AMENDING THE MASSACHUSETTS PARENTAL NOTIFICATION STATUTE

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INTRODUCTION

In 1996, Massachusetts enacted the Parental Notification Statute that requires public schools to notify parents whenever their children are being taught about "sexual education or human sexuality."[1] The statute allows parents or guardians to exempt their children from such courses or programs with a written notification to the school, without their child being penalized for being absent.[2] This statute is currently the center of an ongoing controversy and a recent district court opinion. This Note examines the Massachusetts Parental Notification Statute[3] and argues that the statute should be amended to explicitly allow public schools to teach about sexual orientation in the context of tolerance without notifying parents.[3]

This amendment is necessary because, as will be demonstrated throughout the Note, the statute in its current form is ambiguous with regards to whether public schools in Massachusetts may teach about homosexuality in the context of promoting tolerance in the classroom without notifying parents. As a result, schools will be hesitant about introducing such topics in school without notifying parents for fear of being sued. Furthermore, the statute must be amended to reflect the public policy of the state of Massachusetts, which promotes tolerance among its citizens regardless of sexual orientation.

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1 MASS. GEN. LAWS ch. 71, §32A (1996).

> Every city, town, regional school district or vocational school district implementing or maintaining curriculum which primarily involves human sexual education or human sexuality issues shall adopt a policy ensuring parental/guardian notification. Such policy shall afford parents or guardians the flexibility to exempt their children from any portion of said curriculum through written notification to the school principal. No child so exempted shall be penalized by reason of such exemption. Said policy shall be in writing, formally adopted by the school committee as a school district policy and distributed by September first, nineteen hundred and ninety-seven, and each year thereafter to each principal in the district. A copy of each school district's policy must be sent to the department of education after adoption. To the extent practicable, program instruction materials for said curricula shall be made reasonably accessible to parents, guardians, educators, school administrators, and others for inspection and review. The department of education shall promulgate regulations for adjudicatory proceedings to resolve any and all disputes arising under this section.

2 *Id.*

3 *Id.*

PARKER CASE

The Massachusetts Parental Notification Statute is currently at the center of a federal district court opinion involving the Lexington, Massachusetts public school district and the parents of two schoolchildren.[4] In April 2006, two families filed a federal lawsuit against the Lexington, Massachusetts school system and other public school officials.[5] On February 23, 2007, a federal district court in Boston dismissed the lawsuit.[6] Specifically, the plaintiff Wirthlin family argued that the Lexington Public School District should have sent notification that their child's second grade class was reading a fairy tale, the *King & King*.[7] This story is "a fairly tale that depicts two princes falling in love and marrying."[8] The other family in the lawsuit, the Parkers, argued that they should have been notified that their son, who was in kindergarten at the time, was being taught about same-sex couples.[9] The Parkers' son brought a home a diversity book bag that included the book, *Who's in a Family?*[10] This book includes pictures of different types of families, including those with same-sex parents.[11] Both the Wirthlins and Parkers believed that their children were not old enough to be taught about gay marriage.[12]

The Parkers followed the procedures mandated by the Department of Education, which permits parents to protest the school's failure to follow the Parental Notification Statute. After the school district administrators reached their decision, the Parkers stopped appealing because they did not think that the Department of Education would rule in their favor.[13] The Wirthlins also attempted to follow the procedure mandated by the Department of Education. They were denied because the Lexington School District simply applied the decision it had reached in the Parker case, allowing children to be taught about sexual orientation without first providing parental notification.[14] The Wirthlins apparently have not appealed the School District's decision further.[15]

In an open letter to the community, written on September 22, 2005, the Superintendent of Schools, Paul Ash, articulated the school district's position, regarding the Lexington School District's response to the Parkers. Ash wrote that the school district's policy is to promote diversity and to teach the students not to

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[4] *See generally* Parker v. Hurley, 474 F. Supp.2d 261 (D. Mass. 2007).

[5] Maria Sacchetti, *In Lexington, Fear Surrounds Players in Flap Over Gay Teachings*, BOSTON GLOBE, July 5, 2006, at B1.

[6] *Parker*, 474 F. Supp.2d at 261.

[7] James Vaznis, *Lawsuit Invokes Religious Freedom; Parents say Beliefs Ignored by School*, BOSTON GLOBE, May 4, 2006, at Globe Northwest 1.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Vaznis, *supra* note 7.

[13] Trial Pleadings, Parker v. Hurley, No. 06-10751 MLW, 2006 WL 1324965 (D. Mass. 2007).

[14] *Id.*

[15] *Id.*

discriminate against anyone.[16] He also wrote that that the Parental Notification Statute has been interpreted by the Massachusetts Department of Education to allow for "activities and material designed to promote tolerance and respect for individuals including recognition of differences in sexual orientation 'without further instruction on the physical and sexual implications.'"[17] The Superintendent concluded the letter by writing that "[u]nder this standard, staff has no obligation to notify parents of discussions, activities or material that simply reference same-gender parents or that otherwise recognize the existence of differences in sexual orientation."[18]

Mr. Ash may have mischaracterized the Department of Education's position on the Massachusetts Parental Notification Statute. He refers to the Department of Education's letter from July 24, 2004, which said that a school that included in an assembly a skit depicting a homosexual student did not need to notify parents. He cites this letter to support the argument that the Department of Education believes that the Parental Notification Statute allows schools to promote tolerance without notifying parents. However, as noted before, this same document suggests that the Department of Education's analysis of the skit would be different had it depicted "homosexual relationships."[19]

The school district argued that the failure to notify the parents was not in violation of the Parental Notification Statute because the events in question were not teaching students about human sexuality, but about families.[20] The Lexington School District developed a policy of incorporating same-sex parents into the discussion of families because "families headed by same-gender parents were moving into the community."[21] The school does not believe that it had the duty to notify the parents about what it was teaching their children in those instances because it was not teaching them about homosexuality in the context of human sexuality, but rather about same-sex parents in the context of dealing with different types of families.[22] Moreover, Superintendent Ash stated that "Lexington is committed to teaching children about the world they live in, and in Massachusetts same-sex marriage is legal."[23] He also said that in Massachusetts, "[w]e have gay marriages. Our kids see it, and it's part of our overall curriculum. We're talking about what kids see in today's world."[24]

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16 *Id.*

17 *Id.*

18 *Id.*

19 MassResistance, http://www.article8.org/docs/news_events/parker/paul_ash_letter.htm (last visited March 8, 2007).

20 James Vaznis and Tracy Jan, *In Storm Over Gay Books, a Principal Holds Ground*, BOSTON GLOBE, April 27, 2006, at B1.

21 *Id.*

22 *Id.*

23 Tracy Jan, *Parents Rip School Over Gay Storybook*, BOSTON GLOBE, April 20, 2006, at B1.

24 Joyce Howard Price, *Parents Sue School Over Gay Storybook; Boston-area class Denied Opt-out*, WASHINGTON TIMES, April 30, 2006, at A2.

DECISION IN PARKER V. HURLEY

The Parkers and Wirthlins sued various employees of the Lexington, Massachusetts public schools and members of the Lexington School Committee for violating their freedom of religion and interfering with the ability to raise their children, both federal claims.[25] They also sued the defendants for violating the Massachusetts Parental Notification Statute, a state claim.[26] The district court dismissed the lawsuit brought by the Wirthlins and the Parkers because it found that the parents' rights to raise their children and of free exercise of religion had not been violated.[27] Because of the dismissal of the federal claim and the fact that the only remaining claim was a state claim–that the school district violated the Massachusetts Parental Notification Statute–the state claim was dismissed without prejudice.[28] The district court held that the Massachusetts state courts are responsible for interpreting the Massachusetts Parental Notification Statute because of "[g]eneral considerations of comity, and the particular value of providing the Massachusetts courts an opportunity to decide authoritatively the meaning of the Massachusetts statute."[29]

MASSACHUSETTS PARENTAL NOTIFICATION STATUTE

The Parental Notification Statute was enacted in 1996, after the First Circuit dismissed a lawsuit by parents who argued that their children should not have been required to attend a school assembly about AIDS awareness.[30] The Governor of Massachusetts when the statute was enacted, William Weld, argued that the purpose of the bill was to notify parents in advance what their children were learning in school.[31] Governor Weld contended that "[p]arents shouldn't be the last to know—they should be the first to know what their kids are learning in school, how they are learning it, and when."[32] The year 1996, when the Massachusetts Parental Notification Statute was passed, was an election year.[33] Both the Senate and the House put forth bills that dealt with parental rights and Colorado placed on its ballot a referendum that was to allow parents to direct their children's education upbringing and welfare.[34] In the context of the parental rights debate that occurred in 1996, the Massachusetts Parental Notification Statute was

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25 *Parker*, 474 F. Supp.2d at 263.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 278.

30 Vaznis, *supra* note 7.

31 Timothy J. Connolly, *City Policy Ahead of its Time*, WORCESTER TELEGRAM & GAZETTE, INC., September 10, 1996, at A2.

32 *Id.*

33 Cheryl Wetzstein, *Colorado has Rights of Parents on Ballot; Its Constitution may be Amended*, WASH. TIMES, September 10, 1996, at A2.

34 *Id.*

interpreted to require that parents "be notified when topics of sexuality and homosexuality are taught in public school and be allowed to exclude their children."[35]

Statutory Analysis

The statutory analysis of the Massachusetts Parental Notification Statute hinges on how the term "primarily" is interpreted in the phrase, "primarily involves human sexual education or human sexuality issues."[36] On April 7, 1997, the Massachusetts Commissioner of Education issued an advisory opinion to school districts advising them how to implement the statute.[37] The advisory opinion instructed the public schools of Massachusetts that the statute applies to "courses, school assemblies or other instructional activities and programs that focus on human sexual education, the biological mechanics of human reproduction and sexual development, or human sexuality issues."[38] Moreover, the Commissioner explained that the parental notification statute does not require that parents consent to the course or class that their child is taking, only that parents be notified whenever the school has "curricula which primarily involves human sexual education or human sexuality issues, and of their right to review program instruction materials and exempt their children from any portion of these curricula."[39] The advisory opinion does not clarify whether talking about homosexuality in the context of promoting tolerance among students would require that schools notify parents in accordance with the statute, since a tolerance curriculum may not "primarily" involve human sexuality.

In a letter written on July 26, 2004, the Department of Education determined that skits performed in a school portraying a homosexual student did not fall under the Parental Notification Statute because "the purpose of the skits was to provide instruction on tolerance, not issues of human sexuality."[40] The skits occurred in an assembly that "was part of a 'Day of Respect,' the purpose of which according to the school, was to promote tolerance and respect for every student, including students, such as gay and lesbian students and disabled students, who are often viewed as different by other students."[41] The Department of Education wrote that the assembly did not fall under the Massachusetts Parental Notification Statute because the skit did not include "direct discussion of human sexuality issues and/or

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35 *Id.*

36 MASS. GEN. LAWS ch. 71, §32A (1996).

37 Letter from Robert v. Antonucci, Commission of Education, to Superintendents of Schools and Charter School Leaders, School Committee Chairpersons, School Principals, Health Education Coordinators, and other Interested Parties (Sept. 1, 1997), *available at:* http://www.doe.mass.edu/lawsregs/advisory/c7132adv.html.

38 *Id.*

39 *Id.*

40 MassResistance, *supra* note 19.

41 *Id.*

specifically, homosexual relationships."[42] But it did specify what the constraints of a discussion of homosexual relationships were by writing "[t]he mere reference to the fact of homosexuality or the portrayal of a homosexual student, without further instruction or discussion of the physical and sexual implications of homosexuality, does not constitute instruction about the biological mechanics of human reproduction and sexual development, or human sexuality issues."[43] This letter makes it unclear what the Department would think about a classroom discussion about respecting same-sex marriage or even a discussion about the legalization of same-sex marriage in Massachusetts.

The American Civil Liberties Union ("ACLU") argues that homosexuality could be taught in the context of tolerance without requiring parental notification.[44] Referring to the advisory opinion, the ACLU argues that the statute only pertains to school activities or programs "that focus on human sexual education, the biological mechanics of human reproduction and sexual development, or human sexuality issues."[45] One could disagree, however, and argue that any discussion about sexual orientation, particularly when dealing with same-sex couples, could be said to relate to human sexuality. In the July 26, 2004 letter mentioned previously,[46] the Department of Education at the very least implied that a school assembly about homosexual relationships might trigger the Parental Notification Statute.[47] The ACLU's interpretation of the statute emphasizes the term "primarily" and that teaching about homosexuality in the context of tolerance does not meet this standard. The opposing view is that whenever sexuality is dealt with in school, parents should be notified, regardless of whether homosexuality is the focus of the event or is just related to the issue at hand.[48]

Procedural Rules of the Massachusetts Parental Notification Statute

If a parent believes that the public school their child attends has violated the Parental Notification Statute by failing to provide notice pursuant to the statute, there is a set of procedures that the parent must follow to protest the school's actions. The procedures in place mandate that the Department of Education provide a resolution only if a dispute cannot be settled at the local level.[49] The parents must first attempt to resolve the dispute at the local school or school district

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[42] *Id.*

[43] *Id.*

[44] *See* Brief for the American Civil Liberties Union of Massachusetts et al. as Amicus Curiae in Support of Defendant's Motion to Dismiss, *Parker v. Hurley*, 2007 WL 543017 (D. Mass. 2007) (No. 06-CV-10751-MLW), http://www.lexingtoncares.org/ACLUMAAmicusBrief2006-09-20.pdf.

[45] *Id.*

[46] MassResistance, *supra* note 19.

[47] *Id.*

[48] Complaint and Jury Demand, *Parker v. Hurley*, 2007 WL 543017 (D. Mass. 2007) http://www.massresistance.com/docs/parker_lawsuit/complaint.html.

[49] *Id.*

level.[50] If a parent is dissatisfied with the decision or action of the school principal in a dispute arising under the parental notification statute, the parent must "submit a written request to the superintendent of schools for review of the issue."[51] This request must be submitted within thirty days of the principal's decision unless there are extenuating circumstances.[52] The superintendent then has fifteen days to reply barring any extenuating circumstances.[53] If the parent is still dissatisfied, she "may submit a written request to the school committee for review of the issue."[54] The school committee has thirty days to respond to the request, barring extenuating circumstances.[55] The school committee's decision is deemed to be the "final local decision on the matter."[56] If the parent is unsatisfied with the school committee's decision, she must submit a written request to the Commission with fifteen days of the school committee's decision.[57] The Commissioner has to determine the best method to resolve the problem within ten days. It may choose alternative dispute resolution, appoint a fact-finder, or appoint a collection of experts.[58] If the matter is still unresolved, there will be an adjudicatory proceeding.[59] The Commissioner's

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[50] 603 MASS. CODE REGS. 5.01(3) (2007). (603 CMR 5.00 is intended to encourage local resolution of disputes arising M.G.L. c. 71, § 32A, and to provide for resolution by the Department of Education only when those disputes cannot be resolved by the parties at the local school or school district level.)

[51] 603 MASS. CODE REGS. 5.03 (1) (2007). (A parent who is dissatsified with an action or decision of the school principal under M.G.L. c. 71, § 32A may submit a written request to the superintendent of schools for review of the issue. Except in extenuating circumstances, the parent shall submit the request within 30 days of the action or decision of the principal.)

[52] *Id.*

[53] 603 MASS. CODE REGS. 5.03 (2) (2007). (The superintendent or dseignee shall review the issue and provide the parent with a timely decision within 15 days of the request, unless extenuating circumstances require a delay.)

[54] 603 MASS. CODE REGS. 5.03 (3) (2007). (A parent who is dissatisfied with an action or decision of the superintendent under M.G.L. c. 71, § 32A may submit a written request to the school committee for review of the issue.)

[55] 603 MASS. CODE REGS. 5.03 (4) (2007). (The school committee shall review the issue and provide the parent with a timely written decision within 30 days of the request, unless extenuating circumstances require a delay.)

[56] 603 MASS. CODE REGS. 5.03 (5) (2007). (The decision of the school committee on any issue arising under M.G.L. c. 71, § 32A shall be considered the final local decision on the matter.)

[57] 603 MASS. CODE REGS. 5.04 (1) (2007). (A parent who is dissatisfied with the final local decision on an issue arising M.G.L. c. 71, § 32A may submit a written request for review to the Commissioner within 15 days of the date of the final local decision. The written request shall specify the basis on which the parent alleges the school or school district has not met the requirement of the M.G.L. c. 71, § 32A and shall include a copy of the final local decision and any other relevant correspondence. The parent shall send a copy of the written request to the superintendent of schools or, in the case of a charter school, to the charter school leader.)

[58] 603 MASS. CODE REGS. 5.04 (2) (2007). (Based on his review of the material submitted by the parent, the Commissioner shall determine the process to be followed in resolving the dispute under M.G.L. c. 71, § 32A and shall notify the parties within ten days of receipt of the request. The Commissioner may propose alternative dispute resolution, including mediation, and may appoint a fact-finder or seek the assistance of experts as he deems appropriate to assist in informal resolution of the matter.)

[59] 603 MASS. CODE REGS. 5.04 (3) (2007). (If the matter is not otherwise resolved, the Commissioner shall designate a hearing officer who will conduct an adjudicatory hearing in accordance wiht 801 CMR 1.00, the Standard Adjudicatory Rules of Practice and Procedure).

decision or the result of the adjudicatory proceeding will be considered "the final agency decision" on the matter.[60]

PARENTAL INFLUENCE OVER THEIR CHILDREN'S EDUCATION

In Massachusetts, there are parents who, even if they have no issue with the school district teaching their children about same sex couples, believe that they should be made aware of what their children are learning in school. As one parent asserted, "as a parent, I want to be involved in the process of exposing my children to that material, I want to be aware so when my daughter brings it up, I wouldn't be hearing about it for the first time."[61] Thus, there are parents who are not upset that their children are learning about homosexuality, but still want to be made aware that their children are dealing with such a sensitive issue. The debate between parents and public schools in the state of Massachusetts over the role schools should play in shaping children is a debate that has persisted for many years in the United States, not just in Lexington, Massachusetts. "The appropriate relationship between government and parents in the education of children is an issue that has created recorded controversy since Plato advocated the communal rearing of children."[62] "Until the latter part of the nineteenth century, parental authority was close to absolute and legal supervision was minimal. Parents had sole discretion as to the level of education their child should receive and at what point their child would begin working to help financially support the family."[63] However, states began to increase the local government's role in the family due to the influx of immigrants during the turn of century, through "[t]he creation of child protection laws, the juvenile court system, and free public education"—programs that helped to increase the state's involvement with families.[64] These programs were developed out of concern for the welfare of children, and "because these types of programs usurped many parental freedoms, questions regarding the appropriate level of government involvement arose."[65] Tensions between parents and public schools may have increased due to public education's compulsory nature.

> The entire concept of compulsory education is based upon the assumption that there are times when the state rather than the parent may decide what perspectives the child confronts . . . . To compel education, especially

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[60] 603 MASS. CODE REGS. 5.04 (4) (2007). (The Commissioner or his designee shall issue a written decision to the parties within 30 days of the conclusion of his review of the matter, unless extenuating circumstances require a delay. The decision of the Commission or his designee shall be the final agency decision).

[61] Vaznis, *supra* note 7.

[62] William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 177 (2000).

[63] Michael J. Fucci, *Educating our Future: An Analysis of Sex Education in the Classroom*, 2000 BYU EDUC. & L.J. 91, 95 (2000).

[64] *Id.*

[65] *Id.*

> education under state control or supervision, is to assert that the state–rather than parents–ultimately should decide what is best for children.[66]

There are a number of cases that deal with the extent to which parents can be involved in the public education of their children without interfering with the function of schools. In the earliest case, *Meyer v. Nebraska*,[67] the Supreme Court held "for the first time, that parental authority to establish a home and raise children is protected by the due process clause."[68] In another important case, *Pierce v. Society of Sisters*, the Court held that states cannot prevent parents from sending their children to private schools rather than public schools.[69] Parents' ability to rear their children was limited by the Supreme Court in 1944 in *Prince v. Massachusetts*.[70] In this case, the Court recognized 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. And it is in recognition of this that [the Court's] decisions have respected the private realm of family life which the state cannot enter.[71]

However, the Court held that these rights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.[72]

Thus, *Prince* established that the state could limit the parents' ability to rear their child without violating the parents' constitutional rights. However, the Supreme Court in *Wisconsin v. Yoder* held that there was a limit to the extent to which a parent's right to raise their child may be entrenched upon.[73] *Yoder* concerned Amish parents who argued that a state statute that mandated school attendance for children until the age of sixteen violated their First Amendment right to freedom of religion. The Court upheld the challenge by the Amish parents noting that the State lacked a sufficiently compelling justification for imposing such a burden."[74] The Court explained:

> [I]t seems clear that if the state is empowered, as *parents patriae*, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large

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[66] Richard S. Meyers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 83 (1996).

[67] Meyer v. Nebraska, 262 U.S. 390 (1923).

[68] Fucci, *supra* note 63, at 96.

[69] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

[70] Fucci, *supra* note 63, at 99.

[71] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[72] *Id.*

[73] Fucci, *supra* note 63, at 101.

[74] *Id.*

> measure influence, if not determine the religious future of the child. Even more markedly than in *Prince*, therefore this case involves the fundamental interests of parents as contrasted with that of the State, to guide the religious future and education of their children. 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.[75]

The Court concluded that "the parents' right to free exercise of religion outweighed the state's interest in ensuring education for children."[76] Parents continue to have "a fundamental liberty interest in the parenting of their children. This right has been protected in case law from the 1920s to today. It is well founded in our common-law tradition and is not likely to be undermined any time soon."[77]

ROLE OF PUBLIC SCHOOLS IN AMERICAN SOCIETY

According to two historians, the role and purpose of public schools is to "prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and nation."[78] Thus, "[s]chools may teach civic virtues, including honesty, good citizenship, sportsmanship, courage, respect for the rights and freedoms of others, respect for person and their property, civility, the dual virtues of moral conviction and tolerance and hard work."[79]

Those who support school-choice programs, such as vouchers and charter schools argue that even when the courts recognize that an aspect "of the public school curriculum creates a burden, the courts are far too quick to accept the argument that the state's interest is strong enough to outweigh the harm to the parents and students."[80] This results in the courts permitting the public schools to impose their curriculum regardless of the parents' objections and the forcing of parents to choose whether to keep their children in school, a concept that is referred to as the highway solution—"my way or the highway."[81] The problem with this approach is that "it fails to address the inequities caused by our current system of

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[75] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[76] Lauren D. Freeman, *The Child's Best Interests vs. The Parent's Free Exercise of Religion*, 32 COLUM. J.L. & SOC. PROBS. 73, 86 (1998).

[77] Linda L. Lane, *Comment: The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 840 (1998).

[78] Myers, *supra* note 66, at 72 (citing Bethel School District No. 403 v. Fraser, 478 US. 675, 681 (1986) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[79] *Id.* at 65.

[80] *Id.* at 85.

[81] *Id.* at 90 (citing Mozert v. Hawkins County Public Schools, 827 F. 2d 1058, 1071 (Kennedy, J., concurring) (6th Cir. 1987)).

educational funding, which reinforces our bias in favor state as opposed to parental control over education."[82]

In contrast, commentator James Ryan suggests another way to view these cases. He argues that the Supreme Court acts "*in loco parentis*, enforcing those policies that most parents would support and questioning those policies that a substantial number of parents would oppose."[83]

The Supreme Court cases that deal with the limits of public schools' power have helped define and establish the role that public schools should have in American society. In *Board of Education v. Pico*, the Court held that "the school board's decision to remove certain books from the library that the board considered to be vulgar and inappropriate for students" violated the Constitution's protection of the right to receive information and ideas.[84] Interestingly, in *Pico*, the Supreme Court also recognized "that local school boards must be permitted to 'establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values by the social, moral or political.'"[85] *Pico* establishes that school boards may not remove books to advance partisan politics, but they do have the "discretion to remove books based on educationally relevant criteria."[86] One scholar interprets this case as advancing the notion that school officials should have an "increasing power in educational policy making . . . ."[87]

In other cases, the Supreme Court has stated that:

> [c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'[88]

Moreover, the Court has maintained that "[p]ublic education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.' The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions."[89] In these cases, the Supreme Court has struggled to find a balance between the freedoms that public schools have to

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[82] *Id.* at 90-91.

[83] James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1397 (2000).

[84] Fucci, *supra* note 63, at 106.

[85] Board of Education v. Pico, 457 U.S. 853, 864 (1982) (citing Brief for Petitioner).

[86] Roger J.R. Leveque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of the Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 227-28 (1997).

[87] *Id.* at 227.

[88] Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[89] Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (citing Foley v. Connelie, 435 U.S. 291, 297 (1978)).

prepare students to be productive members of society and what limitations should be imposed on the public schools. But the Court has recognized that "public officials play the key role of arbiters and protectors of community values or preferences, both in the sense of common values shared throughout society and in a particular community."[90]

DEALING WITH SEXUAL ISSUES IN PUBLIC SCHOOLS

The tension between public schools and parents about the school's role in teaching children about certain topics is illustrated when examining issues like sex education classes or condom distribution programs. Although over eighty percent of Americans believe that sex education should be taught in public schools, over twenty-five states have statutes, referred to as opt-out or opt-in provisions, which allow the parent to decide whether to withdraw the child from such classes.[91] "The controversial nature of sex education is reflected in the frequency with which state legislatures consider bills seeking to amend or repeal current sex-education statutes. During the 2003-2004 legislative sessions, thirty-three states each considered at least one sex education bill and considered eighty-five bills in total."[92] As one commentator has suggested, the "[c]ontroversy over the appropriateness of teaching sex education in the public school system has led to a diversification in the ways in which different schools instruct students on matters pertaining to sex."[93] There are significant differences in the sex education statutes of every state.[94] "Variations of state regulations and limitations exist with respect to what must be, may be, and cannot be taught in public schools."[95] Another reason why there is a lack of uniformity is that most state statutes grant local school boards significant discretion on what to include in the curriculum.[96] Twenty-one states require "that public schools include education about sexuality, disease prevention or reproduction in their curricula. Ten states have statutes that permit, but do not require, sex education or education about sexually transmitted diseases."[97] There are nine states that "require that schools teach health and hygiene, but none of these statutes contains specific requirements for sex education."[98] Alabama only requires that drug education be included in the curriculum.[99] "[Nine] states and the District of Columbia remain silent on the issue, entrusting all decisions about sex education to

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90 Leveque, *supra* note 86, at 229.

91 Alyssa Varley, *Sexuality in Education*, 6 GEO. J. GENDER & L. 533, 533-36 (2005).

92 *Id.* at 541.

93 David Rigsby, *Education Law Chapter: Sex Education in Schools*, 7 GEO. J. GENDER & L. 895, 895 (2006).

94 *Id.*

95 *Id.*

96 *Id.* at 897.

97 *Id.*

98 Rigsby, supra note 93, at 896-97.

99 *Id.* at 896.

local school boards."[100] "Opt-out" or "opt-in" provisions are included in sex education statutes because states recognize that sex education is controversial.[101] Opt-out provisions are in place to allow parents to remove their children from the classroom.[102] On the other hand, opt-in provisions require "affirmative" parental consent to allow children to participate in a program, such as a sex education program.[103] There are thirty-two states that either require or permit sex education; twenty-five of those states contain opt-out or opt-in provisions in their statutes.[104] Interestingly, Mississippi, which does not have a sex education statute, also has such a provision.[105]

The different circuits have had difficulty balancing parents' ability to rear their children with the public schools' ability to develop their own curriculum. Cases such as *Brown v. Hot, Sexy and Safer Productions*, have attempted to resolve the conflict between public schools and parents in regards to sex education. [106] Professor Alyssa Varley states that in cases:

> that challenge the validity or constitutionality of sex-education programs . . . courts generally find for the defendant school system, ruling that it is the right and responsibility of the school system to determine curricula and that the rights to privacy and to parental control are too narrow to overcome the rights of the school systems.[107]

Thus, statutes are being passed by many state legislatures to overcome the school's ability to determine its curriculum.

Circuit courts have not consistently determined how to weigh a public school's interest versus a parent's right to raise its child and the Supreme Court has not provided them with guidance. In *Troxel v. Granville*, the plurality appeared to stray from the notion that strict scrutiny should apply in parental rights cases.[108] According to Commentator Heather Good:

> Justice O'Connor, writing for the plurality, cites approvingly to a case applying the compelling interest test, but a few sentences later states that if a parental right 'becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination,' thus implying a less rigid standard of review—perhaps intermediate scrutiny. Justice O'Connor does not explain exactly what she means by the phrase

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100 *Id.* at 897.

101 *Id.*

102 *Id.*

103 Rigsby, supra note 93, at 897-98.

104 *Id.* at 898.

105 *Id.*

106 Brown v. Hot, Sexy & Safer Prods., 68 F. 3d 525 (1st. Cir. 1995).

107 Varley, *supra* note 91, at 542-43.

108 Heather M. Good, *Comment: 'The Forgotten Child of Our Constitution': The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 658 (2005).

> 'at least some special weight.' Justice Kennedy and Souter make no mention of an applicable standard of review. Nevertheless, given the plurality opinion, coupled with Justice Thomas's concurrence—at least five of the Justices favor at least intermediate scrutiny when a fundamental right is at issue.[109]

In *Brown v. Hot, Sexy & Safer Products,* two families sued a corporation, the school committee, two members of the school committee and members of the Chelmsford Parent Teacher Organization for staging a mandatory AIDS awareness event and school officials, alleging that their children should not have been forced to attend the event that took place in their public high school.[110] The families argued that this violated their right to privacy, their procedural due process rights under the Fourteenth Amendment, infringed upon their right to free exercise of religion and "that the Program created a sexually hostile educational environment in violation of Title IX of the Education Amendment of 1972."[111] The court held that *Meyer* and *Pierce*, which the parents cited to argue that parents have a right to direct the upbringing of their children, only established "the principle that the state cannot prevent parents from choosing a specific education program—whether it be religious instruction at a private school or instruction in a foreign language."[112]

The First Circuit affirmed the district court's dismissal of the families' suit and stated that "this freedom [does not constitute] a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children."[113] The court went on to explain that "[i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."[114]

In *Leebaert v. Harrington*, a father argued "that his constitutional right to direct the upbringing and education of his child requires [public school officials] upon his request, to excuse his minor son . . . from attending health education classes at a public school."[115] The Second Circuit disagreed and concluded that "*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."[116] The Second Circuit went on to hold that:

> recognition of such a fundamental right—requiring a public school to establish that a course of instruction objected to by a parent was narrowly

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109 *Id.* at 658-59.
110 *Brown*, 68 F.3d at 529-530.
111 *Id.* at 530.
112 *Id.* at 533.
113 *Id.* at 533.
114 *Id.* at 534.
115 Leebaert v. Harrington, 332 F.3d 134, 135 (2d Cir. 2003).
116 *Id.* at 141.

> tailored to meet a compelling state interest before the school could employ it with respect to the parent's child—would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.[117]

The Sixth Circuit in *Blau v. Fort Thomas* similarly held:

> [parents] do not have fundamental right generally to direct how a public school teaches their child. Whether it is school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school, or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.'[118]

In *Alfonso v. Fernandez*, the parents of children who attended a public school argued that the public schools should not be able to freely distribute condoms to students. [119] The Appellate Division said that had this been a case about an educational program that parent's claim would "falter."[120] Ultimately, the court agreed with the parents, but made clear that its holding did not impact sexual education programs. The distinction between a condom-distribution program and a sexual education program is that in the former "[s]tudents are not just exposed to talk or literature on the subject of sexual behavior; the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases."[121] The line of reasoning found in cases dealing with sex education programs, particularly *Brown*, has been criticized for interpreting parents' ability to rear their children too narrowly.[122] "The court's reasoning has troubling implications for the constitutional rights of parents to direct the education of, and impart their values to their children. The Brown court should have attempted to accommodate parent's rights without unduly burdening school systems, instead of severely curtailing parents' rights."[123]

In *Fields v. Palmdale School District*, the Ninth Circuit dealt with a school survey that asked seven-to-ten year old students questions about controversial issues.[124] The parents of schoolchildren in Palmdale, California argued that a survey in which their children, students at a public elementary school, answered

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[117] *Id.*

[118] Blau v. Fort Thomas, 401 F. 3d 381,395-96 (6th Cir. 2005) (citing Goss v. Lopez, 419 US 565, 578 (1975)).

[119] Alfonso v. Fernandez, 195 A.D.2d 46, 57 (2d Dept. 1993).

[120] *Id.* at 57.

[121] *Id.*

[122] *Constitutional Law – Due Process, Right to Privacy and Free Exercise – First Circuit Denies Parents a Constitutional Right to Prevent Children from Receiving School-Sponsored AIDS Education*, 110 HARV. L. REV. 1179, 1181-82 (1997).

[123] *Id.*

[124] Fields v. Palmdale School District, 427 F. 3d 1197 (9th Cir. 2005); Robert Kubica, *Issues in the Third Circuit: Let's Talk about Sex: School Surveys and Parents' Fundamental Right to Make Decisions Concerning the Upbringing of their Children*, 51 VILL. L. REV. 1085, 1091 (2006).

questions about sexual topics was unconstitutional.[125] The Ninth Circuit determined that *Meyer* and *Pierce* were limited to "the right of parents to be free from state interference with their choice of the education forum itself, a choice that ordinarily determines the type of education one's child will receive."[126] Furthermore, the court held that this right "does not extend beyond the threshold of the school door."[127] This decision severely limited parents' right to rear their children because it says that parents cannot invoke this right in the sphere of public education. The court went even so far as to say that "parents are possessed of no constitutional right to prevent the public schools from providing information on that subject to their students in any forum or manner they select."[128] Although this decision appears extreme, *Fields* is consistent with other cases that acknowledge "education serves higher civic and social functions, including the rearing of children into healthy, productive and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds."[129]

This view is not shared by all of the circuits.[130] For instance, in *C.N. Ridgewood v. Bd. of Education* the Third Circuit addressed a similar issue..[131] In *C.N. Ridgewood*, the parents of seventh through twelfth graders filed a suit against the school district because their children filled out a voluntary and anonymous survey "about students' drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationship—including the parental relationship—and views on matters of public interest."[132]

The Third Circuit explicitly rejected the analysis of the Ninth Circuit in *Palmdale*.[133] "[W]e do not hold, as did the panel in *Fields v. Palmdale School District* that the right of parents under the *Meyer-Pierce* rubric 'does not extend beyond the threshold of the school door.'"[134] Instead, the Third Circuit was by guided by the approach that "it is primarily the parents' right 'to inculcate moral standards, religious belief and elements of good citizenship.'"[135] This is a reference to *Gruenke v. Seip*, where the Third Circuit stated that when a school's policies conflict with the fundamental rights of parents to raise their children, "the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest."[136]

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125 *Fields*, 427 F. 3d at 1200.
126 *Id.*
127 *Id.*
128 *Id.* at 1211.
129 Kubica, *supra* note 124, at 1093 (quoting *Fields*, 427 F. 3d at 1203).
130 C.N. Ridgewood v. Board of Education, 430 F.3d 159, 185 (3d Cir. 2005).
131 *Id.* at 159.
132 *Id.* at 161.
133 *Id.* at 1985, n.26..
134 *Id.* (citing *Fields*, 427 F.3d at 1200).
135 *Id.* at 185.
136 Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir. 2000).

This approach is more nuanced than the Ninth Circuit's approach in *Palmdale* because it mandates that the courts balance the rights of parents versus the school's policies.[137] Commentator Elliot Davis suggests that if courts are confronted by parental claims that parents are being prohibited from exercising their right to rear their own children, then the court "should first determine whether the infringed right is of the 'greatest importance' by considering the importance of the asserted right to a reasonable parent . . . only the most egregious scenarios will qualify as matter worthy of protection under *Meyer-Pierce*."[138] The Third Circuit's approach is to have parents demonstrate that the asserted parental right is of the utmost importance.[139] Once this is demonstrated, the burden shifts to the school to show that there is a compelling interest that justifies its actions.[140] This approach may be problematic, because it initially tends to place a greater burden on the parents. Also, this approach might be problematic because there is a degree of uncertainty as to what decision the court will reach on a given case.[141]

Even the balancing approach would be considered controversial by many because it favors schools by placing a higher burden on parents than on schools. According to William Ross, a Stamford University law professor, "[p]arental rights involving the education of their children help to promote a diversity that is essential to a free society, but the retention of governmental authority in this process helps to assure a unity that is no less essential."[142] Similarly, Kubica argues that "[t]hose challenging a school action should look to the *Gruenke* analysis to support their claim. Further, they should argue that the right to challenge educational content must contain more than the options of private school or home schooling because the expense and viability of these options."[143]

These cases illustrate that even today, courts are still trying to find the correct balance between parents' right to rear their children and the state's ability to educate children. The cases also emphasize that courts have been respecting school officials' decisions in cases in which the school curriculum conflicts with a parent's desire to shield or even expose his child to certain subjects. It is unclear whether it would be wise for the Supreme Court to step in and tell the circuit courts how to weigh the parent's interest against the school's interest. In each community, the population may have a different approach to how the parents' right to rear their children should be balanced with the state's ability to educate children.

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137 Elliot M. Davis, *Recent Case: Unjustly Usurping the Parental Right:* Fields v. Palmdale School District, 427 F. 3d 1197 (9th Cir. 2005), 29 HARV. J.L. & PUB. POL'Y 1133, 1142 (2006).

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 Ross, *supra* note 62, at 207.

143 Kubica, *supra* note 124, at 1105.

TOLERANCE

This author takes the position that public schools should teach about homosexuality and other sexual orientations in the context of promoting tolerance among students. Because different circuits have interpreted the right of a parent under *Meyer* and *Pierce* to control the upbringing of his or her child differently, it is unclear whether this would interfere with parents' rights under the Fourteenth Amendment. However, I believe that there is a strong state interest in promoting tolerance for homosexual students in the classroom.

Public schools in the United States generally do not deal with issues of sexual orientation or educate students about homosexuality or bisexuality.[144] Theresa Bryant, the current Executive Director of Public Interest and Academic Programs at Yale, argues that "[b]y ignoring the subject in all curricula, including family life classes, the schools deny access to positive information about homosexuality that could improve the self esteem of gay youth. This silence provides tacit support for homophobic attitudes and conduct by some students."[145] Similarly, other scholars argue that it is important to make LGBT students comfortable among their peers because they "have a much greater chance than straight youth of being abused and victimized, of abusing substances, of prostituting themselves, of attempting suicide, and of being homeless."[146] A report by the United States Department of Health and Human Services found that gay youth have trouble accepting themselves due to the widespread negative and inaccurate information about homosexual youths.[147] The same study found that gay, lesbian and bisexual youth "account for one-third of all youth suicides and that GLB youth are two to three times more likely than their peers to attempt suicide."[148] Furthermore, suicide is the leading cause of death among gay, lesbian and bisexual youths.[149] The study conducted by the United States Department of Health and Human Services asserts that "[s]chools need to include information about homosexuality in their curriculum and protect gay youth from abuse by peers to ensure they receive an equal education."[150]

In 2002, the Massachusetts Department of Education conducted a study that found that gay students hear homophobic comments more than twenty-five times a

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144 Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 587 (1999).

145 *Id.*

146 Nicolyn Harris and Maurice Dyson, *Safe Rules or Gay Schools? The Dilemma of Sexual Orientation*, 7 U. PA. J CONST. L. 183, 187 (2004).

147 Bryant, *supra* note 144, at 586 (citing PAUL GIBSON, MALE AND LESBIAN YOUTH SUICIDE IN ALCOHOL, DRUG ABUSE, & MENTAL HEALTH ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., Pub. No. (ADM) 89-1623, 3 REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 3-110, at 3-112 (Marcia R. Feinleib ed., 1989) (citing NATIONAL GAY TASK FORCE, ANTI-GAY/LESBIAN VICTIMIZATION (1984); *see also* Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. INTERPERSONAL VIOLENCE 295, 298 (1990)).

148 *Id.*

149 *Id.*

150 *Id.* at 587.

day and that faculty intervenes only about 3% of the time.[151] In 1993, the Massachusetts Governor's Commission on Gay and Lesbian Youth conducted a study which concluded that 97.5% of students heard a homophobic remark made at their school.[152] This included children as young as eight or nine years old.[153] In 2005, the Gay, Lesbian and Straight Network (GLSEN) conducted a survey that included responses from 1,732 LGBT students between the ages of thirteen and twenty from all fifty states and the District of Columbia.[154] The survey found that 75.4% of students heard remarks such as "faggot" or "dyke" often or frequently at school and that 89.2 % heard phrases such as "that's so gay" or "you're so gay" in frequently or often at school.[155] This is evidence that schools are not safe refuges for a significant number of students and illustrates the ineffectiveness of the programs and training that schools have in place, if any, to developing "secure and inclusive learning communities."[156] In 2001, the GLSEN conducted a study that consisted "of interviews with 904 gay, lesbian, bisexual or trangendered youth from forty-eight states and the District of Columbia."[157] The study found that 41.9% of the respondents had been physically harassed and 21.1% attributed their physical assault to their sexual orientation.[158]

Advocates assert that another problem is inaction by school officials.[159] This may be attributed to a variety of reasons, such as not knowing what to do in the face of abuse, fear that they will be considered gay themselves or because they harbor bias toward homosexuals.[160] The GLSEN also found that "23.6% of the respondents reported hearing homophobic remarks from faculty or staff at least some of the time."[161]

A study conducted by the American Psychological Association (APA) concluded that nearly 18% of gay, lesbian and bisexual students had been involved in fights that required medical treatment as opposed to 4% of their peers.[162] The

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[151] Nancy Levit, *Article: Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, n. 25 (2005) (citing Robert Tomsho, *School's Efforts to Protect Gays Face Opposition*, WALL ST. J., Feb. 20, 2003, at B1).

[152] Jeffrey I. Bedell, *Note: Personal Liability of School Officials Under §1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829, 833 (2003) (citing GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, THE 2001 NATIONAL CLIMATE SURVEY (2001)).

[153] *Id.* at 834.

[154] Gay, Lesbian and Straight Network's 2005 National School Climate Survey Sheds New Light on Experiences of Lesbian, Gay, Bisexual and Transgender (LGBT) Students, Apr. 26, 2006, http://www.glsen.org/cgi-bin/iowa/all/library/record/1927.html [hereinafter GLSEN's 2005].

[155] *Id.*

[156] Scott Hirschfield, *Education Law and Policy: Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611, 614 (2001).

[157] Bedell, *supra* note 152, at 833.

[158] *Id.* at 834.

[159] *Id.* at 836.

[160] *Id.*

[161] *Id.*

[162] Paige Aiken, *Gays in School: Generally Uncomfortable Environment, Area Students Say*, RICHMOND TIMES DISPATCH, March 5, 2002 at B1.

APA also found that in a typical month, nearly 22% of gay, lesbian and bisexual students skipped school because they did not feel that their school or school route was safe as compared to about 4 % of their peers.[163] In May 2001, Human Rights Watch released a study finding that "as many 2 million adolescents are harassed in a school year because of sexual orientation.[164] This study also found that 68.6% of gay students do not feel safe in school.[165] In 1999, the Massachusetts Youth Risk Behavior Survey showed that gay, lesbian and bisexual students as compared to heterosexual students are nearly four times more likely to commit suicide and five times as likely to have been in fight that required medical treatment.[166] In 2001, a Massachusetts Youth Risk Behavior Survey demonstrated that "gay, lesbian and bisexual students were more than twice as likely than other students to be threatened or injured with a weapon at school in the past year and more than twice as likely to skip school in the past month because of feeling unsafe at or on route to school."[167] Thus, it is unsurprising that suicide, depression, drug and alcohol abuse, and eating disorders plague gay teens in the United States.[168]

Massachusetts "has encouraged schools to adopt a comprehensive program to support GLB students,"[169] by "encouraging schools to develop policies to protect gay and lesbian youth and to offer training to school personnel, school-based support groups, and school based counseling for gay and lesbian students and their families."[170] However, many states have actually moved in the opposite direction and their state legislatures and school boards are passing legislation that is referred to as "no promo homo" legislation.[171] "[T]hese statutes and school policies seek either to ban all discussion of homosexuality or to require teachers to point out that the people of the state believe it is immoral and/or a crime."[172] "Thus the paradigmatic 'no promo homo' laws are laws—general state statutes—that prohibit the promotion of homosexuality in public educational institutions. These statutes can bar any mention of homosexuality, prohibit pro-gay teachings, or require anti-

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[163] *Id.*

[164] Paula Voell, *Lessons in Tolerance; Schools May Be Safe for Most Students, But Gay Teens Fear Physical and Verbal Abuse on a Daily Basis. What are Schools Doing to Protect Them and Make Them Feel Accepted?* BUFFALO NEWS, October 16, 2001 at D1 (citing HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001), http://www.hrw.org/reports/2001/uslgbt/toc.htm).

[165] MASSACHUSETTS DEPARTMENT OF EDUCATION, 1999 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY (1999), *available at:* http://www.doe.mass.edu/cnp/hprograms/yrbs/99/default.html.

[166] *Id.*

[167] Peter A. Hahn, *Note: The Kids Are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities,* 14 B.U. Pub. INT. L.J. 117, 122 (2004) (citing MASSACHUSETTS DEPARTMENT OF EDUCATION, 2001 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY(Sept. 2002), http://www.doe.mass.edu/cnp/hprograms/yrbs/01/results.pdf).

[168] Aiken, *supra* note 162.

[169] Bryant, *supra* note 144, at 587.

[170] *Id.* at n. 74; *see also* MASS. GEN. LAWS. ANN. ch. 76, § 5 (2007).

[171] Bryant, *supra* note 162. at 587; *see also* CONN. GEN. STAT. § 46a-81r (2007).

[172] Bryant, *supra* note 162. at 587.

gay teachings."[173] In fact, "[o]nly nine states and the District of Columbia have comprehensive anti-bullying laws that specifically address bullying and harassment based on sexual orientation and only three of these laws mention gender identity."[174]

There are many justifications given for not dealing with homosexuality in the classroom. One justification is that homosexuality should not be discussed in public schools because dealing with homosexuality may cause people to choose to become homosexuals.[175] By contrast, proponents argue that if public schools deal with sexual orientation in the context of tolerance, LGBT students are likely to be accepted over time.[176] School is one of the most important places where children learn to develop norms concerning sexuality.[177] "School is a unique place because 'although it is supposed to transmit widely accepted cultural norms and values to children, it is a process through which the child develops as an individual and grows into a mature and discerning adult.'"[178] Consequently, there are many individuals, school districts, and organizations that accept this assertion and believe that sexual orientation, particularly homosexuality should be part of the school curriculum, but not just within the public health curriculum.[179] According to Professor Kelli Armstrong:

> Changes in curricula will help to educate all teens about homosexuality, and help change homophobic tendencies in the public at large. By discussing the experiences of gays and lesbians there will be less fear, misunderstanding and hatred for those of a different sexual orientation. Those who object to sexuality issues in substantive courses are not withholding from their children a deeper level of understanding and knowledge about diversity, but are in fact advancing hatred and homophobia in what is essentially a demand to teach their own moral beliefs.[180]

Thus, it is important to educate children about issues like homosexuality and to be accepting of others, not only to promote equality and respect for others in society, but to make students comfortable and respectful of each other.

DISTRICT COURT'S DUE PROCESS DETERMINATIONS

The district court in *Parker v. Hurley*, found the parents' claims that the school was interfering with their constitutional right to raise their children as they

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[173] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 810-11 (2002).

[174] GLSEN's 2005, *supra* note 154.

[175] Harris & Dyson, *supra* note 146, at 191.

[176] *Id.* at n.139.

[177] Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in our Public Schools*, 24 GOLDEN GATE U.L. REV. 67, 71 (1994).

[178] *Id.*

[179] *Id.* at 81-82.

[180] *Id.* at 83.

want to be indistinguishable from the parent's claims in *Brown*.[181] Judge Wolf interprets *Brown* as establishing "that parents do not have a fundamental liberty interest that permits them to prescribe the curriculum for their children means that the defendants' use of the books at issue and related teaching is constitutionally permissible if there is a rational basis for the instruction."[182] He states that "under the Constitution public schools are entitled to teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy. Diversity is a hallmark of our nation. It is increasingly evident that our diversity includes differences in sexual orientation."[183] Consequently,

> [i]t is reasonable for public educators to teach elementary school students about individuals with different sexual orientations and about various forms of families, including those with same-sex parents, in an effort to eradicate the effects of past discrimination, to reduce the risk of future discrimination and, in the process, to reaffirm our nation's constitutional commitment to promoting mutual respect among members of our diverse society. In addition, it is reasonable for those educators to find that teaching young children to understand and respect differences in sexual will contribute to an academic environment in which students who are gay, lesbian or the children of same-sex parents will be comfortable and, therefore, better able to learn.[184]

The district court found that a rational basis for the law is that it prepares students "for citizenship in a diverse society" and "is also rationally related to the goal of eradicating what the Massachusetts Supreme Judicial Court characterized as the 'deep and scarring hardship' that the ban on same-sex marriages imposed 'on a very real segment of the community for no rational reason.'"[185] "Moreover, attempting to teach young, elementary school students to respect gays and lesbians is also rationally related to the legitimate pedagogical purpose of fostering an educational environment in which gays, lesbians, and the children of same-sex parents will be able to learn well."[186]

PUBLIC EDUCATION IN MASSACHUSETTS

The public education system in the state of Massachusetts has a very rich history that dates back to before the state's constitution was adopted.[187] Even the

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[181] *Parker*, 474 F. Supp.at 263.

[182] *Id.* at 273.

[183] *Id.* at 263-264.

[184] *Id.* at 264.

[185] *Id.* at 274-275.

[186] *Parker*, 474 F. Supp at 275.

[187] Joseph B. Harrington, *Current Developments in the Law: A Survey of Cases Affecting Public Education*, 4 B.U. PUB. INT. L.J. 171, 176 (1994).

state's "early colonial laws promoted public education."[188] In the words of Professor Denise Hartman, "the Massachusetts colonialists believed from the outset that an educated populace was vital to good government and social welfare."[189] Between 1641 and 1679, when New Hampshire and Massachusetts were united as a single province, two significant laws were enacted during this period.[190] There was a 1642 law that ordered that all children in New England be taught to read.[191] The other law which was enacted in 1647, "established the public schools and required that money for these schools be raised by a tax on private property."[192] In Ralph Sianni's words:

> [T]he 1647 law mandated that schooling be provided for all children and that the State control education. The [Supreme Judicial Court] concluded that these two early Massachusetts laws represented not only an intention to create a governmental obligation to support education, but also constituted "the very foundation stones upon which our American public school systems have been constructed."[193]

Harrington states that "in 1647 the colonial legislature passed a law requiring all towns of fifty or more households to appoint a schoolmaster. This law is credited as the genesis of public education in America."[194] If a town did not comply with this law, fines were issued to the community.[195] Also, even when the state was just a colony, there were laws making education accessible to the poor and therefore allowing poor children to learn to read and write.[196] Indeed, another law that was enacted regarding public education in the United States was the Old Deluder Satan Act that was passed into law by the Massachusetts Bay Colony in 1647. The law stated that the purpose of public education was to teach students "the 'true sense and meaning' of scripture so they could avoid Satan."[197]

The Massachusetts State Constitution specifically states that there is a right to education.[198] Fred Capone argues that "[t]he education clause of the

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[188] *Id.*

[189] Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools: How Relevant is the State's Experience to Shaping Governmental Obligations in Emerging Democracies?* 33 SYRACUSE J. INT'L. & COM. 95, 102 (2005).

[190] Ralph N. Sianni, *Current Developments in the Law: A Survey of Cases Affecting Public Education*, 4 B.U. PUB. INT. L.J. 199, 201 (1994).

[191] *Id.*

[192] *Id.*

[193] *Id.* (citing ELLWOOD PATTERSON CUBBERLY, PUBLIC EDUCATION IN THE UNITED STATES 15, 18 (1919)).

[194] Harrington, *supra* note 187, at 176.

[195] *Id.*

[196] *Id.*

[197] David W. Burcham, *School Desegregation and the First Amendment*, 59 ALB. L. REV. 213, n. 18 (1995).

[198] MASS. CONST. pt. 2, ch. V, sec. II (2007).

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of

Massachusetts Constitution imposes an affirmative duty upon the Commonwealth to provide every individual within its borders the opportunity to receive an adequate education."[199] He continues, "[t]he statute specifically states that all children between the established 'minimum and maximum ages' shall attend a public day school and that the school committee must provide for and enforce such attendance."[200] The Declaration of Rights to the Massachusetts Constitution emphasizes the importance of providing education to the population by stating that "without some basic form of education, citizens would be deprived of their rights and liberties, and our democratic system of government would be in jeopardy."[201] However, in *Doe v. Superintendent of Schools*, the Massachusetts Supreme Judicial Court held that "education is not a fundamental right."[202] The impact is that the court will "apply the lowest level of scrutiny, the rational basis test, to [the plaintiff's] claim that the defendants' actions . . . violated her right to substantive due process under the State Constitution."[203] Michelle Bernstein characterized this decision as reflecting "a prudent judicial attempt to protect the educational rights of school children."[204] In *McDuffy v. Secretary of Executive Office of Education*,[205] the Supreme Judicial Court reviewed the history of Massachusetts public education and accordingly stated:

> that the Commonwealth has a duty to provide an education for all its children, rich and poor, in every city and town of the Commonwealth at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.[206]

> the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.

199 Fred Capone, Board of Education v. School Committee of Quincy: *When a Child in Massachusetts is Denied a Fundamental Education, the Massachusetts Constitution is Violated*, 29 NEW ENGL. L. REV. 311, 317(1995).

200 *Id.* at 318.

201 *Id.* at 319-320.

202 Doe v. Superintendent of Sch., 421 Mass. 117, 131 (1995).

203 *Id.* at 132.

204 Michelle A. Bernstein, *Constitutional Law – Massachusetts Does Not Guarantee Fundamental Right to Education* – Doe v. Superintendent of Schools, *421 Mass. 117, 653 N.E.2d 1088 (1995)*, 30 SUFFOLK U. L. REV. 257, 263 (1996).

205 McDuffy v. Secretary of Executive Office of Educ., 415 Mass. 545, (1993).

206 *Id.* at 548.

Emily Plotkin suggests that this view of public education suggests that public education should be constantly evolving and updated to allow students to contribute to the state.[207] The court identified seven capabilities that an educated child must posses:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient trainingor preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[208]

PROMOTING TOLERANCE IN MASSACHUSETTS

Government officials, courts, and school administrators in Massachusetts have enacted measures to encourage tolerant treatment of homosexual and transgender students. This author believes that this is progressive. The first Gay-Straight Alliance student club "was formed in a Massachusetts private school in 1989."[209] Moreover, Massachusetts is one of the few states whose child welfare organizations have established "specialized foster-care group homes that are geared to the LGBTQ [Lesbian, Gay, Bisexual, Questioning, Transgender and Questioning] population."[210]

In Massachusetts until recently, there existed a Governor's Commission on Gay and Lesbian Youth which was established in 1992. One purpose of the Commission was to "investigate the utilization of resources from both the public and private sectors to enhance and improve the ability of state agencies to provide services to gay and lesbian youth."[211] The Commission was created "to examine

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[207] Emily Hunter Plotkin, *Arts Education: A Fundamental Element of Public School Education*, 26 COLUM. J.L. & ARTS 75, n.68 (2002).

[208] *McDuffy*, 415 Mass. 545, at 554.

[209] Barbara Fedders, *Coming out for Kids: Recognizing, Respecting and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 790 (2006).

[210] *Id.* at 795.

[211] Colleen A. Sullivan, *Article: Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEX. 31, 60 (1996) (citing Exec. Order No. 325, Mass. (1992)).

the high rate of suicide by gay and lesbian youth."[212] According to Colleen Sullivan, a staff attorney at the Lambda Legal Defense and Education Fund:

> This Commission effectively serves as a proactive measure to keep gay and lesbian youth out of the legal sphere, by making resources available to them and providing for their safe education. Additionally, it made recommendations regarding the families of gay and lesbian youth, suggesting that reference materials be made available to them, that support groups be formed, and that special trainings be given.[213]

The first report issued by the Commission found that "school, along with family, forms the life of the teenager. Intervening at school was therefore paramount."[214] Moreover, the Commission recommended "that school libraries should 'develop a collection of literature, books, films, and pamphlets for students seeking to learn more on gay and lesbian issues' and that school curriculum should facilitate that learning by integrating gay issues and themes into others subject areas."[215] Another study by the Commission found that "the negative views about gays and lesbians so commonly expressed by students in class, in the halls, and during school activities teach the lesbian or gay adolescent to develop a negative self-image."[216] The Commission argued that "[r]eluctance on the part of the vast majority of schools to encourage discussions of gay and lesbian issues for students and faculty perpetuates the isolation and loneliness of lesbian/gay teens that so often drives them to attempt suicide."[217] It encouraged "schools to develop policies to protect gay and lesbian youth and to offer training to school personnel, school-based support groups and school-based counseling for gay and lesbian students and their families."[218]

It is important to note that then Governor Mitt Romney abolished the Commission in July 2006. Governor Romney abolished the Commission because the state legislature refused to accept any of Governor Romney's nominations to the Commission.[219] There are further examples of initiatives that Massachusetts has taken to provide support and increase safety for homosexual youth. For instance, in 1995 Massachusetts began "to seek out, train, and certify lesbian and gay adults to be foster parents for gay, lesbian, transsexual, and transgender youths.

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212 Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV.1, 12 (2005).

213 Sullivan, *supra* note 211, at 60.

214 *Id.* at 60-61 (citing THE MASS. GOVERNORS COMMISSION ON GAY AND LESBIAN YOUTH, MAKING SCHOOLS SAFER FOR GAY AND LESBIAN YOUTH: BREAKING THE SILENCE IN SCHOOLS AND IN FAMILIES, at 4 (1993)).

215 Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J 125, n. 193 (2000).

216 Bryant, *supra* note 144, at n.63.

217 *Id.* at n.70.

218 *Id.* at n.74.

219 *Romney Abolishes Governor's Commission on Gay and Lesbian Youth*, ASSOCIATED PRESS, July 21, 2006, *available at*: http://www.boston.com/news/local/massachusetts/articles/2006/07/21/romney_abolishes_governors_commission_on_gay_and_lesbian_youth/.

Program organizers planned to place youths with their new foster parents by 1996."[220] Also, Massachusetts "enacted the Hate Crimes Reporting Act in 1990, which provides for the training of police and the collection of statistics about hate crimes directed at several groups of people, including gays and lesbians."[221]

In the sphere of education, "[s]ince at least 1993, Massachusetts has by statute required that public schools not discriminate based on sex or sexual orientation."[222] According to *Parker*:

> Massachusetts law has since 1993 required that the Board of Education and the Commissioner of Education develop standards for curricula for all public elementary and secondary schools "to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth . . . and to avoid perpetuating gender, culture, ethnic or racial stereotypes."[223]

Moreover, "the Department of Education requires that all public schools teach respect for all individuals regardless of, among other things, sexual orientations."[224] In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court validated same-sex marriage.[225] This decision illustrates further state-sanctioned recognition of tolerance for homosexuals in the state of Massachusetts. After *Goodridge*, the Supreme Judicial Court solidified its decision by "emphatically" rejecting a proposal by the state legislature to replace gay marriage with civil unions. [226]

PARENTAL NOTIFICATION

However, if the Massachusetts Parental Notification Statute was amended to allow schools to teach about sexual orientation in the context of tolerance, based on precedent, it would almost certainly be upheld by the Massachusetts courts. In Massachusetts, there is a balancing test that has been developed by the courts to determine whether parents' rights to raise their children has been infringed on by the State. Parents must show that their interests are burdened by the school teaching their children to be tolerant of people of different sexual orientations.[227] "Aspects of child rearing protected from unnecessary intrusion by the government include the inculcation of moral standards, religious belief, and elements of good citizenship."[228] As characterized by Fucci, "without either an opt-out provision or

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220 Sullivan, *supra* note 211, at 61.

221 *Id.*

222 *Parker*, 474 F. Supp 2d, at 265 (citing MASS GEN. LAWS ch. 76, §5 (2004)).

223 *Id.* (citing MASS GEN. LAWS ch. 69, §1D (1996)).

224 *Id.* at 275; *see also* 603 MASS. CODE REGS. § 26.06(1).

225 *See generally* Goodridge v. Dep't of Public Health, 440 Mass. 309 (2003).

226 Jonah M.A. Crane, *Recent Development: Legislative and Constitutional Responses to* Goodridge v. Department of Public Health, 7 N.Y.U. LEGIS. & PUB. POL'Y 465, 471 (2003).

227 Curtis v. Sch.Comm. of Falmouth, 420 Mass. 749, 756 (1995).

228 *Id.*

parental notification, parents are impeded from freely exercising their right to direct the upbringing of their children."[229]

Furthermore,

> [t]he type of interference necessary to support a claim based on an alleged violation of parental liberty appears to be that which causes a coercive or compulsory effect on the claimants' rights . . . While courts apparently have not explicitly stated that "coercion" is the standard, they have not proceeded further in the constitutional analysis unless the governmental action has had a coercive effect on the claimants' parental liberties . . . These cases strongly imply that, in order to constitute a constitutional violation, the State action at issue must be coercive or compulsory in nature. Coercion exists where the governmental action is mandatory and provides no outlet for parents, such as where refusal to participate in a program results in a sanction or in expulsion.[230]

According to Carlo Pedriolio, the *Curtis* court also suggested:

> regardless of parental approval, broader sexual education would not violate parental rights so long as the program is voluntary. A critical distinction between the Massachusetts condom case and the case of sexual education is that the latter would call for students to study material actively rather than passively experience the presence of condom distribution machines. Accordingly, the potential harm to the parental right of raising children could be much greater where students are actively studying material on sexual orientation.[231]

Another Massachusetts court found that the parental interest is balanced by the proposition that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for control and duration of basic education."[232] *Curtis v. Sch. Comm. Of Falmouth* held that to overcome a parent's interest, a state must be "able to show a compelling interest requiring State action."[233] Beh and Diamond conclude that these state interests serve as a limitation on parental authority.[234] In *Goodridge*, the Massachusetts Supreme Judicial Court stated that "Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation."[235] Furthermore, mandating that children be taught to be tolerant of people of various sexual orientations furthers the "legitimate state interest in

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229 Fucci, *supra* note 63, at 117.

230 *Curtis*, 420 Mass. at 785-86.

231 Carlo A. Pedrioli, *Lifting the Pall of Orthodoxy: The Need for Hearing a Multitude of Tongues in and Beyond the Sexual Education Curricula at Public High Schools*, 13 UCLA WOMEN'S L.J. 209, n. 124 (2005).

232 *Care & Protection of Charles*, 399 Mass. 324, 336 (1987).

233 *Curtis*, 420 Mass. at n. 7.

234 Hazel Glenn Beh and Milton Diamond, *Children and Education: The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 COLUM. J. GENDER & L. 12, 47 (2006).

235 *Goodridge*, 420 Mass. at 341.

providing a high quality public education to every child in the Commonwealth."[236] The initiatives taken by the state government, courts, school administrators and other individuals clearly demonstrate that the state actively promotes tolerance for the gay and lesbian community in Massachusetts. Also, as mentioned earlier, there is a problem of intolerance amongst those who attend public schools in that they do not treat homosexual students equally to others.[237] Thus, to be a law-abiding citizen of Massachusetts and to promote the state's commitment to diversity, a student should be taught by his or her public school to be accepting of all people, without regard to their sexual orientation. Requiring parents to be notified prevents the school from being able to effectively teach these principles to its entire student body.

The Massachusetts Supreme Judicial Court has given weight to the fact that a "program was implemented after numerous town meetings and school committee meetings, culminating in a final vote of the school committee in favor of the program."[238] Taking into account the notions that schools have a duty to prepare students to be citizens of the state and that the courts will respect decisions made by the local community, communities in Massachusetts are able to control the curriculum and programs provided in their public schools as long as they prepare their students to be citizens in Massachusetts.[239]

Although some parents may feel uncomfortable that their children are taught about homosexuality at a young age, this educational decision should be based on what the community desires. If the entire community feels that the students should not learn these subjects then local school committees would not include information about same-sex couples and sexual orientation in its curriculum literature and classes. In a community like Lexington, where there are same-sex couples and people of different sexual orientations, the local school committee clearly believes that it is necessary for children to learn to be accepting of those individuals, just as it is important to teach children to be tolerant of people of different races and religion.[240] Furthermore, the district court pointed out in *Parker* that allowing parents to call their children out of the classroom when they are learning to be tolerant and accepting of homosexuals and those in same-sex marriages is analogous to the impact the Supreme Court found in *Brown v. Board of Education*—the same effect that segregation had on minority students.[241] "An exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians and the children of the same-sex parents are inferior and therefore, have a damaging effect on those students."[242]

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[236] *Mass. Fed'n of Teachers v. Bd. of Educ.*, 436 Mass. 763, 778 (2002).

[237] Bryant, *supra* note 144, at 587.

[238] *Curtis*, 420 Mass. at 755.

[239] *McDuffy*, 420 Mass. at 548.

[240] *See generally* Vaznis, *supra* note 7.

[241] *Parker*, 474 F. Supp. 2d at 265.

[242] *Id.*

FEDERAL COURT CHALLENGE

An amendment to the Massachusetts Parental Notification Statute that would allow schools to teach about various sexual orientations in the context of tolerance would survive a constitutional challenge in federal courts. The constitutional argument is that the amendment interferes with parents' rights to rear their children. However, this argument fails because it appears that circuit courts apply rational review or at most an intermediate scrutiny that balances the interests of the parents versus the school's interest.

As mentioned earlier, circuit courts have not consistently determined how to weigh a public school's interest with a parent's right to raise his or her child because the Supreme Court has not provided them with guidance. In *Troxel v. Granville*, five Justices appeared to waver from the notion that strict scrutiny should apply in parental rights cases.[243] In fact, the Second Circuit in *Leebaert v. Harrington* stated that:

> there is nothing in *Troxel* that would lead us to conclude from the Court's recognition of a parental right in what the plurality called "the care, custody, and control" of a child with respect to visitation rights that parents have a fundamental right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach him or her.[244]

In *Brown v. Hot, Sexy & Safer Products,* the First Circuit held that parents do not have "a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children."[245] This is because "[i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."[246] It is important to note that the First Circuit in *Brown* did not decide whether parents have a fundamental right to rear their children.[247] But the Circuit seemed to hint that it believed that parents' rights to rear their children should be analyzed under rational review.[248]

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243 Good, *supra* note 108, at 658.

244 *Leebaert*, 332 F.3d at 142.

245 *Brown*, 68 F.3d at 533.

246 *Id.* at 534.

247 *Id.* at 533 ("We need not decide here whether the right to rear one's children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right.").

248 *Id.* at n. 5 (citing Meyer v. Nebraska at 262 U.S.at 400,403).

> The issue is muddled because the *Meyer* and *Pierce* cases were decided on the grounds that the 'statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.' Indeed, the opinions indicate that something less than the current 'compelling state interest' test was then used to evaluate a substantive due process challenge involving one of the listed liberty interests [. . .].

The Second Circuit in *Leebaert v. Harrington* held that "*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."[249]

[R]ecognition of such a fundamental right—requiring a public school to establish that a course of instruction objected to by a parent was narrowly tailored to meet a compelling state interest before the school could employ it with respect to the parent's child—would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.[250]

The Second Circuit applied rational review, as it had in previous cases dealing with the right of parents to rear their children.[251] The Sixth Circuit, in *Blau v. Fort Thomas*, similarly applied rational review in rejecting an argument by a parent that a school had violated his right to rear his child.[252]

In *Fields v. Palmdale School District*, the Ninth Circuit determined that *Meyer* and *Pierce* were limited to "the right of parents to be free from state interference with their choice of the education forum itself, a choice that ordinarily determines the type of education one's child will receive."[253] Furthermore, the court held that this right "does not extend beyond the threshold of the school door."[254] This decision severely limited parents' right to rear their children because it says that parents cannot invoke this right in the sphere of public education. The court even went so far as to say that "parents are possessed of no constitutional right to prevent the public schools from providing information on that subject to their students in any forum or manner they select."[255]

The Third Circuit in *C.N. v. Ridgewood Bd. of Education* held that "it is primarily the parents' right 'to inculcate moral standards, religious belief and elements of good citizenship.'"[256] This is a reference to *Gruenke v. Seip*, where the Third Circuit stated that when a school's policies conflict with the fundamental rights of parents to raise their children, "the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest.[257] The Third Circuit's approach is more deferential to parents than other Circuits; parents appear to have a right to rear their children and this right is only superseded by the school, if the school can demonstrate that it is advancing a compelling interest. Even under this test, an amendment to the Massachusetts Parental Notification Statute could survive a constitutional

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249 *Leebaert*, 332 F.3d at 141.

250 *Id.*

251 *Id.* at 142.

252 *Blau*, 401 F.3d at 396.

253 *Fields*, 427 F.3d at 1207.

254 *Id.*

255 *Id.* at 1211.

256 C.N. Ridgewood v. Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005).

257 *Gruenke*, 225 F.3d at 305.

challenge. The school district would argue that promoting tolerance for homosexuals and bisexuals in the state of Massachusetts is a compelling interest that outweighs the parents' right to rear their children as they want. However, under the Third Circuit's analysis, a parent may persuade a judge that the parent's interest outweighs the state's interest or that promoting tolerance among students in regards to homosexuals or bisexuals is not a compelling interest.

Influenced by prior federal cases and by *Brown*, the District Court in *Parker v. Hurley* concluded that "parents do not have a fundamental liberty interest that permits them to prescribe the curriculum for their children,"[258] and thus it applied rational review to determine whether the Lexington School District committed any constitutional violation.[259] In *Parker v. Hurley*, Judge Wolf found that *Brown* was binding precedent that stood for the proposition "that the constitutional right of parents to raise their children does not include the right to restrict what a public school may teach their children."[260] To determine whether a party has satisfied rational review, a court must find "that government action correlate to a legitimate government interest. The fit between means and ends need not be tight—it need only be 'plausible.'"[261]

Under this analysis, it will not be difficult for a court to uphold an amendment to the Massachusetts Parental Notification Statute that allows schools to teach about various sexual orientations in the context of tolerance. The legitimate government interest that the amendment would achieve is that it permits schools to teach students to be tolerant of individuals regardless of their sexual orientation.

PREDICTION ABOUT THE *PARKER* CASE

In regards to the *Parker* case, it is doubtful that the parents will succeed in state court on their claim that the school violated the Massachusetts Parental Notification Statute because they did not exhaust all of their administrative appeals.[262] If previous cases are indicative of how the Supreme Judicial Court or the First Circuit Court of Appeals would deal with a conflict between a parent's right to raise his or her child and the public school's ability to develop its curriculum, it seems that the courts will favor the public schools. The Supreme Judicial Court has concluded that the State has a duty to prepare students to be "free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts."[263] The First Circuit, which would hear any appeal in the *Parker* case, has held that it does not believe

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258 Parker, 474 F.Supp.2d at 273.

259 *Id.*

260 *Id.*, at 263.

261 *Id.* at 274 (citing FCC v. Beach Commc'ns., 508 U.S. 307, 313-314 (1993)).

262 Trial Pleadings, *supra* note 13.

263 *McDuffy*, 415 Mass. at 606.

"that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children."[264] Thus, it seems unlikely that the Parkers or Wirthlins would prevail on appeal.

CONCLUSION

Massachusetts has made it clear that it does not want its citizens to discriminate on the basis of an individual's sexual orientation[265] and that an aim of public education is to prepare students to be productive citizens of the State. To achieve these goals and even more, the Massachusetts Parental Notification Statute should be amended to explicitly allow schools to teach about various sexual orientations in the context of promoting diversity and tolerance amongst students without imposing a duty on public schools to notify parents. Massachusetts is a "progressive" state because it has enacted and established programs that embrace its gay community. These initiatives demonstrate that it is well-accepted in Massachusetts, albeit not without controversy, to take measures to protect homosexual youths in the state of Massachusetts.

This amendment is necessary because the statute in its current form is ambiguous as to whether public schools in Massachusetts may teach about homosexuality in the context of promoting tolerance in the classroom without notifying students' parents. Massachusetts' fairly recent commitment to promoting diversity and tolerance for its homosexual and bisexual citizens means that schools within the state are just now starting to develop a curriculum that deals with issues of sexual orientation among its students. If the statute remains in its current form, schools will either be hesitant about introducing such topics in school without notifying parents or parents may waste judicial resources by suing school districts for not notifying them about changes to the curriculum. Furthermore, there may be a period of time before the issue reaches the Massachusetts Supreme Judicial Court, when state courts are split on how the statute should be interpreted and school districts are unsure of whether to promote tolerance regarding homosexuality in their classrooms.

Not only would education about accepting people regardless of sexual orientation better prepare students to live in Massachusetts, but it will also create a safer atmosphere in school for homosexual or questioning students. Thus, education that promotes tolerance for people of various sexual orientations would not only prepare students to be better citizens of a state that has legalized same-sex marriage and promotes tolerance regardless of one's sexual orientation, but would also teach them to be better classmates to their fellow students who are gay or even

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[264] *Brown*, 68 F.3d at 533.

[265] *Goodridge*, 440 Mass. at 341; *McDuffy*, 415 Mass. at 606.

just questioning. Parents should not be able to prevent their children from receiving this type of education.