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## Reforming State Policies on Sex Education Through Local Elections: Navigating the Intersection of Parental Rights and the Fourteenth Amendment

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Navigating the Intersection of Parental Rights and the Fourteenth Amendment**

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## INTRODUCTION

At a Freehold Township Board of Education meeting, a father of three daughters asked the Board to explain the definition of anal sex.<sup>1</sup> Under the 2020 New Jersey Comprehensive Health and Physical Education Student Learning Standards, his thirteen-year-old would be expected to know how to define anal sex by the end of eighth grade.<sup>2</sup> Received with silent stares, the father followed up on his question by asking if any of the Board members themselves had learned about anal sex in middle school.<sup>3</sup> The Board declined to answer either question.<sup>4</sup>

In 1980, the New Jersey State Board of Education shifted from a “recommended-but-not-required” family life and human sexuality policy, to a required curriculum.<sup>5</sup> This change came about in part due to reports showing that only 40% of the state’s public schools were teaching sex education.<sup>6</sup> Statistics revealing that one in five births in the United States were to teenagers between the ages of fifteen and nineteen, along with the fact that in New Jersey twelve thousand babies were born to unmarried girls in the same age range, with 60% of them being unmarried mothers, highlighted the necessity of strengthening sex education efforts.<sup>7</sup> The New Jersey Family Life Committee’s objective in implementing a sex education program across the state was to reduce teen pregnancy and the number of females dropping out of school due to pregnancy.<sup>8</sup> Now, those sex education programs are reviewed every five years by the New Jersey State Board of Education.<sup>9</sup>

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<sup>1</sup> Freehold Township Board of Education, *Freehold Township Board of Education Meeting September 13, 2022*, YouTube (Sept. 13, 2022), [www.youtube.com/watch?v=1eleshRB1Q4](https://www.youtube.com/watch?v=1eleshRB1Q4).

<sup>2</sup> New Jersey Department of Education, *New Jersey Learning Standards*, OFFICIAL SITE OF THE STATE OF NEW JERSEY, [www.nj.gov/education/standards](https://www.nj.gov/education/standards).

<sup>3</sup> Freehold Township Board of Education, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Smith v. Ricci*, 446 A.2d 501, 503 (N.J. 1982) (citing *Report of the Family Life Committee of the New Jersey State Board of Education*, August 1979).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> N.J. ADMIN. CODE § 6A:8-2.1 (2022).

The Board of Education assesses all of the Common Core State Standards through this process, compliant with the New Jersey Department of Education’s (NJDOE) standard review process.<sup>10</sup> The New Jersey Student Learning Standards (NJSLS) specify expectations in nine content areas and benchmark performance expectations for grades two, five, eight and twelve.<sup>11</sup> The content areas include Career Readiness, Life Literacies and Key Skills, Comprehensive Health and Physical Education, Computer Science and Design Thinking, English Language Arts, Mathematics, Science, Social Studies, Visual and Performing Arts, and World Languages.<sup>12</sup> Once approved, districts are expected to ensure that the curriculum is delivered in a way that assures students can demonstrate the specified skills and knowledge outlined in the NJSLS.<sup>13</sup> The state holds the school districts accountable for assessing and reporting student development across the specified learnings standards.<sup>14</sup>

On June 3, 2020, the New Jersey State Board of Education members approved the 2020 NJSLS by a final vote of 8-4.<sup>15</sup> While votes pertaining to Common Core Standards have traditionally been unanimous, the split vote has been attributed to the new Comprehensive Health and Physical Education Standards which had the most changes from the 2015 Learning Standards.<sup>16</sup> The State Board held regional meetings to receive public input on the proposed NJSLS, where parents were able to voice their concerns regarding the additions made to the

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<sup>10</sup> *Id.*

<sup>11</sup> N.J. ADMIN. CODE § 6A:8-1.1.

<sup>12</sup> New Jersey Department of Education, *supra* note 2.

<sup>13</sup> N.J. ADMIN. CODE § 6A:8-3.1.

<sup>14</sup> *Id.*

<sup>15</sup> Laura Waters, *Here Are the Facts on How Murphy’s Ed Department Changed Learning Standards for Sexual Education and Gender Identity*, NJ Education Report (June 4, 2020), [www.njedreport.com/2022/04/13/here-are-the-facts-on-how-murphys-ed-department-changed-learning-standards-for-sexual-education-and-gender-identity/](http://www.njedreport.com/2022/04/13/here-are-the-facts-on-how-murphys-ed-department-changed-learning-standards-for-sexual-education-and-gender-identity/).

<sup>16</sup> *Id.*

Health and Physical Education Standards.<sup>17</sup> The standards that gained the most attention included:

- 2.1.2.PGD.5: By end of Grade 2 list medically accurate names for body parts, including the genitals.
- 2.1.2.SSH.2: By end of Grade 2 discuss the range of ways people express their gender and how gender-role stereotypes may limit behavior.
- 2.1.5.PGD.4: By end of grade 5 explain common human sexual development and the role of hormones (e.g., romantic and sexual feelings, masturbation, mood swings, timing of pubertal onset).
- 2.1.8.SSH.9: By end of grade 8 define vaginal, oral, and anal sex.
- 2.1.8.PP.1: By end of grade 8 describe pregnancy testing, the signs of pregnancy, and pregnancy options, including parenting, abortion, and adoption.
- 2.1.8.SSH.1: By end of grade 8 differentiate between gender identity, gender expression and sexual orientation.<sup>18</sup>

While these standards were adopted in 2020, the NJDOE adjusted the original NJSLS curriculum implementation schedule in reaction to the COVID-19 public health emergency.<sup>19</sup> The decision to postpone the implementation of the new standards was made to alleviate the burden on school districts throughout the state that were prioritizing the implementation of safe return-to-school protocols.<sup>20</sup> The new implementation schedule required districts to align their curriculum with the 2020 Comprehensive Health and Physical Education standards for the 2022-2023 school year to be deemed compliant with state standards.<sup>21</sup> Districts who decline to implement the new learning standards are subject to the repercussions of the New Jersey Quality Single Accountability Continuum; the state's mechanism for monitoring compliance.<sup>22</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> New Jersey Department of Education, *supra* note 2.

<sup>19</sup> New Jersey Department of Education, *2020 New Jersey Student Learning Standards (NJSLS)*, OFFICIAL SITE OF THE STATE OF NEW JERSEY, [www.nj.gov/education/cccs/2020](http://www.nj.gov/education/cccs/2020) (Curriculum Implementation Schedule).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Louis C Hochman, *Will NJ usurp schools' control? State hints at consequences for rejecting sex ed standards.*, Gothamist (Sept. 21, 2022), <https://gothamist.com/news/will-nj-usurp-schools-control-state-hints-at-consequences-for-rejecting-sex-ed-standards>.

Under current New Jersey state law, parents have the ability to opt their children out of sex education instruction that conflicts with their conscience or sincerely held religious and moral beliefs.<sup>23</sup> School districts, such as Middletown, have taken an opposite approach and require parents to “opt in” to lessons based on the new standards.<sup>24</sup> State legislators have also reacted to the new learning standards by proposing legislation that would require school boards to offer an annual opportunity for parents to share their feedback on curriculum related to the NJSLS Health and Physical Education Standards.<sup>25</sup> The “Transparency in Comprehensive Health and Physical Education Curriculum Act,” sponsored by Democratic Senator Vin Gopal, would also require school districts to post the curriculum directly to their websites for parents’ review.<sup>26</sup> However, for the parents who object to these lessons, opt-out, the only required alternative, is not a constitutionally sufficient protection of their parental rights.

While opt-out provisions may have been adequate for First Amendment claims, they are not sufficient to address claims brought under the Fourteenth Amendment.<sup>27</sup> Parental rights are rooted in the text of the Fourteenth Amendment.<sup>28</sup> The Supreme Court has repeatedly held that parents possess a fundamental liberty interest in child rearing that is free from unnecessary governmental intrusion.<sup>29</sup> Therefore, parents should not have to shed their constitutional rights at the schoolhouse gate and surrender their liberty interests to the Department of Education.<sup>30</sup> The right to direct a child’s education should include the right to have direct input into the health and

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<sup>23</sup> N.J. STAT. ANN. § 18A:35-4.7 (West 2022).

<sup>24</sup> Hochman, *supra* note 22.

<sup>25</sup> Transparency in Comprehensive Health and Physical Education Curriculum Act, S. 2481, 220<sup>th</sup> Leg. (2022).

<sup>26</sup> *Id.* at §2(b).

<sup>27</sup> *E.g.*, *Medeiros v. Kiyosaki*, 478 P.2d 314, 319 (Haw. 1970).

<sup>28</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>29</sup> *E.g.*, *Meyer*, 262 U.S. at 401; *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>30</sup> *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

physical education standards being taught in school districts.<sup>31</sup> Unfortunately, courts have closed the gate on parents when it comes to curriculum at a time where children are most impressionable and parental rights should be heightened.<sup>32</sup> While the state has an interest in ensuring students receive a quality education that will mold them into productive citizens, children are not creatures of the state.<sup>33</sup> Simply allowing parents to exempt their children from instruction that go against their deeply held religious or moral beliefs falls short of upholding their constitutional rights. Opting children out of certain lessons does not guarantee that they will not have exposure to the content, as they are likely to come across the material through their peers. Hence, opt-out does not offer sufficient protection if parental objections are disregarded by the courts based on the existence of exemption policies. Moreover, moving decisions about sex education standards from a statewide level to local school boards would give parents a democratic remedy to elect school board officials who will adopt standards that reflect local parental ideals rather than imposing a state-wide standard on every community.

## I. PARENTAL RIGHTS AND THE CONSTITUTION

Courts have been quick to dismiss challenges to public school curriculum on the basis of Fourteenth Amendment violations.<sup>34</sup> However, the Supreme Court very early recognized that parents have the constitutional right to raise their children under the Due Process Clause of the

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<sup>31</sup> See *Meyer*, 262 U.S. at 401 (holding that parents have the right to direct their child's education).

<sup>32</sup> For example, in *Fields*, the Ninth Circuit held that parents of public-school children are not possessed of a constitutional right, either under the Substantive Due Process Clause or the related right to privacy, to restrict the public schools from providing information on the subject of sex. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006).

<sup>33</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship."); *Pierce*, 268 U.S. at 535 ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

<sup>34</sup> See *Fields*, 447 F.3d at 1211; *Citizens for Parental Rts. v. San Mateo Cnty. Bd. of Educ.*, 51 Cal. App. 3d 1, 32 (Ct. App. 1975) (dismissing parent's Fourteenth Amendment violation claims related to the control over sexual education curriculum).

Fourteenth Amendment.<sup>35</sup> In 1923, the Supreme Court defined what “liberty” meant under the Fourteenth Amendment.<sup>36</sup> In *Meyer vs. Nebraska*, a teacher at a parochial school in Nebraska was convicted of violating a state statute when she taught German to a ten year old student.<sup>37</sup> The Nebraska statute penalized anyone who taught a child any language other than English, prior to completion of the eighth grade.<sup>38</sup> The Court evaluated whether the statute unreasonably infringed upon the liberty guaranteed to individuals by the Fourteenth Amendment.<sup>39</sup> The Court held that “liberty” not only meant freedom from bodily restraint, but the right to establish a home and raise children without interference from the government acting under the guise of protecting public interest.<sup>40</sup> The Court also found that it is the “natural duty of the parent to give his children education suitable to their station in life.”<sup>41</sup> The Court held that liberty interests cannot be interfered with by arbitrary legislation that does not further a legitimate state purpose, and therefore found the statute to be overbroad and unconstitutional.<sup>42</sup>

Two years after *Meyer*, the Supreme Court again recognized a parent’s right to direct the education of their child in finding an Oregon Compulsory Education Act in violation of Fourteenth Amendment liberty interests.<sup>43</sup> In *Pierce v. Society of the Sisters*, the challenged act required every parent or guardian to send their children, ages eight through sixteen, to the public school in the district where the family resided.<sup>44</sup> Exceptions were granted only for students who

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<sup>35</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Yoder*, 406 U.S. 205, 232 (1972); *Quilloin*, 434 U.S. at 255; *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

<sup>36</sup> *Meyer*, 262 U.S. at 400.

<sup>37</sup> *Id.* at 396.

<sup>38</sup> *Id.* at 396-97.

<sup>39</sup> *Id.* at 399.

<sup>40</sup> *Id.* at 399-400.

<sup>41</sup> *Id.* at 400.

<sup>42</sup> *Id.* at 403.

<sup>43</sup> *Pierce*, 268 U.S. at 535.

<sup>44</sup> *Id.* at 530.



had learning disabilities and whose parents lived a considerable distance from the public school.<sup>45</sup> Otherwise, parents would be cited for a misdemeanor if they did not send their children to the local public school.<sup>46</sup> The state argued that the purpose of the Act was to compel general attendance in public schools, however the Court did not find that compelling enough to interfere with a parent's liberty interest.<sup>47</sup> The Court held that rights guaranteed by the Constitution "may not be abridged by legislation" and the fundamental theory of liberty does not allow for the state to force children to be instructed from public teachers only.<sup>48</sup> In protecting parental rights, the Supreme Court found that the "child is not the mere creature of the state," and those who care for and direct the future of their children have the right to raise them how they see fit.<sup>49</sup>

After finding that parents could send their children to the school of their choice, the Supreme Court extended the holding in *Pierce* to allow for homeschooling in *Wisconsin v. Yoder*.<sup>50</sup> Members of the Amish community were prosecuted under a Wisconsin compulsory school attendance law that required all children to attend public schools until the age of sixteen.<sup>51</sup> The individuals were found in violation of the state statute for providing their children with informal vocational education and declining to send them to public or private school.<sup>52</sup> The Court held that while a state has an interest in universal education, that interest does not enable the state to impinge on a parent's fundamental rights and interests with respect to the upbringing of their children.<sup>53</sup> Here the Court recognized the parents' rights under the Fourteenth Amendment, as

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<sup>45</sup> *Id.* at 531.

<sup>46</sup> *Id.* at 530.

<sup>47</sup> *Id.* at 535.

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.")

<sup>50</sup> *Yoder*, 406 U.S. at 205.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 214.

well as the Free Exercise clause of the First Amendment, in reading *Pierce* as a charter of rights of parents to direct the religious upbringing of their children.<sup>54</sup> The Supreme Court opined that the interests of parenthood, combined with a free exercise claim, were significant and only subject to limitation in cases where the parent places a child's health or safety in jeopardy or significantly burdens society.<sup>55</sup>

*Mozert v. Hawkins County Bd. Of Educ*, a Sixth Circuit case, demonstrated the beginning of tensions arising between parents and the state after *Yoder* in relation to curriculum under the First Amendment.<sup>56</sup> In this case, a group of Christian parents objected to materials their children were exposed to, which included discussions of topics such as mental telepathy, evolution and thought transfer.<sup>57</sup> They brought suit claiming the material in the textbooks violated their religious beliefs and thus infringed on their First Amendment right to free exercise of religion.<sup>58</sup> The Court rejected the plaintiffs' argument and held that a student's First Amendment right is not violated by mere exposure to ideas that are inconsistent with the student's religious beliefs.<sup>59</sup> The Sixth Circuit distinguished *Yoder* in stating that the parents in *Mozert* were not required to send their children to public school and had the right, granted in *Pierce* and *Yoder*, to home school or send their children to private school.<sup>60</sup> There was, however, no discussion of the parents' rights under the Fourteenth Amendment or any mention of *Meyer*.<sup>61</sup>

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<sup>54</sup> *Id.* at 233.

<sup>55</sup> *Id.*

<sup>56</sup> *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

<sup>57</sup> *Id.* at 1060-61.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1065.

<sup>60</sup> *Id.* at 1067.

<sup>61</sup> *Id.* at 1058-70.

### A. *Beginning of Legal Challenges to Sex Education Programs*

Parents have been especially concerned with their rights as it relates to sex education curriculum being taught in their school districts. Sex education statutes vary across the United States.<sup>62</sup> States regulate what public schools must teach students as it relates to topics such as abstinence, sexuality, STD prevention, HIV/AIDS, and sexual orientation.<sup>63</sup> Some local boards have a great deal of discretion in teaching these topics, while most states expressly regulate sex education.<sup>64</sup> Thirty states and the District of Columbia require public schools to teach sex education; only twenty-two of those states require sex education to be medically accurate.<sup>65</sup> States define “medically accurate” in a variety of ways; some states require the Department of Health to review the curriculum while others rely on medically acclaimed and published authorities.<sup>66</sup>

As long as almost fifty years, parents have been challenging family life and sex education programs by claiming the subject matter being taught infringes on their constitutional right to child rearing. In 1975, a group of parents in California challenged the implementation of a family life and sex education program in their children’s school district under the First, Ninth, Tenth, and Fourteenth Amendments.<sup>67</sup> Topics challenged in *Citizens for Parental Rights v. San Mateo*

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<sup>62</sup> See, e.g., Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J. L. FEM. 496, 507 (2007) (discussing the two types of sexuality education in United States public schools; “abstinence-plus” programs and comprehensive sexuality education programs).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *State Policies on Sex Education in Schools*, National Conference of State Legislatures, (Oct. 1, 2020), [www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx](http://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx).

<sup>66</sup> HAW. REV. STAT. ANN. § 321-11.1 (WEST 2022) (Medically accurate defined as “verified or supported by research conducted in compliance with accepted scientific methods and recognized as accurate and objective by professional organizations and agencies with expertise in the relevant field, such as the federal Centers for Disease Control and Prevention, the American Public Health Association, the American Academy of Pediatrics, and the American College of Obstetricians and Gynecologists”); MICH. COMP. LAWS ANN. § 380.1169 (WEST 2022) (Medically accurate materials provided by the Department of Public Health); TEX. HEALTH & SAFETY CODE ANN. § 85.004 (WEST 2022) (Education programs must be scientifically accurate and factually correct).

<sup>67</sup> *Citizens*, 51 Cal. App. 3d at 5.

*County Bd. of Education* included the discussion of sexual development, sexual intercourse, sexual behavior and the value of sex within a marriage.<sup>68</sup> The parents claimed the program interfered with the free exercise of religion, contained elements of coercion violating the Free Establishment Clause, violated parent and student’s equal protection, and procedural and substantive due process, interfered with the right of parental control, and deprived parents of their right to direct the education of their children.<sup>69</sup> The parents sought declaratory and injunctive relief prohibiting the continuation of the program.<sup>70</sup> The Court denied the parents’ requested relief and dismissed the complaints finding that the students were not compelled to attend any part of the program, and were able to be withdrawn based on parental objection.<sup>71</sup> The “excusal system,” where parents were able to withdraw their children from the program by submitting a written excuse, gave parents notice and opportunity to object based on moral or religious grounds.<sup>72</sup> The Court rejected the parents’ invasion of privacy theory under *Meyer-Pierce* in holding that parents cannot expect the court to “contract the spectrum of available knowledge” by enjoining the country from continuing with sex education programs.<sup>73</sup> The Court held that while parents do have the constitutional right to teach their children about family life and sexual matters in their own homes, it is not exclusive so as to prohibit schools from also teaching children about family life.<sup>74</sup>

While the California Appellate Court found that the parents in *Citizens* failed to raise any substantial constitutional issues or factual issues, that did not deter other groups of parents from

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<sup>68</sup> *Id.* at 10.

<sup>69</sup> *Id.* at 11.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 32.

<sup>72</sup> *Id.* at 30.

<sup>73</sup> *Id.* at 31 (citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) “In the other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”).

<sup>74</sup> *Id.* at 33.

continuing to assert their constitutional rights against sex-based content in public school systems. Over 30 years later, parents of school children brought a similar claim alleging that the district violated their fundamental right “to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs.”<sup>75</sup> The program in question was a psychological questionnaire that was sent to first, third and fifth grade children asking them to rate the frequency of activities such as “thinking about having sex” and “thinking about touching other peoples' private parts.”<sup>76</sup> Letters were sent home to parents requesting consent for their children’s participation, although the plaintiffs alleged that the sexually explicit nature of the questions was not disclosed.<sup>77</sup> The Ninth Circuit in *Fields v. Palmdale School Dist.* did not deny that Due Process protects a parent’s right to control their child’s upbringing as recognized in *Meyer* and *Pierce*.<sup>78</sup> However, they clarified that the *Meyer-Pierce* right does not include the “right to restrict the flow of information in the public schools.”<sup>79</sup> Thus, the Court held that a parent’s fundamental interest does not include the ability to direct how a public school teaches their child and what specific information is conveyed to students.<sup>80</sup> In addition, the Court held that no federal court has found a right to restrict a public school from providing information on sex in the substantive due process clause of the Constitution, or in the right to privacy.<sup>81</sup> *Meyer-Pierce* did not entitle parents to enjoin school boards from teaching material deemed appropriate by educational professionals on the grounds that that material was not in accordance with parents’ personal or religious beliefs.<sup>82</sup>

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<sup>75</sup> *Fields*, 447 F.3d at 1197.

<sup>76</sup> *Id.* at 1200.

<sup>77</sup> *Id.* at 1201.

<sup>78</sup> *Id.* at 1204.

<sup>79</sup> *Id.* at 1205.

<sup>80</sup> *Id.* at 1206.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

The Third Circuit ruled on a similar case in 2005 when parents of high school students in New Jersey sued school district administrators for constitutional violations arising from the administration of a questionnaire.<sup>83</sup> The survey challenged in *C.N. v. Ridgewood Board of Education*, sought information regarding students' sexual activity, as well as other sensitive topics.<sup>84</sup> Questions included whether the student ever "had sexual intercourse ('gone all the way,' 'made love')," and if so "how often [did they] use a birth control method such as birth control pills, a condom (rubber), foam, diaphragm, or IUD."<sup>85</sup> The parents brought Fourteenth Amendment claims alleging that their right to be free from unlawful intrusion into the household, substantive due process right to raise their children as they see fit, and their right to privacy were violated.<sup>86</sup> The Court recognized that the Supreme Court had never defined the precise boundaries of a parent's right to control a child's upbringing, but then established the right as neither absolute nor unqualified.<sup>87</sup> They discussed that, in certain circumstances, courts have held that a parent's right to control the upbringing of their children must give way to the school's ability to control curriculum.<sup>88</sup> While the Court recognized that introducing children to sensitive topics before their parents could undermine parental authority, the survey did not interfere with parental decision making that amounted to a constitutional violation.<sup>89</sup>

More recently, the First Circuit also reaffirmed prior holdings, such as *Citizens and Fields*, when parents brought a §1983 and state-law action against a school district in

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<sup>83</sup> *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005).

<sup>84</sup> *Id.* at 161.

<sup>85</sup> *Id.* at 168.

<sup>86</sup> *Id.* at 171.

<sup>87</sup> *Id.* at 182 (citing *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) holding the constitutional protection available for parent-child relationship in appropriate cases).

<sup>88</sup> *Id.* (citing *Swanson v. Guthrie Independent Sch. Dist.*, 135 F.3d 694 (10th Cir.1998) holding that a school policy against part-time attendance did not violate parents' right to direct upbringing of child).

<sup>89</sup> *Id.* at 185.

Massachusetts.<sup>90</sup> In *Parker v. Hurley*, the Plaintiff parents raised objections to the reading materials used in their children's kindergarten and second grade classes, which included books celebrating same-sex marriage and depicting families with parents of the same gender.<sup>91</sup> The parents alleged that the curriculum being taught to their children violated their right to free exercise and to raise their children as they see fit.<sup>92</sup> The parents argued that, under the Massachusetts exemption statute, they should have been given the opportunity to exempt their children from exposure to reading materials which were in conflict with their religious beliefs.<sup>93</sup> They also contended that their children were too young to be exposed to gay marriage and, being that children are easily influenced by their teachers, this instruction undermined their religious beliefs.<sup>94</sup> The Massachusetts statute required parents to be given notice and the opportunity to exempt their children from instruction involving human sexual education and sexuality issues.<sup>95</sup> The school did not believe the material involved either topic and declined to apply the exemption to the specific curriculum in question.<sup>96</sup> Massachusetts recognized gay marriage, and the Court dismissed the state claims finding that it was rational for a school to educate students on the rights granted by their state.<sup>97</sup> The Court also dismissed the Plaintiff's Federal Free Exercise and Due Process claims, but advised the parents to seek recourse via the political processes for change in the town or state if the curriculum deeply offended their religious beliefs.<sup>98</sup>

While courts recognize a parent's substantive due process right to direct their children's upbringing, courts have not found that right expands so far as to direct public school curriculum.

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<sup>90</sup> *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 94.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 95.

<sup>98</sup> *Id.* at 107.

Therefore, *Citizens*, *Fields*, *C.N.* and *Parker* all held that parents have no federal constitutional right to prohibit a school from teaching material that is offensive to either their moral or religious beliefs.<sup>99</sup> In *Parker*, the Court reminded the Plaintiff parents to engage in the political process if they were unhappy with the curriculum being taught in the school district.<sup>100</sup> However, as opt-out provisions became more common in school districts, Courts found exemptions to be a sufficient solution to parental objects to sex education curriculum.

### *B. Introduction to Opt-Out Provisions*

As family life and sex education programs were executed across the country, opt-out provisions became increasingly present, and in some cases required, in school districts to satisfy parental objections stemming from First Amendment claims. Twenty-five states and the District of Columbia require school districts to notify parents of sex education, thirty-six states allow parents to opt-out of sex education, and five states require parents to opt-in to sex education.<sup>101</sup> Under an opt-out policy, students are automatically enrolled in sex education classes.<sup>102</sup> School districts give the parents notice of what is being taught and who will be teaching the content.<sup>103</sup> It is then the responsibility of the parents to inform the school district, in writing, if they would like to opt their children out of instruction.<sup>104</sup> In contrast, under an opt-in policy, the school district requires written permission from a parent before their child is enrolled in the sex education class.<sup>105</sup>

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<sup>99</sup> See *Citizens*, 51 Cal. App. 3d at 32; *Fields*, 271 F. Supp. 2d at 1219; *Ridgewood*, 430 F.3d at 159; *Parker*, 514 F.3d at 90.

<sup>100</sup> *Parker*, 514 F.3d at 107.

<sup>101</sup> *State Policies on Sex Education in Schools*, *supra* note 65.

<sup>102</sup> *Policy Brief, Sex Ed & Parental Consent, Opt-In v. Opt-Out*, Sexuality Information and Education Council of the United States (September 2018) [www.siecus.org/wp-content/uploads/2018/09/Policy-Brief-Opt-in-v.-Opt-out-Redesign-Draft-09.2018.pdf](http://www.siecus.org/wp-content/uploads/2018/09/Policy-Brief-Opt-in-v.-Opt-out-Redesign-Draft-09.2018.pdf).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*



In 1970, parents of fifth and sixth graders in Hawaii sued to enjoin the Board of Education from continuing to show a film titled “Time of Your Life;” a film implemented as part of the family life and sex education program.<sup>106</sup> The plaintiffs in *Medeiros v. Kiyosaki* claimed that the lessons related to sexuality and sexual development were an invasion of privacy and violation of their religious beliefs.<sup>107</sup> Citing *Meyer* and *Pierce*, they argued that the underlying issue of the case was whether parents were free to educate their children in the intimacies of sexual education without undue interference by the state.<sup>108</sup> The Supreme Court of Hawaii found that the state successfully adopted a curriculum of family life and sex education that did not invade the privacy or First Amendment rights of parents because of the school’s excusal system.<sup>109</sup> Under the excusal system, parents had the ability to withhold their children from the program after submitting a written excuse to the school.<sup>110</sup> The school district’s excusal system also allowed parents to review the lessons in the film series on public television, so they were able to first consider the content prior to determining whether to excuse their child from the instruction.<sup>111</sup> If the lesson did not align with a parent’s moral or religious beliefs, they were able to opt their child out of the program.<sup>112</sup> The Court held that in light of *Meyer* and *Pierce*, they could not enjoin the state from continuing with its family life and sexual education program on the basis of a privacy right violation where an excusal system was adopted.<sup>113</sup> In addition, without compulsion or coercion related to the education program, the parents’ First Amendment Free Exercise claim also failed.<sup>114</sup>

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<sup>106</sup> *Medeiros*, 478 P.2d at 315.

<sup>107</sup> *Id.* at 315.

<sup>108</sup> *Id.* at 316.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 317.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 319.

The Supreme Court of New Jersey followed the *Medeiros* holding in *Smith v. Ricci* when a group of parents challenged the New Jersey Board of Education’s new regulation that required all New Jersey public elementary and secondary schools to institute a family life education program.<sup>115</sup> The plaintiff parents contended that the program infringed on their right to free exercise of religion by teaching their children about human reproduction, sexuality and the development of social values; concepts contrary to their beliefs.<sup>116</sup> The Court did not question the sincerity of the argument, but dismissed the parents’ complaints as they were able to remove their children from any objectionable part of the program via the excusal clause.<sup>117</sup> The excusal clause was incorporated into the newly regulated family life program and stated that parents were able to release their children from instruction without penalty by providing a written statement that the instruction conflicted with the family’s conscience, or sincerely held religious beliefs.<sup>118</sup> The parents argued that the excusal policy placed an intolerable amount of pressure on students that in turn could compel them to abandon their beliefs.<sup>119</sup> The Supreme Court still found the parents’ argument to be flawed, holding that the excusal clause does not inhibit free exercise of religion and parents cannot control what others may study based on what is offensive to their religion or morals.<sup>120</sup>

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<sup>115</sup> *Smith*, 446 A.2d at 503.

<sup>116</sup> *Id.* at 505.

<sup>117</sup> *Id.*

<sup>118</sup> The New Jersey regulation in effect at the time of the case was N.J.A.C. § 6:29.7.1(i) that stated, “The local board of education shall establish procedures whereby any pupil, whose parent or guardian presents to the school principal a signed statement that any part of the instruction in family life education is in conflict with his/her conscience, or sincerely held moral or religious beliefs, shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.” New Jersey’s current excusal provision is N.J. STAT. ANN. § 18A:35-4.7.

<sup>119</sup> *Smith*, 446 A.2d at 505.

<sup>120</sup> *Id.* at 506.

The last section of the *Smith* opinion addressed the parents' Fourteenth Amendment claim.<sup>121</sup> The parents argued that by not showing a reasonable relationship between the goals of the family life program and the means of implementation, the Board violated the Fourteenth Amendment in adopting N.J.A.C. 6:29–7.1.<sup>122</sup> However, the Board rebutted the parents' argument by demonstrating that the program was aimed at reducing teenage pregnancy, venereal diseases, and other social challenges.<sup>123</sup> The Court determined that the parents were unable to offer evidence or meet their burden in proving the Board's regulation unreasonable.<sup>124</sup>

Condom availability programs across school districts have also sparked a considerable amount of debate, with parents bringing similar claims as challenges to sex education programs. In New York City, these programs were designed to fight the public health threat of AIDS.<sup>125</sup> In the 1980's, 20% of reported cases of adolescent AIDS in the United States was attributed to New York City teenagers.<sup>126</sup> *Alfonso v. Fernandez* discussed challenges to a condom distribution program instituted at high schools in New York.<sup>127</sup> After the New York State Commission of Education directed instruction of HIV and AIDS in elementary and secondary schools, the Chancellor of the New York City Board of Education suggested that condoms should be made available to high school students upon request.<sup>128</sup> The condom availability program required students to be given personal health guidance regarding the proper use of condoms and consequences of misuse prior to receipt.<sup>129</sup> The Plaintiff parents of New York City public school children argued that the program, in offering health services to minor children, violated their due

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<sup>121</sup> *Id.* at 507.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 261-62 (N.Y. App. Div. 1993).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

process rights to direct the upbringing of their children, as well as their rights to free exercise under the First Amendment.<sup>130</sup> While the intention of the program was to control the public health crisis, many parents believed the program condoned promiscuity and encouraged sex amongst teenagers.<sup>131</sup> The Court rejected the First Amendment claim, but found that parents did have a well-recognized liberty interest in child rearing based on their own views, and for the government to intrude on that relationship they must show a compelling state interest.<sup>132</sup> However, the Court premised their opinion around the distribution being a medical action, and agreed that a complaint solely about exposure to offensive ideas would likely fail.<sup>133</sup> So while the Court held that the condom availability program was not essential and impermissibly trespassed on the petitioners' parental rights by not including an opt-out or consent waiver, the opinion was largely focused on the violation being centered around a provision of health services.<sup>134</sup>

The Third Circuit addressed a condom distribution program in a suit against Philadelphia public schools.<sup>135</sup> In *Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education*, parents of public high school students sought a permanent injunction against a condom availability program.<sup>136</sup> Their claim stated that the program emphasized the use of condoms rather than encouraging abstinence, thus violating state law provisions, and the opt-out policy violated their fundamental right to child rearing by requiring a parent to veto participation and reclaim authority over their child receiving a health service.<sup>137</sup> The Court held that the Philadelphia School Board had the power to implement a condom program and acted within their

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 262.

<sup>132</sup> *Id.* at 265.

<sup>133</sup> *Id.* at 266.

<sup>134</sup> *Id.*

<sup>135</sup> *Parents United For Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 264 (3d Cir. 1998).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

authority to fulfill an educational mandate of reducing adolescent pregnancy and sexually transmitted diseases.<sup>138</sup> In addition, the Court opined that the policy did not intrude on parental rights regarding care of their children, or parental interests in their children's health, as the program was voluntary.<sup>139</sup> The opt-out provision provided adequate notice to parents and allowed the parents to refuse participation in the program.<sup>140</sup> The Third Circuit distinguished this case from *Alfonso* as the condom availability program in New York was mandatory and parents were not provided an opportunity to opt-out.

As demonstrated in cases such as *Smith* and *Parents United*, opt-out provisions feel inadequate to many parents.<sup>141</sup> The implementation of opt-out as a solution to parental challenges to family life curriculum and programs stemmed primarily from First Amendment religious objections.<sup>142</sup> However, sex education is as central to Fourteenth Amendment parental control as religious education. Concepts surrounding sex education are so fundamental to a parent's right to direct the upbringing of their children, the state should cede control over this area of curriculum and allow local boards to control what is being taught to students through the democratic process of local elections.

## II. FUNDAMENTAL RIGHTS OF PARENTS REVISITED

### A. *Why Sex Education is So Fundamental*

Sex education curriculum has a direct impact on children's morals, values, and familial beliefs. Decisions to teach children about topics so influential should be held to a higher standard than subjects such as reading, math, science, and history. Lessons related to family life and sex

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<sup>138</sup> *Id.* at 266.

<sup>139</sup> *Id.* at 275.

<sup>140</sup> *Id.* at 277.

<sup>141</sup> *See Smith*, 446 A.2d at 501; *Parents United*, 148 F.3d at 260 (plaintiff parents take issue with opt-out provisions).

<sup>142</sup> *See Smith*, 446 A.2d at 506 (holding that the Free Exercise Clause claim was flawed because the excusal clause did not inhibit free exercise of religion).

education are so fundamental to a parent’s constitutional rights that they should be exempt from the standard process of how educational decisions are made. Courts have long recognized a parent’s fundamental right to child rearing, for example, in regard to a parent’s autonomy to punish and make medical decisions for their children without state interference.<sup>143</sup> Courts should apply that reasoning and make states surrender control over education that exposes children to mature and sensitive topics that parents do not feel are age appropriate.

In 2022 the New Jersey Supreme Court, in holding that a jury must be instructed on use of corporal punishment, reiterated that corporal punishment is legal in New Jersey.<sup>144</sup> In *State v. A.L.A.*, a grandmother was charged with simple assault after being accused of abusing her grandchildren.<sup>145</sup> An audio recording was presented as evidence, which captured the sounds of her striking her grandchild with a leather belt while the child was in tears.<sup>146</sup> The defense cited to *K.A.* where a court held that a mother striking her child with a closed fist, resulting in bruising, was not considered excessive corporal punishment.<sup>147</sup> In affirming the *K.A.* holding, the Supreme Court vacated the grandmother’s conviction and held that juries must be instructed that the law does not prohibit the use of corporal punishment, and parents may reasonably inflict moderate correction.<sup>148</sup> Courts have historically granted parents the right to discipline their children as they see fit, and have also shown the same deference when it comes to medical decision-making, even when those decisions have put their children at risk of harm.<sup>149</sup> *Matter of Hofbauer* involved a case about a seven-year-old boy with Hodgkin’s disease, whose parents rejected conventional

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<sup>143</sup> See *State v. A.L.A.*, 280 A.3d 274, 286 (N.J. 2022); *Matter of Hofbauer*, 47 N.Y.2d 648 (N.Y. 1979).

<sup>144</sup> *A.L.A.*, 280 A.3d at 282.

<sup>145</sup> *Id.* at 276.

<sup>146</sup> *Id.* at 277.

<sup>147</sup> *Id.* at 276 (citing *Dep't of Child. & Fams., Div. of Youth & Fam. Servs. v. K.A.*, 996 A.2d 1040 (N.J. Super. Ct. App. Div. 2010)).

<sup>148</sup> *Id.* at 286.

<sup>149</sup> See *Hofbauer*, 47 N.Y.2d at 653.

medicine and took him to Jamaica to receive metabolic therapy.<sup>150</sup> The Court held that it cannot be disputed that every parent has a fundamental right to rear it's child, and great deference must be given to a parent's choice to the mode of medical treatment.<sup>151</sup>

If the right to punish and select medical treatment for a child is so fundamental to a parent's right to child rearing, so is the right to control education that could impact a child's emotional and moral development. Children are highly impressionable and influenced by what they are exposed to in their everyday life; research has attributed this to their developmental patterns of brain activity.<sup>152</sup> Children are also programmed to imitate, which makes them vulnerable to environmental influences.<sup>153</sup> There is a significant qualitative shift in the nature of thinking from a prepubescent child, to an adolescent.<sup>154</sup> Adolescents experience enormous growth in the areas responsible for moral development, judgment and executive functions; areas children lack.<sup>155</sup> The Supreme Court recognized a child's impressionability in *F.C.C. v. Fox Television Stations, Inc.* when they addressed profanity's negative influence on children.<sup>156</sup> Justice Scalia held that it was sufficient to know that children mimic the behavior they observe.<sup>157</sup> Therefore, if children are being exposed to topics such as sexuality, gender identity and gender expression in school at a young age, there is a significant risk that their learnings will influence their moral development and they may begin imitating what they are learning in class.

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<sup>150</sup> *Id.* at 651-52.

<sup>151</sup> *Id.* at 656.

<sup>152</sup> Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 *Stetson L. Rev.* 777, 780 (2011).

<sup>153</sup> *Id.*

<sup>154</sup> Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 *J. Child Psychol. & Psych.* 296, 301-302 (2006).

<sup>155</sup> Sacks, *supra* note 152.

<sup>156</sup> *E.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 520 (2009) (discussing the harmful effects of broadcasting profanity to children when Fox aired curse words during two live broadcasts).

<sup>157</sup> *Id.*

Sleeping constitutes 40% of a child's day, while school is the second largest use of their time, accounting for 19% of their day.<sup>158</sup> With how much time children spend in school, educational instruction is bound to influence and play a critical role in child development. Subjects such as math, history, language arts and science are unlikely to impact a child's moral development, however topics such as sexuality, gender expression, and gender identity could influence how a child perceives themselves when exposed to these matters at such a young age.<sup>159</sup> Family life and sex education are central to the promise under *Meyer* that parents have the right to raise their children without interference from the government.<sup>160</sup> The state imposing standards on public schools that require the education of gender stereotypes to seven year olds, masturbation to ten year olds, and anal sex to thirteen year olds is an interference into the privacy of a family.<sup>161</sup> A state should have the ability to tell a parent when their child should know long division or the rise of powers in World War II, however a parent should maintain the ultimate right to decide at what age is appropriate to teach their children about the intimacies of sex and sexuality. *Meyer-Pierce* granted parents the right to direct the education of their children, and these rights should be held to the highest regard when it comes to education that will impact a child's emotional and moral development.<sup>162</sup> Therefore, family life and sex education should be subjected to different educational standards when it comes to implementing new curriculum in school districts.

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<sup>158</sup> Hannah Hall, *How do children spend their time? Time use and skill development in the PSID*, Board of Governors of the Federal Reserve System (May 26, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/how-do-children-spend-their-time-time-use-and-skill-development-in-the-psid-20200526.html>.

<sup>159</sup> Sacks, *supra* note 152.

<sup>160</sup> *Meyer*, 262 U.S. at 400.

<sup>161</sup> See *New Jersey Department of Education*, New Jersey Learning Standards, OFFICIAL SITE OF THE STATE OF NEW JERSEY, [www.nj.gov/education/standards](http://www.nj.gov/education/standards).

<sup>162</sup> *Meyer*, 262 U.S. at 401 (holding that parents have the right to direct their child's education); *Pierce*, 268 U.S. at 535 (holding that parents have the right to raise their child how they see fit).



### *B. Why Opt-Out Feels Inadequate*

Courts, as well as states, have recognized that family life and sex education programs should be treated differently from core subject areas via the implementation of opt-out policies. States that have enacted laws regulating sex education have recognized the concerns of parents by including opt-out and opt-in provisions, giving them the choice to either withdraw or allow their children's participation in the program.<sup>163</sup> Some states have mandated that districts must provide parents with opt-out provisions when family and sex education conflicts with a family's religious or moral beliefs.<sup>164</sup> However, the existence of opt-out policies led to the dismissal of parental challenges to sex education programs.<sup>165</sup> Cases such as *Medeiros* and *Smith* illustrate that while Courts recognize parents' constitutional rights related to directing their children's education, they believe that opt-out provisions are sufficient to satisfy alleged constitutional violations.<sup>166</sup> Excusal systems may be a valid solution to addressing parental concerns, but it is not the only solution. When opt-out provisions become a cop-out for Courts to avoid evaluating valid concerns regarding the curriculum being taught in school districts, the device implemented to satisfy parents becomes a hinderance to their constitutional rights.

The parents in *Smith v. Ricci* addressed the fact that excusal programs put an immense amount of pressure on students as well as parents.<sup>167</sup> A parent pulling their child out of any lesson or activity that a majority of his or her peers are attending, requires children to unknowingly assert their parent's objection in front of their teachers and classmates.<sup>168</sup> Children

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<sup>163</sup> Melody Alemansour, Austin Coe, Austin Donohue, Laura Shellum, Sophie Thackray, *Sex Education in Schools*, 20 *Geo. J. Gender & L.* 467, 477 (2019).

<sup>164</sup> N.J. STAT. ANN. § 18A:35-4.7.

<sup>165</sup> Eric A. DeGross, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 *J.L. & Educ.* 83, 89 (2009).

<sup>166</sup> *Medeiros*, 478 P.2d at 314; *Smith*, 446 A.2d at 501.

<sup>167</sup> *Smith*, 446 A.2d at 505.

<sup>168</sup> *See id.*

often seek approval and it's only natural for a child to feel uncomfortable when he or she is excused from sex education classes.<sup>169</sup> Even when a parent opts their child out of sex education instruction, that does not successfully shield their children from the topics that they are seeking exclusion from. Children talk at the lunch table, on the playground, during play dates; a conversation as simple as repeating what they learned in health class earlier in the day is a detriment to the aims of opt-out provisions. Therefore, parents lose that fundamental right to direct the education of their children, even when their children are opted-out of lessons, as children are inevitably exposed to topics that conflict with their moral and religious beliefs due to what most of the other children are being taught in class.

Courts have instructed parents who find opt-out policies inadequate to send their children to private schools, or to teach their children at home, if they would like to regulate what is being taught in school. Many parents perceive that their only means of influencing the sex education curriculum being taught to their children is through those two unrealistic alternatives.<sup>170</sup> Private school and homeschooling are not reasonable accommodations for most parents. The average cost of private school across the United States is \$12,187 per year; private elementary school costs \$11,191 per year, while private high schools average at \$14,793 per year.<sup>171</sup> Homeschooling statistics illustrate that prior to COVID-19, 59% of children homeschooled were white, while 8% were black children.<sup>172</sup> Private school and home school are not realistic alternatives for a majority of Americans, and for the Court to tell a concerned parent that they

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<sup>169</sup> See *id.* at 290-93 (Brennan, J., concurring).

<sup>170</sup> See *Mozert*, 827 F.2d at 1067.

<sup>171</sup> *Average Private School Tuition Cost (2022-23)*, Private School Review (Oct. 3, 2022), [www.privateschoolreview.com/tuition-stats/private-school-cost-by-state](http://www.privateschoolreview.com/tuition-stats/private-school-cost-by-state).

<sup>172</sup> *Homeschool Demographics*, Coalition for Responsible Home Education (2016) [www.responsiblehomeschooling.org/research/summaries/homeschool-demographics/](http://www.responsiblehomeschooling.org/research/summaries/homeschool-demographics/).

can pull their child out of public school in order to have a say in their education conflicts with their constitutional rights as parents.

Courts may find opt-out provisions to be sufficient defenses to parental challenges to sex education programs, but for parents who feel excusal systems are inadequate to their Fourteenth Amendment violation claims, the state legislatures should afford them a more democratic option to objecting to curriculum.

### III. SEX EDUCATION LOCALIZED

#### A. *Current Approach to Curriculum Implementation*

In New Jersey, educational decisions are made starting with the New Jersey State Board of Education. The State Board of Education is comprised of thirteen members, who serve for six-year terms, appointed by the Governor with the consent of the State Senate.<sup>173</sup> The Governor also elects the Commissioner of Education, who serves as the Chief Executive School Officer and supervises all public schools.<sup>174</sup> The State Board rules under the Administrative Code, which sets rules to implement state education law, and advises on policies proposed by the Commissioner.<sup>175</sup> The State Board also adopts the Common Core State Learning Standards that each school district must incorporate into their learning curriculum.<sup>176</sup>

In New Jersey, each school district operates under the supervision of the local Board of Education, which is regulated by the State Board of Education.<sup>177</sup> The local board consists of nine members and requires a vote of five to take action.<sup>178</sup> Under New Jersey law, the board must enforce the rules of the State Board of Education and perform all acts consistent with the law and

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<sup>173</sup> Department of Education, *State Board of Education*, OFFICIAL SITE OF THE STATE OF NEW JERSEY [www.nj.gov/education/sboe/](http://www.nj.gov/education/sboe/).

<sup>174</sup> N.J. ADMIN. CODE § 6A:2-1.1(b).

<sup>175</sup> N.J. ADMIN. CODE § 6A:9B-3.1.

<sup>176</sup> N.J. ADMIN. CODE § 6A:8-2.1.

<sup>177</sup> N.J. STAT. ANN. § 18A:10-1.

<sup>178</sup> N.J. STAT. ANN. § 18A:13-8.

rules of the State Board.<sup>179</sup> School districts are subject to the New Jersey Quality Single Accountability Continuum (NJQSAC), which is the Department of Education’s evaluation system for public school districts.<sup>180</sup> The goal of NJQSAC is to ensure all districts are operating at a high level of performance measured under five key components of school district effectiveness; instruction and program; personnel; fiscal management; operations; and governance.<sup>181</sup> A school district is designated a “high performing district” if the district satisfies 80-100% of the quality performance indicators in the five key categories.<sup>182</sup> A district that satisfies 50-79% of the quality performance indicators is placed on an improvement plan to address noncompliance, whereas a district satisfying less than 50% of the performance indicators is put on an in-depth evaluation prior to being placed on an improvement plan.<sup>183</sup> Consequences of failing to successfully implement an improvement plan may result in the Commissioner appointing a state designated professional to provide technical assistance to the district, or ordering the district to be placed under partial state intervention.<sup>184</sup> If the state determines corrective action is necessary, the Commissioner has the power to make any necessary budget adjustments to establish an efficient educational system.<sup>185</sup>

With the adoption of the 2020 New Jersey Student Learning Standards, compliance is left to the local boards of education who are responsible for the review and continuous improvement of curriculum based on any modifications made to the NJSLs.<sup>186</sup> Districts are not able to pick and choose which learning standards they would like to adopt without risk of being penalized

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<sup>179</sup> N.J. STAT. ANN. § 18A:11-1.

<sup>180</sup> Department of Education, *National Conference of State Legislatures*, OFFICIAL SITE OF THE STATE OF NEW JERSEY [www.nj.gov/education/qsac/](http://www.nj.gov/education/qsac/).

<sup>181</sup> N.J. STAT. ANN. § 18A:7A-10.

<sup>182</sup> N.J. STAT. ANN. § 18A:7A-14.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> N.J. ADMIN. CODE § 6A:8-3.1(c).

during the NJQSAC. This places the control of curriculum at the state level, rather than local school districts.

Some states, such as Florida, have taken action beyond merely opting-out to address the concerns of parents who feel as though they do not play a fundamental role in the education of their children.<sup>187</sup> Nationwide, there have been 137 bills introduced this year seeking to restrict teaching on topics such as race, gender, and L.G.B.T.Q. issues.<sup>188</sup> This number has increased from fifty-four last year.<sup>189</sup> In March of 2022, Governor Ron DeSantis signed the Parental Rights in Education Act, which prohibits instruction of sexual orientation and gender identity in kindergarten through third grade.<sup>190</sup> The bill also prohibits instruction that is not age appropriate for students and requires districts to notify parents if there is a change in instruction related to a child's mental, emotional, or physical health.<sup>191</sup> Governor DeSantis stated that his goal in implementing this bill is to protect parental rights in education.<sup>192</sup> Florida representatives claimed that the government should never take the place of a parent, and that the Parental Rights in Education Act empowers parents with the information needed to raise their children as they see fit.<sup>193</sup>

Governor DeSantis has faced criticism since signing the Parental Rights in Education

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<sup>187</sup> *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, Ron DeSantis 46th Governor of Florida (Mar. 28, 2022), [www.flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/](http://www.flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/).

<sup>188</sup> Sarah Mervosh, *Back to School in DeSantis Florida, as Teachers Look Over Their Shoulders*, The New York Times (Aug. 27, 2022), [www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html](https://www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html).

<sup>189</sup> *Id.*

<sup>190</sup> FLA. STAT. ANN. § 1001.42(8)(C)(3) – (7) (WEST 2022).

<sup>191</sup> *Id.*

<sup>192</sup> *Governor Ron DeSantis Signs Historic Bill*, *supra* note 187.

<sup>193</sup> *Id.*

Act.<sup>194</sup> Critics have coined the bill as the “Don’t Say Gay” bill, although the law does not mention the word “gay” once.<sup>195</sup> The law has been criticized for being overly vague and sweeping in its effect, leaving teachers feeling uncertain and confused about what they are allowed to discuss in the classroom.<sup>196</sup> Students of the L.G.B.T.Q. community have vocalized concerns around their ability to express themselves while in school.<sup>197</sup> State officials, in response to various lawsuits challenging the law, stated that the law does not ban references or discussion around these topics; the law only prohibits instruction.<sup>198</sup> Unfortunately, this re-assurance has not entirely eased the apprehension felt by those who do not support the new legislation.<sup>199</sup> However, Governor DeSantis made parental rights central to his reelection campaign, which he most recently won in the 2022 midterm elections.<sup>200</sup>

#### B. *How Localization Respects Parents’ Fourteenth Amendment Rights*

Parents who are not satisfied with opt-out provisions may find that the only way for them to impact their children’s education is to vote at the state level for Governors who support the issues that are important to them. However, it may be that a more appropriate solution is to remand the sex education curriculum to local school boards, where parents can express themselves more appropriately by selecting school board members who represent their views on this critical issue. With many states split politically, and the unfortunate reality that sex education has become a political issue, controlling sex education curriculum by voting for a state-wide candidate has the potential of leaving almost fifty percent of parents across each state wanting to have more control over the sex education programs being taught in their school districts. For

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<sup>194</sup> Mervosh, *supra* note 188.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See id.*

<sup>200</sup> *Id.*

example, Governor DeSantis has demonstrated that political action can address political concerns, but his policies also reflect how state-wide politics do not always sufficiently reflect local concerns. A governor campaigns on a multitude of platforms and their candidacy represents various issues across the state. By leaving sex education as a state-wide political issue, parents are forced to balance it against all of their other state-wide concerns raised by a campaign, rather than giving them a more targeted way to address their concerns regarding curriculum. A Board of Education election is a targeted election; a central issue being voted on is curriculum alignment. A vote for a Board of Education candidate would directly influence the curriculum being taught in a school district. Therefore, by subjecting sex education to a more rigorous standard and taking implementation to a local level of government, parents will be able to have a larger influence on the family and sex education programs being taught in their school district.

Local school districts throughout New Jersey should have the ability to adopt the family and sex education standards that the parents in their school district feel are age appropriate for their children without interference from the state government. The Comprehensive Health and Physical Education standards should be recommended at the state level instead of required. Rather than the state mandating implementation of the Common Core State Standards for Health and Physical Education every five years, school boards should take the standards into consideration when voting to approve new sex education curriculum for the district. This gives the local board the benefit of state board expertise but allows them to customize the curriculum based on the concerns of their local communities. If the school board was able to vote on sex education curriculum without the fear of consequence, they could vote absent coercion from the state. With a localized approach to sex education curriculum, parents would vote for school board members that had similar philosophies and values as they do, just as they would vote for

any candidate during an election. Therefore, when it comes time to vote on implementing new Health and Physical Education standards, board members would be voting based on the platforms they promoted during their campaigns.

As in any election, the outcome would not appease every parent, and some parents may not even care enough to cast a vote. However, with sex education decisions made at the district level rather than state, parents would have more alternatives as to where to send their children to school within the state if each district has a different and localized approach to sex education curriculum. A parent would be able to send their child to a public school within their state by moving to a new community that is teaching health and physical education at the level they feel is age appropriate for their children, similar to how families choose to live in states whose policies they value. Where a parent is currently limited to sending their children to private school, homeschooling, or moving out of state to find a school more aligned with their familial beliefs, a localized approach gives parents more reasonable options. In addition, a local approach would reach more parents than when sex education decisions are made at the state level. If local school boards had the liberty to adopt the learning standards they believed were appropriate, there would be less pressure for Governors to adopt sweeping statewide legislation to address these concerns. Under this approach, if a parent wanted more control of the sex education programs being taught in school, they would be able to participate in the democratic process of voting for board members who share their values on sex education curriculum.

## CONCLUSION

Parents have the constitutional right to direct the care, upbringing, and education of their children.<sup>201</sup> However, courts have told us that parents do not have the right to direct curriculum in

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<sup>201</sup> *Troxel*, 530 U.S. at 66.



the public-school setting.<sup>202</sup> This has given states far too much power in mandating what school districts must be teaching in the areas of family and sex education. Curriculum regarding sex education is so intertwined with a parent's right to child rearing, decisions regarding what to teach children in this realm should be exempt from how other educational decisions are made. Given the level of controversy across the country in relation to parental rights when it comes to health and physical education standards, the court should take another look as to why their current approach is not sufficient. Courts have been satisfied with opt-out provisions; however, exclusion programs do not respect parents' Fourteenth Amendment rights. What would respect parents' constitutional rights, would be to adopt a democratic solution and return family and sex education curriculum decisions back to district boards of education. Therefore, when that father at the Freehold Township Board of Education meeting finds out what the state is proposing for his daughters to learn in health class, he can find relief knowing that he's voted for board members with similar values, or he can evaluate moving his children to a different school district that respects his familial beliefs within his state. A localized approach to family and sex education does not require parents to abandon their constitutional rights, it empowers them to use those rights to vote for school board members that have the authority to decide what age-appropriate sex education curriculum will be taught in their school district.

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<sup>202</sup> *Mozer*, 827 F.2d at 1065.