child," the courts have increasingly upheld that it is the schools', not the parents', right and responsibility to determine curricula and other school matters. What this essentially means is that parents can choose the school in which to enroll their children, but once public school is selected, parents have very little say in curricular decisions. As one court has noted, "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005). *See also Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) ("[P]arents simply do not have a constitutional right to control each and every aspect of their children's education and

[1] The Fourteenth Amendment provides, *inter alia*, that "no State shall deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

oust the state's authority over that subject."); *Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000) (holding that notwithstanding "near-absolutist pronouncements" by the Supreme Court regarding parental rights, in public schools the state has "custodial and tutelary" authority over students and sometimes act *in loco parentis- in place of the parent.*)

Challenging Public School Curriculum Matters

A school's choice of curriculum does not violate parental rights despite parental objections if the curriculum is reasonably related to a legitimate educational purpose. *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (mandatory community service for students held not to violate parental rights as the program was reasonably related to legitimate state educational purposes); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (mandatory community service held to not be a violation of parental rights). Rather, details such as the school curriculum, school hours, discipline, exam schedules, the hiring and dismissal of teachers, the availability of extracurricular activities, school dress codes, and so forth, are generally under the control of state and local authorities. *Blau*, 401 F.3d at 395–96 (citing *Goss v. Lopez*, 419 U.S. 565, 578 (1975)).[2]

1. Student exposure to curriculum content that offends religious convictions

Court decisions addressing religious liberty challenges to public school curriculum materials have been unfavorable where the parents claim that the materials violate their religious beliefs. For example, in *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir.1987), the court dismissed school students' free exercise clause claims against a class requirement that students read a book that violated their religious convictions. The court stated:

> The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.

Id. at 1065.

Similarly, in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), the court rejected a Free Exercise challenge to an elementary school's exposure of young children to books promoting gay marriage. "Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas . . . ." *Id.* at 106. *See also Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (rejecting parent's claim that requiring their son to attend health education classes violated parent's right to direct the upbringing and education of their son); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (rejecting free exercise

[2] In Texas, however, a statute allows parents to request the school board to add classes to the curriculum. Tex. Educ. Code Ann. § 26.003(a)(3)(A) (Vernon 2011) (entitling parents to request "[T]he addition of a specific academic class in the course of study of the parent's child in keeping with the required curriculum if sufficient interest is shown .....").

clause challenge to sex education program with sexually explicit content and crude language).

2. Coercion of students to affirm beliefs that violate the student's religious convictions

Where students are coerced, however, into verbally affirming the truth of something that violates the student's religious convictions, a First Amendment claim may be successful. For example, in *Wood v. Bd. of Educ.*, No. GJH-16-00239, 2016 U.S. Dist. LEXIS 136512 (D. Md. Sep. 30, 2016), the court held that the Plaintiff stated a First Amendment claim where she alleged that the school required her daughter to profess the five pillars of Islam and to write out faith statements of the religion.

One recent case out of the Fifth Circuit clarified that, in this particular case, the school administration did not ignore clearly established law when it compelled "a non-operative recitation of the Mexican pledge." *Brinsdon v. McAllen Indep. Sch. Dist*., 863 F.3d 338, 351 (5th Cir. 2017). In *Brinsdon*, the compelled speech at issue was "a pledge for which there [wa]s no evidence that its purpose was to compel the speaker's affirmative belief." *Id.* at 349-50. *See also C.N. v. Ridgewood Bd. of Educ*., 430 F.3 159, 187 (3d Cir. 2005) ("[W]hile a public educational institution may not demand that a student profess beliefs or views with which the student does not agree, a school may in some circumstances require a student to state the arguments that could be made in support of such beliefs or views").

In sum, the greater the coercion on students to profess beliefs that violate the student's conscience, the greater the likelihood that the offending school requirement could be successfully challenged in court. By contrast, situations involving mere exposure to offensive materials would be better handled by initiating and maintaining an open dialogue with school administrators on the issue. *Importantly, parents can serve as a grassroots catalyst for educational reform and should also consider running for school board and becoming involved in school policy decision making. In taking such affirmative steps at the local level, parents can influence school curriculum and encourage the adoption of opt-out policies.*

The Protection of Pupil Rights Amendment

A federal law, the Protection of Pupil Rights Amendment (PPRA)[3], 20 U.S.C. § 1232h, reinforces the parental right to know and be informed about their children's education by giving parents the authority to inspect all instructional material. *Id.* § 1232h(a). In addition, unless parental consent is given, no student is required to submit to any kind of test designed to reveal information concerning political affiliations, potentially embarrassing psychological problems, sexual behavior and attitudes, illegal and anti-social behavior, critical appraisals of family relationships, legally privileged relationships (e.g. those with a minister or doctor), and income. *Id.* § 1232h(b). Violations of the PPRA should be resolved locally, as far as possible, but if efforts fail, the PPRA also provides avenues for relief through the Family Educational Rights and Privacy Act Office of the U.S. Department of Education.

[3] Also known as the "Hatch Amendment."

State Laws Providing Parental Opt-Out Rights for Curriculum Materials and Classes

Currently, parents have no constitutional right to remove their child from objectionable classes, even if the parents' objections stem from their religious beliefs. However, many states have enacted "opt-out" laws that permit parents to remove their children from various kinds of public school classes. The statutes range from being permissive to restrictive, with restrictive statutes generally limiting parental opt-out rights to limited categories of sex education classes. *See for example* Ala. Code § 16-41-6 (2017); Idaho Code Ann. § 33-1611 (2017); Mass. Gen. Laws Ann. ch. 71, § 32a (West 2017).

By contrast, permissive statutes may allow a broader category of classes and curricula from which parents may withdraw their children. For example, two permissive states, Arizona and Minnesota, grant extensive statutory rights to parents, permitting opt-outs for any class, school activity, and instructional materials to which parents object. The opt-out rights are not confined to specific courses or topics such as sex education or comprehensive health education. Ariz. Rev. Stat. Ann. § 15-102(A)(4) (2017); Minn. Stat. § 120B.20 (2017).

An exhaustive survey of state opt-out statutes is beyond the scope of this memorandum, but parents with curriculum concerns should consult an attorney licensed in their state to determine whether an opt-out statute applies.

Homeschooling Parents' Rights

For information on laws regarding parental rights related to home schooling, visit http://www.hslda.org/laws/default.asp.

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