

Fall 3-2-2011

Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curricular Discussions about Sexual Orientation and Same-Sex Marriage?

Kevin Rogers

Richard Fossey

Follow this and additional works at: <https://digitalcommons.law.byu.edu/elj>



Part of the [Education Law Commons](#), [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Kevin Rogers and Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curricular Discussions about Sexual Orientation and Same-Sex Marriage?*, 2011 BYU Educ. & L.J. 423 (2011).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2011/iss2/11>

.

SAME-SEX MARRIAGE AND THE PUBLIC SCHOOL CURRICULUM: CAN PARENTS OPT THEIR CHILDREN OUT OF CURRICULAR DISCUSSIONS ABOUT SEXUAL ORIENTATION AND SAME-SEX MARRIAGE?

*Kevin Rogers & Richard Fossey**

I. INTRODUCTION

The right of the parent over the child is prior to the right of the State.

Hillaire Belloc¹

Several states, primarily in the Northeast, have approved same-sex marriage either by legislative action or judicial decree,² while thirty states have amended their constitutions to prohibit the recognition of same-sex marriage.³ In those states where same-sex marriage has been approved, we can expect

* Kevin Rogers is Assistant Superintendent of Secondary Instruction for the Lewisville Independent School District in Lewisville, Texas. Richard Fossey is the Mike Moses Endowed Chair in Educational Administration at the University of North Texas.

1. HILLAIRE BELLOC, *ESSAYS OF A CATHOLIC* 177 (1931).

2. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (statutory ban on same-sex marriage violates equal protection provisions of the state constitution); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (statutory ban on same-sex marriage violates equal protection clause of Iowa Constitution); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (statutory prohibition against marriage of same-sex couples fails rational basis scrutiny under Massachusetts Constitution). See also, e.g., N.H. REV. STAT. ANN. § 457: 1-a (2010) (recognizing same-sex marriage).

3. Paul Benjamin Linton, *Same Sex Marriage and the New Mexico Equal Rights Amendment*, 20 GEO MASON U. CIV. R. L.J. 209, 209 n.1 (2010) (lists the following state constitutional provisions that prohibit same-sex marriage: ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 51; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13).

same-sex marriage and sexual orientation to become part of the public school curriculum—at least any aspects of the school curriculum that deal with sexuality.⁴

As same-sex marriage becomes more and more widespread, conflict is inevitable between schools that seek to present same-sex marriage as a legal and morally acceptable alternative to traditional marriage and families who object to same-sex marriage on religious or moral grounds.⁵ For example, the Roman Catholic Church,⁶ the Southern Baptist Church,⁷ the United Methodist Church,⁸ and The Church of Jesus Christ of Latter-day Saints⁹ all disapprove of homosexuality as a matter of religious doctrine; together these four groups have almost one hundred million adherents in the United States.¹⁰

This paper does not consider the development of same-sex marriage in the United States in any detail, and the paper expresses no opinion about the wisdom of same-sex marriage from a public policy perspective. Rather, the premise of this paper is that conflict in the public schools over sexual

4. See LEARNING ABOUT SEXUAL DIVERSITY AT SCHOOL: WHAT IS AGE APPROPRIATE? SAFE SCHOOLS COALITION, <http://SafeSchoolsCoalition.org/whatisageappropriate.pdf> (last updated July 2009) (suggesting that primary school children should be instructed about sexual orientation, including homosexuality and bisexuality).

5. See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (parents sought to shield their children from positive portrayals of same-sex marriage at their children's elementary schools).

6. CATECHISM OF THE CATHOLIC CHURCH ¶ 2357 (1994) (stating that homosexual acts are contrary to natural law and can be approved under no circumstances).

7. Position Statement on Sexuality, OFFICIAL WEBSITE OF THE SOUTHERN BAPTIST CONVENTION, <http://www.sbc.net/aboutus/pssexuality.asp> (last visited May 2, 2011) (homosexuality is not a “valid alternative lifestyle”).

8. UNITED METHODIST CHURCH BOOK OF DISCIPLINE ¶ 65 G (2004) (“[T]he practice of homosexuality is incompatible with Christian teaching.”).

9. Elder Dallin H. Oaks, *Same-Gender Attraction*, ENSIGN, July 1995, at 7, 7, available at <http://lds.org/ensign/1995/10/same-gender-attraction?lang=eng> (“Every Latter-day Saint knows that God has forbidden all sexual relations outside the bonds of marriage.”).

10. See PEW FORUM ON RELIGION & PUBLIC LIFE, RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY 6 (2003) (finding that 61% of “committed white Catholics” and 88% of “committed white evangelicals” consider homosexuality to be sinful, and that 74% of black Protestants considered homosexuality to be a sin). A 2010 report by the Pew Forum on Religion and Public Life found that support for gay marriage among white Catholics had grown in recent years, while white evangelical Protestants continue to oppose same-sex marriage overwhelmingly. PEW FORUM ON RELIGION & PUBLIC LIFE, RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY 5–6 (2010).

orientation is inevitable in those jurisdictions in which same-sex marriage is approved. In states where same-sex marriage has been adopted, either by statute or judicial decree, school systems will undoubtedly begin portraying same-sex marriage in a positive light, bringing school curricular decisions into conflict with families whose religious beliefs condemn homosexuality and same-sex marriage. To avoid this conflict, clear statutory provisions should be adopted to allow parents to shield their children from instruction regarding sexual orientation, just as statutes already exist that permit parents to opt their children out of instruction on sex education.

Currently, forty-four states allow parents to exempt their children from instruction on sexual topics, either by statute or administrative regulation.¹¹ The language and scope of these statutes and regulations vary considerably from state to state, but the fact that so many states give parents some legal right to shield their children from sexual topics in the public schools is an indication that state legislatures recognize parents' sensitivity about the manner in which sexual topics are presented to their children. This paper will examine curriculum opt-out provisions that currently exist and suggest a model statute that will allow parents to opt their children out of any curricular activity that discusses sexual orientation.¹²

II. DO PARENTS HAVE A CONSTITUTIONAL RIGHT TO SHIELD THEIR CHILDREN FROM EXPOSURE TO SEXUAL TOPICS IN A PUBLIC SCHOOL CURRICULUM? THE SHORT ANSWER IS "NO"

In the venerable cases of *Meyer v. Nebraska*¹³ and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,¹⁴ the Supreme Court articulated and affirmed the constitutional right of parents to direct the education of their children. In both cases, the Court identified this constitutional right as a

11. Tommy Kevin Rogers, *Parental Rights: Curriculum Opt-Outs in Public Schools* (Aug. 2010) (unpublished dissertation, University of North Texas) (on file in the university library at the University of North Texas, Denton, Texas).

12. See also Marc D. Stern, *Liberty v Equality: Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307 (2010) (proposing model statute in same-sex marriage states to protect religious liberties of persons opposing same-sex marriage).

13. 262 U.S. 390 (1923).

14. 268 U.S. 510 (1925).

liberty interest under the Due Process Clause of the Fourteenth Amendment.

In *Meyer v. Nebraska*, decided in 1923, Robert Meyer, a teacher at a Lutheran parochial school, taught the German language to a ten-year-old child at the school in violation of a Nebraska statute that criminalized the teaching of a foreign language to any child who had not completed the eighth grade. Meyer was convicted of this offense and fined \$25.¹⁵ Although the Nebraska Supreme Court upheld Meyer's conviction, the U.S. Supreme Court struck down the statute at issue, finding that Meyer had a constitutional right to teach the German language and that parents had a corresponding constitutional right—lodged in the Fourteenth Amendment—"to engage [Meyer] . . . to instruct their children."¹⁶ No emergency had arisen, the Court noted, that would justify this restriction on teaching the German language. Therefore, the statute was "arbitrary and without reasonable relation to any end within the competency of the state."¹⁷

Two years later, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,¹⁸ the Supreme Court examined the Oregon Compulsory Education Act, adopted in 1922 by a voters' initiative that required all children ages eight to sixteen to attend a public school until they had completed the eighth grade. Parents who violated this law were guilty of a misdemeanor. The Ku Klux Klan and the Scottish Rite Masons had been primary supporters of the law, "whose members believed in the superiority of white Protestants and the inferiority of blacks, Jews, Catholics, and immigrants," and who had come to the conclusion that closing parochial schools and forcing all children into public schools "would fortify American democracy."¹⁹ The Society of Sisters of the Holy Names of Jesus and Mary, a religious order operating a parochial school in Oregon, and Hill Military Academy, a nonsectarian private school, challenged the statute in federal

15. *Meyer v. State*, 187 N.W. 100 (Neb. 1922), *rev'd*, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

16. *Meyer v. Nebraska*, 262 U.S. at 400.

17. *Id.* at 403.

18. 268 U.S. 510 (1925).

19. Joseph Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, HARVARD J.L. & PUB. POL'Y (1998).

court, and they obtained an injunction barring enforcement of the law. The State of Oregon then appealed.

Adopting the reasoning of its earlier decision in *Meyer*, the Supreme Court struck down the Oregon law. Under the doctrine of *Meyer v. Nebraska*, the Court declared, “we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”²⁰ As the Court explained, parents have a constitutionally guaranteed liberty interest in directing the education of their children, which cannot be infringed upon by arbitrary and unreasonable governmental action that is outside the competency of the state.²¹ In short, “[t]he fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”²²

Together, *Meyer* and *Pierce* established that parents have a constitutional right to direct the education of their children. *Pierce* made clear that parents have a constitutional right to send their children to private schools and that the state may not abolish private schools or force all children to enter the public school system.²³

In the years since *Meyer* and *Pierce*, parents have brought suit repeatedly, seeking to extend the holdings of those two landmark decisions to include some parental voice in the day-to-day operations of the public schools. In essence, parents in these suits have argued that their constitutional right to direct the upbringing of their children included some authority to control the content of the public school curriculum.

In seven federal appellate court decisions, parents have argued that their constitutional right to direct the education of their children, first articulated in *Meyer* and *Pierce*, entitled them to shield their children from exposure to instruction or materials that were objectionable to the parents on religious or moral grounds. Unfortunately for the parents who brought

20. *Pierce*, 268 U.S. at 534–35.

21. *Id.*

22. *Id.* at 534.

23. In another decision from the same era, the Supreme Court issued a corollary ruling in action against the territorial government of Hawaii. Not only could government not abolish private schools, it could not regulate them so onerously as to effectively put them out of business. *Farrington v. Tokushige*, 273 U.S. 284 (1927).

these cases, the federal appellate courts were entirely unsympathetic in all seven cases.

A. *Mozert v. Hawkins County Board of Education*

*Mozert v. Hawkins County Board of Education*²⁴ is the first federal appellate court decision in a line of cases that have rejected parents' attempts to veto a public school district's curricular and instructional decisions. In that case, seven families, all identifying themselves as "born again Christians,"²⁵ sought to shield their children from exposure to a Tennessee school district's reading program, which utilized the Holt, Rinehart and Winston basic reading series. Vicki Frost, one of the plaintiffs in action, served as the plaintiffs' chief witness, and she testified that the reading series presented ideas that were objectionable to the plaintiffs on religious grounds, including such themes as "secular humanism," "supernaturalism," "pacifism, and "false views of death."²⁶

At the trial court level, the parents made two constitutional arguments. First, they argued that the school district's curriculum interfered with their constitutional right to direct the upbringing of their children as affirmed in *Pierce v. Society of Sisters*.²⁷ Second, they maintained that the school district's requirement that their children be subjected to the approved reading curriculum interfered with their right to free exercise of religion.²⁸ The trial court found in the parents' favor and enjoined the school district from imposing its reading curriculum on the unwilling families.²⁹

At the appellate level, the Sixth Circuit Court of Appeals did not address the parents' arguments under *Pierce*, and *Pierce* was not mentioned in the majority opinion. Nevertheless, the appellate court rejected plaintiffs' other constitutional argument—that they had a free exercise right to shield their children from parts of the curriculum that they found objectionable on religious grounds. The court

24. 827 F.2d 1058 (6th Cir. 1987).

25. *Id.* at 1061.

26. *Id.* at 1062.

27. *Mozert v. Hawkins Cnty. Pub. Schs.*, 647 F. Supp. 1194, 1197 (E.D. Tenn. 1986), *rev'd sub nom. Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

28. *See id.*

29. *Id.* at 1204.

acknowledged that the school district could not force students to affirm a belief in a particular idea, but the school certainly had the authority to offer a reading program “designed to acquaint students with a multitude of ideas and concepts.”³⁰ The court went on to say that families who send their children to public schools were expected to adopt an attitude of civil tolerance.³¹ Such an attitude “does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires recognition that in a pluralistic society we must ‘live and let live.’”³²

B. Brown v. Hot, Sexy and Safer Productions, Inc.

In *Brown v. Hot, Sexy and Safer Productions, Inc.*,³³ decided in 1995, the First Circuit Court of Appeals ruled very much in harmony with the Sixth Circuit’s *Mozert* opinion. In *Brown*, parents of students in the Chelmsford School District of Massachusetts sued the district after their children were exposed to an AIDS and sex education program presented by a contractor named Suzi Landolphi and that allegedly resorted to sexually explicit and ribald language. Specifically:

Plaintiffs allege that Landolphi gave sexually explicit monologues and participated in sexually suggestive skits with several minors chosen from the audience. Specifically, the complaint alleges that Landolphi: 1) told the students that they were going to have a “group sexual experience, with audience participation”; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as “erection wear”; 6) referred to being in “deep sh—” after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor’s entire head and blow it up; 8) encouraged a male minor to display his “orgasm face” with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a “nice butt”; and 11) made

30. 827 F.2d at 1069.

31. *Id.*

32. *Id.*

33. 68 F.3d 525 (1st Cir. 1995).

eighteen references to orgasms, six references to male genitals, and eight references to female genitals.³⁴

At the time that the controversial AIDS program took place, the Chelmsford School Committee had a specific policy in place requiring “positive subscription, with written parental permission” before students could participate in any instruction on the topic of “human sexuality.”³⁵ In addition, a Massachusetts statute gave students the right to opt out of “instruction on disease” if the instruction conflicted with the student’s “sincerely held religious beliefs.”³⁶ According to the plaintiff parents, the school district had violated state law and its own policy when it exposed their children to the controversial AIDS program without giving them advance notice of the program’s content and the opportunity to have their children excused from attending.³⁷

A federal trial court dismissed the parents’ complaint, and the First Circuit affirmed the trial court’s decision.³⁸ In spite of the fact that the school district had arguably violated state law and its own policy by exposing children to the AIDS program without obtaining parents’ permission, the First Circuit refused to recognize any right of redress based on those apparent violations.³⁹

In addition, the appellate court emphatically rejected the parents’ claim that the school had infringed upon their constitutional right to direct the upbringing of their children, concluding that the Supreme Court’s holdings in *Meyer* and *Pierce* did not give parents the right to control what public schools taught their children:

The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to “standardize its children” or “foster a homogenous people” by completely foreclosing the opportunity of individuals and groups to choose a different path of education. We do not think, however, that this

34. *Id.* at 529.

35. *Id.* at 530.

36. *Id.* at 535 (citing MASS. GEN. LAWS. ch. 71, § 1(1995)).

37. *Id.* at 530.

38. *Id.* at 530, 541.

39. *See id.* at 539.

freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. . . . If 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. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.⁴⁰

C. *Parents United for Better Schools v. School District of Philadelphia*

Brown v. Hot, Sexy and Safer Productions, Inc. was followed by five more federal appellate court decisions that refused to extend the constitutional right of parents to direct the upbringing of their children to include a right to prevent schools from presenting their children with objectionable materials about sex. In *Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education*,⁴¹ a group of parents sued the Philadelphia school district seeking a permanent injunction to prevent the district from distributing condoms to students. In implementing the program, the school board affirmed that abstinence from sexual activity during adolescence “promotes good health and a healthy lifestyle.”⁴² Nevertheless, the school board concluded that the distribution of condoms to students was good public policy, partially as a means of reducing the risk of teen pregnancy and the transmission of sexually transmitted diseases. The school district’s condom-distribution policy specifically gave parents the option of refusing to allow their children to participate, stating that parents “have the absolute right to veto their child’s or children’s participation in the program.”⁴³

In seeking to enjoin the school district from implementing its condom-distribution program, the parent group argued that the program fell outside the school board’s lawful authority and

40. *Id.* at 533–34 (internal citations omitted).

41. 148 F.3d 260 (3rd Cir. 1998).

42. *Id.* at 263.

43. *Id.* at 264.

violated parents' constitutional right "to be free from unnecessary governmental intrusion in the rearing of their children."⁴⁴ Even though the school district allowed parents to bar their children from receiving condoms, the plaintiffs maintained that the district had no legal authority to be in the condom-distribution business.⁴⁵

Ruling on the school district's motion for summary judgment, a federal trial court dismissed the parent group's suit, and the Third Circuit Court of Appeals affirmed. The Third Circuit ruled that the school district had the legal authority to adopt its condom-distribution policy and that the policy did not intrude on parents' constitutional right to direct the upbringing of their children.⁴⁶ Although the Third Circuit recognized "the strong parental interest in deciding what is proper for the preservation of their children's health," the court did not believe the school district's policy intruded on that right.⁴⁷ Participation in the program was voluntary, the court pointed out; and the program specifically reserved to parents the option of refusing to allow their children to participate.⁴⁸

D. *Leebaert v. Harrington*

In *Leebaert v. Harrington*,⁴⁹ Turk Leebaert sued a Connecticut school district, arguing that his constitutional right to direct the upbringing and education of his son Corky required the school district to excuse his son from all health education classes, not just those that dealt with human sexuality. Leebaert argued that this constitutional right stemmed from *Meyer* and *Pierce* and was "fundamental," requiring the school district to show that it had a compelling interest in pursuing its curriculum that overrode Leebaert's constitutional interest.⁵⁰

Connecticut law authorized the State Board of Education to develop a family-life curriculum guide for the public schools, which would include such topics as family planning, human

44. *Id.* at 270.

45. *Id.*

46. *Id.* at 275.

47. *Id.*

48. *Id.*

49. 332 F.3d 134 (2nd Cir. 2003).

50. *Id.* at 139.

sexuality, parenting, and various aspects of family life; but Connecticut law further provided that no student could be compelled to participate in a school district's family life program.⁵¹ School authorities had excused Corky Leebaert from participating in six classes in the seventh-grade health-education curriculum that addressed human sexuality and AIDS, but the district insisted that Corky attend the other classes, including classes that discussed issues pertaining to the use of tobacco, drugs, and alcohol.⁵²

Apparently, Leebaert insisted on shielding his son from the entire health education class because he suspected the class would expose his son to values that were objectionable to him on religious grounds.⁵³ For example, he suspected some of the instruction would contradict his traditional view of marriage—that a married man and woman is the basic unit of the family.⁵⁴ According to Leebaert, “The school teaches that this unit can be comprised of anything or anyone, that anything you say can be a family. This contradicts my religious beliefs.”⁵⁵

Relying heavily on the First Circuit's *Brown* decision, the Second Circuit rejected Leebaert's argument that the school could not require his son to attend health education classes unless it could show that it had a compelling government interest that overrode Leebaert's constitutional right to direct the education of his son.⁵⁶ “*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,” the First Circuit wrote.⁵⁷ Indeed, the court observed:

[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 a school curriculum that

51. *Id.* at 135. Under Connecticut law, “no student shall be required by any local or regional board of education to participate in any such family life program which may be offered within such public schools.” CONN. GEN. STAT. § 10-16e (2009).

52. *Leebaert*, 332 F.3d at 137.

53. *See id.*

54. *See id.* at 137–38.

55. *Id.* at 138.

56. *Id.* at 141.

57. *Id.*

would respond to the overall educational needs of the community and its children.⁵⁸

E. *Fields v. Palmdale School District*

In *Fields v. Palmdale School District*,⁵⁹ decided in 2005, parents sued a California school district after school authorities administered a psychological assessment questionnaire to their elementary-school-aged children that contained questions on sexual topics. School officials gave parents advance notice that the questionnaire would be distributed to their children, but plaintiffs complained that they were not apprised that the questionnaire contained questions of a sexual nature.⁶⁰ Questions with sexual references included: “Touching my private parts too much,” “Thinking about touching other people’s private parts,” and “Thinking about sex.”⁶¹

As in *Brown v. Hot, Sexy and Safer Productions, Inc.*, the California parents claimed that the school district’s action interfered with their right to direct the upbringing of their children in violation of constitutional principles laid down in *Meyer and Pierce*.⁶² A Ninth Circuit panel rejected this claim outright. Citing *Brown v. Hot, Sexy and Safer Productions, Inc.* with approval, the Ninth Circuit ruled that parents have no constitutional right “to restrict the public schools from providing information on the subject of sex.”⁶³

F. *C.N. v. Ridgewood Board of Education*

In *C.N. v. Ridgewood Board of Education*,⁶⁴ another controversy over a school-administered student survey, parents sued a New Jersey school district after the district administered a survey to students without obtaining their parents’ consent. This survey sought information about students’ alcohol and drug use, their sexual activity, their suicide attempts, and their relationships with their parents.⁶⁵

58. *Id.*

59. 427 F.3d 1197 (9th Cir. 2005), *aff’d as modified*, 447 F.3d 1187 (9th Cir. 2006).

60. *Id.* at 1202.

61. *Id.* at 1202 n.3.

62. *Id.* at 1204.

63. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006).

64. 430 F.3d 159 (3rd Cir. 2005).

65. *Id.* at 161.

The plaintiffs sued on a variety of grounds, alleging a violation of the Family Educational Records Privacy Act,⁶⁶ the Protection of Pupil Rights Amendment,⁶⁷ and also claiming that the administration of the survey unconstitutionally forced students to engage in forced speech and interfered with parents' constitutional right to direct the upbringing of their children.⁶⁸ A federal trial court dismissed all claims, based partly on the conclusion that the student participation in the survey was voluntary.⁶⁹ The parents appealed.

Affirming the trial court, the Third Circuit ruled that the parents had suffered no constitutional injury. The appellate court ruled that the evidence supported the conclusion that student participation in the survey was not voluntary and the court noted that the New Jersey legislature had passed a law—apparently in response to the events that were the subject of the litigation—requiring “prior written informed consent” from parents before they could administer student surveys in the public schools.⁷⁰

Nevertheless, the Third Circuit concluded that the administration of the student survey—even though student participation may have been required—did not amount to a constitutional violation. The court acknowledged “that introducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority.”⁷¹ The court concluded, however, that administration of the survey did not amount to a constitutional interference with parents' decision-making authority over their children's upbringing.⁷²

G. Parker v. Hurley

Finally, in *Parker v. Hurley*,⁷³ the First Circuit, reaffirming the philosophy it had laid down in *Brown v. Hot, Sexy and Safer Productions, Inc.*, ruled that parents of elementary school children had no constitutional right to bar a Massachusetts

66. 20 U.S.C. § 1232g (2010).

67. *Id.* § 1232h.

68. *Ridgewood Bd. of Educ.*, 430 F.3d at 186.

69. *Id.* at 175–76.

70. *Id.* at 185 (citing N.J. STAT. ANN. § 18A:36-34 (2001)).

71. *Id.*

72. *Id.*

73. 514 F.3d 87 (1st Cir. 2008).

school district from exposing their children to reading materials that portrayed same-sex marriage in a positive light. *Parker* is particularly pertinent because the state of Massachusetts had a statute in force at the time of the dispute that required school districts to give parents notice and an opportunity to exempt their children from those parts of the school curriculum “which primarily involves human sexual education or human sexuality issues.”⁷⁴ The Massachusetts Department of Education, however, had stated in an opinion letter that the parental-notice statute did not apply to “educational materials designed to promote tolerance, including materials recognizing differences in sexual orientation, if those materials are presented ‘without further instruction or discussion of the physical and sexual implications of homosexuality.’”⁷⁵

Plaintiffs in the case, David and Tonia Parker and Joseph and Robin Wirthlin, were “devout Judeo-Christians” whose core religious beliefs included a belief “that homosexual behavior and gay marriage are immoral and violated God’s law.”⁷⁶ In 2005, the Parkers complained to their son Jacob’s school principal after Jacob came home from school with a picture book entitled *Who’s in a Family*, which depicted same-sex families in a positive light.⁷⁷ The Parkers claimed the school had an obligation under Massachusetts law not to allow Jacob to see the book without giving his parents notice and an opportunity to “opt out” of having Jacob exposed to it. Jacob’s principal rejected the Parker’s position, based on his belief that the Massachusetts opt-out statute didn’t apply to *Who’s in a Family*.⁷⁸

Joseph and Robin Wirthlin, the other plaintiffs in the suit, complained to school authorities after a teacher read aloud from the book *King and King* in their son Joseph’s second-grade class.⁷⁹ Like *Who’s in a Family?*, *King and a King* portrayed same-sex marriage in a positive light.⁸⁰ The school district rejected the Wirthlin’s complaint, taking the position

74. MASS. GEN. LAWS ch. 71, § 32A (West 2011).

75. *Parker*, 514 F.2d at 92 n.2.

76. *Id.* at 92.

77. *Id.*

78. *Id.* at 94 n.4.

79. *Id.* at 93.

80. *Id.*

that the Massachusetts opt-out law did not apply to a teacher's reading, without further comment, from *King and King* to a class of second graders.⁸¹

In the litigation that followed, a federal trial court dismissed the two families' claims, and the First Circuit Court of Appeals affirmed the trial court on appeal. Ruling very much in harmony with its 1995 decision in *Brown*, the First Circuit stated, "Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."⁸² The court did not address the issue of the plaintiffs' statutory right to exempt their children from instruction on sex education or human sexuality. Instead, it dismissed all state claims without prejudice and invited the families to pursue those claims in state court.

Mozert, *Brown*, *Parents United*, *Leebaert*, *Fields*, *Ridgewood Board of Education*, and *Parker* are not identical in their reasoning. For example, although most of the decisions considered the scope of a parents' constitutional right to direct the upbringing of the parent's child as articulated in *Pierce* and *Mozert*, *Parents United* did not rely on *Pierce*. Also, in the *Leebaert* decision, the plaintiff went beyond arguing that he had a right to shield his child from exposure to sexual topics. Turk Leebaert maintained that he had a constitutional right to shield his son from the entire health education course. Nevertheless, these seven federal appellate decisions, when taken together, lead to one incontrovertible conclusion: parents have no constitutional right to exempt their children from participating in school learning activities based on the parents' religious or moral views.⁸³

81. *Id.*

82. *Id.* at 106.

83. *But see* Emily J. Brown, Note, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L.J. 109 (2009) (arguing that parents have a fundamental right to direct their children's moral and educational upbringing that includes the right to exempt their children from objectionable sex education programs in public schools).

III. IN MOST STATES PARENTS HAVE A STATUTORY RIGHT TO OPT OUT THEIR CHILDREN FROM SOME PARTS OF THE CURRICULUM, MOST COMMONLY SEX EDUCATION

As the discussion in the previous section makes clear, federal appellate courts have ruled that parents have virtually no constitutional right to remove their children from any part of the public school curriculum, even if the parents' objection is based on religious or moral grounds. Nevertheless, although federal courts do not allow curriculum opt-outs on constitutional grounds, most states have statutes or administrative regulations that grant curricular exemptions in varying situations for public schools. As explained below, co-author Kevin Rogers identified all statutes or administrative regulations in all fifty states and the District of Columbia that grant parents a specific right to excuse their children from some part of the public school curriculum. These statutes and regulations were then categorized into three groups: states with opt-out laws that are "restrictive," states with opt-out laws that are "permissive," and states that are categorized as "non-existent" (meaning that these states have no curriculum opt-out law).

An examination of curriculum opt-out statutes and regulations shows that terminology varies widely. In many statutes, terminology other than "opt-out" is used. For example, terms such as *exempt*, *excuse*, *allow to withdraw from*, and *choose not to participate in* are often used in curriculum opt-out statutes. In some states, students can be excused from only the specific part of the course that parents consider offensive under these opt-out provisions. In other states, the opt-out provisions allow students to miss the entire course if parents find it objectionable.⁸⁴ Another practice, which gives parents even more authority when dealing with an offensive curriculum, is known as "opt-in." In states where the opt-in applies, public schools are only allowed to include students in particular courses, such as sex education or comprehensive health, after a parent is notified of the content and grants specific written permission for their child to be enrolled in the course prior to any instruction.⁸⁵

84. See, e.g., TEX. EDUC. CODE ANN. § 26.010 (West 2009).

85. See, e.g., COLO. REV. STAT. § 22-25-104(6)(b) (2011) ("School officials shall

In addition, although a core purpose of all these curriculum opt-out statutes and regulations is to give parents the right to excuse their children from at least some parts of instruction on human sexuality, states define instruction on human sexuality differently. Some states use the term “family life education” in their opt-out provisions. Maine, for example, defines “family life education” as education in K-12 regarding human development and sexuality, including education on family planning and medically accurate and age-appropriate information about sexually transmitted diseases (STDs).⁸⁶ Virginia describes family life education to include family living and community relationships, human reproduction and sexuality, and the etiology, prevention, and effects of STDs.⁸⁷

Other jurisdictions define instruction on human sexuality as health education. For example, Delaware’s K-12 health education program includes addressing “tobacco, alcohol and other drugs; injury prevention and safety; nutrition and physical activity; family life and sexuality; personal health and wellness; mental health; and community and environmental health.”⁸⁸ The District of Columbia also uses the term “health education,” which includes the following content areas: tobacco, alcohol and other drug education; CPR, first aid and safety; injury and violence prevention; human sexuality and family; nutrition and dietary patterns that contribute to disease; prevention and control of disease; and consumer and environmental health.⁸⁹

In many states, sex education prescribes how instruction on human sexuality is to be presented. In Missouri, instruction on human sexuality and STDs must be medically accurate;⁹⁰ and instruction must present abstinence from sexual activity as the preferred choice.⁹¹ Missouri law also requires sex education instruction to emphasize STDs as serious health hazards and to stress the dangerous connection of sexual activity to human

receive prior written approval from a parent or guardian before his or her child may participate in any program discussing or teaching sexuality and human reproduction.”)

86. ME. REV. STAT. 22 § 1902 (1-A) (2010).

87. VA. CODE ANN. § 22.1-207.1 (West 2011).

88. 14 DEL. ADMIN. CODE § 851.1.1.3 (2010).

89. D.C. MUN. REGS., tit. 5, § 23.04 (2004), *available at* <http://www.youthdevelopment.org/aef/dc.htm>.

90. MO. ANN. STAT. § 170.015.1 (West 2010).

91. *Id.* § 170.015.1(1).

immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS).⁹² In addition, Missouri requires sex education instruction to include conversations about the possible emotional and psychological consequences of preadolescent and adolescent sexual activity and the consequences of adolescent pregnancy⁹³ as well instruction that advises students of the laws pertaining to their financial responsibility to children born in and out of wedlock.⁹⁴

Similarly, Arizona school districts with sex education curricula are required to “include instruction on the laws relating to sexual conduct with a minor for pupils in grades seven, eight, nine, ten, eleven, and twelve.”⁹⁵ Arizona’s sex education curriculum is outlined in administrative regulations and emphasizes abstinence from sexual intercourse, the consequences of STDs, and the emotional and psychological consequences of preadolescent and adolescent sexual intercourse and pregnancy. Arizona also prescribes sex education to include information pertaining to the financial responsibilities of parenting and legal liabilities related to sexual intercourse with a minor.⁹⁶

Many states include instruction about HIV/AIDS as part of their sex education curriculum. New Mexico requires HIV/AIDS instruction to at least include: (a) definition of HIV and AIDS; (b) the symptoms and prognosis of HIV/AIDS; (c) ways HIV/AIDS are spread; (d) ways to reduce the risks of contracting HIV/AIDS, stressing abstinence; (e) societal implications and resources for medical care.⁹⁷ Rhode Island law defines the state’s AIDS curricular requirements to include giving accurate information on the transmission of AIDS with an emphasis on prevention through sexual abstinence.⁹⁸ For a complete list of the type of curriculum opt-outs allowed by each state, see Table 1.

92. *Id.* § 170.0151.1(2).

93. *Id.* § 170.015.1(4).

94. *Id.* § 170.015.1(6).

95. ARIZ. REV. STAT. ANN. § 15-10-2.3 (2010).

96. ARIZ. ADMIN. CODE § R7-2-303, 3(B) (2010).

97. N.M. CODE R. § 6.12.2.10(C)(3) (LexisNexis 2010).

98. R.I. GEN. LAWS ANN. § 16-22-17(A) (West 2010).

A. *Classification of States Based on Opt-Out Statutes*

Based on the review of statutes, administrative codes, and education codes, each of the fifty states and the District of Columbia can be classified into one of three categories of opt-out provisions: *non-existent*, *restrictive*, and *permissive* (see Table 2). In this study, “non-existent,” was defined to mean a state with no statutory or regulatory curriculum exemption provision. Restrictive states were defined as those states that allow parents to opt out of no more than two areas of the school curriculum. Permissive states were defined as states that allow parents to opt out of at least three areas of the curriculum or that require parents’ advance permission before their children could be exposed to some part of the curriculum.

Table 1
Opt-Out Statutes by Curricular Type and by State

STATE	Opt-out statutes	If yes, type of opt-outs				
		S	H	A	P	D
Alabama	YES	X		X		
Alaska	No					
Arizona	YES	X	X	X	X	
Arkansas	YES				X	
California	YES	X	X	X		X
Colorado	YES	X	X			
Connecticut	YES	X	X	X		
Delaware	No					
D.C.	YES	X				
Florida	YES	X	X	X		X
Georgia	YES	X	X	X		
Hawaii	No					
Idaho	YES	X				
Illinois	YES	X	X	X		X
Indiana	YES		X	X		
Iowa	YES		X		X	

STATE	Opt-out statutes	S	H	A	P	D
Kansas	YES	X		X		
Kentucky	No					
Louisiana	YES	X		X		
Maine	YES	X		X		X
Maryland	YES	X		X		X
Massachusetts	YES	X				X
Michigan	YES	X	X			
Minnesota	YES	X	X	X	X	
Mississippi	YES	X				
Missouri	YES	X		X		
Montana	YES	X		X		
Nebraska	No					
Nevada	YES	X		X		
New Hampshire	YES	X	X	X		
New Jersey	YES	X	X	X		
New Mexico	YES	X				
New York	YES			X		
North Carolina	YES	X		X		
North Dakota	No					
Ohio ¹	YES			X		
Oklahoma	YES	X		X		
Oregon	YES	X		X		
Pennsylvania	YES			X		
Rhode Island	YES	X	X	X		
South Carolina	YES	X	X			X
South Dakota	No					
Tennessee	YES	X	X	X		
Texas	YES	X	X	X	X	
Utah	YES	X		X		

STATE	Opt-out	S	H	A	P	D
	statutes					
Vermont	YES			X		
Virginia	YES	X		X		
Washington	YES	X		X	X	
West Virginia	YES			X		
Wisconsin	YES	X	X	X		
Wyoming	YES			X		

Note. ¹Ohio permits three other curriculum opt-outs in areas of venereal disease, CPR, and grades K-6 personal safety and assault prevention instruction.

S=sex or family life education. H=health education. A=HIV/AIDS instruction. P=P.E. D=animal dissection.

Table 2
State Classifications by Number of Opt-out Statutes

STATE	Opt-out No.			Opt- in	Status
	0	1- 2	>2		
Alabama		X			R
Alaska	X				N
Arizona			X		P
Arkansas		X			R
California			X		P
Colorado		X		X	P
Connecticut			X		P
Delaware	X				N
D. C.		X			R
Florida			X		P
Georgia			X		P
Hawaii	X				N
Idaho		X			R
Illinois			X		P
Indiana		X			R

STATE	0	1- 2	>2	Opt- in	Status
Iowa		X			R
Kansas		X			R
Kentucky	X				N
Louisiana		X			R
Maine			X		P
Maryland			X	X	P
Massachusetts		X			R
Michigan		X		X	P
Minnesota			X		P
Mississippi		X		X	P
Missouri		X			R
Montana		X			R
Nebraska	X				N
Nevada		X		X	P
New Hampshire			X		P
New Jersey			X		P
New Mexico		X			R
New York		X			R
North Carolina		X		X	P
North Dakota	X				N
Ohio			X		P
Oklahoma		X			R
Oregon			X		P
Pennsylvania		X			R
Rhode Island			X		P
South Carolina			X		P
South Dakota	X				N
Tennessee			X	X	P

STATE	1-			Opt- in	Status
	0	2	>2		
Texas			X		P
Utah		X		X	P
Vermont		X			R
Virginia			X		P
Washington			X		P
West Virginia		X			R
Wisconsin			X		P
Wyoming		X			R

Note. N=Non-existent (state has no opt-out statute); R=Restrictive(state has 1 or 2 opt-out statutes, e.g., health education); P=Permissive(state has more than 2 opt-out statutes or has opt-in statute that requires prior parent permission for some curricula).

1. States with non-existent curriculum opt-out statutes for parents

Seven states have no curriculum opt-out statute or administration regulation allowing parents to exempt their children from some part of the curriculum. These states are: Alaska, Delaware, Hawaii, Kentucky, Nebraska, North Dakota, and South Dakota. While the seven non-existent states do not have specific opt-out statutes, it seems probable that most of these states allow local school boards to adopt local policies that permit parents to opt their children out of some curricular units, particularly sex education.

2. States with restrictive or limited curriculum opt-out statutes for parents

Seventeen states and the District of Columbia are classified as restrictive states (see Table 2). Restrictive states are those states which have granted parents limited statutory rights to exercise curriculum opt-out provisions in public schools. In this study, for a state to be placed in the restrictive category, statutory rights for curriculum opt-outs must be limited to one or two courses or topics only. The restrictive states are Alabama, Arkansas, District of Columbia, Idaho, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Montana,

New Mexico, New York, Oklahoma, Pennsylvania, Vermont, West Virginia, and Wyoming.

a. Opt-outs for sex education. When surveying the statutory rights for opt-outs within restrictive states, several subgroups were identified. The first and largest subgroup consists of ten restrictive states that allow curriculum opt-outs for sex education. The ten states are Alabama, District of Columbia, Idaho, Kansas, Louisiana, Massachusetts, Missouri, Montana, New Mexico, and Oklahoma. Three of these states in the first subgroup, District of Columbia, Idaho, and Montana, allow only sex education opt-outs. A statute or administrative regulation in this subgroup might have been written without specific procedures to obtain an opt-out, such as that found in Louisiana's statute, which reads: "Any child may be excused from receiving instruction in 'sex education' at the option and discretion of his parent or guardian."⁹⁹

Idaho's statute, titled *Excusing Children from Instruction in Sex Education*, provides very specific guidelines by stating:

Any parent or legal guardian who wishes to have his child excused from any planned instruction in sex education may do so upon filing a written request to the school district board of trustees and the board of trustees shall make available the appropriate forms for such request. Alternative educational endeavors shall be provided for those excused.¹⁰⁰

A representative sex education opt-out statute, limited only to sex education, is found in Massachusetts law, which requires public schools to provide parents the opportunity to excuse their child from sex education curriculum through written notification directed to the school principal. The statute stresses that "no child so exempted shall be penalized by reason of such exemption."¹⁰¹

On the other hand, one of the more distinctive sex education opt-out provisions is found in a position statement issued by the Montana Board of Public Education, which reads:

Any parent who believes their child is not developmentally ready for the particular curriculum content information adopted by the local district may ask to have their individual child taken out of class when the information in question is

99. LA. REV. STAT. ANN. § 17:281(D) (2010).

100. IDAHO CODE ANN. § 33-1611 (2010).

101. MASS. GEN. LAWS ANN. ch. 71, § 32a (West 2010).

presented. This may be an alternative offered to parents by local schools when human sexuality education or sensitive topics are presented. This allows the parent of an individual student the opportunity to say “Do not teach this to my child”; it does not give that parent the right to say “Do not teach this to any child.”¹⁰²

b. Opt-outs for sex education and AIDS instruction. Six restrictive states—Alabama, Kansas, Louisiana, Missouri, Montana, and Oklahoma—form the second subgroup; each has an opt-out statute for the combination of sex education and AIDS instruction. For example, Alabama law allows “any child whose parent presents to the school principal a signed statement . . . of such subjects that conflict with the religious teachings of his church [to] be exempt from such instruction.”¹⁰³ A Missouri statute requires that the school district notify each parent of “the basic content of the district’s or school’s human sexuality instruction to be provided to each student . . . and the parent’s right to remove the student from any part.”¹⁰⁴ The Missouri law also includes the instructional requirement that districts provide the latest information about STDs including HIV and AIDS.¹⁰⁵ Another example that covers both sex education and HIV/AIDS instruction is found in Oklahoma’s statutes. Oklahoma law provides that, “[n]o student shall be required to participate in AIDS prevention education if a parent or guardian of the student objects in writing to such participation,”¹⁰⁶ and that, “[n]o student shall be required to participate in a sex education class or program which discusses sexual behavior or attitudes if a parent or guardian of the student objects in writing to such participation.”¹⁰⁷

c. Opt-outs for HIV/AIDS instruction only. The third subgroup is comprised of New York,¹⁰⁸ West Virginia,¹⁰⁹ and

102. MONTANA OFFICE OF PUBLIC INSTRUCTION, CURRICULUM GUIDELINES FOR HIV/AIDS EDUCATION 26 (1999), available at <http://opi.mt.gov/pdf/HIVED/CurricPlanGuide.pdf>.

103. ALA. CODE § 16-41-6 (2010).

104. MO. REV. STAT. § 170.015.1 (2010).

105. *Id.*

106. OKLA. STAT. tit. 70, § 11-103.3(C) (2010).

107. *Id.* § 11-105.1.

108. N.Y. COMM’R REG. 135.3(2)(i).

109. W. VA. CODE § 18-2-9 (2011).

Wyoming,¹¹⁰ which possess statutes or regulations that only allow limited opt-outs in HIV/AIDS instruction and do not permit general sex education opt-outs. For example, New York Commissioner of Education Regulation title 8, section 135.3(2)(i), states:

No pupil shall be required to receive instruction concerning the methods of prevention of AIDS if the parent or legal guardian of such pupil has filed with the principal of the school which the pupil attends a written request that the pupil not participate in such instruction, with an assurance that the pupil will receive such instruction at home.

In a 1996 administrative appeal, the New York Commissioner of Education made clear that New York administration regulations only permit parents to exempt their children from those parts of AIDS-related instruction “concerning the methods of prevention of AIDS” and does not allow a complete opt-out of AIDS-related instruction.¹¹¹ In *Appeal of Revered Freelon Kerry*, Reverend Kerry sought an exemption for his daughters from Watertown City School District’s entire AIDS curriculum and child sexual abuse training.¹¹² Denied at the local level, Kerry appealed to the New York State’s Commissioner of Education.¹¹³ The Commissioner ruled against Kerry, concluding that Watertown City School District had correctly exempted Kerry’s children from only the “methods of prevention” portion of the AIDS curriculum, in compliance with the AIDS opt-out provision.¹¹⁴ In addition, the Commissioner ruled that the district correctly refused to exempt the children from either the remaining portions of the AIDS curriculum or the child sexual abuse program on the grounds that it lacked the authority to waive these instructional requirements.¹¹⁵ “The programs to which petitioner objects are required by State regulations that

110. HIV/AIDS MODEL POLICY FOR WYOMING PUBLIC SCHOOLS (Sept. 1998) [hereinafter HIV/AIDS MODEL POLICY] (on file with authors).

111. Rev. Freelon W. Kerry, N.Y. Comm’r of Educ., Decision No. 13,562 (March 8, 1996) (administrative appeal).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

provide no exceptions other than the exemption outlined above," the Commissioner ruled.¹¹⁶

Within the third subgroup, the policies of West Virginia and Wyoming, dealing with parental opt-outs of HIV/AIDS curriculum and materials, are very similar in scope to New York's regulation. The West Virginia regulation requires "an opportunity shall be afforded to the parent or guardian of a child subject to instruction in the prevention, transmission, and spread of AIDS" to "exempt such child from participation."¹¹⁷ Similarly, the Wyoming policy also allows parents, if they submit a written request, to have their "child not receive instruction in specific HIV prevention topics at school."¹¹⁸ While the three states of New York, West Virginia, and Wyoming permit HIV/AIDS curriculum opt-outs, parental rights are very limited because the removal from instruction is only specified in the area of AIDS prevention.

d. Opt-outs for AIDS and other diseases. Pennsylvania and Vermont have a similar blend of curriculum opt-outs and form the fourth subgroup. Pennsylvania allows opt-outs for curriculum addressing AIDS and Vermont allows opt-outs for communicable diseases, including AIDS. Pennsylvania Code section 4.29(c) (an administrative regulation) designates, "A school entity shall excuse a pupil from HIV/AIDS instruction when the instruction conflicts with the religious beliefs or principles of the pupil or parent or guardian of the pupil and when excusal is requested in writing." Vermont allows a parent to excuse their children from instruction about disease (defined to include "HIV infection" and "other sexually transmitted diseases")¹¹⁹ when "the teaching of disease, its symptoms, development and treatment, conflicts with the parent's religious convictions."¹²⁰ The other curriculum opt-out allowed by both Pennsylvania and Vermont is for animal dissection. Animal dissection opt-out statutes, found in fourteen states including Pennsylvania and Vermont, are discussed later in this chapter.

e. Other restrictive states. Some restrictive states do not have any consistent characteristics that assist grouping with

116. *Id.*

117. 50 W. Va. Bd. of Educ. Pol. § 2422.45.

118. HIV/AIDS MODEL POLICY, *supra* note 100.

119. VT. STAT. ANN. tit 16, § 134 (2010).

120. *Id.*

other states. This final subgroup of restrictive states consists of exclusive combinations of statutes. For example, Iowa is the only restrictive state allowing opt-outs for the combination of both physical education (P.E.) and health education,¹²¹ while P.E. is the only course students may be exempted from in Arkansas.¹²² Iowa's statute allows students to be exempt from "either physical education or health courses" if the "course conflicts with the pupil's religious belief."¹²³ Arkansas law allows parents to remove their children from P.E. classes if it "will violate the student's religious beliefs and would not be merely a matter of personal objection."¹²⁴ In order for the opt-out to be viable, the parent or student "must be members of a recognized religious faith that objects to physical education as part of its official doctrine or creed."¹²⁵ The last variation of an opt-out combination occurs in the State of Indiana with the subjects of health education and hygiene. Under Indiana law, hygiene and sanitary science instruction must "explain the ways that dangerous communicable diseases are spread and the sanitary methods for disease prevention and restriction."¹²⁶ A student may be excused if his parent "objects in writing, to health and hygiene courses because the courses conflict with the student's religious teachings."¹²⁷

The most common statutory right for parental opt-outs, occurring in ten of the eighteen restrictive states, is for sex education. To be classified as a restrictive state, parents are allowed either one curriculum opt-out or a combination of two curriculum opt-outs. Most of the restrictive states, fourteen of the eighteen, allow curriculum opt-outs in two curricular areas. Arkansas, District of Columbia, Idaho, and West Virginia are the restrictive jurisdictions that statutorily permit an opt-out in only one curriculum area.

121. IOWA CODE § 256.11 (2010).

122. ARK. CODE ANN. § 6-16-132 (2011).

123. IOWA CODE § 256.11(6) (2010).

124. ARK. CODE ANN. § 6-16-132 (b)(4)(B)(ii)(a)(b).

125. *Id.*

126. IND. CODE § 20-30-5-9 (a) (2011).

127. *Id.* § 20-30-5-9 (d).

3. *States with Permissive or Broad Curriculum Opt-Out Statutes for Parents*

The last classification of states is *permissive*, which constitutes a much broader stance of parental rights using curriculum opt-outs in public schools. In this study, twenty-six *permissive* states have granted parents broad statutory rights to exercise curriculum opt-out provisions in public schools (see Table 2). States labeled in the *permissive* category must have statutory rights for curriculum opt-outs that meet one or both of the following criteria: (1) more than two courses or topics are allowed for opt-out, and/or (2) opt-ins required before students can even enroll in a course. Permissive states are Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Maine, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. As with restrictive states, several subgroups can be identified after surveying the statutory rights for opt-outs within permissive states.

a. Opt-outs for sex education. The first and largest subgroup of permissive states consists of twenty-five states, all of which, with the exception of Ohio, allow opt-out provisions for sex education. Unlike many of the restrictive states, sex education opt-outs are just one of several exemptions allowed by most permissive states. One of the more intriguing statutes in this subgroup is a California opt-out statute that acknowledges that it is the parents' responsibility for "imparting values regarding human sexuality to their children" as follows:

It is the intent of the Legislature to encourage pupils to communicate with their parents or guardians about human sexuality and supervise their children's education on these subjects. The Legislature intends to create a streamlined process to make it easier for parents and guardians to review materials and evaluation tools related to comprehensive sexual health education and HIV/AIDS prevention education, and, if they wish, to excuse their children from participation in all or part of that instruction or evaluation. The Legislature recognizes that while parents and guardians overwhelmingly support medically accurate, comprehensive sex education, parents and guardians have the ultimate

responsibility for imparting values regarding human sexuality to their children.¹²⁸

While California's code is unusual due to its parental focus, Washington's opt-out statute addresses sex education opt-outs without the parental focus and is representative of many permissive states. Washington's statute is composed of four common components: (1) "any parent who wishes to have his or her child excused from instruction in sexual health education may do so filing a written request"; (2) the request must be filed "with school district board of directors or its designee, or the principal of the school"; (3) "any parent may review the sex education curriculum"; and (4) "students may not be penalized as a result of being excused from sex education curriculum."¹²⁹ These four components are common to most permissive states.

b. Ohio. As previously mentioned, Ohio is the only state that does not specifically allow opt-outs for sex education curriculum. Ohio forms the second and smallest subgroup of permissive states. While Ohio does not allow sex education opt-outs, the state requires public schools to grant opt-outs in three curricular areas, not found in any other states: "instruction in venereal disease education," "personal safety and assault prevention" in kindergarten through sixth grade, and "cardiopulmonary resuscitation (CPR)."¹³⁰ All Ohio curricular exemptions require a "written request of the student's parent or guardian."¹³¹

c. Opt-outs for HIV/AIDS instruction. Two other large subgroups deal with HIV/AIDS and health curricula. The third permissive subgroup, consisting of twenty-two of the twenty-six permissive states, allows opt-outs for HIV/AIDS instruction. However, Colorado, Michigan, Mississippi, and South Carolina do not specifically mention HIV/AIDS instruction in their statutes. Florida's 2009 Statute is representative of the majority of permissive states' statutes because it explicitly mentions but encompasses more than HIV/AIDS instruction, as follows:

Any student whose parent makes written request to the school principal shall be exempted from the teaching of

128. CAL. EDUC. CODE § 51937 (West 2010).

129. WASH. REV. CODE § 28A.300.475(6) (2011).

130. OHIO REV. CODE ANN. § 3313.60(5)(c)(d), (8)(West 2011).

131. *Id.*

reproductive health or any disease, including HIV/AIDS, its symptoms, development, and treatment. A student so exempted may not be penalized by reason of that exemption. Course descriptions for comprehensive health education shall not interfere with the local determination of appropriate curriculum which reflects local values and concerns.¹³²

d. Opt-outs for all health education. The fourth subgroup, consisting of seventeen of the twenty-six permissive states, provides opt-outs for health courses or comprehensive health education. The states of Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Michigan, Minnesota, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin allow parents to remove their children from any or all parts of health classes. A prototypical statute for health curriculum opt-outs, similar to the sex education statutes, is found in South Carolina's opt-out law:

A public school principal, upon receipt of a statement signed by a student's parent or legal guardian stating that participation by the student in the health education program conflicts with the family's beliefs, shall exempt that student from any portion or all of the units on reproductive health, family life, and pregnancy prevention where any conflicts occur. No student may be penalized as a result of an exemption. School districts shall use procedures to ensure that students exempted from the program by their parents or guardians are not embarrassed by the exemption.¹³³

New Jersey's opt-out statute, more simplified and generic than South Carolina's code, permits parents to excuse their children from "any part of instruction in health, family life education or sex education that is in conflict with his conscience or sincerely held moral or religious beliefs."¹³⁴

e. Opt-ins. The seven permissive states of Colorado,¹³⁵ Maryland,¹³⁶ Michigan,¹³⁷ Mississippi,¹³⁷ Nevada,¹³⁸ North Carolina,¹³⁹ and Utah¹⁴⁰ form the fifth subgroup with statutes

132. FLA. STAT. § 1003.42(3) (2010).

133. S.C. CODE ANN. § 59-32-50 (2010).

134. N.J. STAT. ANN. § 18A:35-4.7 (West 2010).

135. COLO. REV. STAT. § 22-25-104(6)(b) (2010).

136. MICH. ADMIN. CODE r. 380.1507(3) (2010).

137. MISS. CODE ANN. § 37-13-173 (2010).

138. NEV. REV. STAT. § 389.065 (2010).

139. N.C. GEN. STAT. § 115C-8(d)(7) (2010).

140. UTAH ADMIN. RULE r. 277-474-1 (2011).

that mandate curriculum opt-ins. An opt-in is different from an opt-out and empowers parents dealing with a controversial public school curriculum because it requires prior approval by parents before their children may be enrolled in a specific course. This mechanism reduces the possibility that their children might come into contact with objectionable subject matter. States requiring opt-ins are categorized as permissive because opt-ins grant very deliberate and extensive parental rights when dealing with curricula. In all eight of the opt-in states, parents must give prior written consent for students to participate in sex education courses. A public schools' receipt of prior written approval by parents is a critical component of opt-ins. For example, Utah's opt-in statute mandates that "students may not participate in human sexuality instruction or instructional programs . . . without prior affirmative parent/guardian response on file."¹⁴¹

The advance opportunity for parents to receive "an overview of the topics and materials"¹⁴² and even the "prior opportunity to review materials used in the course"¹⁴³ are key components of opt-ins. Colorado and Michigan statutes exemplify opt-in guidelines. Colorado's statute states:

School officials shall receive prior written approval from a parent or guardian before his or her child may participate in any program discussing or teaching sexuality and human reproduction. Parents must receive, with the written permission slip, an overview of the topics and materials to be presented in the curriculum.¹⁴⁴

Michigan provides for pupil opt-ins with an administrative regulation which states:

A pupil shall not be enrolled in a class in which the subjects of family planning or reproductive health are discussed unless the pupil's parent or guardian is notified in advance of the course and the content of the course, is given a prior opportunity to review the materials to be used in the course, and is notified in advance of his or her right to have the pupil

141. *Id.*

142. COLO. REV. STAT. § 22-25-104(6)(b) (2010).

143. MICH. ADMIN. CODE r. 380.1507(3) (2010).

144. COLO. REV. STAT. § 22-25-104 (6)(b).

excused from the class. The state board shall determine the form and content of the notice required in this subsection.¹⁴⁵

While six of the seven opt-in states, excluding Michigan, only permit opt-ins or opt-outs for not more than two courses or curricular topics, the criterion used for restrictive states, all opt-in states are classified as permissive states. For this study's purpose, any state that implements curriculum opt-ins overrides the number of courses allowed for opt-outs due to the empowerment effect for parents. This broad parental right to control whether a child even enrolls in a certain course, or opting in, warrants classification of an opt-in state as permissive.

In 2009, a bill was introduced in the Tennessee legislature that would “[require] local education agencies (LEAs) to obtain written permission from parents or guardians for students to take family life courses.”¹⁴⁶ If this legislation is enacted, Tennessee would become the eighth state to require parents to opt in to instruction on sexual topics. Currently, Tennessee law makes the teaching of sex education a Class C misdemeanor unless the course is authorized by the State Board of Education and the local school board and teacher is deemed qualified by the local school board.¹⁴⁷

f. Opt-outs for physical education. South Carolina and Washington form the sixth subgroup of permissive states by allowing opt-outs specifically for physical education. Both states, while emphasizing the importance of being “physically fit” in their statutes, still allow exemptions based on religious objections. For example, South Carolina law provides:

The parent and student must show that the student’s attending physical education classes will violate their religious beliefs and would not be merely a matter of personal objection; and the parent or student must be members of a recognized religious faith that objects to physical education as part of its official doctrine or creed.¹⁴⁸

The State of Washington addresses its P.E. opt-out by providing flexibility to parents to allow their children to be “excused . . . on account of physical disability, employment, or

145. MICH. ADMIN. CODE r. 380.1507(3).

146. H.R. 0218, 106th Gen. Assem. Reg. Sess. (Tenn. 2009).

147. TENN. CODE ANN. § 49-6-1005 (2010).

148. S.C. CODE ANN. § 59-29-80(B)(2)(a)–(b) (2010).

religious belief, or because of participation in directed athletics or military science and tactics or for other good cause.”¹⁴⁹

g. Opt-outs for any class. Three permissive states, Arizona, Minnesota, and Texas, form the last subgroup. These states are the most permissive of all because they have the broadest curriculum opt-out statutes for parents. These statutes grant extensive statutory rights to parents, permitting opt-outs for *any* class, school activity, and instructional materials in which parents object. There are no specific courses or topics listed such as sex education, comprehensive health education, HIV/AIDS instruction, P.E., animal dissection as seen in all other statutes. Arizona’s opt-out law mandates school districts to develop guidelines “by which parents who object to any learning material or activity on the basis it is harmful may withdraw their children from the activity or from the class or program.”¹⁵⁰ Minnesota’s opt-out law is very similar because it also ensures parental rights to review instructional materials, and “if the parent, guardian, or adult student objects to the content, to make reasonable arrangements with school personnel for alternative instruction.”¹⁵¹

Texas may have the most permissive opt-out statute in the U.S. Although federal case law does not generally support parental rights in public education, Texas statutory law provides significant support for parents. The Texas Education Code sets forth the mission and objectives of Texas public schools. The very first objective listed in this section of the statute declares, “Parents will be full partners with educators in the education of their children.”¹⁵² Texas Education Code Chapter 26 is another entire chapter dedicated solely to “Parent Rights and Responsibilities.” In Chapter 26 of the Texas Education Code, parents’ rights are discussed and include procedures to appeal denied complaints, access to student records, access to teaching materials, requests for public information, student directory information, and exemption from instruction. Section 26.010 of the Texas Education Code is the curriculum opt-out provision for Texas. It allows parents to deliver a written request to the teacher of

149. WASH. REV. CODE § 28A.230.050 (2010).

150. ARIZ. REV. STAT. ANN. § 15-10-2.3 (2010).

151. MINN. STAT. § 120B.20 (2010).

152. TEX. EDUC. CODE ANN. § 4.001 (West 2010).

the child to remove them from objectionable instruction. This broad opt-out provision asserts:

(a) A parent is entitled to remove the parent's child temporarily from a class or other school activity that conflicts with the parent's religious or moral beliefs if the parent presents or delivers to the teacher of the parent's child a written statement authorizing the removal of the child from the class or other school activity. A parent is not entitled to remove the parent's child from a class or other school activity to avoid a test or to prevent the child from taking a subject for an entire semester. (b) This section does not exempt a child from satisfying grade level or graduation requirements in a manner acceptable to the school district and the agency.¹⁵³

The Texas statute recognizes both religious and moral beliefs as grounds for exempting students from instruction. While section 26.010 grants broad permissive rights to parents, in regards to unlimited curricular courses or topics, it also limits parents from exempting their child to "avoid a test," "taking a subject for an entire semester," and "satisfying grade level or graduation requirements."¹⁵⁴

4. *Animal dissection opt-outs*

Animal dissection opt-outs are currently provided by statute by fourteen states. California, Florida, Illinois, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia give statutory rights for animal dissection opt-outs. Four other states, Maine, Maryland, Massachusetts, and New Mexico, have department of education policies that allow students to object to dissection and request an alternative assignment. These opt-outs usually require prior notification from the school to parents if animal dissection is part of its curriculum, including procedures on choosing alternatives without penalty.

Representative of animal dissection opt-out statutes is Oregon's dissection opt-out law which states:

(1) A K-12 public school student may refuse to dissect any vertebrate or invertebrate animal or the parent or legal guardian of a K-12 public school student may refuse to allow the student to dissect any vertebrate or invertebrate animal.

153. *Id.* § 26.010.

154. *Id.*

(2) A school district that includes dissection as part of its coursework shall permit students to demonstrate competency in the coursework through alternative materials or methods of learning that do not include the dissection of animals. These alternative materials and methods may include but are not limited to:

- (a) Videotapes, DVDs and CD-ROMs;
- (b) Models;
- (c) Films;
- (d) Books;
- (e) Computer programs;
- (f) Clay modeling; and
- (g) Transparencies.¹⁵⁵

New Mexico's dissection opt-out policy (set forth in an administrative regulation rather than a statute) is similar to Oregon's dissection opt-out law. The New Mexico dissection opt-out policy mentions "alternative techniques" to dissections such as "using computer two-dimensional or three-dimensional simulations, videotape or videodisk simulations, take-apart anatomical models, photographs, or anatomical atlases."¹⁵⁶ Alternative to animal dissections are increasing. In March 2010, was introduced in the Connecticut legislature that would "prohibit a school district from requiring any student who raises a conscientious objection to dissection."¹⁵⁷

State laws allowing families to opt out of classroom activities involving animal dissection are not directly related to opt out laws that allow parents to shield their children from instruction on religious topics. Nevertheless, the fact that fourteen states allow families to withdraw their children from instruction on animal dissection demonstrates that state legislatures are willing to accommodate families that have reasonable objections to certain topics in the school curriculum.

155. OR. REV. STAT. § 337.300 (2010).

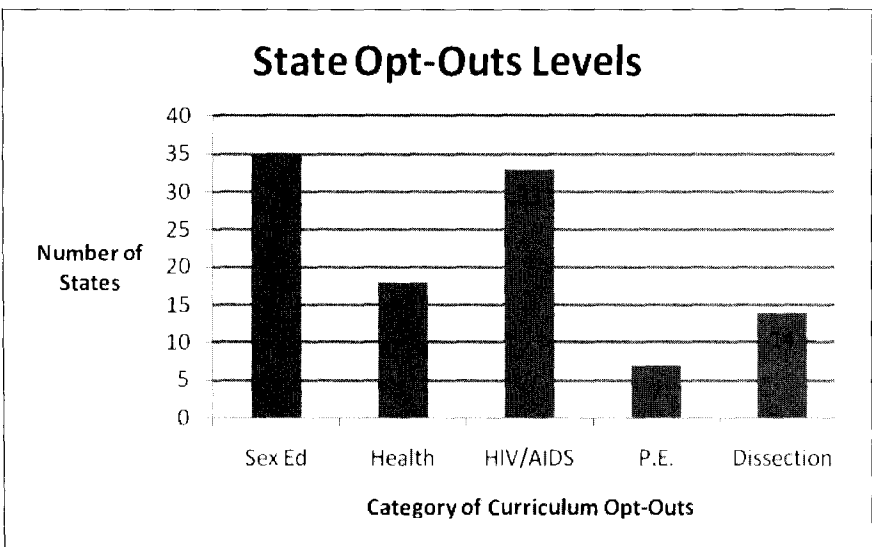
156. N.M. CODE R. § 6.29.1.11(B)(8) (LexisNexis 2010).

157. H.R. 5223, Gen. Assem., Reg. Sess. (Conn. 2010).

5. Summary of state curriculum opt-out statutes and regulations

As discussed above, many states provide statutory rights allowing parents to opt-out of all or part of courses such as sex education and family life education. As shown in Figure 1, the most common curriculum opt-out is for sex education, allowed by thirty-five states. Eight states are even more parent-friendly by prohibiting public schools from teaching sex education to children unless the parents affirmatively give their permission. An opt-in statutory or regulatory provision requires prior approval by parents before their children may be enrolled in a specific course, reducing the likelihood that the parents' children might be taught objectionable subject matter. As Figure 1 exhibits, thirty-three states have statutes that allow opt-outs from HIV/AIDS instruction making it the second largest curricular category. Twenty-seven states, some restrictive and mostly permissive, allow opt-outs in their statutes for both sex education and HIV/AIDS curricula. The smallest curricular category for opt-outs is physical education, allowed in seven states; and it seems probable that legislatures in at least some of these seven states associated physical education with sexuality—perhaps believing that physical education classes is where sex education is most often taught.

Figure 1. State opt-out levels by subject area.



A few states, such as New York and Ohio, provide some distinctive opt-out statutes or regulations. For instance, in New York, a parent may only opt-out of instruction that covers the prevention of AIDS. In Ohio, there are statutory rights given to parents for opt-outs from courses not seen in other states such as CPR, and personal safety and assault prevention. The procedural process is uniform with thirty-one states specifically requiring a written parent note in their opt-out statutes. Eighteen states give authority to the local education agency to develop the procedure for curriculum opt-outs. Specific statutory and regulatory provisions are set forth in the appendix.

Texas may have the most permissive curriculum opt-out law in the U.S.¹⁵⁸ Since the adoption of the statute in 1995, there has been no published litigation over opt-outs in Texas. Apparently, the state's curriculum opt-out law has created no legal problems for Texas public schools in spite of its permissiveness. In fact, having such a permissive law may help Texas school administrators defuse tensions when they are confronted by parents objecting to some curricular element, whether sex education, evolution, HIV/AIDS instruction, animal dissection, the celebration of Halloween, etc. The Texas curriculum opt-out law recognizes that parents are a critical part of the educational process and that it is important to value, within limits, their input into curricular decisions in public schools. The Texas curriculum opt-out statute and all of the other states' opt-out statutes are practical and sensible ways to help both parents and school administrators.

IV. SEX EDUCATION LAWS AND SEXUAL ORIENTATION

A number of states include fairly specific directions to school districts about the manner in which sex education must be taught. In particular, several states direct that sex education should emphasize abstinence from sex prior to marriage and that sexual relations should only occur inside of marriage.¹⁵⁹ In Florida, for example, school districts are

158. TEX. EDUC. CODE ANN. § 26.010 (West 2011).

159. *See, e.g.*, IND. CODE § 20-30-5-13(3) (2011) (sex education should include "instruction that the best way to avoid sexually transmitted diseases and other associated health problems is to establish a mutually faithful monogamous relationship in the context of marriage").

required to “[t]each abstinence from sexuality outside of marriage as the expected standard for all school-age students” and to emphasize the benefits of “monogamous *heterosexual* marriage.”¹⁶⁰ In other states, sex-education laws do not define marriage to preclude same-sex marriage, but it seems likely that state legislatures intend that references to marriage in sex education statutes mean heterosexual marriage.

In a few states, sex education statutes specifically bar any positive presentation of homosexuality. Arizona, for example prohibits school districts from engaging in any instruction that “[p]romotes a homosexual lifestyle,” “[p]ortrays homosexuality as a positive alternative life-style,” or “[s]uggests that some methods of sex are safe methods of homosexual sex.”¹⁶¹ Arizona law also prohibits sex-education instruction from including any teaching about “abnormal, deviate or unusual sexual acts or practices.”¹⁶² In Arizona, sex education is required to “promote honor and respect for monogamous heterosexual marriage.”¹⁶³ Louisiana law specifies that “[n]o sex education course offered in the public schools of the state shall utilize any sexually explicit materials depicting male or female homosexual activity.”¹⁶⁴ In South Carolina, instruction in health education “may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.”¹⁶⁵ In Utah, health-education materials may not advocate homosexuality¹⁶⁶ or sexual activity outside marriage.¹⁶⁷ And in Alabama, school districts’ sex education programs are required by law to emphasize “that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of most states.”¹⁶⁸

160. FLA. STAT. § 1003.46(2)(a) (2010) (emphasis added).

161. ARIZ. REV. STAT. ANN. § 15-716(C)(1)–(3) (2011).

162. ARIZ. ADMIN. CODE § R7-2-303(A)(3)(a) (2009).

163. *Id.* § R7-2-303(A)(3)(b)(v).

164. LA. REV. STAT. ANN. § 17:281A(3) (2010).

165. S.C. CODE ANN. § 59-32-30(A)(5)(2010).

166. UTAH CODE ANN. § 53A-12-101(1)(b)(iii) (A)(II) (West 2010).

167. *Id.* § 53A-12-101(1)(b)(iii)(A)(IV).

168. ALA. CODE § 16-40A-2(c)(8) (2010).

V. A MODEL STATUTE TO PERMIT PARENTS TO EXEMPT THEIR CHILDREN FROM INSTRUCTION ON SEXUAL ORIENTATION

As *Brown v. Hot, Sexy and Safer, Inc.*¹⁶⁹ and *Parker v. Hurley*¹⁷⁰ illustrate, parents may not be able to effectively shield their children from objectionable instruction or curricular activities even if they live in a state that has a curriculum opt-out statute. Both cases took place in Massachusetts, which has a parent opt-out law allowing parents to shield their children from instruction on sexual topics in the public schools. Yet in both cases, parents whose children were exposed to sexual topics that were objectionable to them found they had no legal remedy in a federal court. To provide parents with better legal protection from having their children exposed to objectionable instruction on sexual topics, an opt-in law—requiring schools to get parents' affirmative written permission before offering any instruction or curricular materials on sexual topics—is preferable.

The following proposed statute, modeled after the Colorado sex-education opt-in law,¹⁷¹ is offered as a model:

(1) School officials shall receive prior written approval from a parent or guardian before his or her child may participate in or be exposed to any program, instructional activity, or instructional material that discusses human sexuality, human reproduction, sexual orientation, AIDS/HIV, or sexually transmitted diseases, or non-heterosexual marriage. School officials must provide parents or guardians with a written overview of all instruction and materials that will be presented to students that pertain to the subjects listed in this subsection at least one week in advance of presenting the instruction or materials to students.

(2) If school authorities do not receive written permission from a parent or guardian allowing the parent's child to participate in a program or instructional activity described in subsection (1), the child must be excused from attendance without any academic penalty.

(3) The state board of education shall determine the form and content of the notice required in this section..

169. 68 F.3d 525 (1st Cir. 1995).

170. 514 F.3d 87 (1st Cir. 2008).

171. COLO. REV. STAT. § 22-25-104(6)(b) (2010).

(4) Willful violation of this section by any public school employee or school board member constitutes a Class C misdemeanor.

(5) A parent who prevails in litigation to enforce the rights set forth in this section shall receive reasonable attorney fees.

Families who are opposed to same-sex marriage on religious grounds need strong statutory protection to ensure that their children are not exposed to notions of sexuality and marriage that are offensive to their religious beliefs—especially in states that have recognized same-sex marriage as a legal right. Of course, no statute designed to give families the legal right to shield their children from objectionable sexual topics in the school curriculum will be effective if courts refuse to enforce it. As we saw in *Brown and Parker*, the First Circuit gave families no relief when they sought a remedy to having their children exposed to sexual topics they found objectionable on religious grounds even though the state in which they resided—Massachusetts—had a curriculum opt-out law on the books.

This proposed model statute cannot force a court to enforce the rights protected in the statute, but it does contain elements that will strengthen parents' position. First, the statute is an opt-in statute rather than an opt-out statute, which forces school officials to get written permission from parents before exposing children to programs, instructional materials, instructional activity that addresses sexuality. Thus, the onus is on school officials to get parents' permission before exposing children to sexual themes. The assumption behind the statute is that parents object to exposing their children to sexual topics in school unless they indicate in writing that they do not object.

Second, the statute contains a criminal penalty, which makes it a misdemeanor for school employees or school-board members to willfully violate the law and awards parents reasonable attorney fees that they incur if they are forced to go to court to assert their rights under the law. By making a statutory violation a state-law criminal offense, parents are more likely to go to state courts rather than federal courts to enforce their statutory rights, where judges may be more sympathetic to parents' legal entitlements than the federal courts have shown themselves to be.

VI. CONCLUSION

Federal case law makes it clear: parents have no constitutional right to excuse their children from any part of public school curricula, even if the parents' objection is based on religious or moral grounds. As the First Circuit stated in *Brown v. Hot, Sexy and Safer Productions, Inc.*,¹⁷² parents do not have the constitutional right to "dictate the curriculum at the public school."¹⁷³ In *Parker v. Hurley*,¹⁷⁴ parents believed the public school was indoctrinating their children about homosexuality in contradiction to their religious beliefs; yet the First Circuit Court of Appeals exclaimed that "public schools are not obliged to shield individual students from ideas which potentially are religiously offensive."¹⁷⁵

In those states that now recognize same-sex marriage, it seems probable that the curricula will begin portraying same-sex marriage in ways that are objectionable to many American families on religious grounds.¹⁷⁶ Nevertheless, given the willingness of most states to allow parents to shield their children from sex education, legislatures in the same-sex marriage states may be willing to adopt opt-out statutes that allow parents to shield their children from instruction that positively portrays same-sex marriage. In fact, in some states, current opt-out statutes for sex education may already be adequate to allow opt-outs for sexual orientation curriculum, although as *Parker* demonstrated, a Massachusetts sex-education opt-out law did not protect parents who wished to shield their elementary-school children from exposure to reading materials that portrayed same-sex marriage in a positive light.

This model statute is not presented as an expression of hostility or opposition to same-sex marriage; indeed the authors acknowledge that same-sex marriage has been recognized by the courts in some states as a constitutional right guaranteed by their states' constitutions. Nevertheless,

172. 68 F.3d 525 (1st Cir. 1995).

173. *Id.* at 533.

174. 514 F.3d 87 (1st Cir. 2008).

175. *Id.* at 106.

176. *Jill Tucker, Uproar Over Lessons About Gays, Lesbians*, S.F. CHRON., May 29, 2009, at A1 (reporting on parents' objection to California school district's portrayal of same-sex marriage in positive light in curriculum unit about diversity).

families who are opposed to same-sex marriage on religious ground deserve the right to protect their children from portrayals of sexuality and marriage that offend their religious values. The federal courts have consistently declared that parents have no right under the federal constitution to shield their children from instruction that offends their religious beliefs. Therefore, statutory protection as outlined in the model statute is the only way to give parents reasonable protection from having their children exposed to instruction in the public schools that undermines or disregards their religious values.

APPENDIX

State Curriculum Opt-Out Statutes or Regulations

STATE	Classification	If Allowed, type of objection			Opt-out Method Specified	General Information	Statutes or Regulations
		R e l i g i o u s	M o r a l	G e n e r a l			
Alabama	Restrictive	X			P/N	"conflicts w/ religious teaching of church"	ALA. CODE: § 16-41-6
Alaska	Non-existent						None
Arizona	Permissive	X	X	X	P/N	"object to any learning material or activity on basis it is harmful may withdraw their children . . . because it questions beliefs or practices in sex, morality, or religion"	ARIZ. REV. STAT. ANN. § 15-102 ARIZ. ADMIN. CODE § R7-2-303 (sex education)
Arkansas	Restrictive	X			P/N	"parent must show P.E. will violate student's religious beliefs" and "must be members of recognized religious faith"	ARK. CODE ANN. § 6-16-32
California	Permissive	X			P/N	Opt-out any or all; "parents have ultimate responsibility for imparting values regarding sexuality to their children"	CAL. ADMIN. CODE § 51240 § 51937 § 32255
Colorado	Permissive	X		X	P/N	Opt-in for sex ed - "school officials shall receive prior written approval;" Opt-out for health	COLO. REV. STAT. § 22-25-104 § 22-15-106
Connecticut	Permissive			X	P/N	"written note shall be sufficient to exempt student from program in its entirety or form portion"	CONN. GEN. STAT. § 10-16c § 10-19
Delaware	Non-existent						None
District of Columbia	Restrictive			X	P/N	No specific reason required	D.C. MUN. REGS. tit. 5, chapter 23 2305

Florida	Permissive			X	P/N	No specific reason required	FLA. STAT. § 1003.42 ("reproductive health" & HIV/AIDS) § 1003.47(1)(a) (animal dissection)
Georgia	Permissive			X	P/N	"Each local board shall"	GA. CODE ANN. § 20-2-143
Hawaii	Non-existent						None
Idaho	Restrictive			X	P/N	"family life and sex education . . . rests upon home and church"; schools supplement	IDAHO CODE ANN. § 33-1611(2010)
Illinois	Permissive			X	P/N	No specific reason required	105 ILL. COMP. STAT. 110/3 (2010) (pertaining to AIDS & family life instruction), 112/15 (dissection of animals) 23 ILL. ADMIN. CODE tit. 23, § 1.420(p)(6)(2010) (physical education)
Indiana	Restrictive	X			P/N	May also opt-out of hygiene instruction	IND. CODE § 20-30-5 9(d)
Iowa	Restrictive	X			P/N	"not required to enroll in P.E. or health if course conflicts with religious belief"	IOWA CODE § 256.11.6
Kansas	Restrictive			X		"Each board of education shall . . . include procedures whereby pupil shall be excused from any or all portions"	KAN. ADMIN. REGS. § 91-31-20(b)(2)(D)
Kentucky	Non-existent					Kentucky Dept of Ed believes many districts provide local opt-outs	None
Louisiana	Restrictive			X		"any child excused at option and discretion of parent . . . local or parish school board shall provide procedures;" no specific reason required	LA. REV. STAT. ANN. § 17:281(D)
Maine	Permissive			X		No specific reason required	ME. REV. STAT. tit. 22, § 1911; tit. 7, § 3971

Maryland	Permissive			X		Opt-in required for sex education; no specific reason required	MD. CODE REGS. 13A.04.18.03 13A.04.18.04
Massachusetts	Restrictive			X	P/N	"[P]olicy shall afford parents flexibility to exempt their child from sex education . . ."	MASS. GEN. LAWS ch. 71, § 32A; <i>District and School Policies and Resources for Dissection and Dissection Alternatives in Science</i> provided by Mass. Dept. of Educ.
Michigan	Permissive	X		X	P/N	"conflict with sincerely held religious beliefs" for health opt-out; Opt-in required for sex education	MICH. ADMIN. CODE rr. 380.1170, 380.1506, 380.1507, 380.1507a
Minnesota	Permissive			X		"Have procedure . . . if parent objects to the content, to make reasonable arrangements with school personnel for alternative instruction"	MINN. STAT. § 120B.20
Mississippi	Permissive			X	P/N	Opt-in for sex education required	MISS. CODE ANN. § 37-13-173
Missouri	Restrictive			X		Sex Education & HIV/AIDS only	MO. REV. STAT. § 170.015.1 (5)
Montana	Restrictive			X		"Any parents who believes their child is not developmentally ready for particular curricular content may ask to take child out of class"	MONTANA OFFICE OF PUBLIC INSTRUCTION, GUIDELINES FOR HIV/AIDS EDUCATION, http://opi.mt.gov/pd/HIV/AIDS/CurricPlanGuide.pdf
Nebraska	Non-existent						None
Nevada	Permissive			X	P/N	Opt-in for sex education & AIDS	NEV. REV. STAT. § 389.065
New Hampshire	Permissive			X		Sex education, Health, HIV/AIDS	N.H. REV. STAT. ANN. § 186:11(I)(X)(b)
New Jersey	Permissive	X	X		X	Opt-out from sex education for "sincerely held beliefs"	N.J. STAT. ANN. § 18A:35-4.7, § 18A:35-4.25 2.c

New Mexico	Restrictive			X	X	"Each school district shall implement policy that insure parents have ability to exempt their child"	N.M. CODE R. § 6.29.6.11(8)
New York	Restrictive			X	X	Opt-out in "methods of prevention of AIDS" & animal dissection	N.Y. COMM'R REG. 135.3(2)(i) N.Y. EDUC. LAW § 809
North Carolina	Permissive			X	P/N	Opt-in for sex education & AIDS	N.C. GEN. STAT. § 115C-81(d)(7)(2010)
North Dakota	Non-existent					North Dakota Dept of Ed believes local control allows opt-outs in sex-related curriculum	None
Ohio	Permissive			X	P/N	Opt-outs permitted in venereal disease education; personal safety and assault prevention in grades K-6; and CPR	OHIO REV. CODE ANN. § 3313.60(A)(5)(c), (d) § 3313.60(A)(8)
Oklahoma	Restrictive			X	P/N	Sex education & AIDS prevention	OKLA. STAT. § 70-11-103.3 § 70-11-105.1
Oregon	Permissive			X	P/N	"no pupil shall be required to take or participate in any instruction in sex education, . . . after parent has reviewed materials"	OR. REV. STAT. § 336.465 § 337.300
Pennsylvania	Restrictive	X	X		P/N	HIV/AIDS instruction & animal dissection	22 PA. CODE § 4.29 (AIDS/HIV) 24 PA. CONS. STAT. § 15-1523 (2010) (dissection of animals)
Rhode Island	Permissive			X	P/N	"Exemptions" given for sex education, health, AIDS instruction, & animal dissection	R.I. GEN. LAWS § 16-22-17 § 16-22-18 § 16-22-20
South Carolina	Permissive	X	X	X	P/N	Opt-out of health education for "conflicts with family's beliefs" & opt-out of P.E. if "violates religious beliefs"	S.C. CODE ANN. § 59-32-50 § 59-32-80
South Dakota	Non-existent					South Dakota Dept. of Ed believes local opt-outs are provided	None

Tennessee	Permissive			X	P/N	Opt-in for family life courses	TENN. CODE ANN. § 49-6-1303 (being amended by Tennessee HB 0812 & SB 1234)
Texas	Permissive	X	X		P/N	Broad opt-out provision but "parent is not entitled to remove child to avoid a test or prevent child from taking subject for entire semester"	TEX. EDUC. CODE ANN. § 26.010
Utah	Permissive			X	P/N	Opt-in required for sex education	UTAH ADMIN. CODE r. 277-474-1
Vermont	Restrictive	X		X	P/N	Opt-outs for sex education & animal dissection	VT. STAT. ANN. tit 16, §§ 134, 912
Virginia	Permissive			X	P/N	Opt-outs for family life education & animal dissection	VA. CODE ANN. § 22.1-207.1 § 22.1-200.01
Washington	Permissive	X		X	P/N	Opt-outs for sex education, HIV/AIDS instruction, & P.E.; "religious belief" must be used for P.E.	WASH. REV. CODE § 28A.230.050 § 28A.230.070 § 28A.300.475
West Virginia	Restrictive			X	P/N	Opt-out for AIDS only	W. VA. CODE § 18-2-9
Wisconsin	Permissive			X	P/N	Opt-outs in human growth and development sex education, health, AIDS	WIS. STAT. § 118.019(4)
Wyoming	Restrictive			X	P/N	Opt-out for HIV prevention only	HIV/AIDS MODEL POLICY FOR WYOMING PUBLIC SCHOOLS