Conflicts over Directing the Education of Children: Who Controls, Parents or School Officials?

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INTRODUCTION

When dealing with the issues of quality control and the rights of parents to direct the upbringing of their school-aged children, one of the key factors that affects parental rights is compulsory attendance laws.[1] Put another way, insofar as parents must educate their children, whether in regular public or nonpublic schools or by homeschooling them, controversies arise over the extent to which the rights of parents clash with those of state officials as they, too, try to direct the schooling of children and follow their mandate to help ensure an educated citizenry.

The parental right to direct the upbringing of their children ultimately operates as a form of quality control. Parental choice is a form of quality control because it allows those who wish to, and can afford to, to have their children educated in nonpublic schools. In an attempt to offer all parents similar options, a recent federal law, the No Child Left Behind Act (NCLB),[2] enacted in 2002, includes provisions that will allow parents to remove their children from failing public schools and send them to schools of their choice.

In light of the tension that the issue of quality control raises, this article begins with an examination of parental rights vis-à-vis compulsory attendance laws before examining selected student rights. The article concludes with reflections on how NCLB's quality control provisions may impact the rights of parents and students.

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Compulsory Education and Parental Rights in General

Under the Tenth Amendment to the United States Constitution,[3] and as reiterated by the Supreme Court in its only case on school finance, *San Antonio v. Rodriguez*,[4] education is a responsibility of individual states rather than the federal government. As such, in 1852, Massachusetts became the first jurisdiction in the United States to enact a compulsory attendance law.[5] American courts have generally upheld compulsory education statutes against charges that they unreasonably infringe on individual constitutional liberties.[6] In permitting compulsory attendance laws to remain in effect, with exceptions such as home-schooling and provisions for married students, for example, the courts recognize that these statutes represent a valid exercise of state police power[7] that is served by the creation of an enlightened citizenry.

Based on the concept of *in loco parentis* (literally "in the place of the parent"), compulsory attendance laws are grounded in the common-law presumption that parents voluntarily submit their children to the authority of school officials.[8] Yet a question can be raised about the continuing viability of the presumed voluntary nature of *in loco parentis* in light of compulsory attendance laws (and other school rules[9]), which require parents to send their children to school at the risk of punishment for noncompliance.[10] An alternative justification is that compulsory attendance is rooted in another common-law principle, *parens patriae* (literally "father of the country"), under which state legislatures have the authority to enact reasonable laws for the welfare of their residents.[11] Placing this dispute aside in the interest of addressing the practical issues associated with compulsory attendance laws, suffice it to say that courts agree that parents[12] must ensure that their children are educated. Whether parents satisfy their duty, or whether students are absent from school without justification, is something that school officials must determine.[13]

In one such case, where school officials failed to prove an essential element of the crime of failing to send one's child to school,

school officials did not demonstrate that the parent did so knowingly or purposefully. The Supreme Court of Missouri reversed the parent's conviction for having allegedly violated the state's compulsory attendance statute.[14] In another case, an appellate court in Wisconsin held that a mother could raise the affirmative defense that her son disobeyed her order to attend school.[15] In reversing the mother's conviction, the panel explained that the trial court erred in not permitting the mother to raise the disobedience defense.

As state and local officials enforce compulsory education laws, their goal is to strike a reasonable balance between the rights of individuals and the state. Even so, there is a point beyond which state officials may not go without violating the constitutional rights of students and their parents. Insofar as this point cannot be determined in the abstract, the courts have intervened in cases where parents and students claimed that public officials intruded into their personal rights.

The most basic constitutional limitation on compulsory education laws is that parents can satisfy them by means other than having their children attend public schools, since the primary goal of these statutes is to ensure that individuals obtain a minimum level of education, not to focus on where the education is provided. The Supreme Court first enunciated this principle in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (*Pierce*)[16] when it struck down a law from Oregon that would have required children (other than those needing what would today be described as special education) between the ages of 8 and 16 to attend public schools. Pierce was filed by educators in two nonpublic schools, one religiously affiliated and the other a military academy. Officials sought to avoid having their schools being forced out of business, basing their claims on property rights under the Fourteenth Amendment. In addition to accepting the schools' due process claim, the Court, observing that parents had the right to direct the upbringing of their children, decided that parents can satisfy the compulsory attendance statute by sending their children to nonpublic schools, declaring that "[t]he child is not the mere creature of the state."[17] The Court also acknowledged that state offi-

cials could "reasonably [ ] regulate all schools, to inspect, supervise, and examine them, their teachers, and pupils."[18] In practice, other than health and safety code issues, state officials typically impose fewer restrictions on nonpublic schools than they do on public.

Previously, in *Meyer v. Nebraska*,[19] the Supreme Court invalidated a prohibition against teaching a foreign language in grades lower than the ninth, under which a teacher in a nonpublic school was convicted of teaching German. In the aftermath of World War I and widespread opposition to most things German, the Court rejected the statute's purported goal of promoting civic development by inhibiting training of the young in foreign tongues and ideals before they could learn English and acquire American ideals. In finding that the statute limited the rights of modern language teachers to teach, of students to gain knowledge, and of parents to control the education of their children, the Court emphasized that there was no showing of harm which the state had the right to prevent and that no emergency had arisen which rendered the knowledge of a language other than English to be so clearly harmful as to warrant its prohibition. While conceding that it did not question the state's power over the curriculum in tax-supported public schools, the main pillar of the court's analysis involved the constitutional right to pursue an occupation not contrary to the public interest.

Wisconsin v. Yoder (*Yoder*)[20] represents perhaps the most noteworthy exception to judicial support for compulsory attendance laws. In *Yoder*, the Supreme Court ruled in favor of Amish parents who challenged the refusal of state officials to exempt their children from formal education beyond eighth grade. The parents maintained that since their children received all of the preparation that they needed in their communities, it would have been unnecessary for them to attend high schools. Relying on the First Amendment's Free Exercise Clause, the Court agreed that the community's almost 300-year-old way of life would have been gravely endangered, if not destroyed, by enforcing the compulsory education law. The Court reiterated that while there is no doubt as to the state's power to impose reasonable

regulations over basic education, in balancing the competing interests, it had to give greater weight to the First Amendment and the traditional interests of parents with respect to the religious upbringing of their children. The Court concluded that since the Amish way of life and religion were inseparable, requiring Amish children to attend public high school may have destroyed their religious beliefs. Justice William O. Douglas's partial dissent questioned whether children had rights apart from their parents. He cited a fear that students could have been "harnessed" to the lifestyle of their parents without opportunities to express their personal preferences.

Under *Yoder*, it becomes clear that few, if any, members of other religions can meet its test for avoiding compulsory education requirements. Other than the Amish, courts consistently deny religion-based applications for exceptions to substantial or material parts of compulsory education requirements such as home-schooling[21] and sex/AIDS education.[22] In one case, the federal trial court in Connecticut asserted that school officials did not violate the Free Exercise Clause by rejecting a father's request that his son be excused from a mandatory health education course and by assigning him a failing grade when he refused to complete the course.

Three federal appellate cases involving sexuality in the public school curriculum over the past decade have set the notion of the right of parents to direct the education of their children on its ear. In the first, parents in Massachusetts challenged a highly explicit sex-education program that officials offered to high school students. In upholding the authority of local school officials over curricular content, the First Circuit noted that the parental right to direct the upbringing and education of their children does not encompass a broad-based right to restrict flow of information in public schools.[23] In like fashion, the Ninth Circuit affirmed a school board in California's motion for summary judgment in a suit filed by parents of first-, third-, and fifth-grade students against educators who distributed a sexually explicit survey to their children. The court posited both that parents had neither a fundamental due process right to be exclusive

providers of information on sexual matters for their children nor that due process or privacy rights override public school officials as to the information to which students can be exposed. The court also argued that including the questions about sexual topics in the survey was rationally related to the board's legitimate interest in effective education and mental welfare of children.[24]

Three weeks later, the Third Circuit reached a similar result in affirming a grant of summary judgment in favor of a school board in New Jersey where parents objected to the official use of a voluntary, anonymous survey that sought information about drug and alcohol use, sexual activity, experiences of physical violence, attempts at suicide, personal associations and relationships (including parental relationships), and views on matters of public interest from students in grades 7 to 12.[25] The court essentially agreed that officials violated neither the privacy rights of students nor the rights of parents to make important decisions regarding care and control of their children.

These last three cases clearly stand *Pierce* on its head. The challenge for educators, then, is to reconcile the two divergent judicial visions of their role that emerge after *Pierce* and its progeny and these recent decisions or to run the risk of living in a perpetual state of conflict with parents. Put another way, educators must consider whether their task is essentially to supplant parents with regard to directing the education of their children, thereby giving a radical new meaning to the concept of *in loco parentis*, or whether their duty is to work with parents in educating children as indicated in *Pierce*. Thus, educators may wish to reflect on the following three points to help maintain good relations with parents.

First, before embarking on a program that deals with subject matter as sensitive as human sexuality for young children, educators should consult with parents. While not calling for giving parents a "heckler's veto" over controversial curricular materials, educators should work with parents to consider their points of view. As important a topic as sexuality education may be, one wonders how much schools can accomplish if educators ignore legitimate parental concerns over such sensitive subject matter.

Second, if educators proceed with programs that use explicit questions about sexuality and the private lives of students, they should develop materials that are more age appropriate. While some of the questions may have been acceptable for adolescents, they appear to be inappropriate for young children and may cause more harm than good. In other words, considering that many students, especially those in first grade, may not have understood some of the questions, it seems prudent to address the material in a way that children can grasp and in a fashion that respects parental concerns.

Third, educators should consider permitting parents to opt out based on religious grounds and/or offer alternative programs that may be able to cover the same material in a less controversial format. As the old saying goes, since one can "catch more flies with honey than with vinegar," this is worth considering, especially because it can help to eliminate conflict with parents by working with them and recognizing their legitimate concerns. Moreover this, and the previous two suggestions, will afford parents a measure of quality control that they deserve.

Home-schooling

Parents who choose not to send their children to public schools must provide them with equivalent instruction elsewhere, either by having them educated in nonpublic schools or by home-schooling. As with other areas involving compulsory attendance, statutes and regulations dealing with equivalent instruction are generally upheld.[26] The Supreme Court of Ohio made an exception to this rule in finding that the state's minimum standards were so pervasive and all-encompassing "that total compliance by a nonpublic school would have effectively eradicated the distinction between public and nonpublic education."[27] Further, as reflected by cases from the supreme courts of Georgia[28] and Wisconsin,[29] where laws and regulations lack sufficient clarity with regard to standards for nonpublic schools, they are unenforceable.

After a flurry of activity in the 1980s, home-schooling is now legal throughout the nation, and more than thirty states have enacted explicit statutes. The remaining jurisdictions make home-schooling

legal under laws dealing with alternative[30] comparable,[31] equivalent,[32] or other[33] instruction (including tutors)[34] and/or private,[35] church,[36] or parochial[37] school exceptions.

Following legislative and regulatory approval of home-schooling, courts have still had to address an array of issues such as teacher qualifications, curricular content, and state oversight. Although most states do not have explicit educational requirements for parents who home-school their children, the Supreme Court of North Dakota acknowledged that the state could expect them to meet reasonable certification requirements.[38] Further, the Supreme Court of Michigan indicated that teacher certification requirements violated the free exercise rights of parents, as applied, because state officials failed to show that they were the least restrictive means of achieving the state's claimed interest.[39] According to the court, this approach violated the rights of parents who home-school their children, as the state legislature did not require teachers in nonpublic schools to be certified and permitted individuals who lacked state certification to serve as substitute teachers in public schools.

Most states require parents who home-school their children to cover specified subject areas. Even so, litigation has arisen over the content of the curriculum. For example, the Sixth Circuit, in a case from Kentucky, affirmed that a statute requiring children who were home-schooled to pass an equivalency examination in order to receive credit for a home-study program did not violate the due process, equal protection, or free exercise rights of the student and or his parents based on the commonwealth's desire to ensure that it had an educated citizenry.[40] Relying on similar analysis, a federal trial court in Texas rejected a claim from a home-schooling family that requiring students from non-accredited or home-schools to pass proficiency exams at their own expense in order to receive credit toward graduation violated a student's rights to equal protection and free exercise of religion.[41]

In the related matter of oversight, courts have upheld the right of state officials to ensure that students are progressing in school

whether by means of standardized tests[42] or other measures, such as portfolios[43] and annual reports.[44] However, both the Supreme Judicial Court of Massachusetts[45] and the Ninth Circuit[46] invalidated requirements that would have subjected home-schooling families to state visitations by essentially agreeing that this kind of oversight was overly intrusive since the same information could have been obtained in other ways such as having parents submit written reports. At the same time, an appellate court in Massachusetts affirmed that when home-schooling parents refused to provide school officials with the bare essentials of the educational plan they created for their children or to permit any evaluation of their educational attainment, commonwealth authorities could proceed to take steps to have them declared in need of protection and committed to the care of the Department of Social Services.[47] In like fashion, an appellate panel in Missouri affirmed that while a trial court erred in its discussion of the length of a school term, state officials had the authority to take jurisdiction over an autistic or nearly autistic child.[48] The court agreed that the parents could be charged with educational neglect since they failed to administer the required hours of instruction or keep proper records of the child's work and progress.

Educational Malpractice: An Attempt at Quality Control

Beginning in the 1970s, in an interesting extension of the battle over parental rights, parents and others sought to render school boards liable for perceived failures in educational results allegedly due to pedagogical errors committed during a child's stay in school. Malpractice is a term for negligence of professional personnel, usually those who work in a one-to-one relationship with clients, such as physicians or lawyers. To date, all efforts to establish "educational malpractice" in regular education have failed,[49] since it is ". . . a tort theory beloved of commentators, but not of courts."[50] Of course, there is widespread litigation for negligence in situations where students are injured at school.

In a leading case, parents charged that school officials wrongly permitted their son, who could read only at the eighth-grade level, to graduate from high school. The student and his parents sought redress for having attended school for twelve years yet only being qualified for employment requiring little or no ability to read or write. An appellate court in California, in rejecting the suit, discussed at length the duty of care concept in the law of negligence.[51] The court explained that the claim was not actionable since there was no workable rule of care against which to measure the alleged conduct of school officials, no injury within the meaning of the law of negligence, and no perceptible connection between the educators' conduct and the student's alleged injury. In other words, the court was convinced that the student's claims were too amorphous to be justiciable under a theory of negligence. In addition, the court dismissed a charge of intentional misrepresentation because even though the student and his parents had the opportunity to do so, they could not allege facts to show the requisite element of reliance on the asserted misrepresentation.

Along with the reasons cited above, other courts recognized the difficulties of measuring damages and the public policy considerations arising from the acceptance of such cases, which would, in effect, have positioned them as overseers of the day-to-day operations of schools.[52] To this end, courts ruled that since aggrieved parents have recourse through the administrative channels of local boards and state-level education agencies, they are not helpless bystanders as decisions are made affecting the education of their children. Of course, as evidenced in the voluminous litigation on the tort of negligence, if a specific act of a school employee directly, or intentionally, causes injury to a student, liability may apply.

Conclusion

NCLB, which is actually an extension of the original Elementary and Secondary Education Act of 1965, is designed in part to require public schools to demonstrate greater accountability for academic achieve-

ment. The key elements in NCLB seek to improve academic achievement among students who are economically disadvantaged; assist in preparing, training, and recruiting highly qualified teachers (and principals); provide improved language instruction for children of limited English proficiency; make school systems accountable for student achievement, particularly by imposing standards for adequate yearly progress for students and districts; require school systems to rely on teaching methods that are research-based and that have been proven effective; and afford parents better choices while creating innovative educational programs, especially if local school systems are unresponsive to their needs. NCLB also permits parents to withdraw their children from failing public schools and to enroll them in other public schools of their choice. While this last option has yet to become effective, it may well be the most effective means of quality control in public education.

Even though it may be years before the full impact of NCLB on the rights of students and their parents will be realized, one thing is certain: consistent with the American approach to dispute resolution, the trickle of litigation over this lengthy law is soon to develop into a torrent of lawsuits.

Notes

1. This article is limited to K–12 public school settings for two reasons. First, nonpublic schools, which are governed more by the law of contracts, are generally not subject to the same principles dealing with freedom of expression that are applicable in public schools. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). Second, in addition to the fact that there is virtually no litigation in the area, the rules governing higher education are significantly different from those that govern elementary and secondary schools.
2. 20 USC §§ 6301 et seq.
3. "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people."

4. 411 U.S. 1, 35 (1973). In rejecting the notion that education is a fundamental right, the Court decreed that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."
5. See Mass. Gen. Laws Ann. 76 § 1 (historical notes St.1852, c. 240, §§ 1, 2, 4).
6. Parr v. State, 157 N.E. 555 (Ohio 1927); Concerned Citizens for Neighborhood Schs. v. Board of Educ. of Chattanooga, 379 F.Supp. 1233 (E.D.Tenn.1974); Mazanec v. North Judson-San Pierre School Corp., 614 F.Supp. 1152 (N.D.Ind.1985); Brown v. District of Columbia, 727 A.2d 865 (D.C.1999). But see Wisconsin v. Yoder, 406 U.S. 205 (1972).
7. Matter of Shannon B., 522 N.Y.S.2d 488 (N.Y.1987).
8. State ex rel. Burpee v. Burton, 45 Wis. 150 (Wis.1878).
9. See, e.g., Baker v. Owen, 395 F.Supp. 294 (M.D.N.C.1975), aff'd, 423 U.S. 907 (1975) (holding that parental disapproval of corporal punishment did not preclude its being used on a child).
10. Eukers v. State, 728 N.E.2d 219 (Ind.Ct.App.2000).
11. In Wisconsin v. Yoder, the Court rejected the applicability of *parens patriae* to compulsory attendance but upheld the general principle that the state has the authority to regulate education.
12. While recognizing that many laws speak of guardians along with parents, this chapter uses the term parents to include both parents and guardians.
13. See, e.g., In re C.M.T., 861 A.2d 348 (Pa. Super. Ct. 2004); In re Commissioner of Social Servs. On Behalf of Leslie C., 614 N.Y.S.2d 855 (N.Y. Fam. Ct. 1994).
14. State v. Self, 155 S.W.3d 756 (Mo. 2005).
15. State v. McGee, 698 N.W.2d 850 (Wis. Ct. App. 2005).
16. 268 U.S. 510 (1925).
17. Id. At 535.
18. Id. at 268 U.S. at 534.
19. 262 U.S. 390 (1923).
20. 406 U.S. 205 (1972).
21. Johnson v. Charles City Community Schs. Bd. of Educ., 368 N.W.2d 74 (Iowa 1985), cert. denied sub nom. Pruessner v. Benton, 474 U.S. 1033 (1985).

22. See, e.g., Ware v. Valley Stream High Sch. Dist., 551 N.Y.S.2d 167 (N.Y.1989) (refusing a grant of summary judgment where issues of material fact existed over the burden that exposure to an AIDS curriculum would have had on the religious beliefs of students and their parents).

23. Brown v. Hot, Sexy and Safer Productions, 68 F.3d 525 [104 Educ. L. Rep. 106] (1st Cir.1995), *cert. denied*, 516 U.S. 1159, 116 S.Ct. 1044, 134 L.Ed.2d 191 (1996).

24. Fields v. Palmdale School Dist., 427 F.3d 1197 [203 Educ L. Rep. 44] (9th Cir. 2005).

25 *C.N. v.* Ridgewood Bd. of Educ., 430 F.3d 159 [203 Educ. L. Rep. 468] (3d Cir. 2005).

26. State v. Shaver, 294 N.W.2d 883 (N.D.1980); State ex rel. Douglas v. Faith Baptist Church of Louisville, 301 N.W.2d 571 (Neb.1981), appeal dismissed. 454 U.S. 803 (1981); New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir.1989), cert. denied, 494 U.S. 1066 (1990).

27. State v. Whisner, 351 N.E.2d 750, 768 (Ohio 1976). See also State ex rel. Nagle v. Olin, 415 N.E.2d 279 (Ohio 1980).

28. Roemhild v. State, 308 S.E.2d 154 (Ga.1983).

29. State v. Popanz, 332 N.W.2d 750 (Wis.1983).

30. S.D. Codified Laws Ann. § 13–27–3.

31. Idaho Code Ann. § 33–202.

32. Conn. Gen. Stat. Ann. § 10–184; Nev. Rev. Stat. Ann. § 392.070; N.Y. Educ. Law § 3204(2).

33. Ind. Code Ann. §§ 20–8.1–3–17 ("... some other school which is taught in the English language.")

34. Ala § 16–28–1(2) (addressing church schools and tutors).

35. For statutes covering home-schooling as private schools, see, Cal. Educ. Code § 48222; Ill. Comp. Stat Ann. 105 § 5/26–1; Iowa Code Ann. §§ 299A.1 et seq. (competent private instruction); Mass. Gen. Laws Ann. Ch. 76 § 1; Okla. Stat. Ann. tit. 70 § 10–105(A) (private or other schools); Tex. Educ. Code Ann. § 25.086 (private or parochial schools).

36. Ky. Rev. Stat. Ann. § 159.030(b)(private, parochial, or church day schools); Neb. Rev. Stat. Ann. § 79–1701(2) (private, parochial, or denominational schools).

37. Kan. Stat. Ann. § 72–1111(a)(2) (private, denominational, or parochial schools providing instruction that is substantially equivalent to that in the public schools).

38. State v. Anderson, 427 N.W.2d 316 (N.D.1988), cert. denied, 488 U.S. 965 (1988).

39. People v. DeJonge, 501 N.W.2d 127 (Mich.1993).

40. Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir.1991).

41. Hubbard v. Buffalo Indep. Sch. Dist., 20 F.Supp.2d 1012 (W.D. Tex.1998).

42. Murphy v. State of Arkansas, 852 F.2d 1039 (8th Cir.1988).

43. Stobaugh v. Wallace, 757 F.Supp. 653 (W.D.Pa.1990); Battles v. Anne Arundel County Bd. of Educ., 904 F.Supp. 471 (D.Md.1995) affirmed w/o r'ptd opinion, 95 F.3d 41 (4th Cir.1996).

44. State v. Rivera, 497 N.W.2d 878 (Iowa 1993).

45. Brunelle v. Lynn Pub. Schools, 702 N.E.2d 1182 (Mass.1998).

46. Calabretta v. Floyd, 189 F.3d 808 (9th Cir.1999).

47. In re Ivan, 717 N.E.2d 1020 (Mass.App.Ct.1999).

48. In re J. B., 58 S.W.3d 575 (Mo.Ct.App.2001).

49. Insofar as children with disabilities have statutorily protected rights, some courts have allowed such suits to proceed. See, e.g., Snow v. State, 469 N.Y.S.2d 959 (N.Y.App.Div.1983); M.C. on Behalf of J.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3d Cir.1996), cert. denied, 519 U.S. 866 (1996). Other courts have disagreed. See, e.g., Suriano v. Hyde Park Cent. Sch. Dist., 611 N.Y.S.2d 20 (N.Y.App.Div.1994).

50. Ross v. Creighton Univ., 740 F. Supp. 1319, 1327 (N.D, Ill. 1990).

51. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal.Rptr. 854 (Cal.Ct.App.1976).

52. For other representative case, see, e.g. Christensen v. Southern Normal Sch., 790 So.2d 252 (Ala.2001); Hunter v. Board of Educ. of Montgomery County, 439 A.2d 582 (Md.1982); Donohue v. Copiague Union Free Sch. Dist., 418 N.Y.S.2d 375 (N.Y.1979).